



Kimani v County Executive Member – Lands, Housing, Physical Planning and Urbanization & another (Environment & Land Petition 4 of 2019) [2023] KEELC 20859 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20859 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND PETITION 4 OF 2019
JO OLOLA, J
OCTOBER 19, 2023
IN THE MATTER OF
ARTICLES 19, 22, 23, 40, 47, 50 & 64 OF
THE CONSTITUTION OF KENYA
IN THE MATTER OF
GOVERNMENT LANDS ACTS AND THE TRUST LANDS ACT
IN THE MATTER OF
CONTRAVENTION OF RIGHTS OF REGISTERED PROPRIETOR
IN THE MATTER OF
PURPORTED SUSPENSION OF DEVELOPMENT APPROVAL**

BETWEEN

NANCY WANGARI KIMANI APPLICANT

AND

COUNTY EXECUTIVE MEMBER – LANDS, HOUSING, PHYSICAL PLANNING AND URBANIZATION 1ST RESPONDENT

COUNTY GOVERNMENT OF NYERI 2ND RESPONDENT

JUDGMENT

1. By her Petition dated 23rd October, 2019 as amended on 28th January 2022, Nancy Wangari Kimani (the Petitioner) prays for:



- (a) A declaration that the Petitioner's right to Fair Administrative Action under Article 47 of *the Constitution* as read together with the Fair Administrative Action 2015 (sic) as well as (her) right to a fair hearing under Article 50(i) of *the Constitution* have been violated by the Respondents;
 - (b) A declaration that the Respondents contravened the Petitioner's right to property under Article 40(1), (2) and (3) of *the Constitution*;
 - (c) A declaration that the letter dated 4th October, 2019 addressed to the Petitioner by the 1st Respondent is unconstitutional, null and void;
 - (d) A Permanent injunction restraining the Respondents, their servants or agents from interfering with the Petitioner's quiet enjoyment of the said Nyeri/Municipality/Block 1/1404;
 - (e) Special damages as specifically pleaded in (Paragraph) 3 above be paid by the Respondents to the Petitioner;
 - (f) General and exemplary damages be paid in consideration of breach of Article 47 of *the Constitution* and the delay of completion of building in 2020 as expected;
 - (g) An order that the costs of this Petition be provided for; and
 - (h) Any other relief or orders that the Honourable Court shall deem just, fit and appropriate to grant in favour of the Petitioner.
2. Those prayers arise from the Petitioner's contention that she is the bonafide purchaser for value without notice and the first registered proprietor of all that parcel of land known as Nyeri/Municipality/Block 1/1404. The Petitioner asserts that she was desirous of constructing a building on the said premises and that she duly commenced construction thereon after she obtained approval of the Development Plan for the said premises from the Respondents on 30th May, 2019.
 3. The Petitioner avers that on 4th October 2019, the 1st Respondent suspended her approved development plan for the development of the suit property pending determination of an alleged dispute over the ownership thereof. The Petitioner accused the Respondents of acting unreasonably by purporting to suspend the development on the property on the basis of what she terms as hearsay and without giving due consideration to the losses she was likely to incur.
 4. It is the Petitioner's case that the Respondents have no legal power to suspend the construction on her parcel of land on extraneous reasons and that whatever the case, she had a right to be heard before the decision affecting her was made.
 5. The Petitioner avers that consequent to the Respondents' suspension of the construction she had commenced, she was compelled to employ security to guard the building materials on the suit property from 1st November, 2019 at a cost of Kshs.20,000/- per month and that she had incurred losses of more than Kshs.250,000/- arising from destruction of the materials by the weather and termites.
 6. By their joint Grounds of Opposition dated 5th April 2022, the County Executive Committee Member, Lands Housing, Physical Planning and Urbanization (the 1st Respondent) and the County Government of Nyeri (the 2nd Respondent) assert as follows:
 1. That the amended Petition is a non starter as the Petitioner has failed to set out with a reasonable degree of precision that of which she complains about, the infringed law and the manner in which the Respondents are alleged to have caused the infringement;



2. That the amended Petition is fatally defective as it is common ground that the issues at hand in this matter was about Physical Planning and Land Use Planning Act hence the Petitioner ought to have followed and exhausted the alternative mechanism provided by Parliament under the *Physical and Land Use Planning Act* before engaging the Court;
3. That as such the amended Petition constitutes an abuse of the Court process for failure to exhaust the alternative dispute resolution mechanism provided under Section 32 (4) and (5) of the *Physical and Land Use Planning Act*;
4. That the Petitioner has not provided any proof of the alleged special damages incurred towards guarding the premises nor provided any tangible evidence of the alleged destruction of building materials hence the claim for special damages should fail;
5. That the Respondents have a legal and constitutional duty to ensure that development permissions and approvals are monitored and to ensure due compliance hence may suspend any approval in instances of breach or discovery of material facts that was not within their knowledge at the time of the approval; and
6. That the Respondents in exercise of the sovereign powers were justified in temporarily suspending the development permission granted to the Petitioner pending further inquiries on the controversy of the Petitioner's legitimate ownership of the suit property which does not amount to deprivation of the Petitioner's right to own property as enshrined under Article 40 of *the Constitution* of Kenya.
7. The Petition was disposed of by way of Affidavit evidence and submissions. I have accordingly carefully considered both the Petition and the response thereto. I have similarly perused and considered the submissions placed before me by the Learned Advocates representing the Parties herein.
8. The Petitioner herein is the registered proprietor of the parcel of land known as Nyeri/Municipality/Block 1/1404. From the material placed before the Court she did apply in April, 2019 for approval of a Development Plan she intended to carry out on the said property. It was not disputed that the said plan received the Respondents' approval sometime on 31st May, 2019.
9. According to the Petitioner, immediately upon receipt of the approval she thereafter started construction of the approved buildings under the full inspection of the Respondents' engineers. A couple of months after commencing construction, the Petitioner received a Letter dated 4th October, 2019 emanating from the 1st Respondent and signed by one Dr. Kwai Wanjaria stating as follows in the relevant portion:

“Re: Temporary Suspension Of Development Approval

The above subject refers.

We are in receipt of a complaint letter Ref. Mtihud/Hud/Ed/Nyi/Hg/28/143 dated 25th September, 2019 and a follow up letter Ref. Mtihud/Hud/ Ed/Nyi/Hg/28/144 dated 3rd October, 2019 (copies attached) in relation to the ownership of the plot which you are developing (Nyeri/Municipality Block 1/1404).

We hereby temporarily suspend your approved Development Plan Number 2019/282 until the issue of the Plot ownership is determined.

Please liaise with the Ministry of Transport, Infrastructure, Housing and Urban Development Officials to obtain clearance over the matter.”



10. It is the Petitioner's case that arising from this letter, she was forced to halt the construction as a result whereof she has suffered loss and damage. It is further the Petitioner's case that the letter was written without her being given a hearing and that the Respondents had no power to act in the manner which they did.
11. On their part, the Respondents did not deny that they had written the letter. It is their case that they have a legal and constitutional duty to ensure that development permissions and approvals are monitored and to ensure due compliance. Accordingly, the Respondents asserted that they may suspend any approval in instances of breach or discovery of material facts that were not within their knowledge at the time of approval.
12. It was further the Respondents' case that they were justified in temporarily suspending the development permission in this instance pending further inquiries on the controversy surrounding the ownership of the suit property. They assert that their actions did not amount to deprivation of the Petitioner's right to own property as enshrined under Article 40 of *the Constitution*.
13. In the matter herein, it was not denied that the Petitioner was the registered proprietor of the suit property and that she had received the requisite approval to carry out certain developments on the suit property. The Respondents did not dispute the contention by the Petitioner that prior to the stoppage of the construction on the suit land, the Petitioner had neither been consulted nor notified of the impending action.
14. As it were, the two Respondents herein are creatures of statute and hence required to act within the confines of the law. Under Section 17 of the Physical Planning Act No. 3 of 2019, the 1st Respondent is responsible for:
 - “(a) formulating a County Policy on Physical and Land Use Planning; and
 - (b) promoting the integration of County Physical and land Use Planning functions and sectoral planning levels.”
15. That being the case, it was clearly within the powers of the 1st Respondent to approve and disapprove development plans within the County of Nyeri. I was however unable to find anywhere in law where the office of the 1st Respondent was imbued with the power to resolve land ownership disputes as the 1st Respondent had purported to do herein.
16. Even where the 1st Respondent were to have such powers, it was clear to me that in so doing given the repercussions of his actions, the principles enunciated under Article 47 of *the Constitution* must apply. The said Article provides as follows:
 47. Fair Administrative Action:
 - (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.
 - (4) ...
17. By taking such drastic action of stopping construction which they had approved without giving any hearing to the Petitioner, it could not be denied that her rights had been violated. As was stated in



“... It is irrelevant whether the Tribunal would have arrived at the same decision even if it had afforded the parties an opportunity of being heard before making its decision. It must always be remembered that where a party has a right to be heard that right cannot be taken away by the mere fact that the Tribunal considers that the said Party’s contribution is unlikely to affect the decision. See Onyango Oloo -vs- Attorney General (1986 – 1989) EA 456:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard ...

There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice ... A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since

if the principle of natural justice is violated, it matters not that the same decision would be arrived at ... Denial of the right to be heard renders any decision made null and void ab initio.”

18. In the matter herein, it was clear to me that the 1st Respondent had clearly acted in excess of his powers as the complaint made to him was not about the Petitioner’s failure to abide by the approved development plans but the ownership of the suit property.
19. In the circumstances herein I am satisfied that the Petitioner has demonstrated that the drastic decision taken by the Respondents were ultra vires and tainted with illegality and procedural impropriety. It was also clear to me that those decisions had led to the Petitioner incurring losses as pleaded at Paragraph 3 of the Amended Petition.
20. I am equally satisfied that as a result of the Respondents actions, the Petitioner has suffered loss and damage as particularized at Paragraph 3 of the Amended Petition and that she was entitled to general damages for the violations of her rights.
21. Accordingly I hereby enter Judgment for the Petitioner as against the Respondents and make orders as follows:
 - (a) A declaration is hereby made that the Petitioner’s right to fair administrative action under Article 47 of *the Constitution* as read together with the *Fair Administrative Action Act* 2015 as well as her right to a fair hearing under Article 50(1) of *the Constitution* have been violated by the Respondents.
 - (b) A declaration is hereby made that the Respondents contravened the Petitioner’s right to property under Article 40(1), (2) and (3) of *the Constitution*.
 - (c) A declaration is hereby made that the letter dated 4th October, 2019 addressed to the Petitioner by the 1st Respondent is unconstitutional, null and void.
 - (d) A permanent injunction is hereby issued restraining the Respondents, their servants or agents from interfering with the Petitioner’s quiet enjoyment of the said Nyeri Municipality/Block 1/1404.
 - (e) Special damages of Kshs.1,576,820/- to be paid by the Respondents to the Petitioner.



- (f) The Respondents shall pay Kshs.2,000,000/- to the Petitioner as general damages for breach of her rights and to compensate her for the expected delay in completion of the building.
- (g) The Respondents shall also meet the costs of this suit.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 19TH DAY OF OCTOBER, 2023.

J. O. OLOLA

JUDGE

