



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 12 OF 2017

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS OF FUNDAMENTAL FREEDOMS UNDER ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE COUNTY GOVERNMENT ACT 2012

AND

IN THE MATTER OF: PHYSICAL PLANNING ACT, CHAPTER OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015

KOOBA KENYA LIMITED.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

JUDGMENT

The Petition

1. The Petition herein is dated 16th February, 2017 and filed on 17th February, 2017. The Petitioner is a limited liability company incorporated in Kenya while the Respondent is the County Government of Mombasa.

The Petitioner's Case

2. The Petitioner alleges that it was established in 2015 so as to set up and operate the very first data centre in Greater East Africa (hereinafter "*the Project*") - a carrier neutral collocation for the entire region comprising Kenya, Tanzania, Uganda, Rwanda, Ethiopia, Burundi, DR Congo, Malawi, Mozambique, Somalia, South Sudan and Zambia. It is alleged that between 2010 and 2014, the region has experienced substantial growth in internet connectivity, with installed capacity increasing from zero

to 14 tbps since 2009, a growth spurred in large part by installation of submarine cables including SEAs, TEAMS, SEACOM, LION2 and EASSY. Colocation data centre supply has not kept pace with this bandwidth and connectivity explosion. The entire region outside South Africa, Mauritius and Sub-Saharan Africa has only five of them which are carrier neutral with only Google present in East Africa having a private IXPs. A carrier neutral data colocation centre, such as the one the Petitioner seeks to establish is important to multinationals, content providers, government and bank/financial customers who at present are forced to use centres located in Europe and elsewhere. In pursuit of the Project, the Petitioner alleges that it identified and acquired all that piece of land then known as Land Reference Number MI/1017/XXVI (**“the Project Land”**)- [now **MOMBASA/BLOCK XXVI/1017**]-which is situate at Kizingo Area, Mama Ngina Drive, Mombasa, from Telkom Kenya Limited. This acquisition was driven by the strategic location of the Project Land approximately 200 metres from the Seacon Landing Station and its close proximity (less than 1km) from where the TEAMS, LION AND EASSY submarine cables land. After the acquisition of the Project Land, the Petitioner, alleges that it directly or through its agents and/or consultants begun the process of obtaining the requisite statutory approvals and/or licenses from the relevant agencies. On or about July, 2015, the Petitioner, which was still in the process of being formed, applied for a change of user with respect to the Project Land by filing the requisite Form PPA1 and submitted it together with the planning brief prepared by the physical planner it had engaged. The said change of user was from *“Kenya Posts & Telecommunication Training School”* to *“Commercial Telecommunication & Ancillary Purposes”*. The Respondent thereafter sought comments from the District Physical Planner, District Surveyor and District Land Officer all of whom expressed no objections to the application for change of user. The Petitioner also placed two advertisements one in the Saturday Nation and The Standard both appearing on 11th July, 2015 with a view to informing the public about the intended change of user. The said application was approved on 16th November, 2015 after all the relevant agencies which had been consulted had endorsed it. The Petitioner is aware that the following correspondence and/or notification from the relevant agencies with respect to that application were submitted to the Director County Planning and Architecture:

- a. Letter of no objection from the District Surveyor, Mombasa dated 11th August, 2015;
- b. Letter recommending the approval from the Chief Land Administration Officer dated 14th August, 2015;
- c. Letter of no objection from the County Physical Planner dated 1st October, 2015;

3. On 3rd February, 2016 the Ministry of Lands granted Approval for the change of user subject to certain conditions being met. The Ministry of Lands also forwarded the revised rent valuation by a letter dated 15th February, 2016, which the Petitioner paid. Subsequent to this, the Ministry of Land and Planning issued the aforesaid Certificate of Lease to the Petitioner by letter dated 5th September, 2016. The Petitioner also applied to the National Environmental Management Authority (*“NEMA”*) for an Environmental Impact Assessment License for the Project in accordance with the Environmental Management and Coordination Act, Act No 8 of 1999. On 8th September, 2015, NEMA granted a license for the *“Construction of a data center comprising a three storey office complex, 2No. two storey buildings, 2No. 24,000 litre underground diesel tanks, associated facilities and amenities”*. The Petitioner also submitted the Project building plans to the Respondent for approval by the Project architects. As the Petitioner was unable to upload the building plans online as required, hard copies of the same including the engineering drawings were submitted to the Respondent.

4. On 29th October, 2015, the Respondent notified that said architects that the building plans had been approved. Having obtained these licenses and/or approvals, the Petitioner pushed ahead with project arranging for financing, mobilising resources, promoting the project and securing clients/customers. In the meantime, the Petitioner’s consultants finalised the building plans as well as other arrangements to ensure the timely completion of the project. The Petitioner also negotiated supply contracts with respect to/suppliers Flexend user and Bulkon. It is alleged that the said contracts have been finalized and are awaiting execution. The Petitioner made arrangements to commence construction. As part of these arrangements, its aforesaid architects submitted to the Respondent the detailed plans for issue of a

Certificate of Approval as well as stamping in line with the prior notification of approval which had already been given. Subsequently there was a meeting between the Project architect and the County Lands Executive member who requested for certain documents that were supplied. However, the Petitioner states that the Respondent unexpectedly raised objections with respect to the Project as a whole. Upon inquiry, the Petitioner states that the Respondent has, orally, raised several non-particularized ever-changing reservations such as security, traffic congestion, alleged misrepresentation as to the identity of the Project proponent, the status of the land among others. In effect despite the Petitioner's entreaties, the Respondent has refused and/or neglected to issue the certificate of approval and stamp the building plans, which according to the Petitioner is a mere administrative task following its approval for the same as notified to the Petitioner on 29th October, 2015. As a consequence of delay in commencing the Project as occasioned by the Respondent's refusal to issue the Certificate of Approval, the Petitioner now alleges it has incurred substantial loss, which it continues to incur each day the Project is delayed further. The Petitioner particularized the losses incurred as at February, 2017 as follows:

Expenses	Cost each month in US\$	Cost for 3 months in US\$
a. Operating Expense Burn	105,520	316,560
b. Lost Revenue	340,515	1,021,545
Total Damages		<u>1,338,105</u>

5. The Petitioner's case is that if the Project has to be abandoned, the lost returns to the investors of the amount of US\$ 3,512,228 invested to date will amount to US\$ \$17,034,306. The Petitioner's case is that unless construction commences forthwith, there is a real risk that the Project will collapse with various strategic investors pulling out with even greater losses forecasted.

6. Arising from the foregoing, the Petitioner's case is that the Respondent should be compelled to approve the drawings and the Petitioner prays for the following orders:

- (i) A declaration that the Respondent has violated the Petitioner's rights under Article 47 of the Constitution;
- (ii) An order compelling the Respondent to stamp and return the Petitioner's building plans;
- (iii) An order compelling the Respondent to issue a Certificate of Approval;
- (iv) An order for compensation for the amount of US\$ 1,338,105 with respect to damages incurred;
- (v) Such other and/or further relief as this court may deem fit and just to grant; and
- (vi) The costs of and occasioned by this Petition be provided for.

The Response

7. The Petition is opposed by the Replying Affidavit sworn by **Paul Manyala**, a director of Physical Planning and Architecture of the Respondent, on 24th March, 2017. The Respondent's case is that the Petition filed herein is bad in law, frivolous, misconceived and an outright abuse of process of this court and ought to peremptorily be struck out with costs as having failed to satisfy the threshold requirement for the issuance of the prayers sought. The Respondent's case is that it is a stranger to the allegations made by the Petitioner as it has never had any dealings with the Petitioner. So far as the Respondent is concerned, the records at the Physical Planning department reflect that an application for development permission was made on 11th August, 2015 by East African Capital Partners Limited ("EACP") and an approval was subsequently granted on 29th October, 2015 to the said EACP. The Respondent's case is

that the building plans submitted for stamping and approval at the Respondent's Physical Planning department bear the name of EACP and were paid for by EACP and not the Petitioner. The Respondent denies receipt of the Exhibit marked "RB 8" in the Supporting Affidavit to the Petition. It is a letter informing the Respondent that the said EACP was the Petitioner's agent and that the approvals should be made in the name of the Petitioner. The Respondent's case is that even if they were to assume that the Respondent indeed received the letter, the same is insufficient to enable the Respondent act in the circumstances of this case. The Respondent draws to attention of this court that the Petitioner who alleges that it bought the Project Land from Telkom Kenya Limited never effected a Memorandum of Rates Transfer of Title ("MRTT") from Telkom Kenya Limited to its name in order to regularize the Respondent's Valuation Roll records. Accordingly, as the Respondent's records at the Land Rates office at present reflect, the Rate Payer is still Telkom Kenya Limited and the account is in arrears in the sum of Kshs. 248,640.00. The Respondent's case is that it only issues approvals to a party that applies for the same. From the foregoing, it is quite clear that Petitioner did not apply for the development permission but rather the same was done by EACP who are not a party to this Petition. In the Respondent's view the correct approach to be employed by the Petitioner in the circumstances would have been as follows:

- (a) First, the Petitioner should have ensured that all arrear property rates are cleared by Telkom Kenya Limited and the rates account is paid up to date at the point of purchasing the property.
- (b) Thereafter, the Petitioner should have effected a MRTT from Telkom Kenya Limited's name to its name in order to update the records on the Respondent's Valuation Roll.
- (c) Finally, the Petitioner ought to have written to the Respondent and returned the Notification of Approval issued to EACP on 29th October, 2015 and also enclosed a copy of the Title evidencing ownership to the Project Land and requested for the amendments to be effected in their favour.

8. Based on the foregoing, the Respondent's case is that it would be in a better position to act and effect the necessary changes. As it stands, the Respondent's case is that it has already made a decision to issue a Notification of Approval to EACP on 29th October, 2015 subject to conditions. Accordingly, a Certificate of Approval can only be issued to EACP should they approach the Respondent for the same.

Submissions

9. Parties made oral submissions in court. **Mr. Amoko** for the Petitioner cited Article 47 of the Constitution which provides *inter alia* as follows:-

"47(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."

10. Mr. Amoko submitted that having already approved the building plans and notified the Petitioner of such approval, the Respondent has no or no lawful authority to decline to issue a Certificate of Approval and stamp the building plans. Further, the Respondent has not explained its reason for failure to approve the said plans. Counsel submitted that the lack of transparency with respect to the Respondent's statutory duty insofar as the approval of the plans runs afoul of the Petitioner's right to reasonable, lawful and procedurally fair action. Despite engaging the Respondent severally, to date the Petitioner is unable to establish the real reasons why the Respondent has declined to act, the legal basis for such inaction and when if at all, the Respondent will communicate its decision. Mr. Amoko also referred to Articles 27 of the Constitution and the Fair Administrative Action Act. Counsel submitted that Article 27 of the Constitution provides so far as material to these proceedings that "*every person ... has the right to equal protection and benefit of the law.*" One of the national values and principles of governance enshrined in the Constitution includes "*good governance, integrity, transparency, and accountability.*" By declining to stamp the building plans as well as issue a Certificate of Approval, counsel submitted that the Respondent has betrayed these values as well as denied the Petitioner the protection and benefit of the

law. Counsel submitted that the Petitioner relied and acted upon the approvals and licences which the Respondent had issued and/or given under the Physical Planning Act in discharge of its obligations under the County governments Act, 2012. The Petitioner had a legitimate expectation that having already granted approval of the building plans as well as the change of user, the Respondent would timeously stamp the plans when presented and issue the Certificate of Approval. Mr. Amoko submitted that the Respondents' inaction violates sections 2(c), (e), (h), (j) and (m) of the Fair Administrative Action Act, 2015.

11. **Mr. Obinju** for the Respondent submitted that the Petitioner's assertions that the Respondent ought to issue written reasons for declining to issue approvals cannot stand. Mr. Obinju submitted that the Respondent is indeed not obligated to communicate any reasons to a party that is clearly a stranger to it. Counsel submitted that the Respondent has never received any formal request from the Petitioner or EACP requesting to be supplied with any written reasons for any alleged decline of issuance of approvals. Mr. Obinju submitted that in any event, the Notification of Approval issued to EACP was done subject to certain conditions one of them being **"Not constituting part of public land earmarked for repossession or private land with ownership disputes."** Counsel submitted that the records at the Respondent's Rates Office reflect the Rate Payer as Telkom Kenya Limited, which is a public entity and that for that reason the suit property constitutes public land. Accordingly, should the court compel the Respondent to issue a Certificate of Approval to the Petitioner, this could potentially cause ownership disputes over the Project Land between EACP and the Petitioner herein. Counsel submitted that it is for this reason that the Petitioner ought to have first, properly engaged the Respondent to regularize its records before any approvals are issued in its favour. Counsel submitted that if the orders herein are granted as prayed the same would not be enforceable as far as the Respondent is concerned.

The Determination

12. I have carefully considered the Petition and opposition to it. I have also considered the submission of parties. In my view the following are the issues for determination.

- (i) Whether the Petitioner is a stranger to the Respondent.
- (ii) If the answer to above issue is in the negative, whether the Petitioner's rights have been violated.
- (iii) Whether the approval should be issued and if so, in what terms.

13. To address issue number (i) above, it is important to go briefly into the history of the matter. In pursuit of the Project, the Petitioner through East African Capital Partners Limited, (EACP) identified and acquired the suit property then known as Land Reference Number MI/1017/XXVI (**"the Project Land"**)-[now **MOMBASA/BLOCK XXVI/1017**]-which is situate at Kizingo Area, Mama Ngina Drive, Mombasa, from Telkom Kenya Limited. After the acquisition of the Project Land, the said EACP, acting on behalf of the Petitioner begun the process of obtaining the requisite statutory approvals and/or licenses from the relevant agencies. On or about July, 2015, the Petitioner, which was still in the process of being formed, applied for a change of user with respect to the Project Land by filing the requisite Form PPA1 and submitted it together with the planning brief prepared by the physical planner it had engaged. The said change of user was from *"Kenya Posts & Telecommunication Training School"* to *"Commercial Telecommunication & Ancillary Purposes"*. The Respondent thereafter sought comments from the District Physical Planner, District Surveyor and District Land Officer all of whom expressed no objections to the application for change of user. The Petitioner also placed two advertisements one in the Saturday Nation and The Standard both appearing on 11th July, 2015 with a view to informing the public about the intended change of user. The said application was approved on 16th November, 2015 after all the all relevant agencies which had been consulted had endorsed it.

14. The following correspondence and/or notification from the relevant agencies with respect to that application were submitted to the Director County Planning and Architecture:

- a. Letter of no objection from the District Surveyor, Mombasa dated 11th August, 2015;
- b. Letter recommending the approval from the Chief Land Administration Officer dated 14th August, 2015;
- c. Letter of no objection from the County Physical Planner dated 1st October, 2015;

15. On 3rd February, 2016 the Ministry of Lands granted Approval for the change of user subject to certain conditions being met. The Ministry of Lands also forwarded the revised rent valuation by a letter dated 15th February, 2016, which the Petitioner paid. Subsequent to this, the Ministry of Land and Planning issued the aforesaid Certificate of Lease to the Petitioner by letter dated 5th September, 2016. The Petitioner also applied to the National Environmental Management Authority (“NEMA”) for an Environmental Impact Assessment License for the Project in accordance with the Environmental Management and Coordination Act, Act No 8 of 1999. On 8th September, 2015, NEMA granted a license for the “*Construction of a data center comprising a three storey office complex, 2No. two storey buildings, 2No. 24,000 litre underground diesel tanks, associated facilities and amenities*”. The Petitioner also submitted the Project building plans to the Respondent for approval by the Project architects. As the Petitioner was unable to upload the building plans online as required, hard copies of the same including the engineering drawings were submitted to the Respondent. On 29th October, 2015, the Respondent notified that said architects that the building plans had been approved. Having obtained these licenses and/or approvals, the Petitioner pushed ahead with project arranging for financing, mobilizing resources, promoting the project and securing clients/customers. In the meantime, the Petitioner’s consultants finalized the building plans as well as other arrangements to ensure the timely completion of the project. The Petitioner also negotiated supply contracts with respect to/suppliers Flexend user and Bulkon. The said contracts are said to have been finalized and are awaiting execution. The Petitioner further made arrangements to commence construction. As part of these arrangements, its aforesaid architects submitted to the Respondent the detailed plans for issue of a Certificate of Approval as well as stamping in line with the prior notification of approval which had already been given. Subsequently there was a meeting between the Project architect and the County Lands Executive member who requested for certain documents that were supplied. It is at this stage that the Respondent unexpectedly raised objections with respect to the Project as a whole, and alleging that the Petitioner is a stranger to the Respondent, and that there are outstanding rates to be paid by Telkom Kenya Limited, and that the suit property is a public land.

16. The above history is supported by the documents in support of the Petition. In fact the Respondent does not deny the same. The Respondent’s only problem is that the Petitioner is a stranger. However, the Respondent knew or had every reason to know that the proceedings and activities referred to herein were being done at the behest of the Petitioner, an entity which was yet to be formed. Once that entity was formed, the Respondent only merely needed to be given notice thereof. The Respondent’s allegation that the Petitioner is a stranger is therefore not correct. The Respondent is raising a legal technicality at the tail end of the engagement. However, this court understands and knows the fears that the Respondent may be having in regard to releasing the required approval to the Petitioner. However, there are better ways of overcoming such fears, if any, and this court will not shy away from pointing out such a way. I will return to this issue later on.

17. On the second issue, as to whether the Petitioner’s rights have been violated, this court is of the view that once a determination has been made that the Petitioner is not a stranger to the Respondent then there also must be a finding in the circumstance of this case, that the Petitioner’s right to fair administrative action under Article 47 of the Constitution has been violated. In the case of **PZ CUSSONS EAST AFRICA LIMITED VS. THE KENYA REVENUE AUTHORITY**, the court, on the Article 47 commented as follows:

“It is incumbent upon an organ such as the Respondent which has a monopoly over the discharge of administrative action that affects the rights of others that it carries out its duties in a fair and procedural manner. In the case of Dry Associates Limited vs. Capital Markets

Authority and Another, Petition No. 328 of 2011, it was noted as follows with regard to Article 47 provisions; “Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law ... but is to be measured against the standards established by the Constitution.”

18. From the foregoing, this court observes that the Petitioner was denied information or reasons regarding the basis for denial of approvals. Further, the Respondent intentionally decided to disregard the historical facts of the matter, and appears to be holding to a legal technicality with the sole objection of delaying the process herein and cause the Petitioner to incur additional costs.

19. Like in above case, the Respondent herein is accused of withholding information, and their action is inconsistent with their earlier conduct. If the Respondent was genuinely of the view that the Petitioner was a stranger, there was nothing stopping the Respondent from stating so at the onset, and indeed trying to find out why the so called stranger was asking for approval of the documents. The conduct of the Respondent herein is that of a party who does not care. Its conduct radiates an “I don’t care” attitude which is not good for business, and is indeed a very old business practice. At the end of the day, although this is a Constitutional Petition, the underlying dispute is both Constitutional and Commercial. The activities herein started in the year 2009. When the necessary ground works were completed, the Petitioner was incorporated as a company in 2015. During that time, both time and money had been spent on the project, and if the Petitioner’s claim is anything to go by, the expenses and losses are running into millions of dollars. The prudent thing for the Respondent to do would be to fastrack the process so that the intended project can take off. It is the duty of the court to ensure that commercial transactions take off as soon as possible, and that investors are not unduly delayed from commencing commercial activities and recovering their investments as soon as possible. The Respondent is a government. It should not be seen to be encouraging factors which unnecessarily slow down business and frustrate investors, when there is no need for such. This court cannot ignore the fact that the parcel of land constitute the suit property is now legally owned by the Petitioner pursuant to the Certificate of Lease dated 14th September, 2016. The Respondent’s fear that the Petitioner is a stranger will be addressed by the Petitioner providing a suitable undertaking to indemnifying the Respondent against any claims the East African Capital Partner Limited may have against the Respondent in relation to the subject matter of this suit.

20. In the upshot, it is the finding of this court that the Petitioner has proved its case on a balance of probability, and Judgment is hereby entered in favour of the Petitioner against the Respondent as follows:

- (i) A declaration that the Respondent has violated the Petitioner’s rights under Article 47 of the Constitution;
- (ii) An order is herewith issued compelling the Respondent to stamp and return the Petitioner’s building plans;
- (iii) An order is hereby issued compelling the Respondent to issue a Certificate of Approval;
- (iv) If need be, the parties to set a date for submissions on damages and compensation.
- (v) It is hereby ordered and directed that the Petitioner shall indemnify the Respondent, and shall issue an appropriate statement of indemnity within seven (7) days from the date hereof, indemnifying the Respondent against any and all claims that may be brought against the Respondent by M/S East African Capital Partners Limited.
- (vi) The Petitioner shall within seven (7) das from the date hereof procure an undertaking from M/S East African Capital Partners Limited, addressed to the Respondent that upon the said approvals being given to the Petitioner the said EACP shall have no claims of any nature against the Respondent.
- (vii) The costs of and occasioned by this Petition be provided for.

That is the Judgment of the court.

Dated, Signed and Delivered in Mombasa this 13th day of April, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Obinju for Respondent

Mr. Oluga holding brief Mr. Amoko for Petitioner

Mr. Kaunda Court Assistant