



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ENVIRONMENT AND LAND DIVISION**

**FORMELY PETITION NO. 63 OF 2012 NOW ELC NO. 867 OF 2012**

**IN THE MATTER OF ENFORCEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER CHAPTER 4 ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF VIOLATION, DENIAL AND/OR CONTRAVENTION OF RIGHTS AND FUNDAMEN TAL FREEDOMS OF THE INDIVIDUAL UNDER ARTICLES 21(1) & 3, 22, 27(1) & (2), 35, 42, 43, 47(1) & (2), 50(1), 56(c), 10 (1), & (2), 69, 70 AND 165 OF THE CONSTITUTION OF KENYA**

**JOHN KAMAU KENNETH I. MPAPALE**

**(Suing on behalf of Mutindwa Market Self Help Group.....PETITIONERS**

**=VERSUS=**

**THE CITY COUNCIL OF NAIROBI.....1<sup>ST</sup> RESPONDENT**

**THE PERMANENT SECRETARY, MINISTRY OF NAIROBI METROPOLITAN DEVELOPMENT.....2<sup>ND</sup> RESPONDENT**

**THE MINISTER FOR NAIROBI METROPOLITAN DEVELOPMENT.....3<sup>RD</sup> RESPONDENT**

**MINISTER OF LANDS.....4<sup>TH</sup> RESPONDENT**

**COMMISSIONER OF LANDS.....5<sup>TH</sup> RESPONDENT**

**COMMISSIONER OF POLICE.....6<sup>TH</sup> RESPONDENT**

**OFFICE OF THE PRESIDENT.....7<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....8<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

This matter was originally filed the Constitution and Human Rights Division of the High Court (No. 63/2012). Pursuant to the order of the Court (Mumbi Ngugi, J.) on 20/11/2012 the file was transferred to this Court and given its present file number.

In a petition dated 5/3/2012, the Petitioners seek the following orders:

a. *A Permanent injunction be issued restraining the respondents, their agents, servants and/or employees and anyone claiming through them or under them from evicting or demolishing or continuing with demolishing of the applicant's stalls or any other structures on the Mutindwa market situated between Buruburu estate ring road in the eastern side of Nairobi city or in any other manner whatsoever interfering with the applicant's business or closing down the market activities thereon.*

b. *Declaration that the Petitioners have a right to information from the Respondents which affect them and their livelihood and their use of the natural resources at their disposal and especially Mutindwa Market.*

c. *Declaration that the Petitioners have a right to protection of the law against the unlawful exercise of power and discretion by the Respondents on all matters affecting the development in the land in which they do their business and earn their livelihoods.*

d. *Declaration that the Respondents as State Organs have a duty to uphold the rule of law and rights, freedoms and dignity of the Petitioners.*

e. *Declaration that the Petitioners have a right to participate in the development of the land in which they occupy and earn their livelihoods.*

f. *Declaration that all the deliberations, resolutions, designs, development plans and goals regarding future developments on the land now occupied by the Petitioners and their group without involving the Petitioners and the intended demolition and eviction of the petition from Mutindwa market are in violation of the Petitioners rights and freedoms, unconstitutional and null and void.*

*g. Declaration that the demolition by the Respondent of the Petitioners business stalls and destruction of their stock on 5/3/2012 was unconstitutional and inhuman and that the Respondents jointly and severally should compensate petitioners as listed record marked “JKKI” by way of general damages.*

*h. Any other orders that this court may deem fit to order including but not limited to being allocated an alternative site by the 1<sup>st</sup> – 5<sup>th</sup> Respondents on which to do their business plus compensation of damages for disturbances and goodwill by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and severally.*

*i. Costs of the Petition.*

The Petition is supported by an affidavit sworn by the 1<sup>st</sup> Petitioner, John Kamau, the chairman of Mutindwa Market Self Help Group, on 5/3/2012. The deponent states that Mutindwa Market stands on public utility land held by the 1<sup>st</sup> Respondent on behalf of the people ordinarily residents including members of the Self Help Group. It is his disposition that since 1992 the Self Help Group has been in continuous possession of the suit premises doing business in the stalls with the ostensible authority of the 1<sup>st</sup> Respondent which collects daily market fees. Further that the businesses are operated in the full knowledge of the Respondents who have not raised any objection. The deponent stated that Mutindwa Market has received recognition and approval of the Respondents, the area councilor, Local Government Minister and the President through public pronouncements. The deponent also states that they have heavily invested their finances and time in the market where they earn a living and that some members have secured financial credit to boost their businesses.

The deponent stated that in 2010, the Respondents planned and commissioned a project for construction of a link road to Rabai – Mumias South Road and Umoja II Spine Road, and that despite Mutindwa Market’s close proximity, the self-help group was not consulted prior to the commencement of the project. It was his disposition that whilst in preparation to file this petition, they awoke on 5/3/2012 to demolition of the stalls under tight security by armed Administration Police on the instructions of the 1<sup>st</sup> Respondent and the Ministry of the Metropolitan Development. The deponent stated that the demolition is draconian, illegal, unconstitutional and also inhuman, thus the Respondents must be restrained and ordered to pay compensation. Further that the demolition will affect the members of the Self-Help Group rendering them jobless and that they shall incur losses running into millions of shillings.

The deponent stated that their rights have been violated through denial of their right to participate in the planning of local developments which are likely to interfere with their livelihood, denial of their right to information about meetings on planning of local developments, denial of essential services and clean environment for doing business despite paying taxes, demolition of stalls and destructions of stock without notice thus being condemned unheard. The deponent stated that the Respondents have given verbal promises to consider the residents and members of the Self-Help Group for an alternative market site, but that the promises are firstly not in writing and secondly the said promises did not emanate from consultations with the Petitioners. It was his disposition that despite several demands, the members of the self-help group have not been afforded any hearing and have been kept in abeyance.

In support of the Petition, the deponent annexed the following documents: Affidavits sworn by members of the Self Help Group Certificate of Registration of the Mutindwa Market Self Help Group dated 23/5/2011; Minutes of the meeting held by members of the Self-Help Group on 27/2/2012; Receipts evidencing payment of Hawkers fees; Photographs showing the demolition of stalls; Affidavits of sworn by various members of the Self-Help Group; and Letters written by the member of the group to various offices.

The 1<sup>st</sup> Petitioner also swore a Supplementary Affidavit on 19/7/2012 whereby he annexed a bundle of documents to show the loss of the sources of income suffered by members of the Self-Help Group.

### **1<sup>st</sup> Respondent's Response**

Patrick Tom Odongo, the Director of City Planning Department of the 1<sup>st</sup> Respondent swore a Relying Affidavit on 2/7/2012. He deposed that the petition lacks merit, as it discloses no cause of action against the 1<sup>st</sup> Defendant. Further that it does not raise any constitutional issue and discloses no right that is breached as breach of right to property can only stand where a party owns property which is not the case herein. The deponent stated that being in continuous occupation of land for a long time does not validate occupation or give ownership rights as alleged by the Petitioners. It was his disposition that the Petitioners had not attached Temporary Occupational Licenses which would, with the knowledge of the owner, permit the Petitioners to occupy the property on a temporary basis, but that such license cannot be used to claim proprietary interest. Further that a Hawker's Daily Receipt relied on by the Petitioner is also not proof of ownership.

The deponent contended that the Petitioner had failed to show the illegality, unconstitutionality, and unlawful process adopted by the Respondents to deal with the property in issue. The deponent refuted the claim that the 1<sup>st</sup> Respondent authorized the construction of the stalls and further that the Petitioners had not exhibited approval of such plans. He joined the 1<sup>st</sup> Petitioner's disposition that the property stands on public utility and submitted that the Petitioners could not claim exclusive rights over the property against the public who take domain.

### **2<sup>nd</sup> – 8<sup>th</sup> Respondents' Response**

Architect Philip O. Sika, the Permanent Secretary of Ministry for Nairobi Metropolitan Development swore a Replying Affidavit on 2/7/2012. The deponent stated that the Ministry of Nairobi Metropolitan Development, referred to as “MoNMED” was created through a Presidential Circular No. 1 of 5/2008 and its mandate was to, *inter-alia*, prepare and enforce integrated spatial growth and development strategy and actualize integrated strategic programs for the provision of social, economic and infrastructural services. The deponent stated that “MoNMED” contracted the services of M/s Mehta and Sons Limited to construct link road – Rabai and Mumias south road and Umoja II Spine road under the direct supervision of Senior Principal superintending Engineer. He deposed that the construction of a link road was between Mumias South Road at Buruburu Shopping Center and Outering road.

The deponent stated that contrary to the allegations made by the Petitioners, a 14 day notice was issued to the Petitioners to vacate from the road reserves to pave way for the construction. The deponent contended that the construction of the link road was in response to several requests made by the residents of the Mutindwa market and its environs for the expansion of Mutindwa road to ease traffic congestion around the area. The deponent stated that the contractor commenced the construction works when after the Petitioners obtained temporary injunction orders against the City Council of Nairobi and the Attorney General in *Milimani CMCC No. 3854/2011* from dealing with the suit land. Subsequently, the application was heard *inter-partes* when the temporary injunction order was vacated and the application dismissed. The deponent stated that the dismissal was for lack of merit and not want of the prosecution as alleged by the Petitioners. Further that there was no appeal lodged by the Petitioners against the Court’s decision.

Following the dismissal of the application, Arch. Sika deposed, the contractor re-commenced the works which involved demolition of illegal structures to pave way for further construction of the road. The deponent contended that the demolitions were necessary to enable the construction of the link road – Rabai and Mumias, South Road and Umoja II Spine Roads. It is his disposition that this construction does not contravene the law in any way and also that it is for the benefit of all Kenyans. The deponent stated that the Petitioners, having invaded public land, have no right over it and therefore cannot lay claim for compensation. Further, the suit filed by the Petitioners in the Magistrate’s Court is still pending. Thus, the deponent concluded, this application as filed is an abuse of the court process.

### **Submissions**

By consent of all the parties, the Petition was canvassed by way of written submissions. O.N. Makau Advocate for the Petitioners filed submissions dated 19/11/2012 where counsel submitted that from the pleadings, there emerged three issues for determination: first, whether there was a valid notice to vacate issued to the Petitioners; second, whether the demolition was constitutional and lastly, whether the prayers sought can be granted. On the first issue, counsel submitted that the notice dated 8/4/2011 was suspect for reasons that it was served upon the Attorney General on 28/5/2012 one year after its issuance and well after the demolition suggesting that there was no notice issued at all. Counsel submitted that Article 35 as read together with Article 47, the Petitioners are entitled to consultation in respect to the alternate purpose the land should be used, they should be afforded adequate and reasonable

notice and be given reasons regarding evictions. Counsel cited the case of **Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security Petition No. 2/2011** where the Court observed that: “..... *21 day notice to vacate for people who had lived on a land since 1940s and have put up permanent structures and other dwellings thereon was both insufficient and unreasonable.*”

Counsel submitted that the Petitioners have shown that they have been on the property for over 15 years and have valuable merchandise. Counsel submitted that there were no averments made by the Respondents that the demolitions were conducted in a civil manner, and in the presence of a neutral party to ensure that the Petitioners’ rights were protected. It was counsel’s submission that the demolition was conducted in a manner that did not allow the Petitioners to salvage their possessions and as a result, they incurred huge losses. Counsel cited the cases of **Susan Waithera Kariuki & 4 Others v Town Clerk, City Council of Nairobi & 2 Others (2011) eKLR** and **Musa Mohammed Dagane & 25 Others v Attorney General & another (2011) eKLR** where the Court held that *the eviction subjected to the applicants was in violation of the law and consequently the applicant suffered loss and damage which must be compensated for by the State.*

Counsel submitted that of significance to note out of the three authorities referred to the Court, none of the Petitioners therein exhibited title documents secondly, the Courts considered the duration of time over which the Petitioners had been in occupation, the notices issued and the manner in which the evictions were carried out. Counsel urged the Court to consider these issues and find that the evictions were in contravention of the Petitioner’s constitutional rights and proceed to grant the orders as prayed.

Momanyi Advocate for the 1<sup>st</sup> Respondent filed submissions dated 5/12/2012. It was counsel’s submission that the Petitioners lack locus standi for reasons that they are not stakeholders to be informed of the developments taking place around Mutindwa area as they do not hold valid land Title Deeds. Further that the Petitioners cannot claim exclusive rights to the property and therefore their claim lacks merit and is baseless. In respect to the Hawker’s Daily Receipt, counsel submitted that its purpose was to allow a hawker to carry on business from day to day and not confer proprietary rights over a property they do business on.

In respect to the Petitioners’ constitutional right, counsel submitted that there is no evidence of breach or violation of any specific right should the construction of the road proceed as commissioned. Therefore, there is no cause of action against the Respondents. Counsel submitted that the Kenyan citizenry have equal rights to be protected therefore the construction of the link road will ease congestion thereby enhancing decent living. In respect of Article 35 on the Constitution on the right of information held by the state, counsel submitted that the Petitioners’ claim was mistaken and that it is a clear misrepresentation of the provision.

Irari Faith Mercy, Litigation Counsel at the Attorney General Chambers filed submissions dated 12/7/2012 on behalf of the 2<sup>nd</sup> – 8<sup>th</sup> Respondents. Counsel submitted that the Petition does not disclose any cause of action. It was counsel’s submission that it is not in contention that the market stands on public utility held by the 1<sup>st</sup> Respondent on behalf of the public.

Counsel referred the Court to Article 62 of the Constitution which provides for public land being held in trust for the people resident in the country and used for public purposes as provided under Section 2 of the Land Act, 2012. Counsel submitted that in exercising this mandate, the Ministry of Nairobi Metropolitan heeded the request of residents of Mutindwa and its environs to expand the road to ease traffic congestion around the area which culminated into the construction of the link road and Mumias South Road Umoja II Spine Road. Counsel submitted that the construction plan is in the Ministry's Strategic Plan which is to provide mobility and access through efficient transportation. Counsel submitted that the construction works commenced on 4/5/2011 when the Minister officially launched it after the Petitioners had been given notice to vacate the road reserve to pave way for the execution of the contract.

Counsel submitted further that the suit filed at the lower Court on 1/9/2011 by the Petitioners against the 1<sup>st</sup> Respondent herein was heard *inter-partes* and the interim injunction orders vacated thus allowing the 1<sup>st</sup> Respondent to continue with the demolition to pave way for the road construction. Counsel submitted that the lower court found that the Petitioners had not established that they were allotted the suit premises by the 1<sup>st</sup> Respondent. Consequently, counsel submitted, the Petitioners' occupation was illegal and unlawful and they cannot therefore seek to be provided alternative premises neither are they entitled to damages.

In support of the response, the deponent annexed the following documents: Presidential Circular No. 1/2008 issued by the Office of the President establishing the Ministry of Nairobi Metropolitan Development and outlining its mandate; Contract Agreements entered into on 10/1/2011 between the Ministry and M/s Mehta and Sons Limited (the Contractors); Two Orders of the Court in **Milimani CMCC No. 3854/2011** the first order issuing injunctive orders against the Council and the AG from dealing with the property upon which Mutindwa Market stands and the second order issued after *inter-partes* hearing dismissing the Petitioner's application. The latter order accompanied by the ruling of the court; and Progress Reports of the construction works

### **Determination**

It is not in dispute that where Mutindwa Market once stood/stands is public land where the Petitioners have been carrying out their businesses for over 15 years. This was so until 5/3/2012 when the Petitioners found their stalls demolished under the instructions of the Council and the Ministry of Metropolitan Development. The Petitioners cry foul that their fundamental rights have been violated on the basis that they were not afforded adequate notice to vacate, they were not consulted by the Respondents on the alternative use of the property, and also that they have not been issued with alternative property where they can relocate their businesses to. The Respondents on their part submit that fundamental rights of some cannot supersede those of others. It is their averment that the property is being used for construction of a link road - Rabai and Mumias south road and Umoja II Spine – and its resultant effect will be to reduce traffic congestion.

From the foregoing narrative, the issue for determination is whether the Petitioners' fundamental rights have been violated as alleged. 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 vs Republic (1976-80) 1 KLR 1272** and **Trusted Society of Human Rights Alliance vs 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 - **Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others Petition No. 65 of 2010**

### **Whether the Petitioners have a claim over the property**

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 1<sup>st</sup> 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 Licenses 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 not 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.’*

**Allegations of Breach of Articles 21(1) & 3, 22, 27(1) & (2), 35, 42, 43, 47(1) & (2), 50(1), 56(c), 10 (1), & (2), 69, 70 and 165 of the Constitution**

### **Articles 22 and 165**

Article 22 makes provision for the enforcement of the Bill of Rights whereas Article 165 establishes the High Court and gives it jurisdiction to hear any question respecting the interpretation of the Constitution. From the pleadings and submissions filed by the Petitioners, there are no allegations of breach of these articles, but they certainly afford the Petitioners an avenue to approach this court. In the words of Majanja J. in **Joseph Ihugo Mwaura & 82 Others V Attorney General & 2 Others [2012] eKLR**

*‘The provisions of Articles 22 and 23 are the gateway to the Bill of Rights in the sense that without them, the rights and fundamental freedoms guaranteed remain non-justiciable. It is the fact that the court can be moved*



*to grant relief in case of infringement, violation or threat that gives the Bill of Rights teeth.”*

**Article 35, 47 and 50**

**Article 35**

1. **Every citizen has the right of access to—**
  - a. **information held by the State; and**
  - b. **information held by another person and required for the exercise or protection of any right or fundamental freedom.**
  
2. **Every person has the right to the correction or deletion of untrue or misleading information that affects the person.**
  
3. **The State shall publish and publicise any important information affecting the nation.**

**Article 47**

- (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.**

**Article 50**

- (1) **Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**

The allegations made in respect to these Articles 35, 47 and 50 are interconnected, and I deem it proper to address them under one limb. It is the Petitioners' case that they have been in occupation of the subject property since 1992 operating their businesses in which they have invested immensely. Further that they have been operating with the knowledge of the 1<sup>st</sup> Respondent as it has been collecting revenue in terms of the Daily Hawkers Fees. It is the Petitioners' contention that they have been denied their right to information about meetings

on planning of local developments, therefore, not afforded an opportunity to participate in the planning and developments of the subject property which is likely to affect their livelihoods. The Petitioners contend that under Article 47, they were entitled to receive reasons regarding their evictions and be informed of the alternative use of the subject property. In response, the Litigation Counsel on behalf of the Respondents submitted that the Petitioners were indeed given an opportunity to air their grievances as a community which was the Respondents took into account.

The Petitioners have made allegations that their rights to information, participation in development projects and fair administrative actions have been violated. The question is whether they have stated in precision the manner in which these rights have been violated. A reading of **Article 35** shows that the right of access contains three key elements. Article 35(1) the entitlement to information from the state or to information held by another person required for exercise or protection of a fundamental right and freedom. The Petitioners in moving the court to enforce rights under Article 35(1) must set out what information was sought but not given. Refer to the case of **Kenya Society for the Mentally Handicapped (KSMH) v Attorney General and Others Nairobi Petition No. 155A of 2011** the court stated, at para. 43, that,

*“I am not inclined to grant ..... the application as the Petitioner has not requested the information from the state or state agency concerned and that request rejected. Coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state or its agency and such request denied. Where the request is denied, the court will interrogate the reasons and evaluate whether the reasons accord with the Constitution. Where the request has been neglected, then the state organ or agency must be given an opportunity to respond and a peremptory order made should the circumstances justify such an order.”*

On perusal of the Petition and the submissions, the Petitioners do not state that they have requested for the information from the Respondents and in particular, the Ministry of Nairobi Metropolitan Development and the request rejected. The Petitioners at paragraph 18 of the Affidavit in support of the Petition refer the Court to annexures “JKK4” and depose that they have written several demands to the Respondents and even visited their offices but they have not been afforded any hearing. None of the letters therein refer to requests made for information on projects undertaken on the subject property. The Petitioners in their letters addressed to the Office of the Prime Minister and the Town Clerk City Council of Nairobi, dated 3/11/2011 and 14/2/2011, respectively seek appointments with the holders of these offices and the letter dated 9/8/2011 addressed to the Ministry of Metropolitan Development is in respect uncertainties over the closure of Mutindwa Market.

The second element contained in **Article 35(2)** is the right to correction or deletion of untrue or misleading information that affects a person. There is no allegation that this aspect of the right to information has been violated. **Article 35(3)** is the third element which imposes on the State the obligation on the State to publish and publicize important information. I am of the view that information on road construction is important information worth publishing for the general public knowledge but more particularly in this case, because it affects the

Petitioners herein as the construction is to be undertaken on subject property. The Respondents did not avail any newspaper articles, press statements or websites where information in respect to their intention to undertake the construction works, subject matter herein, has been published. However, on perusal of the Petitioners' supporting documents, photographs (marked "JKK 3A & B") showing the position of the market also show a billboard displaying the following information:

**Contract No. MoNMED/14/2010 – 2011. Construct Link Road to Rabai Road – Mumias South Road and Umoja II Spine Road**

**Client: Ministry of Nairobi Metropolitan Development**

**Financing: Government of Kenya**

**Contractor: SS Mehta & Sons Limited**

**Supervisor: Senior Superintendent Engineer (T) Ministry of Nairobi Metropolitan Development**

This display is in my view a means of bring to the public notice of the intention to construct. The significant information in respect to the road construction has been captured in the board. It is therefore incumbent upon the party in need to request for further particulars including *deliberations, resolutions, designs, development plans* from the Ministry concerned. It is my conviction that the Petitioners have failed to establish a case in support of their allegation of breach of Article 35(1).

The Petitioners also contend that they were not given notice to vacate the subject property prior to the demolition of their stalls. It is their averment that they awoke on 5/3/2012 to find a demolished stalls and destructions of stock. Consequently, the demolition amounts to being condemned unheard, it is unlawful, draconian, inhuman and thus unconstitutional. Arch. Sika in his affidavit denied this allegation stating that the Petitioners were issued a 14 day notice to vacate the premises to pave way for the construction works. He also referred the Court to the ruling in **Milimani CMCC No. 3854 of 2011** and submitted that there being no Court Order impeding the Respondents from dealing with the subject property, demolitions ensued. I have perused the pleadings together with the annexures thereto. Arch. Sika in his affidavit refers to a notice issued to the Petitioners dated 8/4/2011 annexed and marked "POS3" but the said document is not in affidavit that is in the court file. Nevertheless, the Petitioners have denied that it was served on them.

Notwithstanding service of the notice to vacate, it is noteworthy that the Petitioners moved the Chief Magistrates Court on 1/9/2011 and successfully obtained temporary injunction orders in respect to the subject property against the 1<sup>st</sup> and 8<sup>th</sup> Respondents herein. Upon the hearing of the Petitioner's application *inter-partes*, the same was dismissed on 27/2/2012 and in effect, the injunction orders discharged. It is noteworthy that the Petitioners did not challenge the Magistrate's ruling on appeal nor approached this court for an order of stay but opted to withdraw the suit on 2/3/2012. The Petitioners submit that the suit was dismissed for want of jurisdiction leading to their withdrawal of the suit. They have, however, not availed court proceedings to support that submission. The ruling of the Court annexed to the 2<sup>nd</sup> Respondent's affidavit reveals that the application was dismissed for lack of merit. It is

evident that the demolition exercise on 5/3/2012 occurred subsequent to the dismissal of the Petitioner's application and the withdrawal of the suit. This court takes notice that from the date the temporary injunction orders were obtained on 1/9/2011 to the date the demolition exercise commenced on 5/3/2012 was a period of 6 months. Hence, as to whether the Petitioners can sustain a claim they had no reasonable notice to vacate the subject property is in my view, in the negative. It is my conviction that the Petitioners had knowledge that they faced eviction from the subject property.

In respect to the aspect of fair administration under Article 47, this Court has found that the Petitioners were occupants of the subject property on temporary basis and therefore cannot claim ownership or proprietary rights over the same. In that regard, the Petitioners are entitled to the rights that accrue to them as temporary license holders, that is, reasonable notice to vacate which has no requirement that they be given any or any specific reason for being required to vacate the land they occupy on a license - See the **Veronica Njeri Waweru case**.

### **Article 43 and 56 (c)**

#### **Article 43**

**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.**

**1. A person shall not be denied emergency medical treatment.**

**2. The State shall provide appropriate social security to persons who are unable to support themselves and their dependents.**

#### **Article 56(c)**

**The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—**

- (c) are provided special opportunities for access to employment;**

The Petitioners allege that the demolition of their stalls and eviction from the subject property by the Respondents without being offered alternative land is a violation of their socio-economic rights under Article 43 of the constitution. The Petitioners submit further that they had immensely invested in their business and the losses incurred ran into millions of shillings.

Article 43 which make provision for health care, adequate housing, water and sanitation, adequate food and education which denote the general well-being of every citizen but do not encompass the activities of the Petitioners herein. I say so because the subject property was not utilized by the Petitioners as an informal settlement or for dwelling/ living purposes but as business premises. As regards social security sub-Article 3 places an obligation upon the state to provide for those who are unable to support themselves, and their dependents. Read together with Article 56, the Petitioners aver that they are a marginalized group of persons, whose constitutional rights have been violated by the Respondent's action. Conversely, the Petitioners in Paragraph 7 of the Petition aver:

*Par. 7 The Petitioners have invested all their finances and efforts in Mutindwa market which is their only source of livelihood with some members having to secure financial credits to boost their businesses.*

The provision of sub-Article (3), in my view, is not envisaged to include the Petitioners for the simple reason that they are not vulnerable persons unable to fend for themselves. If anything, the Petitioners have demonstrated that they are able persons, traders, operating businesses among others: green groceries, boutiques, bookshops, and have the ability to secure credit to re-invest in their businesses. I associate myself with the reasoning of Mumbi Ngugi in Veronica Njeri Waweru & 4 others v City Council of Nairobi & 2 others [2012] eKLR

*.....It does not encompass, in my view, persons in the circumstances of the petitioners in this case who are, in their own words, operating businesses such as garages, hardware and furniture shops and who have invested millions of shillings in their businesses on the road reserve. Indeed, even in the case of those who may be poor residents of informal settlements, the duty of the state may be limited to putting in place policies to ensure access to adequate housing. Article 43 cannot therefore be interpreted to impose a duty on the respondents to provide alternative business premises to business men who can afford to invest millions in their businesses. I find, therefore, in the instant case, no violation of the petitioners' rights under Article 43 of the constitution.*

Sub- article 1(e), however, entitles every person the right to social security. I understand the Petitioners to mean that their eviction from where they carry out their businesses without allocation of an alternative site is in violation of Article 43(1) (e). The 2<sup>nd</sup> Respondent on their part submit that their eviction is so as to pave way for expansion of the road to ease traffic congestion in the area and it does so in response to requests made by the area residents. Evidently, the foregoing presents a scenario which requires a balance between the Petitioners' private rights and those of the public. It is trite that where there is a conflict, between the

public interest and the private interest the public interest must prevail. The social security of the Petitioner is limited by the requirement in Article 24 of the Constitution that *‘the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.’* Accordingly, I find and hold that the Petitioners’ right to social security, in respect to the subject property which creates employment opportunities to the Petitioners, cannot be asserted over expansion of a public road. Refer to the Susan Waithera Kariuki case where Musinga J. made the following observation:

*59. The 1<sup>st</sup> and 4<sup>th</sup> petitioners and such of the other residents of the villages they are said to represent occupy what are, on the evidence available, public roads. Even though they do have the right to housing under the Constitution, I take the view that such right cannot properly be asserted over a public road, as this clearly interferes with the rights and interests of a much larger public. There is clearly therefore a need for the petitioners to vacate the said premises as the public interest in the development of the said roads must outweigh their private interest.*

#### **Articles 42, 69 and 70**

Article 42 guarantees the rights to a clean and healthy environment; Article 69 (1) imposes a duty upon the state to ensure environmental sustainability and persons at sub-article (2) are obligated to cooperate with the state organs to protect and conserve the environment; and Article 70 makes provision for the enforcement of environmental rights.

#### **Article 42**

**Every person has the right to a clean and healthy environment, which includes the right—**

- (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and**
- (b) to have obligations relating to the environment fulfilled under Article 70.**

#### **Article 69**

**(1) The State shall—**

- (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;**
- (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;**

- (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;**
- (d) encourage public participation in the management, protection and conservation of the environment;**
- (e) protect genetic resources and biological diversity;**
- (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;**
- (g) eliminate processes and activities that are likely to endanger the environment; and**
- (h) utilise the environment and natural resources for the benefit of the people of Kenya.**

**(2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.**

#### **Article 70**

**(1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.**

**(2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—**

- (a) to prevent, stop or discontinue any act or omission that is harmful to the environment;**
- (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or**
- (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.**

**(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.**

The Petitioners aver that they have been denied essential services and clean environment for doing business despite paying taxes to the Respondents. This claim has been overtaken by events noting that the Petitioners are no longer on the subject property. It will be unreasonable to interrogate this allegation any further.

Notably, the Petitioners have not made any submissions to the effect that the projects undertaken by the Respondents, being expansion of a road/construction to a link road, will result to environmental degradation or in any way create unclean and unhealthy environment to the Petitioners. In the absence of specificity of the manner in which Articles 42, 69 and 70

have been violated, I find that there is no violation of the Petitioner's rights to a clean and healthy environment.

**Articles 21 (1) & (3), 27 and 10**

**Article 21**

**1. It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.**

**2. ....**

**3. All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.**

**Article 27**

**1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.**

**2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.**

**Article 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—**

**(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.**

The circumstances of this case are that the Petitioners were in occupation of public land operating businesses. Though they dispute that notice to vacate was served upon, this Court has established that they had knowledge that they faced eviction from the property to pave way for road expansion. Suffice to say that the land in question is a road reserve and the public interest demands that such land should be used for the purpose it is intended and should not be appropriated for private use. The court has also found that the rights of the Petitioner cannot override that of the public interest. There is also no allegation, of violence or excessive use of force meted out on the Petitioners herein during the demolition despite the presence of armed administration police. It is my finding that the demolition exercise and subsequent eviction was not unconstitutional and therefore that there is no violation of the Petitioners' rights of Articles 21, 27 and 10 of the Constitution.

**Prayer (a) permanent injunction**

The Petitioners in their submissions dated 19/11/2012 concede that this prayer has been overtaken by events. In the circumstances, I make no further representations on the same.

**Prayer (b) to (h)**

Having found that there is no violation of the Petitioners' fundamental rights, the Petition stands dismissed and none of the declaratory orders under this heading can be granted.

**Prayer (i) Costs**

This being a matter of public interest, I make no orders as to costs.

Dated, signed and delivered this 9<sup>th</sup> day of **May** **2014**

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

In persons for the Petitioners

None attendance for the 1<sup>st</sup> Respondent

M/s Irare for AG for the 2<sup>nd</sup> – 8<sup>th</sup> Respondents

Lukas: Court Clerk

Court:

Ruling read in open court in the presence of the petitioners in person and M/s Irare for the AG for 2<sup>nd</sup> – 8<sup>th</sup> Respondents

None attendance for 1<sup>st</sup> Respondent

**L. GACHERU**

**JUDGE**



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