



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 26 OF 2015

IN THE MATTER OF: ARTICLES 2, 10, 19, 21, 22, 23 AND 165 OF THE CONSTITUTION

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS SECURED AND GUARANTEED UNDER ARTICLES 27, 28, 35, 40, 43 (1) (b), AND 47
OF THE CONSTITUTION**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA AND THE MOMBASA COUNTY
DEVELOPMENT PROJECTS 15-16FY**

AND

**IN THE MATTER OF: THE THREATENED DEMOLITION OF HOUSES IN THE
INFORMAL SETTLEMENT SCHEME KNOWN AT BANGLADESH WITHIN MOMBASA COUNTY TO
MAKE WAY FOR THE CONSTRUCTION OF THE BANGLADESHI-MIKINDANI RAJU ROAD
PROJECTS**

BETWEEN

FR. GABRIEL DOLAN.....1ST PETITIONER

FR. PETER FINEGUN.....2ND PETITIONER

FR. RAPHAEL SANKHULANI MWENDA.....3RD PETITIONER

MARTIN OUMA.....4TH PETITIONER

GEORGE OOKO.....5TH PETITIONER

JAMES WENDO.....6TH PETITIONER

BEATRICE OLUOCH.....7TH PETITIONER

HENRY NYAGA AMWAYI.....	8 TH PETITIONER
RIPSER JUMA.....	9 TH PETITIONER
ANN WAWUDA.....	10 TH PETITIONER
KENEDY OTIENO.....	11 TH PETITIONER
STEPHEN MUTUA.....	12 TH PETITIONER
MARGARET AUMA.....	13 TH PETITIONER
MARTIN ONYANGO OTWAR.....	14 TH PETITIONER
ROSE OLOO.....	15 TH PETITIONER
MONICA ATIENO OTWAR.....	16 TH PETITIONER
JACOB OJWANG.....	17 TH PETITIONER
DIDACUS OKOTH ODONGO.....	18 TH PETITIONER
DAVID OKETCH.....	19 TH PETITIONER
JOYCE AUMA ODHIAMBO.....	20 TH PETITIONER
ELIZABETH USIKU.....	21 ST PETITIONER
BENTA ANYANGO ATHOOH.....	22 ND PETITIONER
MILLICENT ANYANGO OWINO.....	23 RD PETITIONER
GEORGE ODHIAMBO.....	24 TH PETITIONER

VERSUS

1. COUNTY GOVERNMENT OF MOMBASA

2. KENYA NATIONAL HIGHWAY AUTHORITY.....RESPONDENTS

JUDGMENT

1. In this Petition dated and filed on 28th April, 2015, the Petitioner's sought the following orders:-

(a) A declaration that the Respondents must adhere to the principles of participation and inclusivity before the Bangladesh–Mikindani Runyu Road Project can be implemented and an order of injunction stopping the project until the Respondents adhere to the law and the Constitution.

(b) A declaration that the decision to construct the Bangladesh-Runyu Road was null and void.

(c) A declaration that the Petitioners' rights under Articles 27, 35, 40, 42, 43 and 47 of the Constitution have been violated by the Respondents;

(d) An order to the effect that the Respondents cannot demolish the Petitioners property arbitrarily without regard to compensating the Petitioners for any damage caused to their property.

(e) Costs.

2. By orders made and issued on 29th April, 2016, the court granted conservatory orders restraining the Respondents from carrying out the Mombasa County Project – “15-16” pending the hearing of the application for conservatory orders. In the event those orders are still subsisting having been extended till the determination of the Petition.

3. Though the Petition is premised upon the provisions of Articles 27 (equality and freedom from discrimination), 35 (the right to information), 40 (the right to and protection of property) 42 (the right to a clean and healthy environment including the right to have the environment protected for the benefit of present and future generations etc.), 43 (economic and social rights – the right to the highest attainable standards of health, which include the right to health care services including reproductive health, accessible and adequate housing, and to reasonable standards of sanitation, clean and safe water in adequate quantities, social security, and education), the **REAL ISSUE** raised in this Petition is the rights of dwellers of informal settlements.

4. Dwellers in informal settlements have no title to the land in which they have erected their dwellings. They are physical and spiritual families. Their income comes from what we call the **informal sector**. Their factories and manufacturing premises are road **side kiosks**, the pavements next to their informal settlements. Their right to settle comes from the local government both the national and county government operatives, the Chiefs and Ward Administrators, and no doubt, the Honourable Members of the County Assemblies. The informal settlements are their mines not for gold and silver, but for votes in the five-year circle when they are called to exercise their political right to vote in their political leaders. Beyond that, society and the leadership forgets them. They may get drips of water at water points of sale, not taps in their house. They are the new “**les miserable**” of Victor Hugo, the French writer.

5. They cry to court for protection. The Respondents say in their Replying Affidavits, they must give way for development. Whose development, but theirs, they are the objects of the development. Article 43(3) delegates the state to provide appropriate social security to persons who are unable to support themselves and their dependants.

6. Indeed the state has put in some measures to support these vulnerable groups. Housing or shelter however remains a big challenge. Often the pace of physical development such as construction of roads becomes a challenge to those informal settlements. Roads are indeed needed for welfare of these dwellers themselves. They also need street lights, good recreational facilities. The challenge is how to reconcile these apparently conflicting, but in effect, mutually beneficial contradictions.

7. Part of the answer is to be found in Article 40 (3) and (4) of the Constitution. Whereas Article 40(3) protects the rights of persons with title, Article 40 (4) protects the rights of those (who like the Petitioners), who have no title. Article 40 (4) says-

“Provision shall be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land”.

8. Construction of roads and street lights, and sewage facilities needs land, and some or many of the Petitioner's will, or may be affected. The acquisition of their dwellings, their clinics, their maternity (for pre-and post-natal care), their nursery school, their community hall, their residential homes and the residential houses of their spiritual leaders, the priests, imams, will be a subject of detailed discussion between the government at the national and county levels. That is the requirement of public participation under Article 10(2(a) – the national values and principles of governance – patriotism, national unity, sharing and devolution of power and **participation of the people**.

9. Being of the above mind, I must find in favour of the Petitioners and grant orders in terms of paragraphs 28(a) and (d) of the Petition. I also grant the Petitioners the orders in terms of paragraph 28(b), in relation to Articles 35, 40(3) and (4), 42, 43, and 47 of the Constitution. I decline to grant the order sought in paragraph 28 (c).

10. This being a public interest litigation I direct that every party shall bear its own costs. There shall be orders accordingly.

Dated, Signed and Delivered at Mombasa this 30th day of November, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Miss Gacheru holding brief Mr. Jengo for Petitioners

Miss Oyier for Respondents

Mr. Kaunda Court Assistant



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