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Judge:	Mumbi Ngugi
Citation:	Susan Waithera Kariuki & 4 others v Town Clerk Nairobi City Council & 3 others [2013] eKLR
Advocates:	-
Case Summary:	-
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County:	Nairobi
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Case Outcome:	Petition Dismissed
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Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 66 OF 2010

1. **SUSAN WAITHERA KARIUKI**
2. **FRANCIS MUSUNGU**
3. **JOSEPH NJOROGI**
4. **ALPHONCE MUSYOKA**
5. **FRANCIS KABIROPETITIONERS**

VERSUS

1. **THE TOWN CLERK**

NAIROBI CITY COUNCIL.....1ST RESPONDENT

2. **THE COMMISSIONER OF POLICE..... 2ND RESPONDENT**

3. **MINISTER FOR LANDS.....3RD RESPONDENT**

AND

4. **GAMI PROPERTIES LTD..... 4TH RESPONDENT**

JUDGMENT

Introduction

1. This matter concerns the alleged violation of various of the petitioners' constitutional rights in relation to the informal settlements that they occupy within the Kitisulu and Westlands area of Nairobi. The matter first came before the court on the 2nd of November 2011 when the petitioners sought conservatory orders restraining the respondents from enforcing eviction notices allegedly issued to the

petitioners and other residents of the said informal settlements. They alleged that the 1st respondent, the City Council of Nairobi (hereafter '**the City Council**') had given them 72 hours within which to vacate the subject land. They termed the issuance of the said notices, which were not addressed to anyone in particular, a violation of their right to fair administrative action under Article 47 of the Constitution.

2. Upon hearing the application for conservatory orders filed under Certificate of Urgency dated 1st November, 2010 ex parte, the court, (Musinga, J, as he then was) granted, inter alia, the following orders:

1. ***That interim conservatory orders be and are hereby issued restraining the Respondents by themselves, agents or assigns from in anyway evicting the petitioners or any of the residents in the hereto mentioned villages or anyway attempting to enforce the impugned notices, namely Kaptagat Village along Kaptagat Road within Kitisuru Location, Ndumbuini Village along Kapenguria/Forthsmith Road within Kitisuru Location, Masai Village, Consolata on Purema Road off 2nd Parklands Avenue, Highridge within Parklands Location, Kabete native Industrial Training and Development (NITD) in Kabete all being informal settlements (otherwise known as slums) pending hearing and determination of this application inter-partes.***

3. In his ruling of 4th March, 2011, the learned Judge confirmed the said orders and directed that the petitioners shall remain in occupation of their informal settlements pending hearing and determination of their petition.

The Pleadings

4. In their petition dated 2nd November 2011, the petitioners seek the following orders:

1. ***A declaration that the notices served on the petitioners and other residents of the named villages are unconstitutional.***

2. A declaration that if indeed the lands occupied by the petitioners and other residents are road reserves they are therefore public land and fall within the constitutional definition of public land hence the petitioners are protected against arbitrary removal and treatment.

3. An order restraining the Respondents by themselves, agents or assigns from evicting the petitioners and other residents without prior mutually agreed alternative and suitable location within or on the outskirts of Nairobi.

4. A declaration that the respondents' duty to respect, promote and fulfil the rights of the petitioners and other residents is perpetual and cannot be abrogated and is perpetual.

5. A declaration that the respondents' duty to formulate, with the citizens participation regulations and standards of evictions so as to avoid undue deprivation and violation of any person within their jurisdiction.

6. An order for payment of general, exemplary and punitive damages by the Respondents to the Petitioners assessed by this court.

5. The respondents oppose the petition. The 1st respondent has filed an affidavit in reply sworn by Ms. Rose Muema on 29th November 2010 and written submissions dated 24th July 2013. The 1st and 3rd respondents did not file an affidavit in reply to the petition but the office of the Attorney General filed written submissions on their behalf dated 25th July 2012.

6. By its application dated 31st January, 2012, the 4th respondent applied and was granted leave to participate in the proceedings as a respondent and to oppose the petition. On the 26th of July 2013, the parties to this petition indicated that they would be relying on their respective written submissions and

asked the court to render judgment on the basis thereof.

The Petitioners' Case

7. The petitioners' case is set out in the petition and two affidavits. The first is sworn in support of the petition on 2nd November 2010 by **Ms. Susan Waithera Thuo**, who describes herself as the 1st petitioner but does not indicate whether the said Susan Waithera Thuo is the same as the 1st petitioner, **Susan Waithera Kariuki**. A further affidavit sworn by Mr. **Alphonse Musyoka** on 20th June 2012 was filed in response to the averments by the 4th respondent. Mr. Musyoka also swore an affidavit in support of the application for conservatory orders on 1st November 2010 in which he adopted the averments by Ms. Thuo sworn in support of the petition. The petitioners also filed written submissions dated 25th September, 2012.

8. The petitioners' claim that they are all residents of various informal settlements in Nairobi, and that their rights are threatened with violation by the respondents who seek to evict them from these settlements.

9. In her affidavit in support of the petition, Ms. Thuo depones that she has sworn the affidavit on her own behalf and on behalf of the other petitioners. She avers that she has lived in the informal settlement known as **Kaptagat Village** along Kaptagat Road within Kitisuru Location, for the last 40 years, and that she is the Chairman of the village welfare Association.

10. She alleges that the petitioners eke out a living as petty traders selling vegetables, water and other foods, while others are employed as watchmen and house-helpers in the nearby Kitisuru area.

11. Ms. Thuo avers that on 28th October, 2010, an officer from the City Council of Nairobi delivered blank but signed notices to evict to the office of the area Chief; that the notices were intended to be served on the residents the following day, 29th October, 2010, with the evictions to be carried out on 30th October, 2010; that the residents refused to accept the notices and the officers negotiated a 72 hour notice which was to expire on 2nd November, 2010.

12. The petitioners allege that they were apprehensive that their village would be demolished as a neighbouring settlement, Masai village, situated in High Ridge, had been demolished on 22nd October, 2010 following similar notices; and that the residents of Masai Village had not been given alternative accommodation.

13. The petitioners also contend that the notices issued by the City Council were not addressed to anyone in particular and she terms them as anonymous, equivocal and presumptuous. Copies of these notices which are addressed to '**Owner/Structures along Kaptagat Road**' or '**Owner/Occupier/Kiosk/Structures along Kaptagat Road**' are annexed to her affidavit as '**SWK 1-3**'.

14. The petitioners contend that the City Council had permitted the construction of toilet facilities by a non-governmental organization known as **Maji na Ufanisi** for the use of the residents of Kaptagat village, but that the Council was now intending to demolish the said facility.

15. Ms Thuo depones that the petitioners in all the other villages named in the petition, which are situated in various locations within Westlands District of the City of Nairobi are in the same situation as she and the other petitioners in Kaptagat Village. These villages are set out in the petition as being **Dam Village** at Kabete Veterinary Research within Kitisuru Location, **Ndumbuini Village** along Kapenguria/Forthsmith roads within Kitisuru Location, **Masai Village, Consolata** on Purema Road off 2nd Parklands Avenue, Highridge within Parklands Location, **Kabete Native Industrial Training and Development (NITD)** in Kabete

16. Ms Thuo avers, on the advice of her counsel, that where residents in their situation have no alternative home, they are entitled to be treated reasonably and fairly; that they are entitled to adequate notice with reasons why they must be moved; and that they are also entitled to relocation to a suitable and more habitable place rather than being condemned to more acute homelessness.

17. The petitioners assert that the respondents have a duty to respect, promote fulfil and protect their right to dignity; that their right to life will be undermined if they are evicted as they will be unable to fend for themselves; that the City Council has a duty to pass laws and regulations which are fair on how evictions should be carried out so as not to inconvenience citizens and that the notices issued by the City Council are void ab initio for not being addressed to anyone. They contend however, that even if the notices were technically valid, they are void for violating the fundamental rights of the petitioners.

18. The petitioners ask that the enforcement of the notices be stopped until the respondents demonstrate that they have taken steps to find alternative premises for the residents of the villages to areas where their livelihoods will be possible.

19. They allege that the notices, which were allegedly served by officers of the Nairobi City Council accompanied by police officers from the Administration Police Service, are the commencement of the violation of their rights to life, adequate housing, freedom of movement and right to live in Kenya, the right not to be discriminated against, and the right to be treated fairly, efficiently, reasonably and to receive a written explanation for administrative action.

20. In his affidavit sworn on 20th June 2012 in response to the 4th respondent's affidavit, Mr. Musyoka avers that their settlement, Masai Village, was in existence even before the construction of the 4th respondent's flats; that the settlement has been in existence since the early sixties, and he calls in aid a letter dated 17th May 2010 (annexure "AM1") allegedly signed by the Chief, one Peter K. Mwangi. He confirms that the 4th respondent used a different route to ferry his materials to the construction site, namely 1st and 2nd Parklands Avenues, and did not disturb them at the time of the construction. He alleges further that any promises made to the 4th respondents that the occupiers of the Masai village would be removed from the informal settlement would amount to a violation of their rights.

21. Mr. Musyoka asserts that the real intention of the respondent, particularly the 4th respondent, is to appropriate the site of their homes as a new and third access to its property and is not motivated by concern about the rights of the public.

22. In their written submissions dated 25th September 2012, the petitioners have set out what they state are uncontroverted facts: that they have lived in the villages set out in the petition within the City of Nairobi for decades and with the knowledge of the 1st respondent; that the 1st respondent delivered blank but signed notices to evict to their villages. They then set out the provisions of the Constitution which they believe will be violated should they be evicted from the premises namely Article 2(6), 43, 47, 53, and 57.

23. The petitioners also submit that the respondents are bound by the provisions of Articles 3(1) of the Constitution which requires that they respect and uphold the Constitution in dealing with the petitioners; Article 10 on the national values and principles of governance; and Article 73 which sets out the principles of leadership and governance. They also place reliance on Article 232 which provides the principles of public service to be followed, inter alia, in the process of policy making.

The Case for the City Council

24. The 1st respondent's case is set out in the affidavit sworn on 29th November 2010 by **Ms. Rose K. Muema**, the City Council's Acting Director for the City Planning Department, and its written submissions dated 24th July 2012.

25. While asserting that it is a stranger to the averments in the affidavit of Ms. Thuo, the 1st respondent questions her authority to swear an affidavit on behalf of other petitioners.

26. Ms. Muema also denies that the City Council ever permitted the construction of a modern toilet as alleged by Ms. Thuo She contends that the Council served notices upon the developers and owners of the structures along Kaptagat Road to remove the structures as they were developed on a road reserve and without any development permission.

27. The 1st respondent concedes that it is charged with the responsibility of planning the city but asserts that it has not violated any of the petitioners' rights as alleged. It maintains that it is mandated to enforce the Physical Planning Act; that it discharged its duty under the Act procedurally and in accordance with the Act by issuing notices to the petitioners; and that it is not its statutory mandate to

settle the homeless.

28. In its written submissions, the City Council submits that the petitioners have not demonstrated that they obtained development permission from the 1st respondent as required under section 30(1) of the Physical Planning Act; and that the Council served the enforcement notices in accordance with section 38(1) of the Act upon realising that the petitioners had carried out developments without permission.

29. The 1st respondent asserts that even if there had been permission to occupy public land or a road reserve, if the said land is required for road expansion or other use for the public good, the occupiers should vacate on notice.

Submissions by the 2nd and 3rd Respondents

30. In their grounds of opposition dated 18th April 2012 and the written submissions dated 25th July 2012, the 2nd and 3rd respondents take the position that the petition is totally unmerited with regard to them. In so far as the 2nd respondent is concerned, they point out that there is no appointment made yet to the Office of the Inspector General; that the Police Officers who allegedly accompanied officers of the 1st respondent are from the Administration Police Service which is not under the command of the Police Commissioner; that no evidence has been tendered with regard to which station or camp the officers allegedly involved in the service of the notice were from; and that the Commissioner of Police is not aware of any officers under his command who participated in the alleged acts.

31. The 2nd and 3rd respondents ask the court to take judicial notice of the fact that evictions have more often than not turned violent; that sometimes they have led to a loss of life and damage to public and private property; and that the police have a constitutional and legislative mandate to maintain peace, order and security.

32. The second limb of the 2nd and 3rd respondent's submissions is that the petitioners are not the owners of the land that they occupy. They term as inconceivable that the petitioners have invaded public land and now claim that they cannot be removed without consultation; that the rights claimed in the petition are not absolute but must be balanced with the rights of others, in this case the rights of the

public; and that the government must put the land or road reserve to the purpose for which it was intended and guard against any trespass or encroachment on the road reserve.

33. The 2nd and 3rd respondent further point out that the petitioners have not identified the land parcel that they lay claim to; or any legitimate interest in the suit land; that they cannot seek to benefit from their unlawful occupation of the suit land by seeking compensation; and they have failed to identify the provisions of the Constitution that have been violated. They therefore ask that the petition be dismissed with costs to the respondents.

The 4th Respondent's Case

34. In its application dated 31st January 2013, the 4th respondent sought, among others, the following orders:

1.

2. ***The applicant be enjoined to this Petition as a party.***

3. ***The Orders of this Court dated 4th march 2011 be vacated to the extent that they apply to the Access Road situate between 1st Parklands Avenue and 2nd Parklands Avenue that serves to the parcel of land known as L.R No Nairobi 209/107/2 (“sic Consolata on Purema road Off 2nd Parklands Avenue)” pending the hearing and determination of this application or further orders of the court.***

4. ***The Orders of this Court dated 4th March 2011 be vacated to the extent that they apply to the Access Road situate between 1st Parklands Avenue and 2nd parklands Avenue that serves the parcel of land known as L.R No Nairobi 209/107/2 (“sic Consolata on Purema Road Off 2nd***

Parklands Avenue”)

5. The costs of this applications be provided for.

35. The 4th respondent's interest in this matter is thus confined to what it refers to as the access road situate between 1st Parklands Avenue and 2nd Parklands Avenue that serves the parcel of land known as L.R No Nairobi 209/107/2. This appears to be the part which the petitioners describe as '**Consolata on Purema Road Off 2nd Parklands Avenue**'.

36. The 4th respondent's case is set out in the affidavit in opposition to the petition sworn on 12th March 2012 by Mr. **Bharat Ramji Manji**, a resident of Nairobi and Director of the 4th respondent. In the said affidavit, Mr. Manji depones that the 4th Respondent is opposed to the reliefs sought in the petition to the extent that they relate to the informal settlement identified as Maasai Village Consolata, on Purema Road Off 2nd Parklands Avenue.

37. According to the 4th respondent, it is the proprietor of L.R No 209/1071/5 which is located between 1st and 2nd Parklands Avenue, Parklands area in Nairobi; that it became the proprietor by way of transfer registered on 11th May 2010 from Oriental Commercial Bank Limited. It has annexed a copy of the grant to the said property.

38. It contends that the property was undeveloped at the time of purchase; that it has since commenced development of residential flats with a loan of Kshs 600 million obtained from Investments & Mortgages Bank; that it has obtained the approvals it needs from the 1st respondent, and the block of flats is almost complete.

39. The 4th respondent depones that the authorized access to the suit property is a public road that serves the suit property and adjoining properties. The said road is indicated on a copy of a survey plan from the Department of Survey annexed to the 4th respondent's affidavit and marked "**BRC**".

40. Mr. Manji avers that while the 4th respondent does not know the petitioners personally, it is aware that there is an informal settlement known as Maasai Village, Consolata on Purema Road Off 2nd Parklands Avenue. It contends that the said settlement comprises about four temporary structures, and it has annexed photographs of the said structures which have been erected upon a section of the public road leading to its property, thus blocking the entrance thereto. Mr. Manji avers that the City Council represented to the 4th respondent that the informal settlement was purely temporary and unauthorized; and that when the need arose, the City Council would invoke its statutory power to remove them from the public access road. It asserts that as its development is nearly complete, it is necessary to clear the blocked access road to allow pedestrian and motor vehicle access.

41. While maintaining that it is alive to and respects the fundamental rights and freedoms of all Kenyans enshrined in the Constitution, particularly those pertaining to the right to adequate housing, it asserts that in the circumstances of this case, the petitioners' alleged rights to occupy a section of a public access road cannot be said to override those of other citizens who are blocked from lawful use of the access road. It contends, further, that the construction of informal settlements on a public access road cannot be justified by invoking the Constitution; that it is an act that borders on impunity and utter disregard for the rights and interests of other affected citizens; that while the Constitution provides for equality before the law for all, in the present circumstances, the petitioners' purported interests, which in this case offend the laws of the land, should be found to be subordinate to those of the 4th respondent and other citizens affected by the acts of the petitioners.

42. It asks the court to weigh the interests of the petitioners, who have, without a colour of right invaded and occupied a public road, against those of the respondent and other affected persons who have lawfully invested in the area but have been denied access and the fruits of their investment by the acts of the petitioners and find that the petition should be disallowed to pave way for lawful removal of the petitioners from the settlements to allow the affected access road to be put to the use for which it was by law intended.

43. In its written submissions dated 16th October 2012, the 4th respondent asserts that the village known as Masai Village has been established on a road reserve; that Purema road is a public road as defined under Article 62 of the Constitution and is governed by the provisions of the Public Roads and Roads of Access Act, Cap 399 of the Laws of Kenya. It asserts that the public has a right of access to the public road; that the 4th respondent is entitled to use Purema Road and that the acts of the petitioners are in violation of its rights and those of other residents.

44. The 4th respondent also contends that there has been no violation of any of the rights of the petitioners as alleged. It contends that the notices issued to them by the 1st respondent were issued pursuant to the provisions of the Physical Planning Act; that the 1st respondent has a responsibility under the provisions of the Kenya Roads Board Act, 1999 to ensure that public roads are not encroached upon as it has been designated under the Act as a sub-agency for the purpose of maintenance, development and rehabilitation of streets within its jurisdiction.

Determination

45. Some of the parties have proposed what they consider to be the issues for determination in this matter, including whether or not the land occupied by Masai Village is a public road and whether or not there has been a violation of the petitioners' rights.

46. With regard to the first issues, the evidence before me suggests that the property on which Masai village is situated is a public road. Indeed, the petitioners appear to concede as much and assert that if it is indeed a road, then it is public property. The critical issue for consideration and determination in this matter, however, in my view, is whether the petitioners have established a violation of their rights under the Constitution.

47. Before considering this issue, I must express serious disquiet about the pleadings in this matter and the facts that the '*petitioners*' have presented before the court in support of their case. I have placed the word '*petitioners*' in quotes deliberately, for I also have very serious reservations even about the identity of the parties who have been allegedly affected by the acts of the respondents and whose rights are likely to be affected if the orders sought are not granted.

48. This court has in the past expressed its concern about the manner in which parties coming before the court and alleging violation of constitutional rights present their cases. In **Consortium For The Empowerment & Development Of Marginalized Communities –vs- The Chairman The Selection Panel for Appointment of Chairperson and Commissioners to Kenya National Human Rights Commission High Court Petition No. 385 of 2012**, I observed as follows at paragraph 32 thereof:

'As a basic minimum, the petitioners are required to not only cite the provisions of the constitution which have been violated, and the manner in which they have been violated with regard to them-see Anarita Karimi Njeru (1976-80) 1 KLR 1272 and Trusted Society of Human Rights Alliance -v- Attorney General & Others High Court Petition No. 229 of 2012. In demonstrating the manner in which there has been a violation of their rights or of the Constitution, the petitioners should present before the court evidence or a factual basis on which the court can make a determination whether or not there has been a violation.'

49. In that case, the petitioners had made averments on matters of law on the advice of their counsel. The factual basis on which their claim for violation of rights was founded was totally missing from their pleadings.

50. Majanja, J was similarly concerned with the pleadings in petitions alleging violation of constitutional rights when he observed, at paragraph 71 of his decision in **John Waweru Wanjohi & Others –vs- Attorney General** as follows:

71. Before I conclude this matter I would be remiss if I did not comment on the pleadings and depositions filed in Petition No 373 of 2012. The key purpose of pleadings is to set out facts which constitute a cause of action. Similarly, the purpose of an affidavit is to depone to facts which the deponent known of his knowledge, information and belief. Affidavits should not express the deponent's opinions or those of the advocate. These matters are better left for submissions. I do not think that this obligation is lessened merely because the matter is one filed to enforce fundamental rights and freedoms under Article 22 or enforce the constitution under Article 258. Argumentative pleadings, devoid of facts obscure the real issues in controversy and more often than not undermine the objective of expeditious disposal of matters (see Meme v Republic [2004] 1KLR 645 and Tito Alai Okumu v Commissioner of Customs and Another Nairobi No. 240 of 2011 (unreported). (Emphasis added)

51. This petition presents a similar failing on the part of Counsel for the petitioners. The petition is expressed to relate to four villages within the Kitisuru and Westlands areas, namely **Kaptagat Village along Kaptagat Road within Kitisuru Location, Ndumbuini Village along Kapenguria/Forthsmith Road within Kitisuru Location, Masai Village, Consolata on Purema Road off 2nd Parklands Avenue, Highridge within Parklands Location, Kabete Native Industrial Training and Development (NITD) in Kabete.** However, the only averments of facts before me relate to the alleged Kaptagat Village and Masai Village.

52. While Ms. Thuo purports to make averments with regard to the conditions and circumstances of the occupants of the other villages, her evidence is at best hearsay. There is nothing before me that explains why the residents of the other villages whose rights are allegedly threatened could not make averments

in support of their case. Such averments as Ms. Thuo purports to make on behalf of others are clearly inadmissible under the provisions of Section 33 of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, which deals with statements by persons who cannot be called as witnesses, and lays out the kind of statements that constitute exceptions to the hearsay rule by providing as follows:

“Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases...”

53. Nothing has been presented before me to explain why the residents of the other villages have not made depositions with regard to the alleged violation or threat of violation of their rights.

54. Which then leaves the court with no evidence whatsoever regarding the other villages, and many unanswered questions: Do the other villages actually exist" Who are the residents of those villages" Did they get notices of eviction from the respondents and therefore are their rights likely to be violated if the orders sought in this petition are not granted" On the material before me, the answer with regard to these other alleged petitioners would have to be in the negative. I can issue no orders with regard to petitioners who are not before me, and in respect of whom there are absolutely no facts on record. In the circumstances, I will confine my decision in this matter to the alleged violation of the rights of Ms Susan Thuo (on the assumption that the said Ms. Thuo is the same as the 1st petitioner, Ms. Kariuki) in Kaptagat Village and Mr. Alphonse Musyoka in Masai Village.

Masai and Kaptagat VillageVillage

55. The petitioners allege violation of their rights under various provisions of the Constitution, but primarily Article 47 of the Constitution which guarantees to everyone the right to fair administrative action. The basis of their complaint is that they were given only 72 hours to vacate. They also assert that their right to life, adequate housing, freedom of movement and right to live in Kenya, the right not to be discriminated against, and the right to be treated fairly, efficiently reasonably and to receive a written explanation for administrative action has been violated. I will begin by considering the alleged violation of the rights of the rights of the 4th petitioner, Mr. Alphonse Mutua, and other alleged residents of Masai Village situated on Purema Road, Parklands.

56. The evidence before me as contained in the affidavit of the 4th petitioner and the 4th respondent indicates that the 4th petitioner, Mr. Musyoka, is among a few people, only four of them, who are in

occupation of Purema Road, and it is common ground that this is a public road. The question then is whether there is or can be a justification for the 4th petitioner and the other, unnamed occupiers of the said public road, to continue in occupation of the said road. A second critical question is whether requiring that they vacate the said road constitutes a violation of their constitutional rights.

57. It is indeed true that the petitioners have been guaranteed by the Constitution the rights that they allege violation of. They have the right to housing guaranteed under Article 43 of the Constitution, and the right to fair administrative action under Article 47.

58. Their rights, however, are limited by the requirement in Article 24 that ***'the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.'*** A balance is thus always required under the Constitution between private rights and the public interest. Where there is a conflict between the private interest and the public interest, the public interest must prevail. **As the court observed in James Joram Nyagah & Another –vs- The Attorney General & Another High Court Misc. Civil Application No. 1732 of 2004:**

'Clearly, the rights and freedoms of the individual are not absolute but are subject to other people's rights and the general public interest at large.'

59. The 1st and 4th 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.

60. However, the petitioners are entitled to be given adequate notice to vacate the said public road. They cannot be required to vacate the places said to be their homes within a matter of hours. Even though they are in occupation of a public road, they deserve to be given adequate notice to vacate the said premises.

61. In the case of Masai Village, it is not clear from the pleadings whether the four premises on Purema Road are residential or commercial premises, or indeed whether one can describe four structures on a road reserve as 'a village'. The material before me, however, including the reference to the structures on the road as 'kiosks', suggests that they are business premises. In the circumstances, I believe that a period of three (3) months within which to vacate the said premises would be a reasonable period.

62. With regard to Kaptagat Road, it is also not clear what the situation is, or what the number of persons resident or carrying on business in the village is. However, as it is acknowledged that the premises they occupy are situate on a public road, I believe the greater interest of the public requires that they vacate the road.

Disposition

63. My orders therefor with respect to the matters raised in this petition are as follows:

i. I dismiss this petition in so far as it relates to the alleged violation of the rights of persons residing in **Ndumbuini Village** along **Kapenguria/Forthsmith Road** and **Kabete Native Industrial Training and Development (NITD)** in **Kabete** with regard to whom no evidence was placed before me.

ii. I direct that the 1st respondent issues to the petitioners resident on Kaptagat Road and Purema Road adequate notice of at least 90 days within which to vacate the said roads.

64. Should the eviction of the petitioners from the said roads be necessary after the expiry of the notice period, then the same shall be carried out in accordance with the international standards contained in the **UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007)** cited with approval by the court in the case of **Satrose Ayuma & Others -vs- The Kenya Railways Retirement Benefits Scheme & Others High Court Petition No. 66 of 2010**.

65. These Guidelines require at paragraphs 45-49 thereof, among other things, the mandatory presence of government officials or their representatives and neutral observers on site during evictions;

that the evictions are not carried out in a manner that violates the dignity and human rights to life and security of those affected; that the evictions are not carried out at night or during bad weather; and that no one shall be subjected to indiscriminate attacks during the eviction.

66. Each party shall bear its own costs of this petition.

Dated, Delivered and Signed at Nairobi this 24th day of September 2013

MUMBI NGUGI

JUDGE



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