



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 280 OF 2013

BETWEEN

MOSES KIARIE KAIRURI

SAMUEL MACHARIA KAMAU

NAFTALLY MWANGI KAMAU

JOSEPH KAMAU NGANGA

JOHN WAITHAKA WAMBUI SUIING AS

WESTLANDS ENVIRONMENTAL

CARE TAKER GROUP PETITIONERS

(SUIING ON THEIR OWN BEHALF AND ON BEHALF OF ALL PERSONS TRADING

IN FLOWERS, PLANTS AND POTS ON PLOT NO. 209/12721 LOCATED AT LOWER KABETE ROAD)

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

THE CITY COUNCIL OF NAIROBI 2ND RESPONDENT

COUNTY GOVERNMENT OF NAIROBI 3RD RESPONDENT

AND

STATIONERY EXPRESS LIMITED INTERESTED PARTY

JUDGMENT

Introduction

1. This case concerns a Removal Notice issued by the 3rd respondent to the petitioners requiring them to vacate, within 48 hours of service of the notice, the premises they occupy and carry on business.

Petitioners' Case

2. The petitioners are members of a self-help group which has been operating the business of selling flowers, plants and pots on a piece of land located partly on the riparian and partly on a road reserve on Lower Kabete Road next to the intersection of Brookside Drive in Westlands Area, Nairobi.
3. According to the deposition of Moses Kiarie Kairuri, sworn on 30th May 2013, the petitioners have been issued with a Single Business Permit over the years which entitles them to occupy the land and carry on business. The last permit was issued on 27th February 2013 for the year 2013.
4. On 28th May 2013, the petitioners were served with a Removal Notice ("the Notice") by the Nairobi County, City Inspectorate Department requiring them to move from the property within 48 hours of the service of the said notice for reason that, *"Your presence, and, or that of your structure/article is undesirable ..."*
5. It is this Notice that the petitioners challenge before this Court in the petition dated 30th May 2013. Mr Waikwa, learned counsel for the petitioners, submitted that the Notice violated the right and protection of fair administrative action protected by **Article 47(1)** of the Constitution which provides, **"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."**
6. Counsel also asserted that the Notice violates the petitioners' constitutional rights; right to livelihood, the right to dignity and the right to property as the notice of 48 hours ignores the fact that the petitioners have been on the property for a long period of time carrying on their lawful business from which they derive their livelihood.
7. The petitioners assailed the Notice not only on the ground of unreasonableness in terms of the time limited for vacating the property but also that the Notice did not give sufficient reasons for the action nor give the petitioners an opportunity to contest the reasons if indeed, there was a violation of the terms of the licence. He urged the Court to allow the petition.

Respondents Case

8. The 1st respondent did not file any depositions or grounds of opposition in response but nevertheless opposed the petition. Mr Moimbo, learned counsel for the 1st respondent, submitted that the Court should take into account the property rights of the interested party who was the owner of the property which the petitioners had trespassed. He also submitted that as the licence had lapsed on 31st December 2013, the suit lacked substratum and it ought to be dismissed.
9. The 2nd and 3rd respondents oppose the petition based on the affidavit of Violet Oyangi, the

Deputy Director Legal – Affairs of the City Court sworn on 15th November 2013. She depones that the reasons for requiring the petitioners to vacate the premises they occupy is that they are causing obstruction to pedestrians on Road Reserve and vehicular access to property LR No. 209/12721, that they have contravened the permit regulations by encroaching Plot No. 209/1272 and further that the petitioners did not obtain permission from the environment department to operate in the area.

Disposition

10. The petitioners raised the issue that the City Council could not issue the Notice as the Council was not in existence on 28th May 2013. Although, the Notice is issued on the letter head of the City Council of Nairobi, it was issued by officers of the County Government who have authority over such matters. It is therefore a proper notice.
11. This case can easily be disposed of by having regard to the terms of the notice. **Article 47** intends to bring discipline to administrative action so that the values and principles of the Constitution are infused in matters of public administration. This is a case where a Notice has been issued to petitioners who have occupied premises since at least 1984 by giving a 48 hours' notice. By any measure, such a notice is in the circumstances unreasonable as it does not take into account the period of occupation, the nature of business or the opportunity for the petitioners to relocate. Our Courts have expressed displeasure in the manner in which wanton evictions continue to be carried out in this country without regard to the rights and fundamental freedoms of the occupants. These cases include; **Satrose Ayuma & Others v Registered Trustees of the Kenya Railway Staff Retirement Benefits Scheme and Others Nairobi Petition No. 65 of 2010 [2013] eKLR**, **Ibrahim Sangor Osman and Others v Minister of State for Provincial Administration and Internal Security and Others Embu HCCC No. 2 of 2011**, **Mitubell Welfare Society v Attorney General and Others Nairobi Petition No. 164 of 2011**. Whatever the justification for the Notice, 48 hours' notice is unreasonable in the circumstances. It constitutes a violation of **Article 47(1)** in these circumstances.
12. The Notice also fails the constitutional test in that it has not given the petitioners clear reasons for the notice. The reasons stated in the Notice is that, *"Your presence and or, that your structures is undesirable"* are vague and cannot assist the petitioners to remedy the situation. This deficiency is particularly acute when one considers that the 2nd respondent has licenced the petitioners over the years. How then did their presence become undesirable" In **Geothermal Development Company Limited v Attorney General and Others Nairobi Petition No. 352 of 2012** the court held that, *"[30] In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be."*
13. Further, the notice required the petitioners to vacate the premises without giving them an opportunity to remedy or address any breaches that they may have committed. The Notice as it stands undermines the rights protected under **Article 47(1)** and it is therefore quashed.
14. It is clear that the reasons proffered by the 3rd respondent for issuing the Notice contained in the affidavit of Violet Oyangi are irrelevant for purposes of these proceedings as they ought to have been clearly set out in the Notice. As the reason given in the Notice was vague and indeterminate and the Notice unreasonable, I do not think it is necessary to proceed on a justification/limitation analysis of the 3rd respondent's action under **Article 24** of the Constitution.

15. It is not in dispute that the interested party is the legal owner of the property known as LR No. 209/12721. It claims that its property has been trespassed upon by the petitioners and it fears that if the orders herein are granted, it will be affected as the petitioners have used conservatory order to stop fencing off of the property. Mr Waikwa, contended that this petition is not a claim for trespass nor should the court entertain such a claim or provide relief as these proceedings are ill-suited for such an inquiry and determination. In any case he submitted that the petitioners denied any trespass upon the interested party's property.
16. I take the position that it is the duty of the court, particularly under **Article 159(2)** of the Constitution, to do complete justice to the parties whenever possible and where circumstances permit. Any misunderstanding between the parties will saddle the Court with further proceedings and suit which will in turn defeat the object of **Article 159**. The interested party as the title holder to LR No. 209/12721 should be at liberty to fence its plot. In any case, the City Council and or its successor would have no authority to issue a temporary occupation licence over personal property.

Disposition

17. In view of what I have outlined, I hereby make the following reliefs;
- i. **A declaration be and is hereby issued that the Petitioners' rights under Article 47(1) of the Constitution were violated by the 3rd respondent issuing the Removal Notice in respect of Temporary Occupation Licence No. 2013/1051177 .**
 - ii. **The Removal Notice in respect of Temporary Occupation Licence No. 2013/1051177 be and is hereby quashed.**
 - iii. **The petitioners are granted 14 days from today's date to apply for a single business permit for the year 2014.**
 - iv. **Petitioners be and are at liberty to apply for further and other orders.**

DATED and DELIVERED at NAIROBI this 15th day of January 2014.

D.S. MAJANJA

JUDGE

Mr Wanyoike, Advocate for the petitioners.

Mr Moimbo, Litigation Counsel, instructed by the State Law Office for the 1st respondent.

Mr Ongicho instructed by Ongicho-Ongichi Advocates for the 2nd and 3rd respondents.

Mr Atonga instructed by Kemboy and Company Advocates for the interested party.



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