



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CONSTITUTIONAL PETITION NO. 12 OF 2019

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 12, 19, 20, 21, 22, 23, 27, 40, 46, 47, 73, 174, 175, 184, 196, 232, 258, 259 AND 260 OF
THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, ACT NO. 17 OF 2012

AND IN THE MATTER OF THE URBAN AREAS AND CITIES ACT, ACT NO. 13 OF 2011

AND

**IN THE MATTER OF THE INTENDED ILLEGALLY DEMOLITION OF 250 MODERN ENTREPRENEURIAL MARKET
STALLS (KIOSKS) WITHIN ISIOLO TOWN CBD BY THE ISIOLO MUNICIPALITY**

BETWEEN

HELLEN MUTHONI KABENGI..... 1ST PETITIONER
LEAH W. WARUINGE..... 2ND PETITIONER
JOHN KAMAU..... 3RD PETITIONER
REGINA KAJUJU KIMENGU..... 4TH PETITIONER
SULTAN YUSUF..... 5TH PETITIONER
SADIA HALAKE GALGALO..... 6TH PETITIONER
JOHN MBOGO GITHINJI..... 7TH PETITIONER
ISAYA NTONGAI 8TH PETITIONER
HASSAN ROBA..... 9TH PETITIONER
DAVID MURAGE KABAIKU 10TH PETITIONER
JOHN KATHERU KIMENGU 11TH PETITIONER
STEPHEN NTONGAI..... 12TH PETITIONER
DAVID MWIRIGI13TH PETITIONER
JOHN GITAHL.....14TH PETITIONER
CHARITY GATEI MURIIRA..... 15TH PETITIONER

SAMSON MUTUMA 16TH PETITIONER
SARAH BENSON..... 17TH PETITIONER
BERNARD MAINGI18TH PETITIONER
NATHIFO MOHAMED 19TH PETITIONER
FATUMA BONAYA SAMA 20TH PETITIONER
JAMILA GUYO 21ST PETITIONER

VERSUS

MUNICIPAL MANAGER, ISIOLO

MUNICIPALITY 1ST RESPONDENT
ISIOLO MUNICIPAL BOARD2ND RESPONDENT
COUNTY GOVERNMENT OF ISIOLO.....3RD RESPONDENT

AND

CENTRE FOR YOUTH LINKAGES AND

EMPOWERMENT PROGRAMMES1ST INTERESTED PARTY

SPRING CHASE SERVICES

LIMITED 2ND INTERESTED PARTY

RULING

1. The petitioners filed a Notice of Motion dated 22nd May 2019 where they sought among others, a conservatory order restraining the respondents, whether by themselves, their servants, agents and/or any other person (s) acting through the respondents from demolishing and or evicting the petitioners from the 250 Modern Entrepreneurial Market Stalls (*Kiosks*) within Isiolo Town CBD until the suit is heard and determined. The kiosks were put up in 2016 through a Memorandum of Understanding (*MOU*) executed between the 1st Interested Party and the 2nd respondent on a Build Operate Transfer (BOT) model.
2. On 22nd May 2019 a conservatory order was issued on temporary basis pending the inter parties hearing of the application. This triggered the filing of the Notice of Motion dated 17th June 2019 by the respondents who sought for the review, varying and or setting aside of the said orders.
3. On 8th July 2019 the court directed that the two applications be heard together. However, in essence, the application of the respondents is more or less a response in opposition to the initial application of 22.5.2019 filed by the petitioners. I will therefore deal with the merits of the application of 22.5.2019 only.
4. The petitioners through their application dated 22.5.2019 and the supporting and supplementary affidavit of Hellen Muthoni Kabengi and their oral submissions contend that the 2nd respondent and 1st interested party through their MOU set up well-planned modern Kiosks which are operated by the petitioners. The petitioners paid rent to the 1st interested party until August 2018 when the 2nd respondent introduced the 2nd interested party as the entity to be paid the monthly rent as it was owed by the 2nd respondent some monies.
5. On 17th May 2019 the petitioners were served with two conflicting notices. One referenced '*Relocation of Kiosks for the development of proposed construction and upgrading of urban access roads through cabro works development in Isiolo Municipality – FY 2018/2019*' which gave the petitioners 21 days' notice to relocate their business. The other notice was referenced '*Notice for removal of illegal construction of kiosk in Isiolo CBD*' which gave the petitioners 24 hours to remove their kiosks/structures with immediate effect. The petitioners contend that the two notices were discriminative, issued unlawfully and violate the provisions of the Constitution, the County Government Act and Urban Cities Act.
6. Moreover, the respondents have failed the test of transparency and accountability having failed to call for public participation which seriously taints the whole demolition/relocation process with illegality, procedural impropriety thus rendering the whole process unconstitutional for lack of inclusivity, equality and ignoring marginalized groups. It was argued that the public participation evidenced through invoices adduced as payments to the radio stations, do not provide any details to the effect that the Kiosk owners participated in the

process. Consequently, petitioners contend that without the conservatory orders, their petition would be rendered nugatory.

7. During the oral hearing of the application, Mr. Mugambi, counsel for the applicants argued that government policy is planned over time of which the county government went ahead and issued the petitioners with trade licenses for the whole year. He further stated that the Kiosks have not affected the ongoing road works and cabros being put. Thus, applicants pray that pending the hearing of the petition, they be granted conservatory orders.

8. The respondents have opposed the application through their own application dated 17.6.2019 and the affidavits of Osman Halake Dadacha, who is the municipal manager of Isiolo Municipality. They contend that they conducted public participation which was advertised and carried out with the populace giving them the green light to remove the Kiosks. It has further been argued by the respondents that the programme being rolled out which necessitated the removal of the Kiosks is largely funded by the World Bank to a sum of Kshs. 93 Million which stipulates that the project must be completed within 6 months. This needs to be adhered to as the bank has warned that failure to do so will result in the withdrawal of funds.

9. As for the issue of notices, the respondents contend that there are no two conflicting notices as alleged but rather one notice is for those people who had put up kiosks on the project proposed location, while the other is for people who had established sprawling structures in the central business district.

10. The respondents have averred that the orders in force have brought the entire programme of developments in Isiolo town to a halt to the detriment of the people of Isiolo.

11. Mr. Muriuki, counsel for the respondents submitted that public participation was conducted but this issue can only be dealt with during the hearing of the matter. Further, it was submitted that in granting the orders sought, the court should bear in mind public versus individual interest, whether the petitioners have established a *prima facie* case and whether they will suffer irreparable damage.

12. It was also argued that there are 21 petitioners yet in the body of the motion prayer b & c they purport to be appearing on behalf of 250 Kiosk owners whose names have not been listed and are not party to these proceedings. The respondents contend that the government was the one which gave people the Kiosks, hence they ought to have filed a normal suit and not disguise it as a petition which is an abuse of the court process. The Kiosks set to be demolished were put up by the respondents and not the petitioners who would not suffer irreparable damage.

13. The issue for determination is *whether to grant the conservatory orders sought or not?*

14. The test for grant of conservatory orders was stipulated by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwendwa Kithinji & 2 others (2014) eKLR* where it stated as follows:

‘Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case, or ‘high probability of success’ in the applicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

15. The principles relating to conservatory orders are now reasonably well settled as laid down in the case of *Kenya Small Scale Farmers Forum v Cabinet Secretary Ministry of Education, Science and Technology & 5 others [2015] eKLR* where Onguto J held as follows:

“For the grant of conservatory orders under Article 23(3) of the Constitution as read together with Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, the court ought to consider certain pertinent factors. A series of cases may be stated to have laid down the proper guidelines applicable. I would state the principles which govern a court considering an application for interim or conservatory relief to be the following:

i. The applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted: see *Centre for Rights Education and Awareness & 7 Others –v- The Attorney General HCCP No. 16 of 2011*. It is not enough to show that the prima facie case is potentially arguable but rather that there is a likelihood of success: see *Godfrey Mutahi Ngunyi –v- The Director of Public Prosecution & 4 Others NBI HCCP No. 428 of 2015* and also *Muslims for Human Rights and Others –v- Attorney General & Others HCCP No. 7 of 2011*.

ii. The grant or denial of the conservatory relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights: see *Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Benefits Scheme [2011] eKLR* and also *Peter Musimba –v- The National Land Commission & 4 Others (No. 1) [2015] eKLR*.

iii. If the conservatory order is not granted, the Petition or its substratum will be rendered nugatory: see *Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 Others HCCP No. 7 of 2014*.

iv. The Public interest should favour a grant of the conservatory order: see the Supreme Court of Kenya’s decision in *Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR*.

v. The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all

material facts and avoidance of immaterial matters: see *Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others HCCP No. 11 of 2012* as well as *Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589*.”

16. Having the above principles in mind the question to be determined is whether the petitioners have met the criterion to warrant issuance of the orders sought for. In answering this and following the principles laid down, not every single element needs to be proven but rather the totality of the facts should guide the court. However, the court should opt always for the lower rather than the higher risk of injustice. See ***Amir Suleiman v Amboseli Resort Limited [2004] eKLR***.

17. The first issue to consider is the nature and extent of the petitioner’s rights and interests in the kiosks. According to the petitioners, the 250 Kiosks were put up in 2016 as a result of an MOU executed between the 1st interested party and 2nd respondent on 16th May 2016. The 2nd respondent was to provide the 1st interested party with a non- irrevocable 7 year lease to carry out the project with a renewable clause and that the petitioners were to be provided with a lease for the entire period. This would then mean that the petitioners were to have a non-irrevocable 7 year lease period of which according to them time has not run out. This MOU has been availed by both parties. I have perused the said document and I find that it has not been executed and or signed by any party. The purported MOU cannot therefore be an anchor to support petitioner’s rights and or interests.

18. Further, it has emerged that the kiosks were not put up by the petitioners.

19. It is also clear that the petitioners did not get leases in respect of the said kiosks. It follows that the petitioners cannot stake a claim of ownership of the said kiosk and hence their rights and interests in these properties are limited to the platform of a licence.

20. I also find that the petitioners before this court are twenty one, however in their application, they seek orders on behalf of the 250 Kiosk owners to prevent their eviction. So, apart from the 21 petitioners, who are the rest? Authority to represent them has not been brought before this court neither are they part of the proceedings. ***Order 1 Rule 13 of the Civil Procedure Rules*** provides that:

“(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.....”

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case”.

21. I find that no clarity has been made as to who the 250 persons are.

22. On issue of the notices issued seeking the eviction of the Kiosk owners, I have perused the same as they are in the bundle of documents availed by the petitioners. One relates to removal of illegal construction of Kiosk while the other sought to relocate the Kiosks owners to another location. The petitioners allege that these notices were issued without their participation or knowledge. The respondents aver that they carried out public participation and hence the green light to demolish them. The respondents have availed radio station invoices in which one was written ‘***Radio Talk Show Public awareness on municipality***’ while the other is ‘***Radio Talk Show on World Bank Development project awareness in Isiolo CBD***’. They have produced minutes for a meeting with participants and stakeholders held at the Grade Hotel of which includes names of **Isiolo Market chair, secretary and treasurer**. Also, photos were produced to show the participation. It does not follow that every individual person is required to give his opinion prior to a public body arriving at a decision as was held in ***Shree visa Oshwal community Nairobi Registered trustees v. Attorney General and 3 others(2014) eKLR***. Thus from the material so far availed to this court, it appears that there was public participation. Further, the 24 hour notice was in respect of illegal construction, otherwise for the other kiosks, there was provision for re-location.

23. From the material so far presented before this court, I find that the petitioners have not established a prima facie case.

24. As rightly submitted by the respondents, the court also has to take into account the principle of public interest. The petitioners desire that this court considers their individual interest in the kiosks. However, the project being undertaken is meant to benefit a large populace in Isiolo county. In ***Meru ELC PETITION 14 OF 2017, John Ntoiti Mugambi & Others vs. Isiolo County Government & 2Others and 21 interested parties***, I was dealing with a case almost similar to the present one where the petitioners wanted courts protection in respect of their kiosks which were located at the Isiolo bus stage. I held thus;

“I am in agreement with Respondent’s submissions that public interests overrides private interests. That is why enjoyment of fundamental rights and freedoms have limitations as stipulated in article 24 of the constitution.”

25. I find that the Kiosk owners who had legal structures were not to be left destitute but were being relocated to available spaces in fisheries market. It is the illegal structures which were to be removed as they had been erected in the wrong place. The proposed project is to allow the road works and *cabros* to be put in the County of Isiolo for the benefit of all the residents of Isiolo County. The bulk of the funding of KShs. 93 Million is coming from the World Bank. This is quite a substantial amount of funding which if lost will have a detrimental effect which may be difficult to regain. Besides, it is being used for the development of the roads in Isiolo County for the benefits of its people.

26. Accordingly, and without preempting the outcome of this petition, at this stage, the petitioners have not met the criteria for the grant of conservatory orders. I proceed to give orders as follows;

1) The application dated 22nd May 2019 has no merit and the same is hereby dismissed.

2) The temporary conservatory orders given on 22.5.2019 are hereby discharged.

3) The application dated 17.6.2019 is marked as spent.

4) Each party to bear their own costs of the applications.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 25TH DAY OF SEPTEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Muriuki for respondents

Murage Githinji

Hellen Muthoni Inside the court

John Kamenchu

Samson Mutuma

Ntongai

Fatuma

Giatho Haverd Outside the court

John Kamau

HON. LUCY. N. MBUGUA

ELC JUDGE