



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 146 OF 2017

IN THE MATTER OF ARTICLE 23(3) (f) 40 AND 43(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 1 RULE 8 AND ORDER 53 RULE 1(3) OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF ILLEGAL EVICTION DEMOLITION OF RESIDENTIAL HOUSES, INSTITUTIONS AND BUSINESS PREMISES IN MUKURU KWA NJENGA NAIROBI

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

REPUBLIC.....APPLICANT

VERSUS

CABINET SECRETARY MINISTRY OF TRANSPORT AND

INFRASTRUCTURE.....1ST RESPONDENT

CABINET SECRETARY MINISTRY OF LANDS, HOUSING AND

URBAN DEVELOPMENT.....2ND RESPONDENT

DIRECTOR GENERAL KENYA URBAN

ROADS AUTHORITY.....3RD RESPONDENT

COUNTY GOVERNMENT OF NAIROBI.....4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....5TH RESPONDENT

EX PARTE

ALI GOLLE.....1ST APPLICANT

ELIJAH MAINA.....2ND APPLICANT

(Suing on their own behalf and on behalf of and representing all persons interested in and being residents in the affected Mukuru Kwa Njenga Area).

JUDGMENT

1. By a Notice of Motion dated 26th May, 2017 the exparte Applicants Ali Golle and Elijah Maina suing on their own behalf and on behalf of all the persons interested in and being residents on the affected Mukuru Kwa Njenga Area seek from this Court the following Judicial Review Orders:

a) An Order of certiorari removing into this Court and quash the decision of the 3rd Respondent, The Director General Urban Roads Authority (KURA) in conjunction with the 1st, 2nd and 4th Respondents namely: The Cabinet Secretary Ministry of Transport & Infrastructure, Cabinet Secretary, Ministry of Lands, Housing and Urban Development and the County Government of Nairobi respectively to construct a road through the exparte Applicants' residences, Schools and Other Institutions and consequently to irregularly and unlawfully, to evict and/or displace the exparte Applicants from part of all that area known as Mukuru Kwa Njenga Nairobi to pave way for construction of the said road.

b) Prohibition directed at the County Government of Nairobi, the 4th Respondent herein Prohibiting them from demolishing the exparte Applicants' residential houses, business premises and Institutions situate within Mukuru Kwa Njenga, Nairobi, to pave way for the intended Construction of a road passing through the area.

c) Costs of the Application.

2. The exparte Applicants' case is that they are residents of Mukuru Kwa Njenga area in Nairobi and have brought these proceedings on their own behalf and on behalf of all Persons interested in and being residents of the said area.

3. That in 2015, the Respondents decided to construct and develop Catherine Ndereba Road, passing through the said area and in April 2016, the 3rd Respondent engaged a consultant, **Illovi Consulting Engineers Ltd** to undertake a feasibility study preliminary and detailed Engineering Design, Environmental and Social Impact Study and Tender documentation of Nairobi Region missing links in Nairobi County in preparation of the planned project, to construct the said missing links.

4. It is alleged by the exparte Applicants that the said consultants initiated a survey of the area with the intention of expanding the road passing through the area without consent of the area Residents and that no meeting was convened to discuss the road expansion with the area residents.

5. That nonetheless, the Respondents purportedly held a meeting on 23.1.2012 in **Hossanah Prophetic Church Hall** which effectively excluded Muslim residents who could not converge in a church premises and that in the said meeting a resolution was passed authorizing Respondents to survey the Road. The Applicants lament that the purported attendees were fictitious and had no authority from the residents to represent other residents in the said meeting. It is also asserted that the area Chief never used proper channel to invite the residents to the said meetings.

6. That as a result thereof, the surveying company erected beacons marking off the area for the proposed construction and the building earmarked for demolition by the 3rd & 4th Respondents.

7. That brokers also emerged, and started intimidating, threatening and harassing tenants and Landlords. That despite efforts of residents to engage with the Respondents to discuss the issues involved, there was no success hence those proceedings.

8. The above facts are contained in the Applicant's statutory statement and supporting affidavit and supplementary and further affidavit sworn by Ali Golle and the verifying affidavit accompanying the Chamber Summons for leave.

9. The Respondents filed replying affidavits. According to the 3rd Respondent, through an affidavit sworn by Engineer Doreen Kirima on 27.9.2017, Kenya Urban Roads Authority, (KURA) is charged with the statutory mandate of constructing, maintaining, rehabilitating, developing and managing National trunk Roads in Urban areas in Kenya.

10. That the said **KURA** started decongesting Urban trunk roads by reinstating roads which had existed on paper on Cadastral Maps but missing on the grounds due to land grabbing, encroachment and uncontrolled growth and spread of Informal Settlements in Urban areas called "**Missing Links.**"

11. That the Mukuru Kwa Njenga area has one such missing link as per the cadastral Map, which is called "**Catherine Ndereba Road.**"

12. That therefore **KURA** engaged Illovi Consulting Engineers Ltd to undertake the feasibility study, preliminary and detailed Engineering design, environmental and social impact study and preparation of associated tender documentations, and that the said consultancy was procured in accordance with the **Public Procurement and Disposal Act** hence Legal and Regular.

13. That the deponent being part of the team from KURA personally attended some consultative fora, and that the consultant had organized meetings, barazas and consultative gathering variously attended by representatives of the affected residents/community elders/leaders, the clergy, County Administrators, Political and Opinion Leaders.

14. It is therefore contended that the consultancy and intention to re-establish the missing link road is legitimate, as consultations are ongoing

and an appropriate Resettlement Action Plan (RAP) enumerating them and providing them with resettlement allowances is being worked out and is to be implemented in concert with persons to be Affected by the Project (PAPS) hence no law nor rights are breached by the consultant nor the manner in which the study is being undertaken. The respondents annexed copies of minutes and attendance registers and contended that the Notice of the Applicants to KURA could not be responded to timeously because it was too short prior to these proceedings being initiated and that no leave was obtained to file supporting affidavit.

15. The 4th Respondent filed a replying affidavit sworn by F.N. Karanja acting Chief Officer Roads, Transport and Public Works, contending that the 4th Respondent was not aware of the proposed new Road passing through Mukuru Kwa Njenga nor an expansion hence the County Government is not in any way involved in such Public Works. Nonetheless, the deponent deposes that he is aware that KURA is mandated to carry out such projects and are implementing the project as part of the National Urban Road Network improvement. That in the absence of the County Government being involved in such project, the 4th respondent should not be held liable for actions of National Roads Agencies who have not consulted the County Government.

16. It was further contended that the Applicants had not demonstrated that they own the plots on the proposed project and that they are squatting on road reserves hence they cannot seek to stop such project that is being undertaken for the benefit of all Kenyans.

17. The exparte Applicants filed a supplementary affidavit sworn by Ali Golle on 8.11.2017 and a further affidavit on 13.11.2017 in response to the 3rd and 4th Respondent's affidavit reiterating the contents of his earlier affidavit in support while maintaining that some of the purported meetings allegedly held by the consultant were clearly intended to exclude some if not most affected Residents, who are Muslims by choosing to hold the meetings in locations like churches where Muslims could not attend, unlike if they were held at the Chief's Camps or other Public places.

18. That no posters were issued inviting residents to the meetings. That none of the identified affected institutions were invited to attend any of the purported meetings and that the committee allegedly appointed to lead the process had no authority from the residents hence there were no consultations.

19. That the purported chairmen of the residents were paid by the Government and consultants to attend meetings in secret hence the decision was made arbitrarily and in bad faith as the consultant marked *Mabati* [ironsheets] structures for demolition and left out the Chairman's permanent home interconnecting discriminately and that the link is a minor road a major road yet the measurement is wide; and that whereas the residents do not oppose development, they seek a free, fair and open process where proper consultations are done.

20. That no resettlement plan can take place without consulting hence the process is intended to evict the applicants from their area irregularly which is a violation of their Right to be compensated, Right to property and Right to adequate Housing; and that the demand Notice was short due to the urgency of the matter and that prior, the residents had sought audience with the 3rd Respondent to no avail.

21. That if the Applicants are evicted from their homes and business then they stand to be displaced and that even if there was a compensation or resettlement plan, there was no identification of genuine victims.

22. On the contention that no leave was obtained to file a supporting affidavit, it was deposed that in any case the application was supported by statutory statement and the verifying affidavit accompanying the Chamber Summons for leave.

23. In the further affidavit of 13.11.2017, Mr. Ali Golle deposed that the affidavit accompanying the Notice of Motion was erroneously titled as a supporting affidavit instead of a verifying affidavit which contents are said to be essentially the same as the verifying affidavit that accompanied statements of facts filed at the leave stage hence the error was that of the advocate which should not be visited upon clients and which error is curable under **Article 159 (2) (d) of the Constitution**.

24. The Parties' Advocates filed written submissions which they wholly adopted as canvassing the Motion both for and against the Judicial Review orders sought.

25. In the exparte Applicants' detailed submissions filed on 21.11.2017, it was submitted on two issues namely:

(a) Whether the decision undertaken by the 3rd Respondent was illegal, arbitrary, unreasonable, made in bad faith and made in conformity with the rules of Natural Justice.

(b) Whether the decision should be quashed.

26. On the first issue above, the Applicants maintained that the decision by the 3rd Respondent was arbitrary, unprocedural and made without any consultations with the residents. That no Public participation took place prior to the impugned decision being reached and that the decision contravenes the United Nations Basic Principles and guidelines in regard to development based eviction and settlement, 2007, which form part of the Laws of Kenya by virtue of **Article 2 (5) and (b) of the Constitution of Kenya, 2010**. Reliance was placed on the decision by Odunga – J. In **R Vs. C.S. Ministry of Transport and Infrastructure & 3 Others exparte Francis N. Kiboro & 198 Others [2015] eKLR** where the Learned Judge cited Lenaola – J., in **Safrose Ayuma & 11 Others Vs Registered Trustees of the Kenya Railways Staff Retirements Benefits Scheme & 3 Others Petition No. 65/2010** and warned against notorious forced evictions without adequate warning and compensation and called to enactment of Laws regarding evictions as echoed by Musinga– J., (*as he then was*).

27. The Applicants maintained that some minutes purportedly reflecting meeting held had fictitious attendees who are unknown to the residents while others have fictitious positions such as Peter Ndung'u allegedly being Chairman of Wape Wape which is not true.

28. Further, that the Committee allegedly appointed to lead the process pursuant to the alleged meeting was never elected by the affected squatters, to attend any such meetings on their behalf and that in addition, it was submitted that the Baraza allegedly held on 23.1.2017 following previous meetings was held in church however, it excluded Muslims who could not enter the church for religious reasons.

29. That the area Chief never notified residents of the need to converge and discuss the intended constructions. Further, that Public participation and consultation being a national value under **Article 10 of the Constitution** could not be ignored as was held in **R Vs. IEBC exparte NASA Kenya & 6 Others [2017]** by a Three Judge Bench citing a South African Constitutional Court, in **Doctors for life International Vs. The Speaker of the National Assembly & Others [2006] ZACCII** where it was *emphasized that Members of the Public must be accorded a reasonable opportunity to know about the issues at hand contribution and say on such issues, then it is possible to say that there was public participation*

30. On the threshold for Public participation, the case of **Mui Coal Basin Local Community [2015] eKLR** was referred to. It was also submitted that the purported meetings if at all they took place excluded Muslims by holding the meetings in a church and further, that the decision violated the rules of natural justice. Reliance was placed on **R Vs Board of Governors, Our Lady of Victory Girls School Kapnyeberal & Another Exparte Korir Kipyego Joseph & Another [2015] eKLR** where it was held *inter alia* that no man shall be condemned unheard or be a Judge in his own cause. In this case it was submitted that no notice of consultative meetings was ever given to accord the residents an opportunity to express themselves hence there could be no fairness as was held by Odunga – **J in R Vs. National Police Service Commission Exparte Daniel Chacha Chaka [2010] eKLR** citing **Halsbury's Laws of England 5th Edition 2010 Vol. 61 Para 639**.

31. It was further submitted that the decision was unreasonable, irrational and biased since there is an alternative road but the Respondents simply want to expand Catherine Ndereba Road to inconvenience Residents as it is a very narrow road hence the expansion will negatively affect Socio-Economic livelihoods of the area residents namely, Schools, Mosques, Churches, business premises, Police Post among others.

32. That failure to consider expanding the alternative viable road is failure to take account of relevant considerations. Further, that there was no authenticity of the purported representatives of residents who allegedly attended consultative meetings. Reliance was placed on **R Vs. District Land Adjudication Officer, Tigania East District Exparte Joseph M'ingala (Deceased) (2016) eKLR** where **P.M. Njoroge J.** held *inter alia*, that there can be no regularity in a decision making process where there has been illegality irrationality, procedural impropriety and breach of the principles of Natural Justice.

33. On the second issue of whether the decision should be quashed, it was submitted in the affirmative for reasons among others, that the Respondents violated the Applicant's right to fair administrative action as stipulated in **Article 47 of the Constitution, Articles 40, 28 and 29 (c)** thereof on the right to protection of property, right to human dignity and the right to security of the person respectively which latter rights were being threatened since there had been no consultation or enumeration on who would benefit from the alleged resettlement or compensation.

34. That the area houses subsidized Educational Institutions, places of worship and disadvantaged families who number over two thousand and who will be adversely affected by the intended action if (carried out without consultations. Further, that displacements will give rise to insecurity in the area hence this Court has Jurisdiction under **Article 23 (1) of the Constitution** to hear and determine the application herein on threatened violations of people's rights to ensure that the applicants are given fair treatment. Reliance was placed on **Commissioner of Lands Vs Kunste Hotel Limited [1997] eKLR**.

35. It was submitted that the threats complained of were real as beacons were already installed and marked and Surveyors/Consultants already procured.

36. It was also submitted that the purported Minutes of 30.10.2017 were neither signed nor dated. Further, that it was not denied that the impugned decision exists as was stated in the IEBC (Supra) case by a three Judge Bench.

37. The Applicants asserted that they were concerned with the decision making process and not the merits of the decision and urged the Court to grant the orders sought.

38. On the part of the 1st, 2nd 3rd and 5th Respondents represented by the 5th Respondent Attorney General, submissions were filed much earlier on 30.10.2017 contending that there is no merit in the motion herein. The Respondents framed two issues for determination namely:-

(a) Whether the failure to attach the decision to be quashed is fatal; and

(b) Whether the Applicant has met the threshold for the grant of Judicial Review remedies of certiorari and prohibition.

39. On the first issue, it was submitted that failure to attach a decision impugned as stipulated in **Order 53 Rule 7(1) of the Civil Procedure Rules** is fatal to these proceedings since no explanation has been given for failure to annex the said decision for the Court and parties to ascertain precisely which decision is under challenge. When it was made and to whom it was addressed. Reliance was placed on the decision in **Waweru Vs. District Veterinary Officer, Maragua & Another [2006] 1 (E & L)** where Wendoh J., held that it was mandatory to annex a decision which was sought to be quashed so that the Court knows whether it exists, its nature and content and avoid acting in vain or giving an order which may end up being contradictory and an embarrassment to the Court.

40. Further reliance was placed on **R Vs Mwangi S. Kimenyi exparte Kenya Institute of Public Policy & Research Analysis (KIPRA) (2013) eKLR** where the Court of Appeal underscored the need to ascertain itself of the existence of orders before granting an order of certiorari.

41. On the second issue of whether the Applicant had met the threshold for the grant of the Judicial review remedies of certiorari and

prohibition, it was submitted that the minutes of 27.3.2017 are not a proper decision for quashing as they are neither signed nor dated. Reliance was placed on **KNEC Vs R ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** to submit that only an order of certiorari can quash the decision already made and where such decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for like reasons.

42. The Respondents submitted that they had not made any decision which is without or in excess of their jurisdiction or in non-conformity with the rules of natural justice. Further, that the mandate of KURA is stipulated in the Kenya Roads Act, 2007 and that what KURA and is as stipulated in the affidavit sworn by Engineer Doreen Kirima on 27.9.2017.

43. That therefore the consultant was on the ground carrying out a feasibility study so as to inform the decision on whether or not and how and when to re-establish the missing link but that no construction was ongoing as alleged by the applicants.

44. It was also submitted that the consultancy was properly procured and that there was no compulsory acquisition of land alluded to by the applicants but that the Respondents only wish to establish a missing link and that matters of compulsory acquisition & or ownership would be dealt with by the Environment and Land Court.

45. On whether prohibition should issue, the case of **Geoffrey Gathenji Njoroge** (Supra) was cited and a submission made that the applicants had in this case not demonstrated that they are deserving of the orders sought hence the Notice of Motion should be dismissed truth costs to the Respondents.

DETERMINATION:

46. I have considered the foregoing and in my humble view, the main issues for consideration in this matter are:

(1) Whether failure to attach (annex the impugned decision is fatal to the motion herein.

(2) Whether the Applicants are entitled to the orders sought.

(3) What orders should the Court grant.

(4) Who should bear costs of this Application and proceedings?

47. On the first issue of whether the Applicant's alleged failure to annex the decision sought to be quashed is fatal to these proceedings, the Respondents contended that failure to annex the impugned decision to be quashed is fatal to the prayer for certiorari. They relied on **order 53 Rule (7) (1) of the Civil Procedure Rules** which stipulates that:

“In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the Applicant shall not question the validity of any Orders, Warrants, Commitment, Conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the Registrar or accounts for his failure to do so to the satisfaction of the High Court.”

48. Reliance was also placed on **Waweru V. District Veterinary Officer Maragua and Another (Supra)** where Wendoh – J., stated that it is mandatory to lodge the decision sought to be quashed, so that the Court can know whether the order does exist, its nature and contents and avoid acting in vain or giving an order that may end up being contradictory and an embarrassment to the Court.”

49. Further reliance was placed on **R Vs. Mwangi S. Kimenyi** (Supra) where the Court of Appeal held that the judge was correct in his judgment when he stated that the Court cannot act in vain against a non-existent decision and that as there was no letter or decision that could be called and removed into the High Court to be quashed, the judge could not have quashed a non-existent decision.

50. Further, that a Court of law should not descend into speculation. The decision to be quashed must first be in existence, which then becomes the rationale for calling and removing into court a decision to be quashed.

51. The above legal position cannot be wrong. The respondents are entirely correct that there must be a decision capable of being quashed and I entirely agree.

52. The only question that I must pose, therefore, arising from **Order 53 Rule 7 (1) of the CPR** and the above two cited cases is whether there is or was any decision made by the Respondents jointly or by either of them capable of being quashed by this Court.

53. To Counter the above position as articulated by the Respondent's Counsel Ms. Maina, the exparte Applicants counsel cited the decision in **R. Vs IEBC exparte National Super Alliance (K) & 6 Others [2017] eKLR** which is a three judge High Court Bench decision where the Court held, inter alia.

“In our view, the requirement that a decision be exhibited serves two purposes. Firstly it is meant to confirm that a decision in actual fact exists and that the Court is not being asked to quash a non-existent decision. Secondly, it is meant to confirm whether the Applicants is within the statutory timelines prescribed for the purposes of an Application for certiorari. Where, therefore, it is conceded that there exists a decision and that the said decision falls within the prescribed time for challenging the same, the omission to exhibit the same is curable under Article 159(2) (d) of the Constitution.

..... Accordingly, whereas in this case the decision sought to be quashed was not exhibited, since it is not in doubt that the decision in fact exists, to dismiss the application simply on the technical ground that the decision was not exhibited would amount to elevating procedural Rules to a fetish. We therefore decline to determine this application based merely on the failure to exhibit the decision sought to be quashed.”

54. It is the view of this court that the decisions cited by both sides of the dispute speak to one factor – that the Court must first determine whether there is a decision sought to be quashed or capable of being quashed. And as to whether there is a decision capable of being quashed, the Court must examine the prayer subject of the impugned or alleged impugned decision, while focusing on the decision in the Mwangi Kimenyi [supra] case which is a Court of Appeal decision and which is binding on this Court.

55. The exparte Applicants in their Notice of Motion dated 26.5.2017 sought the following Order.

1 (a) An Order of Certiorari to remove into this Honourable Court and quash the decision of the 3rd Respondent in conjunction with the 1st, 2nd and 4th Respondents herein to construct a road through the applicant’s residences, schools and other institutions and consequently to irregularly and unlawfully evict and/or displace the exparte Applicants from part of all that area known as Mukuru Kwa Njenga Nairobi to pave way for the construction of the said road.”

56. In the Replying affidavit sworn by Engineer Doreen Kirima on 25.9.2017, there is no denial that the Respondents had embarked on the process of construction of the missing link as per the cadastral map of Catherine Ndereba Road and had gone ahead to procure a consultancy to undertake a comprehensive study to inform the decision whether or not and how and when to re-establish the missing link.

57. The said deponent was categorical that the consultancy was regular, intended to re-establish the missing link road and that residents or persons to be affected PAPs had and were being consulted and an appropriate Re-settlement Action Plan (RAP) enumerating them and providing them Resettlement allowances was being worked out and was to be implemented in concert with the (PAPs).

58. The Applicants in the verifying affidavit gave a historical background to the issues which are canvassed culminating in meetings or Baraza’s being held on 23.1.2017 and which they claim was a sham as the persons who allegedly attended had no authority to represent the residents.

59. In my humble view, there is a clear admission by the Respondents that a decision was made to re-establish a missing link road in the area and that it was upon such decision being taken that the Respondents embarked on what they call consultative meetings with area leaders and residents with a view to carrying out a comprehensive study of the project by a consultant, before the actual works of construction/expansion of the road could be undertaken.

60. Accordingly, I find that there was a decision made to undertake the works complained of and therefore capable of being quashed by this court.

61. The second issue is whether the Judicial Review orders sought are available to the exparte Applicants.

62. The Applicants in challenging the decision by the respondents to undertake any construction works on the Catherine Ndereba Road being a missing link, claim that the decision was made arbitrarily, was unreasonable and illegal because there was no consultation or Public participation by the area residents in the process of such decision making contrary to **Article 10 of the Constitution** and that such construction which would threaten their livelihoods was unconstitutional as there was no discussion on the ground on compensation of the residents who have also invested in the lowly area.

63. The Respondents on their part contend that if resettlement would be necessary then a Resettlement plan and a compensation plan would be in place otherwise the Respondents had only but engaged a consultant to carry out a feasibility study and advise the relevant Government Departments on what, when and how to re-establish the missing link.

64. The Applicants on the other hand claim that their premises were marked for demolition with beacons on the extent of the intended road expansion hence they were apprehensive that their rights to housing and dignity would be violated without being accorded a hearing.

65. It must be understood from the onset that Courts of Law derive their Judicial authority from the people on whose behalf Judicial authority is exercised. It follows that Courts of Law cannot and should not be seen or perceived to be anti-development or to inhibit development or activities that bring development to the County and for the benefit of the Citizens especially the lowly, like the exparte Applicants herein.

66. Courts themselves are beneficiaries of development projects that are undertaken by the government at either national or devolved levels.

67. However, where administrative decisions taken are likely to affect the rights of individuals then those persons must be accorded a hearing before such a decision is made.

68. The Applicants claim that they were never given a hearing before a decision to re-establish a missing link in the area was made which decision in their view, if implemented, will see the demolition of their residences, schools, Police Station, Mosques, churches and training institutions which are the residents’ backbone and that the earmarked expansion was being done in a biased manner because some peoples’ business premises which were on the road were being left out, whereas those residents whose premises were in the interior were earmarked for demolition at the implementation stage.

69. The Respondents on the other hand contend that they accorded the area Residents a hearing through consultative fora with the consultant. However, the minutes of the purported meetings between the project team members and area residents are not signed hence it is not possible for this Court to establish the authenticity of the said minutes. Secondly, it is not denied that the area in question is highly densely populated and therefore where there is any activity that would affect the Socio-economic livelihoods of the people, then it is important that those residents are consulted, not just through their zonal leaders but in their own right so that they can have their day and their say in the decision making processes as the decisions being made are likely to affect their socio-economic lives.

70. Furthermore, there is no affidavit from any of the purported participants in the alleged consultative meeting whose minutes are not signed.

71. In addition, the Respondents never exhibited a single Notice issued to the residents whether by way of posters or newspapers, advertisements, or otherwise, to the residents communicating to the residents requiring them to attend any scheduled consultative meetings for public participation and/or views gathering on the intended re-establishment of a missing link in the area. It is expected that such consultative public participation meetings are conducted prior to procurement of a consultant to undertake the comprehensive study so that as he embarks on his assignment, he has the public buy-in, to avoid wastage of Public resources in situations where such projects abort, for one reason or the other.

72. Since August 27th 2010, the people of Kenya decided on how they wish to be governed and to govern themselves. They made a conscious decision to be involved in decision making processes especially where the contemplated decisions is likely to affect their legal rights. It is for that reason that Article 10 of the Constitution espouses National Values and Principles of Governance and one such principle and value which binds all, this Court included, is the public participation value/principle.

73. It follows that before decisions of such magnitude as would affect the livelihoods and rights of people are reached, those people must be accorded reasonable opportunity to know about the issues at hand and make known “their contributions and say on such issues, for public participation to be seen to have taken place.” Anything short of that is a violation of the principle and value of public participation. Justice **Albie Sachs of the Constitutional Court of South Africa in the SA case of the Minister of Health Vs. New Clicks South Africa Ply Ltd [2005] ZACC** stated.

“The forms of facilitating an appropriate degree of participation in the law making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

74. A Similar position was adopted in **Doctors for Life International Vs. The Speaker of the National Assembly and Others [2006] ZACC 11** where it was stated that:

“The Phrase “facilitate Public Involvement” is a broad concept, which relates to the duty to ensure public participation in the law making process. The key words in this phrase are “facilitate” and “involvement.” To “facilitate” means to “make easy or easier,” “provide” or “help forward.” The Phrase “Public involvement is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of “involve” includes to “bring a person into a matter” while participation is defined as “(a) taking part with others (in an action or matter)... The active involvement of members of a community or organization in decisions which affect them.” According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participate in something. It is possible to say that there was public participation.”

75. In this case, it is not in doubt or denied that the Applicants as residents of the area which is affected by the intended development are owed a duty by the Government. That duty includes the duty to develop the area infrastructure and other social amenities, being public goods. In the process of performing that duty, the Government must however be conscious of its other duty to involve the residents in decision making process since such development projects affect the residents both positively and negatively. The negative aspects of such development include uprooting the residents from the area. I must however, point out that the issue of compulsory acquisition of land or compensation to the residents does not arise since the residents have not claimed that they are absolute or leasehold owners of the area they are occupying. If that were to be the case then this Court would not be the right forum for ventilating such grievances. The Environment and Land Court would be the Court vested with jurisdiction to hear and determine issues relating to ownership, compensation and/or occupation of land.

76. What this Court in exercise of its Judicial Review Jurisdiction is concerned with is whether the Applicants were accorded the right to participate in decision making process before a decision to re-establish the missing link and therefore the intended works was made.

77. Citing with approval the **Doctors for life International (Supra) case, the Court in Robert N. Gakuru and Others Vs. Governor, Kiambu County [2014] eKLR cited in R Vs. IEBC Exparte NASA Kenya & 6 Others [2017] eKLR** (a three Judge Bench of Ngugi J., Mativo – J., and Odunga – J., held inter alia, concerning Public participation principle:

“..... Public participation ought to be real and not illusionary and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of Public participation is attained both quantitatively and qualitatively.”

78. In the NASA (Supra) case, the three judge Bench emphasized the essence of Public participation as was captured in the case of **Poverty Alleviation Network & Others Vs. President of South Africa & 19 Others [2010] ZACC5** where it was stated inter alia:

“..... Engagement with the Public is essential. Public participation informs the Public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the Public, the result can never be an informed decision.”

79. I am also in agreement with the 3 judges' expression which I hereby adopt that:

***“170. Therefore, Public participation is not a mere cosmetic venture or a public relations exercise. In our view, whereas it is not to be expected that a public agency or state organ would be beholden to the Public in a manner which enslaves it to the Public, to content that Public views ought not to count at all in making a decision whether or not a procurement affecting the provisions of the Bill of Rights ought to be undertaken and in what manner, would be to negate the Spirit of Public participation as enshrined in the Constitution*”**

80. Albeit the decision in the above case concerned Public Procurement, the principle espoused therein on Public participation in decision making process is relevant to the circumstances of this case.

81. The remedies sought by the *ex parte* Applicants are certiorari and Prohibition. These are Judicial Review remedies which are no longer mere common Law prerogative writs. The remedies are espoused in the Constitution. They are available as remedies where the Court finds and holds that, in the process of decision making, the administrator is likely to violate or has violated the Constitutional rights of the persons aggrieved by the process.

82. As was stated in **Republic *ex parte* Chudasama Vs. The Chief Magistrate's Court, Nairobi & Another [2008] 2 EA 311**, *Inter alia*:

“..... the Government is a Government of Laws and not of mess and will certainly cease to deserve this high Appellation if the Laws furnish no remedy for the violation of a vested legal right.”

83. In this case, the vested legal right is the right to Public participation and involvement in Public affairs and decision making process of the Applicants whereas the duty of the Respondents is that of ensuring that they involve the Public in decision making process, where the decisions to be made would affect these Public right or interests.

84. I reiterate that it is not the Responsibility of any Court of Law to unduly interfere with the Executive when the latter lawfully and procedurally exercises its powers and performs its functions. However, this Court is vested with Jurisdiction to maintain and uphold the Constitution and the rule of Law, the latter being the hallmark of democracy. Our Country's Constitution is anchored on such pillars as the rule of law, democracy Public participation, non-discrimination among others. There is therefore no room for anarchy. Anarchy, whenever it manifests its head, injures the citizens who have delegated their power to the State Organs to exercise on their behalf. This Court exists to check on such anarchy and/or its manifestations.

85. Albeit the Respondents contend that there was Public participation in making of the decision to re-establish the missing link, the documents annexed show otherwise. The “minutes” so called are unsigned, there is no affidavit, not even of an area Chief to confirm that the process was all inclusive and to make it worse, some of the purported meetings were held in church premises as if there was no other neutral place to hold such meetings, in an area which is inhabited by both Christians, Muslims and neither of the two namely, those who do not profess either of the two faiths.

86. Meetings in religious places of worship are only acceptable if they are or were targeting a specific religious groups and not otherwise.

87. Some of the residents in the area affected by the decision are Muslims and therefore it would have been appropriate if meetings were also held in Mosques to ensure full participation of Muslims as well.

88. In the alternative, it would have been ideal to hold such meetings in places such as integrated schools/Public Schools, Chief's Office areas or at any other Public places. In **R Vs. The Attorney General and Another *ex parte* Hon. Francis Chacha Ganya** (JR Nos. 374/2012) the Court stated *inter alia*:

***“.....a Public participation programme must, however, show intentional inclusivity and diversity. Any clear and Intentional attempts to keep out bonafide stakeholders would render the public participation programme ineffective and illegal by definition*”**

89. On what orders should this court grant, this Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. The Applicants have sought for certiorari to quash the decision made by the 3rd Respondent jointly with the 1st & 2nd & 4th Respondents to construct a road through the *ex parte* Applicant's residences, Schools and Other Institutions and to consequently irregularly and unlawfully evict or displace he *ex parte* Applicants from part of all that area known as Mukuru Kwa Njenga Nairobi to pave way for the Construction.

90. Accordingly, in view of the above analysis and findings, the appropriate order for this Court to make is to bring into this Court for purposes of quashing and to quash the decision made by the Respondents jointly and severally, to construct a road through the Applicant's residences, schools and other Public and private institutions which decision was reached without involving the Applicants. I further order that any such future decision shall only be reached upon carrying out Public Participation and adhering to principles Public Participation by involving the area residents of Mukuru kwa Njenga, Nairobi.

91. In addition, as there is no material to demonstrate any illegal/irregular eviction or displacement of the Applicants from the area, I decline

to grant prohibition. I also decline to grant the second part of the prayer for certiorari which should essentially have been a separate prayer but which is lumped up as one.

92. The Applicants also seek for prohibition directed at the 3rd Respondents prohibiting them from demolishing the exparte Applicants residential houses, business premises and Institutions Situate within the Mukuru Kwa Njenga, Nairobi to pave way for the intended Construction of a road passing through the area.

93. This Court, upon assessing the facts as presented and the Applicable Law is persuaded that the decision making process was procedurally unfair and therefore faulty. The Applicants were never part of the decision making process in matters development of a road which would affect their rights and interests. The Applicants are entitled as a matter of right to Public participation in matters that would affect them whether positively or negatively. On the part of the Respondents they are under a legal or Constitutional duty to involve the Applicants in decision-making processes. They failed to do so. Accordingly, a prohibition is hereby issued prohibiting the respondents from carrying out any eviction of the applicants from their Mukuru Kwa Njenga residences and or demolishing their premises or institutions in the area until after consultations and public participation exercise is undertaken and the applicants are given a hearing on the legitimacy or merits of their claims.

94. Each Party shall bear their own costs of these Judicial Review proceedings.

Dated, Signed and Delivered in open Court at Nairobi this 28th day of September, 2018.

R. E. ABURILI

JUDGE