



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN KISUMU
LAND & ENVIRONMENTAL DIVISION
MISC. PETITION NO. 4 OF 2015

FREDRICK DINDI NDUMBI.....1ST PETITIONER
JACKTON ETIANG2ND PETITIONER
ANNA NYONGESA3RD PETITIONER
JOHN SIMIYU WASIKE4TH PETITIONER

VERSUS

COUNTY GOVERNMENT.....1ST RESPONDENT
GADI OBARA JAKAA WARD REPRESENTATIVE
SILAS JUMA, WARD ADMINISTRATOR
BUKHAYO/WATSI WARD2ND RESPONDENT
FRANCIS ARAP TEMOI ASSISTANT CHIEF
BUKHAYO NORTH/WALATSI WARD.....3RD RESPONDENT
CHIEF KAPINA SUB-LOCATION4TH RESPONDENT
THE HON. ATTORNEY GENERAL5TH RESPONDENT

J U D G E M E N T

1. The petitioners herein – (1) **FREDRICK DINDI NDUBI**, (2) **JACKTON ETIANG**, (3) **ANNA NYONGESA** and (4) **SIMIYU WASIKE** – filed this petition on 13/7/2015 on behalf of themselves and on behalf of affected members of public within Kapina Sub-Location and/or Bukhayo North/Watatsi ward. Their complaint is simple: The respondents – (1) **COUNTY GOVERNMENT OF BUSIA**, **GADI OBARA JAKAA, WARD REPRESENTATIVE**, (2) **SILAS JUMA, BUKHAYO; WARD ADMINISTRATOR, BUKHAYO/WATATSI WATSI** (3) **FRANCIS ARAP TEMOI, ASSISTANT, BUKHAYO NORTH/WALATSI WARD**, (4) **CHIEF KAPINA S/LOCATION** and (5) **THE HON: ATTORNEY GENERAL** – unilaterally decided to relocate construction of a health facility, styled as Kapina Health Centre, from an agreed central place where it would have served the convenience of all to

a fringe area where only a few would be served.

2. This action by the respondents is said to have violated various constitutional provisions, most notably the right to fair administrative action (Article 47), right of equality and freedom from discrimination (Article 27), right to dignity (Article 28) and right of participation of people in decision making (Article 10). The respondents are also said to have violated the principles of devolved government spelt out in Article 174 of the Constitution and right to health (Article 43) which is envisaged as a function of County Government and specifically provided for under the 4th Schedule in the Constitution.

3. The petitioners also averred that they were bound to suffer financial and irreparable loss, having acquired the site – BUKHAYO/LUPIDA/2663 – for construction of the health facility which will remain un-utilized following the re-location. Their position too is that their legitimate expectation has been affected as they expected that they would have the health facility within their vicinity contrary to what the respondents have done.

4. The petitioners decided to come to court for redress. They ask for various prayers as follows:

(i) A declaration that the petitioners' right to the highest attainable standard of health which includes the right to health care services has been violated, is threatened, and remains violated/threatened by the respondents.

(ii) A declaration that the petitioners' right to fair administrative action as envisaged under Article 47 of the Constitution has been violated and remains violated.

(iii) A declaration that the petitioners right to equality and freedom from discrimination as per Article 227 (sic) and also right to be treated with dignity under Article 228(sic) has been and remains violated.

(iv) An order of permanent injunction restraining the respondents either acting by themselves, their agents and/or servants from constructing and/or continuing to construct the proposed Kapina dispensary on any other parcel of land other than LR. BUKHAYO/LUPIDA/2663.

(v) Any other order/relief and/or direction(s) that this court may deem just to grant.

5. The 1st, 2nd, and 3rd respondents responded vide a replying affidavit filed on 1/12/2015. According to them, all developments by the County Government are planned and implemented within the framework of the County Government Act which embraces public participation as a mandatory requirement. The County Government also has a masterplan which prioritizes what the residents of the County identify as their core development needs. The respondents averred that the proposed health facility could not have been at the proposed site as another health facility – Lupida Health Centre – is around there. The proposed health facility needed to serve the residents of Akudet, Mashambani, Ojamii and Nairia as these are villages that are far off. The respondents averred that if the two health facilities - Lupida and Kapina – are to be located as proposed, one of them would remain underutilized or even un-utilized, given the close distance between them.

6. The respondents further averred that the construction of the health facility on the new site is complete and is only awaiting commissioning. The court was therefore asked to decline to grant the injunctive order sought as, if stopped, a considerable amount of public funds will go to waste.

7. The 4th and 5th respondents replied vide grounds of opposition filed on 18/8/2015. According to these two, there are no constitutional violations of the petitioners rights by them. To them, the petitioners have not demonstrated how the rights are violated by them. To them too, they are wrongly enjoined in the suit.

8. The petition was canvassed by way of written submissions. The petitioners submissions were filed on 26/9/2017. In the submissions, there is an exposition of the law and, in that regard, it is submitted that Article 1 of the Constitution is about sovereignty of the people enjoining that sovereign power be

exercised at both national and county level. Article 2 is about the supremacy of the Constitution requiring that the Constitution, as the supreme law, binds all persons and state organs at both levels of government. Article 19 is stated to be about fundamental freedoms affirming such freedoms as an integral part of the state and expressing their purpose as recognition and protection of the freedoms in order to preserve the dignity of individuals and communities and to promote social justice and to enhance or realise the potential of all humanity.

9. Further, implementation of fundamental freedoms of the Constitution was stated to be enjoined under Article 21 while Article 27 proscribes discrimination in various forms. Article 43 was said to afford every person various rights including the right to the highest attainable standard of health and health care services. Article 47 was expressed to be about fair administrative action requiring, *inter alia*, that a person affected by such administrative action is entitled to written reasons for the action.

10. The petitioners pointed out further that Article 186 of the Constitution and the ensuing 4th Schedule thereof make the County Government the repository of the function of providing county health services and facilities while Article 174 calls for recognition of the right of communities to manage their own affairs including promotion of their social and economic development and provision of the necessary services.

11. The exposition of the law as given by the petitioners is meant to be contextualized in light of presumably demonstrated facts stated to be as follows: That the proposed health facility was supposed to be located in a central place accessible to all subjects of Kapina Sub-Location and/or Bukhayo North/Walatsi ward. The petitioners then purchased and/or procured a site using funds availed by Constituency Development Fund. The site was said to be suitable to serve all the 15 villages in the area. The choice of the site was said to be a result of prior consultations involving all stakeholders, including the respondents.

12. But the respondents apparently had, or later developed, other ideas. To them, Kapina was not the ideal place; the ideal place was near the villages of Akudiet, Mashambani, Ojamii, and Mauria. This is a far-off place according to the petitioners and its choice amounts to discrimination of the residents of 11 other villages who would have been better served had Kapina remained the choice. That choice too was said to amount to denial of the right to health for the residents of the 11 other villages. And the manner of picking the choice, said to be unilateral and without stakeholder consultation, was said to amount to violation of the right to fair administrative action. It also, in the same vein, amounted to flouting of the petitioner's legitimate expectation that the health facility would be put at Kapina.

13. The submissions of 1st, 2nd, and 3rd respondents were filed on 18/10/2017. According to these respondents, the fact that Nambale Constituency National Development Fund came into play makes the proposed health facility at Kapina a national government project which is governed by an entirely different set of laws. The petitioners were also faulted for not demonstrating how their rights were infringed by mere re-location of the project to another place.

14. The jurisdiction of this court was disputed. According to these respondents, the mere acquisition of land and the subsequent failure or refusal by the respondents to put up a health facility does not make the dispute land-related. To the respondents, what is at the centre of it all are allegations of violation of fundamental freedoms and the High Court is the proper place for that.

15. Finally, it was submitted that Kapina dispensary is an unknown entity in law as registration showing its legal existence is not shown. The petitioners are therefore said to be interim committee members of an entity without legal existence. They are therefore said to lack the necessary capacity to sue.

16. The submissions of the 4th and 5th respondents were filed on 19/6/2017. It was reiterated that these respondents are improperly sued. The complaint is said to be that of location and construction of a health facility and this is a function of the County Government. The 4th and 5th respondents belong to National Government and should not therefore be dragged into the matter. It was also submitted that the

petitioners failed to demonstrate how the 4th and 5th respondents specifically violated their constitutional rights.

17. Both the petitioners and 4th and 5th respondents cited the decided cases of **ANARITA KARIMI NJERU vs The Republic [1976-1980] KLR 1272** to support their various positions. The case is authority for the proposition that a person alleging violation of fundamental freedoms must set out clearly the manner and particulars of such violation. IN this regard, the petitioners averred that they had adequately demonstrated the alleged violation while the 4th and 5th respondents asserted that there was lack of proof relating to any violation emanating from them.

18. I have considered the petition, the responses made by the respondents, the statements of the witnesses that accompanied the petition, and the rival submissions. The petitioner's case arose in a somewhat simple way. It relates to simple relocation of a project contrary to prior agreement and allegedly in a unilateral and/or non-consultative manner. The petitioners saw it as a violation of some of their fundamental rights while the respondents saw their action as justified in light of prevailing facts and circumstances.

19. I think I should first address the issue of jurisdiction as raised by the 1st, 2nd, and 3rd respondents. To these respondents, this is not a land dispute; it is a dispute concerning violation of fundamental freedoms. Being such, the jurisdiction lies in the High Court, not Environment and Land Court. To them, the High Court is the one clothed with jurisdiction.

20. At the centre of this dispute is land parcel No. BUKHAYO/LUPIDA/2663. On that land a health facility was supposed to be constructed but the plan to do so aborted when the respondents relocated the project. Article 162(2)(b) of the Constitution spells out the jurisdiction of the Environment and Land Court as involving the environment and the use and occupation of, and title to, land. The envisaged project was one that would involve use and occupation of land. In my view, any violation of law concerning such use and/or occupation of land, whether such violation relates to statutory or constitutional provisions, requires to be dealt with by Environment and Land Court. This court therefore has jurisdiction and the averments of the respondents seem to have misapprehended the foundational basis of the petition.

21. I now move on to other aspects of the case. I will first take two issues raised by one side and not responded to by the other. The petitioners stated that the relocation of the projection to a new site was done unilaterally. They said they were not involved. The respondents did not respond to this. This averment therefor is an undisputed fact. The respondents on their part stated that there is another health facility nearby which serve the residents, a fact which they considered while relocating the project. This averment has no rebuttal from the petitioner. It stands therefore as an undisputed fact.

22. The 1st, 2nd, and 3rd respondents argued that Kapina health project is a non-legal entity and the petitioners therefore lack legal capacity to sue on its behalf. I think these respondents fail to appreciate the approach taken by the petitioner's while filing the petition. The petitioner's are not saying the rights of Kapina Health Project were violated. Their averments rather are that their own fundamental freedoms together with the freedoms of other Kapina residents were violated. The violations therefore are not about Kapina project but about the petitioners and other Kapina residents.

23. But even if it were to be assumed that the issue is about the rights of Kapina Project, there is un-rebutted evidence that the respondents had engaged with the petitioner's over that project in the past. Question is: While so engaging, was Kapina a legal entity? The answer is an obvious No. Another Question is: Why then turn around now to assert that Kapina Project is a non-legal entity when confronted with the issue of not involving stakeholders in your decision? And the answers seems to me that these respondents are being less than honest. On all these allegations therefore, these respondents are wrong.

24. Besides, don't we have un-incorporated associations in law? Don't we have such associations suing or being sued through their authorized representatives? The fact of the matter is that we have such

associations and they often seek redress in courts. They are allowed to pursue their matters in court in accordance with the law.

25. Bearing all these in mind, I feel impelled to reject, and hereby reject, the 1st, 2nd, and 3rd respondents averments about the petitioner's capacity to sue.

26. The 1st, 2nd and 3rd respondents also tried to make the point that the proposed project belonged to Constituency Development Fund and therefore is a project of National Government. It is unclear where this assertion is derived from. The petitioner's never insinuated or pleaded such a thing. All I see is that the Constituency Development Fund was the source of money to acquire the site for the project. It is not stated anywhere that the same entity would undertake the development of the project. It is not indicated anywhere that the same entity would oversee the implementation of the project. I think these respondents are creating their own stories and submitting on them.

27. It is clear at this point therefore that most of the averments or arguments made by the 1st, 2nd and 3rd respondents are largely wishy-washy and unhelpful.

28. I now turn to the submissions of the 4th and the 5th respondents. I understand the arguments in the submissions as espousing the position that the 4th and the 5th respondents are offices or officials of the national government and should not therefore be included in a matter like this which involves devolved government. It is also the argument of the 4th and 5th respondents that the petitioners did not spell out exactly how they violated their fundamental freedoms.

29. I however see the matter differently. The petitioners had a problem with the 4th respondent who is the local administrator of the area. In the petition, the 4th respondent comes out clearly as an official of the National government. It seems reasonably clear that the complaint against this respondent is much the same as the complaint against the 1st, 2nd, and 3rd Respondents. The 5th respondent is sued, as is usual proceedings where national government officials are sued, because the 4th respondent is sued.

30. In my view, the petitioners did not have to show exactly what the 5th respondent has done. It is very clear in the petition in what capacity the 5th respondent is brought on board. For the 4th respondent, what is complained concerning other respondents includes even himself. I think the 4th and the 5th respondents are missing these crucial stand points in their submissions. And due to this, the submissions of the 4th and 5th respondents fail to address crucial issues in the petition.

31. When the submissions of all the respondents are looked at in totality, they largely fail the test of persuasion and conviction.

32. What next then for the petition? This petition turns largely on the facts found undisputed at paragraph 21 of this judgement. It also depends on the state of affairs obtaining at the time of this judgement. The first undisputed fact is that the project was relocated unilaterally and/or without consultations. The respondents never responded to this. To the extent that this was done without the petitioner's or other stakeholders' participation, it was in violation of Article 47 which accords the right to fair administrative action. **I therefore issue a declaration in terms of prayer (ii) in the petition. And this is because the petitioner's right to hearing and fair administrative action is violated.**

33. The other undisputed fact is that another health facility – Lupida Health Centre – exists and serves the people nearby. The petitioner failed to respond to this. This being the position, the respondents then had a good reason to relocate the project. The only problem being, as observed earlier that they did so without involving the stakeholders. It would appear to me that the petitioners and the other stakeholders can still go to Lupida Health Centre and get medical services there. If the petitioners had responded to say that they are denied such services, I would probably have taken it differently. As things stand now, no response was made to this issue. The issue is therefore undisputed.

34. And this being the position, it becomes impossible to hold, as prayer (i) would have me do, that the petitioners right to the highest attainable standards of health was violated. It also becomes impossible, as prayer (iii) implores me to do, to hold that relocation amounted to discrimination of the petitioners or was an affront to their human dignity. For these reasons, **I decline to grant prayers (i) and (iii).**

35. I now turn to prayer (iv). This prayer is for issuance of a permanent injunction against the respondents, their agents and/or servants from constructing and/or continuing to construct the proposed health facility on the new site. It is with this prayer in mind that I earlier on made the observation that it is important to appreciate the stage at which this judgement is being made. In the 1st, 2nd, and 3rd Respondents response to the petition, it was stated that the proposed health facility is already constructed and is only awaiting commissioning. The petitioners did not respond to this. I must therefore take that deposition as true.

36. If the facility is already constructed, which construction is the court going to restrain? Courts of law do not issue orders in vain. It appears to me that this is one order that the court would issue in vain. But there is also another consideration namely: Even assuming that the order could issue, the people meant to benefit from the project are not part of this case. These people are the residents of the four (4) villages said to be meant to benefit from the project. The order would certainly punish them yet they do not seem to be part of the respondents alleged scheme. Since the perceived wrong doers are the respondents, the petitioners should have sought a remedy that would affect only them, not other innocent people. It is for the reasons that I decline to grant the order of injunction.

37. Ultimately, the petitioners only get prayer (ii) as that is the only prayer found suitable based on what they availed to this court. The other alleged violations were not proved.

38. There is also prayer (v) which is any other order/relief that is just to grant. I do not deem it necessary to grant any other prayer. But I think I need to address the issue of costs. This is what one can call public interest litigation. Having regard to what has been presented and the various outcomes concerning the prayers made, I do not deem it necessary to condemn any side to pay costs. Accordingly therefore, each side should bear its own costs.

Dated, signed and delivered at Busia this 6th day of December, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

1st Petitioner:

2nd Petitioner:

3rd Petitioner:

4th Petitioner:

1st Respondent:

2nd Respondent:

3rd Respondent:

4th Respondent:

5th Respondent:

Counsel of Petitioners

Counsel of Respondents.....