



Eldo Hawkers Savings and Credit Co-operative Society Limited v Uasin Gishu County Government (Petition 2 of 2018) [2024] KEELC 6272 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6272 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

PETITION 2 OF 2018

EO OBAGA, J

SEPTEMBER 30, 2024

IN THE MATTER OF ARTICLES 1, 2, 10, 22, 28, 40, 43, 47, 55, 57 AND 186 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE FOURTH SCHEDULE PART 2(7) (A), (B), (C) AND (E) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS & FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLES 28, 40, 43, 47, 55 AND 57 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE REGULATION OF HAWKING ZONES, HAWKING ACTIVITIES, SMALL SCALE TRADE, LICENCING EXCLUDING PROFESSIONAL LICENCING, FAIR TRADE PRACTICES AND CO-OPERATIVE SOCIETIES IN UASIN GISHU COUNTY

BETWEEN

ELDO HAWKERS SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LIMITED PETITIONER

AND

THE UASIN GISHU COUNTY GOVERNMENT RESPONDENT

Occupation of public land and payment of a daily hawker's fee does not confer ownership of the land
The petition challenged the banning of the petitioner's members from hawking and engaging in small-scale trade activities they had been carrying out within the Central Business District of Eldoret. The court highlighted the



requirements for the principle of legitimate expectation to be successfully invoked. The court further held that neither occupation of public land over a long period nor payment of a daily hawker's fee or even holding temporary licences conferred ownership of the subject property, and any proprietary interest capable of protection under the law.

Reported by Kakai Toili

Land Law – ownership of land – ways of obtaining ownership or proprietary interest of public utility land - whether occupation of public land over a long period; payment of a daily hawker's fee; and holding temporary licences conferred ownership of, or proprietary interest in public utility land capable of protection under the law – Constitution of Kenya, article 40.

Constitutional Law – right to fair administrative action - doctrine of legitimate expectation - requirements for the principle of legitimate expectation to be successfully invoked - what were the requirements for the principle of legitimate expectation to be successfully invoked.

Brief facts

The petitioner stated that the respondent invited all hawkers and small traders who were members of the petitioner to a meeting on April 14, 2016 seeking stakeholder support in carrying out trade reforms. The petitioner further stated that the respondent designated hawking zones and had authorised it, in liaison with its Director of Trade, to grant hawker identification cards to its members. The petitioner deponed that in consideration of a Kshs. 100 daily licensing fee, the respondent in designating the hawking zone created an interest in land in favour of the petitioner's members.

The petitioner further deponed that its members had complied and paid the requisite fees, which created a legitimate expectation that their activities would not be halted, adversely changed or rendered uneconomic. The petitioner claimed that on January 16, 2018 the respondent failed to collect the daily licensing fee but instead made an oral announcement within the hawking zones, that the petitioner's members must cease the hawking and small-scale trade activities they had been carrying out.

It was deponed that the respondent's actions in seeking to remove the petitioner's members from the designated hawking zones were unlawful. The petitioner deponed that the respondent did not follow due process, was acting without a decree of the court and was thus improperly exercising sovereign power. Further, that the action was contrary to article 47 of the Constitution, which guaranteed the petitioner's members the right to reasonable, procedurally fair and the right to be given written reasons since their interests were adversely affected.

The petitioner thus sought among other reliefs; a declaration that the acts and/or omissions of the respondent in failing to obtain a decree for eviction or pursuing the legally recognized legal channels for terminating an interest in land were a nullity and invalid, and it violated the tenet of legitimate expectation.

Issues

- i. Whether the following conferred ownership of, or proprietary interest in public utility land capable of protection under the law;
 1. occupation of public land over a long period;
 2. payment of a daily hawker's fee; and
 3. holding temporary licences.
- ii. What were the requirements for the principle of legitimate expectation to be successfully invoked?

Held

1. The principle of legitimate expectation was basically a promise made to a party by a public body that it would or would not act in a particular manner. However, for the promise to hold, it must be made within the confines of the law. For the principle of legitimate expectation to be successfully invoked, the expectation must first be legitimate, as the law did not protect every expectation but only that which was legitimate.



2. Where the decision of a public body such as the respondent purported to derogate from what could be considered as legitimate expectation as was created by its conduct or outright provisions/utterances, such a decision ought to be quashed for breach of legitimate expectation.
3. The respondent appeared to be very cognizant of the need and expectation of the petitioner's members to be allowed to carry out their businesses within Uasin Gishu County. It was for that reason that the respondent had not banned the petitioner's businesses completely neither did it dislodge or displace the petitioners from their previous areas of operation without any regard for their businesses. The respondent sought a partnership with the World Bank to obtain funding, prepared and submitted plans for approval for construction of markets and awarded tenders for the construction works. The petitioners had not disputed those allegations by the respondent.
4. A lot of thought and public resources was expended in providing alternative premises for the petitioners to conduct their businesses. The petitioners could not claim legitimate expectation to run their businesses when that expectation was at the expense of the legitimate expectation of other business owners to make a living. The court had seen the complaints by other business owners within Eldoret town complaining of interference by the hawkers, which interference had negatively impacted their businesses.
5. Article 47 of the Constitution on the right to fair administrative action was intended to subject administrative processes to constitutional discipline. The result was that relief for administrative grievances was no longer left to the realm of common law or judicial review, but was measured against the Constitution.
6. Administrative actions that flowed from statutes must meet the constitutional test of legality, reasonableness and procedural fairness. The right was safeguard actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. The Fair Administrative Action Act, cap 7L was enacted to pursuant to article 47(3) of the Constitution to give effect to article 47. Section 4 of the Act provided the broad values that public bodies were to take into consideration and adhere to when making administrative decisions.
7. The petitioner was a person for purposes of article 47 of the Constitution, and its right as an entity and the rights of its members were affected by the respondent's decision to move the hawkers' businesses into the hawkers market. They were therefore entitled to an administrative action that was not only procedurally fair and lawful but also reasonable. They were also entitled to be given reasons for the decision. The petitioner did not, however, exactly state or lead evidence to establish how exactly the respondent failed to comply with its members' right to fair administrative action.
8. The process of building hawkers market seemed to have started in 2007. The environmental impact assessment report for the project was dated December 18, 2007. The petitioners must have been aware of the decision to ban hawking as it was taken way back in 2008 when the initial notice dated April 9, 2008 was issued to the general public, hawkers and vendors notifying them that no hawking would be allowed in the CBD.
9. The meeting of April 14, 2016 was to seek stakeholder support for the trade reforms and discussed the temporary designated hawking zones. What all those documents showed was that it was not a spur of the moment decision or one that was undertaken frivolously. The process of moving the hawkers into the appropriately named hawker's markets had been ongoing for over 15 years. The petitioner's members were given sufficient notice of the decision by the respondent. The petitioners were also given reasons for the decision undertaken by the respondent. The respondent had demonstrated that it adhered to the laid down laws, rules, regulations and procedure. The respondent did not violate the petitioner's right to fair administrative action guaranteed by article 47 of the Constitution.
10. Article 40 of the Constitution allowed every person the right to acquire and own property within Kenya. The petitioners did not claim that they owned the property that comprised the designated hawking zones. The fact that the petitioner did not claim compensation for the property under article



- 40(3), was a clear acknowledgement that neither the petitioner nor its members owned the property over which they claimed an interest.
11. The petitioners claimed some sort of interest to operate their businesses on the land that allegedly arose from the daily hawking licence fee they paid to the respondent. However, the areas that were designated hawking zones as well as the streets, roads and highways that the petitioner's members were said to operate from were and remained public land or land set apart for a public purpose. Article 62(2) and (3) of the Constitution provided that public land shall be held in trust by either the county government or the National Government as the case may be, and used for public purposes as provided under section 2 of the Land Act, 2012.
 12. The alleged designated hawking zones claimed by the petitioners stood on public utility land that was held by the respondent on behalf of the public. Neither occupation of public land over a long period nor payment of a daily hawker's fee or even holding temporary licences conferred ownership of the subject property, and any proprietary interest capable of protection under the law. The petitioner's members could not therefore claim violation of article 40 of the Constitution since they did not own the land.
 13. Article 10 of the Constitution provided for the national values and principles of governance that bound all State organs, public officers and all persons whenever they applied or interpreted the Constitution, enacted, applied or interpreted any law or made or implemented public policy decisions.
 14. The respondent did not announce a cessation of hawking activities. From all the notices produced in court, the respondent only banned hawking activities in the CBD and along the named roads and streets as well as along the highway. The initial approval of the disputed designated hawking zones was from the relevant notices temporary to allow the petitioners continue their businesses pending completion of the construction and expansion of the markets, which were ready for use but were underutilised by the petitioners because they refused to move in.
 15. The allegation that the respondent did not follow due process and that it was acting without a decree of the court and was thus an improper exercise of sovereign power remained unfounded. It was not the business of court to veto any executive decision before it was made or implemented. There was no law that made it mandatory that the county governments must seek approval of the court or a decree to that effect before undertaking any of its executive action. It was for that reason that even a complaint relating to fair administrative action came after the fact and not before an action had been made.
 16. Article 10(2)(c) of the Constitution was on the requirement of good governance, integrity, transparency and accountability. No allegation had been raised that the respondent acted without integrity, transparency and accountability. The final consideration under article 10(2)(d) was sustainable development.
 17. There existed a rebuttable presumption that a body vested with a mandate exercised that mandate with due regard to procedure and law. The burden would lie on the person alleging non-compliance to prove the nature and extent of that non-compliance. A petition alleging infringement of rights must contain sufficient information to enable the other side to understand and respond to the case against them. In the instant petition, no evidence had been tendered to establish that the respondent failed to ensure enjoyment of the petitioner's rights espoused at article 43 of the Constitution.
 18. The respondent did not give notice for a total ban of hawking activities, and if the respondent had done that, it would have qualified as an infringement of their rights under article 43 of the Constitution. The notices from the respondent only banned hawking in the contested hawking zones, instead directing the petitioners to operate from the hawkers markets. In any event, the rights envisaged in article 43 were progressive in nature and could not be implemented immediately. However, in ensuring that the petitioner's members had a safe place from where they could operate their business, it could be said that it was one step towards ensuring enjoyment their socio-economic rights.



19. The petitioner had not shown how exactly the rights of its members under articles 55 and 57 of the Constitution were infringed. It had not been claimed for instance that the intended evictions were skewed against the youth or the elderly. The petitioner also did not allege any discrimination in the issuance of stalls at the hawkers market. The petitioner's witnesses in their testimonies did not testify or produce evidence to support that allegation.
20. At clause 3 of Part 2 of the Fourth Schedule to the Constitution, the respondent was mandated to control noise pollution and other public nuisances. The letters from the members of the public produced by the respondent lodged complaints ranging from noise pollution to public nuisances. The respondent had every right under law to set up mechanism to control the pollution and nuisances. Clause 5 thereof empowered the county to manage county transport. The respondent indicated that the presence of hawkers on the roads, streets and the highway had made movement and navigating the CBD impossible. The respondent was under constitutional duty to respond to the transport challenge within the County.
21. Under clause 7 of Part 2 of the Fourth Schedule to the Constitution, the respondent was allowed to regulate trade and development including markets and trade licences. The respondent took the initiative to build markets for the members of the petitioner from where they could operate their businesses. The respondent was in charge of and had been charging licences for the businesses being carried out in its jurisdiction. Those were all functions that a county government was empowered to undertake.
22. The respondent indicated that it had faced major challenges in disaster management caused by obstruction of the streets and fire lanes resulting in loss of property. County governments at clause 12 of Part 2 of the Fourth Schedule to the Constitution also had a mandate to deal with firefighting and disaster management. It was thus within the respondent's mandate to come up with measures to ensure that its disaster management and response mechanisms were workable. The respondent was well within its rights to deal with all those challenges through the construction of the hawkers' market and relocation of the petitioner's members to operate therefrom.
23. Under article 186(3) of the Constitution, a county government could not either assign or arrogate to itself any functions or powers beyond those assigned to it under the Constitution or national legislation as enacted by Parliament from time to time. That was what would constitute a breach of article 186 of the Constitution. The respondent was well within its rights to undertake the decisions and/or actions as they all fell within its exclusive mandate/functions. In the circumstances, the respondent did not arrogate to itself constitutional powers and functions that were not within its constitutional mandate.

Petition dismissed.

Orders

Each party to bear its own costs.

Citations

Cases

1. Ayuma & 11 others (Suing on their own Behalf and on Behalf of Muthurwa Residents) v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others; Kothari (Interested Party) (Petition 65 of 2010; [2013] KEHC 6003 (KLR)) — Explained
2. Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR)) — Explained
3. Jacqueline Okuta & Jackson Njeru v Attorney General, Director of Public Prosecution & Article 19 of East Africa (Petition 397 of 2016; [2017] KEHC 8382 (KLR)) — Explained
4. John Kamau Kenneth I Mpapale v City Council of Nairobi & 7 others (Environment & Land Case 867 of 2012; [2014] KEHC 7505 (KLR)) — Explained
5. Judicial Service Commission v Mbalu Mutava & another (Civil Appeal 52 of 2014; [2015] KECA 741 (KLR)) — Explained



6. Keroche Industries Limited v Kenya Revenue Authority & 5 Others Nairobi (Misc Civ Appli 743 of 2006; [2007] KEHC 3680 (KLR)) — Explained
7. Pius Kibet Tott v Uasin Gishu County Government & 9 Others (Petition 10 of 2013; [2018] KEELC 4855) — Mentioned
8. Pius Kibet Tott v Uasin Gishu County Government & 9 Others
9. Republic v Attorney General & Another Ex Parte Waswa & 2 Others ([2005] 1 KLR 280) — Explained
10. Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte) (Judicial Review Application E023 of 2021; [2022] KEHC 5 (KLR)) — Explained
11. Republic v Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO (Miscellaneous Civil Application 461 of 2016; [2019] KEHC 10312 (KLR)) — Explained
12. Royal Media Services Limited & 2 others v Attorney General & 8 others (Civil Appeal 4 of 2014; [2014] KECA 877 (KLR)) — Explained
13. Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemtu (Interested Party); With Kenya Human Rights Commission & another (Amicus Curiae) (Petition 229 of 2012; [2012] KEHC 2480 (KLR)) — Mentioned
14. Veronica Njeri Waweru & 4 others v City Council of Nairobi & 2 others (Petition 58 of 2011; [2012] KEHC 5667 (KLR)) — Explained
15. Veronica Njeri Waweru & 4 Others v City Council of Nairobi & 2 Others (Petition 58 of 2011; [2012] KEHC 5667 (KLR)) — Mentioned

Statutes

1. Constitution — article 1; 2(4); 10; 28; 40; 43; 47; 55; 57; 62(2),(3) 186; Schedule Fourth — Interpreted
2. Co-operative Societies Act (cap 490) — In general — Interpreted
3. Evidence Act (cap 80) — section 107, 108, 109 — Interpreted
4. Fair Administrative Action Act (cap 7L) — section 4 — Cited
5. Land Act (cap 280) — Interpreted
6. Physical Planning Act (cap 286) — section 16(1); 38 — Interpreted
7. Public Finance Management Act (cap 412A) — In general — Interpreted

Advocates

Mr. Mogambi for Petitioner.

Ms. Chesoo for Respondent.

JUDGMENT

1. By a petition dated and filed on January 18, 2018 the petitioner, on behalf of its members, sought various reliefs against the respondent on account of alleged violation of various provisions of the Constitution of Kenya, 2010. The petitioner sought the following reliefs:
 - a. That a declaration do issue pursuant to article 2(4) of the Constitution of Kenya, 2010 that the acts and/or omissions of the respondent in failing to obtain a decree for eviction or pursuing the legally recognized legal channels for terminating an interest in land are a nullity and invalid for failure of compliance with articles 1, 10, 28, 40, 43, 47, 55, 57 and 186 of the Constitution of Kenya 2010, it violates the tenet of legitimate expectation and the respondent has no mandate whatsoever to evict the petitioner's members from the designated hawking zones without following the law and the Constitution of Kenya, 2010.
 - b. That the petitioner prays for damages for breach of the constitutional rights under articles 28, 40, 43, 47, 55, 57 and 186 of the Constitution of Kenya, 2010.



- c. That the respondent by itself, its servants and/or agents be restrained from evicting and/ or unlawfully removing the petitioner's members from the designated hawking zones in Uasin Gishu County.
 - d. That the costs of the petition be awarded to the petitioner.
 - e. That any other appropriate relief that the court may deem fit to grant.
2. The petition is supported by an affidavit sworn on the same day by Joseph Gitau, the Chairperson of the petitioner. He deponed that the Petitioner is duly registered under the *Co-operative Societies Act* vide Certificate No CS/20646 with a membership of about 230 including the elderly and the youth, who are involved in hawking activities and small-scale trade within Uasin Gishu County. He deponed that the respondent has a constitutional mandate to carry out trade development, licensing & fair trade practices and co-operative societies, and in doing so is bound to uphold the national values and tenets of good governance under article 10. That in 2016, before the petitioner was registered, the respondent invited all hawkers and small traders who are members of the petitioner to a meeting on April 14, 2016 seeking stakeholder support in carrying out trade reforms. That the Respondent designated hawking zones and has authorised the petitioner, in liaison with its Director of Trade, to grant Hawker Identification Cards to its members that show the hawking zone allocated to each member.
 3. Mr Gitau deponed that in Consideration pf a KShs 100/- daily licensing fee collected under the Uasin Gishu County Finance Act, the respondent in designating the hawking zone creates an interest in land in favour of the petitioner's members which has to accord to the legal determination procedures relating to it. He deponed that the petitioner's members have complied and paid the requisite fees, which creates a legitimate expectation that their activities will not be halted, adversely changed or altered to their disadvantage or rendered uneconomic. That the petitioner's members also have a legitimate expectation that the respondent shall not bring their economic activities to an end without following the due process of the law, fair administrative actions and observing their constitutionally guaranteed rights and freedoms.
 4. Contrary to this, on January 16, 2018 the respondent failed to collect the daily licensing fee from the petitioner's members. That instead, it made an oral announcement through its director of trade within the hawking zones, that the petitioner's members must cease the hawking and small scale trade activities they have been carrying out. It was deponed that the respondent's said actions in seeking to remove its members from the designated hawking zones are a nullity, unlawful and unconstitutional for various reasons. He deponed that the respondent did not follow due process, is acting without a decree of the court and is thus improperly exercising sovereign power. That the said action is contrary to article 47, which guarantees the petitioner's members the right to reasonable, procedurally fair and the right to be given written reasons since their interests are adversely affected.
 5. Mr Gitau deponed that the respondent's action contravenes article 10(1), (2)(a)-(d) for being contrary to the rule of law, objects of devolution, human dignity, social justice, human rights, good governance and sustainable development. Further, that the removal of the petitioner's members amounts to arbitrary deprivation of property contrary to articles 40 and 43 as the licensees have a legitimate expectation that they will operate their activities for the period specified in their member ID Cards and be considered for renewal thereof. In addition, that the intended eviction of its members is an infringement of article 43, 55 and 57 as it denies them an opportunity to associate and participate in economic spheres of life, pursue personal development, live with dignity and respect free from abuse. Lastly, that the action is contrary to article 186 as it does not mandate the respondent to issue an oral notification or evict any persons without a decree.



Respondent's Reply;

6. The respondent replied *vide* an affidavit sworn on October 16, 2020 by Simion Tanui, its Chief Officer in the Department of Trade and Industrialisation, stating that the petitioner is not deserving of the orders sought in the petition. He deponed that the petitioners invaded the highway, streets and bus stations within the Central Business District (CBD) making operation and movement within Eldoret Town impossible to navigate. He deponed that the petitioners were carrying out their activities illegally as they have no permit from the respondent to allow them carry out hawking activities in their alleged designated areas. He confirmed that a notice dated April 9, 2008 was issued confirming that no hawking shall be allowed within the Central Business District that took effect from April 14, 2008. He explained that after deliberations done on October 29, 2017 a 30-day notice was issued to the petitioners dated November 1, 2017 confirming that no hawking shall be done within the CBD and the petitioners were allocated other areas to operate.
7. The deponent stated that the respondent received several complaints from members of the public through letters annexed in its affidavit concerning the nuisance occasioned by the petitioners. He deponed that at the meetings held on October 29, 2017 and December 14, 2017 it became clear that over 247 stalls and lock up allocation stalls developed for use by members of the petitioner are being underutilised. He deponed that the defunct Eldoret Municipal Council prepared and a Physical Development Plan (PDP) that was approved in compliance with the *Physical Planning Act* cap 286. The areas being contested in this petition fall within the very definition of a road under the Physical Planning Act, which at Section 16(1) allows a regional PDP may provide for planning, re-planning or reconstruction of the whole or part of the area comprised in the plan.
8. Mr Tanui deponed further that under section 38 of the Physical Planning Act, the respondent has the power to carry out appropriate action to restore public property. He averred that thousands of properties were destroyed by fire in July, 2017 in Komora Centre because fire engines could not access the site. This is because the petitioners had invaded the fire lanes as stated in the report dated July 27, 2017 contrary to Municipal Council Fire Brigade (By-Laws) 2009. That the PDP designated the fire lanes, which are to remain open as a means of disaster preparedness and mitigation in case of a fire breakout. He stated that in a bid to provide the petitioner's with a safe working environment, the respondent prepared and tabled plans for construction of a market for all hawkers before the Eldoret Municipal Council in 2007, for which an Environmental Impact Assessment (EIA) was done. The respondent issued bids and set aside funds for construction of the markets within Uasin Gishu County, 2 markets are operational within Eldoret town.
9. For this reason, Mr Tanui averred that the respondent had fully complied with the requirements of the [Constitution](#) and relevant legislation and wider public interest dictates that the petitioners be directed to use the designated and unused market areas. He stated that the petition herein does not raise any constitutional issue of merit and the petitioner had failed to either meet the threshold to be entitled to grant of the orders sought or demonstrate any enforceable interest over the highway and streets. He urged that the EIA study and assessment were conducted properly in an open process and with input of the members of the public as well as dedicating a lot of time and effort into development of the markets. That public interest outweighs narrow private interests of the Petitioner, and in any event the petitioners' interests have already been catered to, thus any conservatory orders would open up the respondent to unnecessary litigation and expenses.
10. Mr Tanui also urged that the petitioners' acts of abandoning their designated stands in the traders markets and invading streets, footpaths, bus parks, and highways were illegal and harmful to the environment and the public at large, and would as well impact other business owners negatively. He



indicated that the Petitioners have been invited to collect their metallic stands in full compliance of the orders issued herein. He deponed that the said actions have increased challenges to the Kenya Police and County Police in their provision of services. That the orders sought are unjustifiable and will impede the respondent's performance of its constitutional mandate to avert imminent health, environmental and socio-economic catastrophe. He averred that the respondent being desirous of collecting revenue as tasked under the Constitution and Public Finance Management Act No 18 of 2012, has stationed Council Police at the traders markets to issue licences and permits but the petitioners have refused to visit the markets and operate their businesses therefrom.

11. Further, Mr Tanui deponed that the petitioners make their payments and then leave the designated areas to invade public areas contrary to regulations. That the respondent issued a directive pursuant to its constitutional and statutory mandate to control hawkers and petty traders within the CBD to maintain public order and peace. That the petitioners want to bring back confusion and anarchy under the erroneous belief that they have a legitimate expectation to run amok under the protection of article 43 without regard to other members of the public. He urged that it is in the public interest that the hawkers and petty traders be regulated by the Respondent, which is the body mandated in law to do so.

Hearing and Evidence;

12. The petition proceeded by way *viva voce* evidence. The petitioner first called Patrick David Lihanda as PW1 and he gave a sworn testimony. PW1 testified that he is an accountant of 15 years whose job is to compute loss resulting from fire. He testified that he compiled the report dated June 22, 2018 entailing the losses incurred by petitioner's members due to closure of backstreet businesses. PW1 placed the loss at KShs. 45,076,960/- indicating that he considered the items purchased and their sale value, and he produced the report as PEX1. He was cross-examined by Ms Karuga and testified that he had included the documents relied on in the report save for the stock book as they were bulky. PW1 testified that he used the documents provided by the Sacco members, their loan statements and their average sales.
13. Joseph Gitau Kinuthia testified as PW2, he gave a sworn testimony and adopted his written statement dated January 15, 2018 as his evidence-in-chief and produced the documents contained in the petitioner's Supplementary List of Documents. He testified that he has been a hawker in Eldoret for the last 15 years, but the County Police officers came and confiscated their goods using a lot of force, which goods have not been returned contrary to the orders of the court herein. PW2 testified that they had been allowed to operate on the back streets, Saito mainstage, Miapo and Ubera. That they used to pay KShs 100/- per day and were given receipts for the amount paid but they were evicted on January 16, 2018. It was his testimony that the County Government had given them a loan of KShs. 100,000/- from the county enterprise fund, which they had been repaying. That they are not operating from where they were operating from and neither have they been referred to where they ought to be operating from.
14. On cross-examination, PW2 testified that the County Government to charged them KShs 100 until January 18, 2018. PW2 testified that they used to go where they were evicted from and they worked from the sewer and power lines, however, they were not obstructing roads, fire engines or electricity vehicles. When re-examined, he testified that they did not obstruct any vehicles or pedestrians. PW2 stated that the Notice that was given was for 2017 and had been overtaken by events.
15. The respondent called Kiplating Mengich who testified under oath and adopted the replying affidavit dated October 16, 2020 as his witness statement and produced the annexures therein as the respondent's exhibit 1-23. Mr Mengich testified that he is the respondent's Director of Trade. He testified that the areas listed at para 9 of the petition are not designated areas for hawkers. He testified that the hawkers were not licensed to hawk from the areas they were removed. That the receipts issued



to the Petitioner's members were issued to casual traders and do not confirm that a trader has been allowed to trade in a certain area. He stated that the County Government temporarily allows hawkers to operate from certain streets. That the County has markets throughout the county, 9 of them in Eldoret town. He explained that anyone who wished to operate from a street must have a license to operate from that street. He testified that exhibit 4 was a notice issued by the then Chief Officer for Trade. That the Hawkers were asked to move out of the streets and operate from designated places. He asked for the petition to be dismissed because the hawkers are operating from the markets designated for hawking.

16. Upon cross-examination, Mr Mengich testified that the notice dated April 8, 2016 signed by the County Government of Uasin Gishu approved hawking areas. That there are 7 hawking areas approved vide the letter dated July 8, 2017. The witness testified that the enterprise fund advanced loans to Saccos but he did not know how much the Petitioner was given. He testified that the hawkers were given the loans to operate from the hawkers market. He further stated that the membership ID Cards, which last for a period of 1 year, were issued by the County Government and show where a hawker is supposed to operate from. He denied knowledge that the hawkers pay KShs 250/- for the ID Cards but admitted that they used to pay KShs 100/- daily to the respondent. He testified that the letter dated September 27, 2016 was approved by the respondent in respect of 13 markets and that there was another notice issued after the notice on April 8, 2016.
17. He was cross-examined and he testified that the cards were issued by the Hawkers Sacco. He testified that there were a number of meetings with the hawkers. That the hawkers were asked to operate from designated areas. When shown the list of hawkers, the witness testified that he could not tell who authored the list.

Submissions;

18. The respondent then closed its case and court directed the parties to file written submissions. It appears however that the petitioner did not file its submissions. The court did request its registry staff to reach out to both parties herein to determine whether the petitioners did in fact file the submissions to no avail.
19. The respondent on the other hand complied and filed its submissions dated December 7, 2023. Counsel submitted that legitimate expectation may be established through representation or past practice. Counsel relied on *Communications Commission of Kenya & 5 others v Royal Media Services & 5 Others* [2014] eKLR. He submitted that the respondent did not condone hawking activities and had banned them since April 14, 2014. That the letter dated April 8, 2016 that the petitioners rely on to operate on the roads and bus parks was a stop gap measure as the county finalised the building and expansion of markets to accommodate all of the petitioner's members. That the payment of the daily licensing fees does not legitimize the hawking activities.
20. Counsel argued that the principle of legitimate expectation is a common law principle that cannot override express provisions of the law. That the law under the 4th schedule of the *Constitution* allows the respondent to regulate trade and development including markets and trade licences. That it is under this constitutional mandate that the respondent allocated various markets for hawkers and small traders while also prohibiting the petitioners from operating in the CBD, backstreets and bus stages. That the respondent has never represented to the petitioner's members that hawking activities in these areas would be permissible. That the letter of April 8, 2016 had indicated that the respondent had singled out markets where they would conduct their activities and the designated hawking zones were only valid up to July 8, 2016. He cited *Republic vs Principle Secretary, Ministry of Transport, Housing and Urban Development ex parte Soweto Residents Forum CBO* [2019] eKLR. Counsel also cited



Republic v Kenya Revenue Authority; Proto Energy Limited (Ex parte) [2022] KLR on the requirements for the existence of legitimate expectation.

21. Counsel submitted that the petitioners had invaded the highway, streets and bus stations making it impossible to operate in or navigate movement in Eldoret town. That the petitioner's activities were negatively impacting other business owners and causing noise pollution as well as illegal dumping of waste materials thus interfering with commerce and public service. Further that they hampered access of fire lanes and cited the 2007 fire incident at the Komora Centre. He argued that the petitioner's activities are antithetical to the public interest and the right of the members of the public to a clean environment. He urged the court to be persuaded by *Jacqueline Okuta & Another v Attorney General & 2 Others* [2017] eKLR and find that the Petitioners could not lawfully occupy the streets, highway and bus stations.
22. On the infringement of the petitioner's right to acquire and own property under article 40, Counsel submitted that an interest in land cannot be acquired over public land. That the backstreets, highways, streets and bus stations are on public land and serve a public purpose (*Pius Kibet Tott v Uasin Gishu County Government & 9 Others* [2018] eKLR and *Veronica Njeri Waweru & 4 others v City Council of Nairobi & 2 others* [2012] eKLR). Counsel submitted that the petitioners had not established how the respondent had infringed their socio-economic rights under article 43 of the *Constitution*. He relied on *Trusted Society of Human Rights Alliance v AG & 2 Others* [2012] eKLR. Counsel urged that the petitioners have not discharged the evidentiary burden per section 107, 108 and 109 of the *Evidence Act* to prove infringement of their rights as alleged. He asked the court to dismiss the petition with costs.

Analysis and Determination;

23. Having appreciated the pleadings of the respective parties herein and considered the submissions and decisions referred to, the following issues arise for determination: -
 - a. Whether the respondent's decision violated the petitioner's rights to legitimate expectation
 - b. Whether the respondent complied with the petitioner's right to fair administrative action under article 47
 - c. Whether the petitioner's members had acquired an interest in the designated hawking zones capable of being protected under article 40
 - d. Whether the petitioner's rights under articles 10, 43, 55, 57 and 186 were infringed

a. Whether the Respondent's decision violated the Petitioner's rights to legitimate expectation;

24. The principle of legitimate expectation is basically a promise made to a party by a public body that it will or will not act in a particular manner. However, for the promise to hold, it must be made within the confines of the law. For the principle of legitimate expectation to be successfully invoked, the expectation must first be legitimate, as the law does not protect every expectation but only that which is legitimate. This was the finding in *Royal Media Services Limited & 2 others v Attorney General & 8 others* [2014] eKLR where the court held that:

"141. It has been stated by various legal experts that the doctrine of legitimate expectation is intended to give relief to a party who is not able to justify their claim on the basis of pure application of statutory law, though he has suffered a civil consequence because a certain lawful promise that had been made by a respondent or a party in a dispute has not been fulfilled.



Several authorities were cited by all the parties. HWR Wade & CF Forsyth in “AdministrativeLaw”, 10th Edition at page 449 state that:

“It is not enough that an expectation should exist; it must in addition be legitimate. But how is it to be determined whether a particular expectation is worthy of protection? This is a difficult area since an expectation reasonably entertained by a person may not be found to be legitimate because of some countervailing consideration of policy or law.”

142. Legitimate expectation cannot prevail against statute. See MasonHayes Curram, 2008 “The Doctrine of Legitimate Expectation; Recent Developments”. I may also add that legitimate expectation, however strong it may be, cannot prevail against express provisions of the *Constitution*. If a person or a statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that offends the *Constitution*, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise.”
25. In other words, the doctrine of legitimate expectation should not be invoked to confer an unmerited, unlawful or improper benefit. The rationale behind the principle was explained in *Keroche Industries Limited v Kenya Revenue Authority & 5 others Nairobi* [2007] 2 KLR 240, where the court stated as follows:-
- “By rejecting the applicants decision to change the tariff as proposed, the court will be sending out a clear signal that legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way. In this case the applicant did not expect an abrupt change of tariff where the process of manufacture or its products had not changed. Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised.”
26. The petitioner claims that once its members paid the requisite fees, a legitimate expectation was created that their activities will not be halted, adversely changed or altered to their disadvantage or rendered uneconomic. The petitioner further claimed that its members also have a legitimate expectation that the respondent shall not bring their economic activities to an end without following the due process of the law, fair administrative actions and observing their constitutionally guaranteed rights and freedoms. The respondent strongly opposed this assertion, and instead averred that it has never represented to the Petitioner’s members that hawking activities in the conflicted areas would be permissible.
27. A look at the letter of April 8, 2016 produced by the petitioner shows that the respondent had singled out markets where the petitioner’s members could conduct their activities. The letter of April 8, 2016 was explicit that the designated hawking zones were valid for a period of 3 months, thus the designation under this letter was valid until July 8, 2016. The petitioner also produced the Proposed Guidelines



for Management of Small Scale Businesses within the county dated December, 2016. This document at paragraph 3.1 provides that all hawkers are to be enclosed within markets, and those that could not get space in the markets would be assigned specified temporary hawking zones. The document goes on to explain that the temporary hawking zones shall be renewed every 3 months and licensed once approved. It is again very explicit that “There shall be no other hawking within streets and corridors”.

28. From my understanding of the principle of legitimate expectation, where the decision of a public body such as the respondent purports to derogate from what can be considered as legitimate expectation as is created by its conduct or outright provisions/utterances, such a decision ought to be quashed for breach of legitimate expectation. This was the holding in *Republic v Attorney General & another ex parte Waswa & 2 others* [2005] 1 KLR 280 where it was held:

“A legitimate expectation arises where a person responsible for taking a decision has induced in someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken. In such cases, the expectation ought not to be summarily disappointed.”

29. That is not the case in the current petition, where it is very clear that the approval of the designated hawking zones was temporary. The respondent’s witness testified that it was a stopgap measure as the respondent built and expanded the markets for use by the petitioner’s members. Even the Proposed Guidelines for Management of Small Scale Businesses provide that only those traders who could not get spaces in the market would be assigned “temporary” hawking zones. The petitioner deponed that it has a membership of approximately 230 people. In its replying affidavit, the respondent averred that there are about 247 unused stalls in the markets. This means that, at the moment every member of the petitioner can at least be guaranteed space in the existing markets from which to operate.
30. The respondent appears to be very cognizant of the need and expectation of the petitioner’s members to be allowed to carry out their businesses within Uasin Gishu County. It is for this reason that the respondent has not banned the petitioner’s businesses completely neither did it dislodge or displace the petitioners from their previous areas of operation without any regard for their businesses. The respondent sought a partnership with the World Bank to obtain funding, prepared and submitted plans for approval for construction of markets and awarded tenders for the construction works. The petitioners have not disputed these allegations by the Respondent.
31. It is clear that a lot of thought and public resources was expended in providing alternative premises for the petitioners to conduct their businesses. The respondent’s Exhibit 2 is a notice dated April 9, 2008 which stated that hawking in the CBD would not be allowed. The notice was to take effect from April 14, 2008. Another notice dated November 1, 2017 gave hawkers and small scale traders in the CBD in areas such as backstreets, verandahs, enclosed bus stages and petrol stations a 30-days notice to vacate such areas. It indicated that the county had provided several markets as alternative places for them to conduct their businesses. This notice all stated that all applications for allocation to the said areas would not be renewed. The respondent acknowledged that the petitioners were previously licenced and allocated the impugned areas but after the notice, they would no longer proceed with renewal for such areas.
32. The petitioners cannot claim legitimate expectation to run their businesses when that expectation is at the expense of the legitimate expectation of other business owners to make a living. The court has seen the complaints by other business owners within Eldoret town complaining of interference by the hawkers, which interference has negatively impacted their businesses. The letters range from as early as July 16, 2012 to November 1, 2017 There is also a complaint from an educational institution, being Kenya Medical Training College dated January 15, 2013.



Whether the Respondent complied with the Petitioner’s right to fair administrative action under Article 47;

33. Article 47 of the Constitution of Kenya on the right to fair administrative action provides that:

- “(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

34. Article 47 was intended to subject administrative processes to constitutional discipline. The result is that relief for administrative grievances is no longer left to the realm of common law or judicial review, but is now measured against the Constitution. The importance of this right to fair administrative action as a constitutional right in our article 47 is stated in the case of Judicial Service Commission v Mbalu Mutava & another [2014] eKLR, where the Court of Appeal held that;

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of *ultra vires* from which administrative law under the common law was developed.”

35. Administrative actions that flow from statutes must now meet the constitutional test of legality, reasonableness and procedural fairness. The right is safeguard actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. The Fair Administrative Action Act, cap 7L was enacted to pursuant to article 47(3) to give effect to article 47 of the Constitution. Section 4 of the Act provides the broad values that public bodies are to take into consideration and adhere to when making administrative decisions. The petitioner averred that:

“The respondent, in giving an oral announcement in rem is acting contrary to article 47 of the Constitution of Kenya, 2010 which guarantees the members of the petitioner the right to lawful, reasonable, procedurally fair, and entitlement to be given written reasons since their interests are adversely affected.”

36. The petitioner is a person for purposes of article 47 of the Constitution, and it is true that its right as an entity and the rights of its members were affected by the respondent’s decision to move the hawkers businesses into the Hawkers Markets. They were therefore entitled to an administrative action that was not only procedurally fair and lawful but also reasonable. They were also entitled to be given reasons for the said decision. The petitioner did not, however, exactly state or lead evidence to establish how exactly the respondent failed to comply with its members’ right to fair administrative action.

37. The process of building Hawkers market seems to have started in 2007. The Environmental Impact Assessment Report for the project is dated December 18, 2007. Petitioners must have been aware of the decision to ban hawking as it was taken way back in 2008 when the initial notice dated April 9, 2008 was



issued to the general public, hawkers and vendors notifying them that no hawking would be allowed in the CBD. The respondent produced a Contract dated August 30, 2012 for “Proposed Completion of Hawkers Market within the Municipality of Eldoret” as its Exhibit 17. At page 39, it indicates that a public consultation was carried out on December 3, 2012. The petitioner has not denied that the Respondent undertook the public consultation or neither has it denied that its members were involved in the process as alleged by the respondent. There has been no allegation that the views of its members were not sought or considered in the Hawkers Reform projects that resulted in the construction of the markets.

38. The meeting of April 14, 2016 was to seek stakeholder support for the trade reforms and discussed the temporary designated hawking zones. What all these documents show is that this is not a spur of the moment decision or one that was undertaken frivolously. The process of moving the Hawkers into the appropriately named Hawker’s Markets has been ongoing for over 15 years. The petitioner’s members were given sufficient notice of the decision by the respondent. There is a series of notices from all the way back in the year 2008 to 2017, not forgetting the alleged oral notice on January 16, 2018. The petitioners were also given reasons for the decision undertaken by the respondent. The respondent has demonstrated that it adhered to the laid down laws, rules, regulations and procedure. Considering all this, there is no doubt in my mind that the respondent did not violate the petitioner’s right to fair administrative action guaranteed by article 47 of the Constitution.

Whether the Petitioner’s members had acquired an interest in the designated hawking zones capable of being protected under Article 40;

39. The petitioner also claimed that the rights of its members under article 40 was infringed. The petitioner averred that the respondent’s intended removal amounts to arbitrary deprivation of property or an interest in it contrary to articles 40 of the Constitution. It was explained that the petitioner’s members had a legitimate expectation that they would operate their businesses for the period specified in the identification cards. Further, that the cards would be renewed because they relied on the activities to repay the credit advanced by the respondent.
40. The petitioner claims that its members have been carrying out their businesses within Uasin Gishu County without interruption until January 16, 2018 when the respondent made an oral announcement that its members must cease the hawking and small scale trade activities they have been carrying out. The petitioner’s case is that by virtue of the daily hawking licence fee its members paid to the respondent, they had acquired a right over their designated hawking zones capable of protection under article 40 of the Constitution. The respondent on its part is of the opinion that the petitioners were conducting their businesses on the streets and the highway, which are public property for which the petitioners cannot claim proprietary interest. The petitioner relies on article 40(1), which reads:-

“ 40.

- (1) Subject to article 65, every person has the right, either individually or in association with others, to acquire and own property (a) of any description, and (b) in any part of Kenya.”

41. Article 40 allows every person the right to acquire and own property within the republic of Kenya. The petitioners do not claim that they own the property that comprises the designated hawking zones. The fact that the petitioner did not claim compensation for the property under article 40(3), is a clear acknowledgement that neither the petitioner nor its members own the property over which they claim an interest. What they claim is some sort of interest to operate their businesses on the land that allegedly arose from the daily hawking licence fee they paid to the respondent. However, as averred by



the respondent the areas that were designated hawking zones as well as the streets, roads and highways that the petitioner's members are said to operate from were and remain public land or land set apart for a public purpose. Article 62(2) and (3) of the *Constitution* provide that public land shall be held in trust by either the county government or the national government as the case may be, and used for public purposes as provided under section 2 of the *Land Act*, 2012.

42. There can be no dispute that the alleged designated hawking zones claimed by the Petitioners stand on public utility land that is held by the respondent on behalf of the public. Therefore, on the issue of whether petitioner's members are entitled to the land they were asked to vacate, I will be persuasively guided by the case of *John Kamau Kenneth I Mpapale v City Council of Nairobi & 7 others* [2014] eKLR where the court cited *Veronica Njeri Waweru & 4 others v City Council of Nairobi & 2 others* [2012] eKLR which dealt with a similar scenario and the court observed:

“It is the petitioners contention that the demolition of their stalls was in breach of their constitutional rights. Whilst the petitioners admit that the subject property is on public utility land, they submit that they have been in occupation for over 15 years and have been carrying out their businesses and therefore Mutindwa Market is their lifeline. The 1st respondent in its defence contended that neither being in occupation of public land over a long period, payment of Daily Hawkers' fees nor holding Temporary Occupation Licences confer ownership of the subject property to the petitioners. Consequently, the petitioners cannot make a claim over property which they do not own and also that they cannot claim exclusive rights on the same over the public. The petitioners have conceded that the subject property is public land. The court has also taken note that the petitioners have no claimed a violation of article 40 of the *Constitution*. Suffice to say, however, that one cannot claim to be deprived of that which he does not have rights over - See *Veronica Njeri Waweru & 4 others v City Council of Nairobi & 2 others* [2012] eKLR where the court observed:

“The petitioners have readily conceded that they have been occupying public property, a road reserve, for the last ten years. They have licenses to operate businesses, but have no proprietary interest in the land. Clearly, therefore, their claim that their rights under article 40 have been violated has no basis. They do not own the land, and they therefore cannot be deprived of that which they have no rights over. I therefore find and hold that there has been no violation of the petitioner's right to property under article 40’.”

43. As held in the above authority, neither occupation of public land over a long period nor payment of a daily hawker's fee or even holding temporary licences confers ownership of the subject property, and I dare say any proprietary interest capable of protection under the law. The petitioner's members cannot therefore claim violation of article 40 since they do not own the land.

Whether the Petitioner's rights under Article 10, 43, 55, 57 and 186 were violated;

i. Violation of Article 10 on the National Values and Principles

44. The petitioner averred that the respondent's actions and/or intended actions of evicting people en masse goes against article 10(1), (2)(a), (b), (c) and (d) of the *Constitution*, since the same is contrary to the rule of law, the objects of devolution, human dignity, social justice human rights, good governance and sustainable development. Article 10 of the *Constitution* provides for the national values and principles of governance that bind all State organs, public officers and all persons whenever they apply or interpret the *Constitution*, enact, apply or interpret any law or make or implement public policy decisions.

“National values and principles of governance.



10.

- (1) The national values and principles of governance in this article bind all

State organs, State officers, public officers and all persons whenever any of them:-

- (a) applies or interprets this Constitution;
- (b) enacts, applies or interprets any law; or
- (c) makes or implements public policy decisions.

- (2) The national values and principles of governance include:-

SUBPARA (a)

patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- (c) good governance, integrity, transparency and accountability; and
- (d) sustainable development.”

45. The respondent in this petition has indicated that it engaged the public in its hawkker reforms as well as the Hawkers Market project that led to the intended eviction of the petitioners from the current designated zones to market stalls. the petitioner did not deny or even controvert this evidence. The court has also heard the considerations given for the decision to move the petitioners to the Hawkers Market, one of them being the safety of the petitioners themselves together with that of other residents of this county in the event disaster strikes. The respondent cited a fire incident and as the report on the said incident indicated, there was a delay in getting the fire engines to the site because the road was obstructed by hawkkers.

46. The petitioners claimed that the respondent announced that the members of the petitioner must cease their activities. The respondent however did not announce a cessation of hawking activities. From all the notices produced in court, the respondent only banned hawking activities in the CBD and along the named roads and streets as well as along the highway. The initial approval of the disputed designated hawking zones was from the relevant notices temporary to allow the petitioners continue their businesses pending completion of the construction and expansion of the markets, which are now ready for use but are underutilised by the petitioners because they refuse to move in. The respondent undertook the decision so as to allocate all the hawkkers a safe place for all them to conduct their business. There is no complaint that there is discrimination on the part of the respondent in the allocation of stalls either. In addition, acknowledging that the spaces offered may not be enough, the respondent has in place a mechanism to offer hawkkers who do not manage to get a stall from the markets a temporary designated operating area.

47. The allegation that the respondent did not follow due process and that it is acting without a decree of the court and is thus an improper exercise of sovereign power remains unfounded. It is not the business of court to veto any executive decision before it is made or implemented. There is no law that makes



it mandatory that the County Governments must seek approval of the court or a decree to that effect before undertaking any of its executive action. It is for this reason that even a complaint relating to fair administrative action comes after the fact and not before an action has been made.

48. Article 10(2)(c) is on the requirement of good governance, integrity, transparency and accountability. No allegation has been raised that the respondent acted without Integrity, transparency and accountability. The final consideration under article 10(2)(d) is sustainable development, which was defined in *Association of Kenya Insurers (AKI) Suing through its Chairman Mr Mathew Koech v Kenya Revenue Authority & 2 others; Insurance Regulatory Authority (IRA) & another (Interested Party)* [2021] KEHC 402 KLR as follows:

“On infringement of article 10(2)(d) of the Constitution, the respondents contended that the World Commission on Environment, 1987, Our Common Future (Oxford University Press), defined ‘sustainable development’ as ‘development that meets the needs of the present without compromising the future generations to meet their own needs’. The provision of insurance services is a fundamental ingredient that underpins economic development and growth in society. The insurance industry supports individuals, communities, and businesses to understand, manage and mitigate risks and supports their assets. In essence a thriving marketing supports a vibrant community and vice versa.”

49. Similarly, the Hawkers Market project is one that will not only ensure a safe working environment for the petitioner’s members but is a source of revenue for the County. Through the licences and fees collected from the stall, it will ensure the respondent will have resources through which it can continue with its mandate of service delivery to the residents of the county. As indicated in the authority above, a thriving market supports a vibrant community and vice versa. For these reasons, I am not convinced that the petitioner can succeed on this front.

ii. Violation of Article 43 on Economic and social rights as well as Article 55 and 57 on the Rights of persons the youth and rights of older members of the society

50. The petitioner alleged that the intended evictions of its members amounts to infringement of article 43, 55 and 57 was argued along the lines that it denies them an opportunity to associate and participate in the economic spheres of life, pursue personal development, to live in dignity and respect free from abuse. It is the petitioner’s contention, that the respondent’s actions contravened its member’s the rights enshrined under article 43 of the Constitution of Kenya 2010. article 43 provides:-

“Economic and social rights.

43.

- (1) Every person has the right:-
 - (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
 - (b) to accessible and adequate housing, and to reasonable standards of sanitation;
 - (c) to be free from hunger, and to have adequate food of acceptable quality;
 - (d) to clean and safe water in adequate quantities;



- (e) to social security; and
 - (f) to education.
- (2) A person shall not be denied emergency medical treatment.
- (3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.”
51. The petitioner also claimed a violation of article 55 and article 57. On the one hand, article 55 provides that:-

“ 55. The State shall take measures, including affirmative action programmes, to ensure that the youth:-

- (a) Access relevant education and training;
 - (b) Have opportunities to associate, be represented and participate in political, social, economic and other spheres of life;
 - (c) Access employment; and
 - (d) Are protected from harmful cultural practices and exploitation.”
52. On the other hand article 57 provides that:-

“ 57. The State shall take measures to ensure the rights of older persons:-

- (a) To fully participate in the affairs of society;
 - (b) To pursue their personal development;
 - (c) To live in dignity and respect and be free from abuse; and
 - (d) To receive reasonable care and assistance from their family and the State.”
53. From the foregoing narrative, the issue for determination is whether the fundamental rights of the members of the petitioner have been violated as alleged. For the court to make a clear determination on the alleged violations, the petitioner ought to demonstrate with some degree of precision, the right they allege has been violated, the manner it has been violated and the relief they seek for that violation. See *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* Petition No 65 of 2010 [2013] KEHC 6003 KLR where the court had this to say:-

“ 107. Turning to the violation of other rights as alleged by the petitioners, that is; right to information, protection from discriminations, the right of persons with disability and rights of older members of the society, I do not think that the petitioners have demonstrated the violations of these rights. There is no material before me that would lead to such a categorical finding. This being a constitutional petition, it is now a well settled principle that the petitioners ought to demonstrate with some degree of precision, the right they allege has been violated, the manner it has been violated and the relief they seek for that violation – See *Anarita Karimi Njeru v Republic* [1976 - 80] 1 KLR 1272 and *Trusted Society of Human Rights Alliance v Attorney General and others*



Petition No 229 of 2012. This is important not just to allow the respondents to know the case that they have to answer, but also to enable the court make a clear determination on the alleged violations. I shall say no more.”

54. There exists a rebuttable presumption that a body vested with a mandate exercises this mandate with due regard to procedure and law. The burden would lie on the person alleging non-compliance to prove the nature and extent of that non-compliance. As explained earlier, a petition alleging infringement of rights must contain sufficient information to enable the other side to understand and respond to the case against them. In this present petition, no evidence has been tendered to establish that the respondent failed to ensure enjoyment of the petitioner’s rights espoused at article 43. The respondent did not give notice for a total ban of hawking activities, and no doubt if the respondent had done that, it would have qualified as an infringement of their rights under article 43. Clearly though, the notices from the respondent only banned hawking in the contested hawking zones, instead directing the petitioners to operate from the hawkers markets. In any event, the rights envisaged in article 43 are progressive in nature and cannot be implemented immediately. However, in ensuring that the petitioner’s members have a safe place from where they can operate their business, it could be said that it is one step towards ensuring enjoyment their socio-economic rights.
55. The petitioner has also not shown how exactly the rights of its members under 55 and 57 were infringed. It has not been claimed for instance that the intended evictions were skewed against the youth or the elderly. The petitioner also did not allege any discrimination in the issuance of stalls at the Hawkers Markets. The petitioner’s witnesses in their testimonies did not testify or produce evidence to support this allegation. In fact, apart from mentioning that its membership comprises of the youth and older persons in the society, the petitioner appears to have only made the allegation and failed to substantiate it with evidence. On this ground, the petitioner’s claim is found to be unproven.

iii. Violation against Article 186

56. The petitioner claimed that the respondent contravened article 186 because the said provision does not mandate the respondent to issue an oral notification or evict any persons without notice. Article 186 of the Constitution as read together with the 4th Schedule thereof delineates the different functions and powers between the National and County Governments. Article 186 provides that:-

“Respective functions and powers of national and county governments.

186.

- (1) Except as otherwise provided by this Constitution, the functions and powers of the national government and the county governments, respectively, are as set out in the Fourth Schedule.
- (2) A function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.
- (3) A function or power not assigned by this Constitution or national legislation to a county is a function or power of the national government.
- (4) For greater certainty, Parliament may legislate for the Republic on any matter.”



57. The 4th Schedule of the *Constitution* sets out the functions of County Governments. These are inter alia:

“The functions and powers of the county are;-

3. Control of air pollution, noise pollution, other public nuisances and outdoor advertising.
4. ...
5. County transport, including:-
 - (a) county roads;
 - (b) street lighting;
 - (c) traffic and parking;
 - (d) public road transport; and
 - (e) ferries and harbours, excluding the regulation of international and national shipping and matters related thereto.
6. ...
7. Trade development and regulation, including—
 - (a) markets;
 - (b) trade licences(excluding regulation of professions);
 - (c) fair trading practices;
 - (d) local tourism; and
 - (e) cooperative societies.
8. ...
9. ...
10. ...
11. ...
12. Fire fighting services and disaster management...”

58. The above provisions are clear and require no explanation. Having invoked the provisions of article 186 of the *Constitution*, it is important that this court analyse the actions of the respondent to determine its compliance with its constitutional mandate. At clause 3 of the 4th Schedule, the respondent is mandated to control noise pollution and other public nuisances. The letters from the members of the public produced by the respondent lodge complaints ranging from noise pollution to public nuisances. The respondent had every right under law to set up mechanism to control the pollution and nuisances.

59. Clause 5 thereof empowers the county to manage county transport. The respondent indicated that the presence of hawkers on the roads, streets and the highway had made movement and navigating the CBD impossible. The respondent has produced photographs showing the congestion and obstruction along the streets of Eldoret. This led to respondent coming up with the Hawkers Market project in



- order to ease congestion and navigation of the area, which culminated into the building of the markets. It was under constitutional duty to respond to the transport challenge within the County.
60. Under Clause 7, the respondent is allowed to regulate trade and development including markets and trade licences. The respondent took the initiative to build markets for the members of the petitioner from where they can operate their businesses. It is not disputed that the respondent is in charge of and has been charging licences for the businesses being carried out in its jurisdiction. These are all functions that a county government is empowered to undertake.
 61. Lastly, the respondent indicated that it had faced major challenges in disaster management caused by obstruction of the streets and fire lanes resulting in loss of property. County Governments at clause 12 of the 4th schedule also have a mandate to deal with fire fighting and disaster management. The Department of Licensing and Compliance had in a document titled “Implementation of Hawking Reforms” annexed to the petitioner’s supporting affidavit directed that all hawkers are to inter alia operate from approved hawking zones. Yet in cross-examination PW2 conceded that they used to go to work where they were evicted from. He further stated that they worked from the sewer line and power lines, but that they were not obstructing roads, fire engines or electricity vehicles.
 62. Although this witness on re-examination denied the stated obstruction, this court has to consider the respondent’s allegation of the hindrance to disaster mitigation measures. The court has seen the Fire Report produced in court as respondent’s Exhibit 14, where the Chief Fire Officer indicated that there was a delay in entering the affected premises due to the overcrowded street by roadside vendors and taxis. The respondent’s Annexure 11 comprises of Minutes of a meeting held on December 14, 2017 and at Minute 2 thereof, the County noted that one of the challenges the County faced was the occupation of hawkers in streets which is a threat to life, the safety of shop owners and the public at large during outbreak of fire or explosion. It was thus within the respondent’s mandate therefore to come up with measures to ensure that its disaster management and response mechanisms are workable. The respondent was well within its rights to deal with all these challenges through the construction of the Hawkers Market and relocation of the petitioner’s members to operate therefrom.
 63. Under article 186(3) a County Government cannot either assign or arrogate to itself any functions or powers beyond those assigned to it under the Constitution or national legislation as enacted by Parliament from time to time. This is what would, to my knowledge, constitute a breach of article 186. A look at the above analysis shows that the respondent is well within its rights to undertake the above decisions and/or actions as they all fall within its exclusive mandate/functions. In the circumstances, it is clear that the respondent did not arrogate to itself constitutional powers and functions that are not within its constitutional mandate.
 64. Having found no basis for the petitioner’s claim of violation of constitutional rights of its members, the only logical conclusion I can make is that the petition in its entirety lacks merit. However, this being a public interest litigation, and bearing in mind the need to bolster good relations between the respondent and the petitioners who are residents within its county, the court will not condemn the petitioner to pay costs. Consequently, the Petition dated January 18, 2018 lacks merit and dismissed. Each party shall bear its own costs.

DATED, SIGNED and DELIVERED at ELDORET on this 30th day of SEPTEMBER, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Mogambi for Petitioner.



Ms. Chesoo for Respondent.

Court Assistant –Laban

E. O. OBAGA

JUDGE

30th SEPTEMBER, 2024

