



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 24 OF 2012

IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 43 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006

BETWEEN

JIMMY ODARI.....1ST PETITIONER

BELDINA OTIENO2ND PETITIONER

PETER MUTUTI3RD PETITIONER

EVANS OWUOCHE4TH PETITIONER

IBRAHIM ABDI5TH PETITIONER

OMAR KEA KARISA.....6TH PETITIONER

JACINTER NJERI7TH PETITIONER

VERSUS

MINISTER FOR LOCAL GOVERNMENT.....1ST RESPONDENT

MUNICIPAL COUNCIL OF MOMBASA.....2ND RESPONDENT

LOCAL AUTHORITIES PENSION

TRUST (LAPTRUST).....3RD RESPONDENT

JUDGMENT

Introduction

The petitioners who describe themselves as “committee members of Changamwe Estate Residents’ Group, which comprises about 200 members all being the tenants in the new Changamwe Estate” suing “on their own behalf and on behalf of the members of the Changamwe Estate Residents’ Group” filed a petition dated 3rd April 2012, challenging the transfer of the Estate in which they are tenants by the 2nd respondent to the 3rd Respondent as being unconstitutional for violating the provisions of Article 43 and 47 of the Constitution, and sought the following specific relief:

“A Declaration that the transfer of New Changamwe Estate Blocks A13, A14, A15, A16, A17, A18, A19, A20, A21, A22, A23, A24, A25, A26, A27, A28, A29, A30, A31, A32, A33, A34, A35, A36 and A37 to the 3rd respondent is illegal and unconstitutional.”

The cause of action

The Petitioners’ cause of action is set out in paragraphs 5 – 20 of the Petition as follows:

“PETITION DATED 3RD APRIL, 2012

5. *The petitioners are committee members of Changamwe Estate Residents’ Group, which comprises about 200 members all being the tenants in the new Changamwe Estate.*
6. *The Petitioner brings this petition on their own behalf and on behalf of the members of the Changamwe Estate Residents’ Group who have all given their consents.*
7. *The 2nd Respondent by a letter dated 22nd December, 2011 purported to transfer and or vest the estate to the 3rd Respondent, the Local Authorities Pension Trust (LAPTRUST) ostensibly with the consent of the 1st respondent.*
8. *The Changamwe Housing Estate like other Municipal estate is a public residential estate built in the 1970s to cater for low income group in the society.*
9. *The Petitioners and its membership upon being informed of the impending transfer gave a written offer to buy the estate rather than the estate being sold to the 3rd respondent.*
10. *The petitioner’s legitimate expectation is that the municipal would have sold the estate to respective tenants upon receiving a written expression of interest from the tenants to buy the estate.*
11. *That change of ownership though allegedly done with the consent of the Local Government Minister is unreasonable and contrary to the spirit of article 43(1) and Article 47(1) and (2) of the constitution.*
12. *The excuse provided by the 1st respondent that the 2nd respondent is heavily indebted to the 3rd respondent is not a valid reason that allows the 1st respondent to make a unilateral decision over a public property with extreme importance to the people.*
13. *The 1st respondent as public body is guided by the Constitution and statute, which it completely failed to uphold in particular, the Local Government Act and the public Procurement and Disposal Act.*
14. *The respondents in complete disregard of the law made a unilateral decision on the sale/transfer of its asset.*

15. *The end result of non compliance with the Constitution and the law is the entire process is a nullity.*

16. *That the unjust decision to transfer ownership of the houses affected the Petitioners negatively as they were entitled to be provided with written reasons of the increment.*

17. *That 2nd and 3rd Respondents, notwithstanding the dilapidated state of the houses have without notice already increased the house rent by 150% and this has adversely affected the lives and welfare of the Tenants.*

18. *Under Article 47(2) the 1st respondent is mandated to provide the Petitioners with written reasons for the transfer.*

19. *The transfer violated the provisions of Article 47(1) and (2) and is ultra vires the Constitution.*

20. *The action by the 1st Respondent is illegal, mischievous and tainted with malice and intention to arbitrarily deny the Petitioner their constitutional rights as provided for under Article 43(1)(b)."*

Responses

The 2nd and 3rd Respondents filed replying affidavits setting out the facts of the case that they respectively relied on. The 2nd respondent filed a Replying Affidavit and supplementary affidavit both sworn by its Town Clerk respectively on 10th October 2012 and 24th October 2012. The Board Secretary of the 3rd respondent filed a Replying Affidavit sworn on 6th June 2012. The 1st Respondent did not file any response, despite leave granted for that purpose.

The facts of the case

It was common ground that the 2nd respondent had with the approval of the 1st respondent transferred the suit property to the 3rd respondent and the only dispute was on whether the 2nd Respondent had done so rightfully in accordance with the law and whether the transaction was affected by the provisions of the Constitution of Kenya 2010, and whether there was any violation of the same with respect to the transaction for the transfer.

Submissions

The parties filed written submissions and judgment was reserved. For the petitioners, the facts of the case were set out as follows:

"BRIEF HISTORY OF FACTS

The 2nd Respondent by a letter dated 22nd December 2011 purported to transfer and/or vest the estate to the 3rd Respondent, the Local Authorities Pension Trust (LAPTRUST) ostensibly with the consent of the 1st Respondent. The Changamwe Housing Estate like other municipal estate is a public residential estate built in the 1970's to cater for low income group in the society. The Petitioners and its membership upon being informed of the impending transfer gave a written offer to buy the estate rather than the estate being sold to the 3rd Respondent. The Petitioner's legitimate expectation is that the municipal would have sold the estate to respective tenants upon receiving a written expression of interest from the tenants to buy the estate.

The excuse provided by the 1st Respondent that the 2nd Respondent is heavily indebted to the 3rd Respondent is not a valid reason that allows the 1st Respondent to make a unilateral decision over a public property with extreme importance to the people. The Respondents in complete disregard

of the law made a unilateral decision on the sale/transfer of its asset. The 2nd and 3rd Respondents, notwithstanding the dilapidated state of the house have without notice already increased the house rent by 150% and this has adversely affected the lives and welfare of the tenants.

By reason of the forgoing, the Petitioner has suffered and is likely to suffer grave loss and damage and seeks protection of this Honourable Court and for the enforcement of the provisions of the Constitution and for orders ensuring the Respondents' compliance with the provisions contained therein."

On the basis of these facts, the Petitioners submitted that the transfer placed the suit property on the hands of a private entity that is not bound by the Constitution citing **Consumer Federation of Kenya (COFEK) v. AG & Ors.**, Petition No. 88 of 2011, per Mumbi Ngugi, J. thereby occasioning them loss, injury and damage by loss of such protection. It was further contended in the submissions that:

"When the Petitioners heard of the impending sale and transfer, they did write to the 2nd Respondent an offer to buy the suit property. The 3rd Respondent having taken ownership of the suit property defeats the object and purpose of Article 43 (1) (b) of having a right to accessible to adequate housing and to reasonable standards of sanitation. The 3rd Respondent has increased the rent of the houses making it not accessible to the Petitioners. Thus the said actions of the 2nd Respondent breach the stipulations of Article 43. We rely on the decision in the case of Satrose Ayuma & 11 Others –vs- Registered Trustees of Kenya Railways Staff Retirement Benefits Scheme and 2 Others Petition 65 of 2010.

*Further, the purpose of Article 47 (1) is to subject administrative action to constitutional discipline. The term "administrative action" is not limited to decision; it is an expansive term which includes any act or omission that affects the rights and interests of the citizens. This position was adopted by D.S. Majanja J in the case of **Orion East Africa Limited –vs- Permanent Secretary, Ministry of Agriculture & another Petition 100 of 2012.***

The 1st and 2nd Respondent have legal responsibility thrust upon them by virtue of the relevant Articles of the Constitution and other statutes to uphold the law and to protect the Petitioner's enjoyment of their constitutional rights guaranteed by the Constitution and have a further duty to ensure all persons obey and abide by the law.

The end result of non-compliance with the Constitution and the law is that the entire process is a nullity. That the unjust decision to transfer ownership of the houses affected the Petitioners negatively as they were entitled to be provided with written reasons of the increment.

Under Article 47(2) the 1st respondents is mandated to provide the Petitioners with written reasons for the transfer. The transfer violated the provisions of Article 47(1) and (2) and is ultra vires the Constitution.

For the 2nd respondent, it was submitted that the local Government authority had statutory authority to alienate land and that the transfer was between two government departments for which the Public Procurement and Disposal Act did not apply, and that there had not been any violation of the petitioner's right under Article 43 on access to housing, as follows:

"[I]t is our humble submission that there was no illegality whatsoever in the transfer of the Changamwe Estate Blocks to the 3rd Respondent by the 2nd Respondent. It is our further submission that the 2nd Respondent acted within the purview of the law in the said transfer. The provisions of Section 12 (3) of the Local Government Act empowers the 2nd Respondent to acquire, hold or alienate land. Quoted verbatim, the section reads.

*“Every Municipal Council shall under the name ‘the Urban Council’ be each and severally a body corporate with perpetual succession and a common seal (with power to alter such seal from time to time) and shall by such name be capable in law of suing and being sued **and acquiring, holding and alienating land.**”*

The term ‘Land’ is defined under Section 2 of the Act to include any interest in land, any building on land, land covered by water, any easement or right into or over land.

Your Honour, the Petitioners herein cannot now come to court to challenge the statutory powers of the Council ever that which the Council is statutorily allowed to do. There is nothing under the Act barring the Council from alienating its assets to offset its debt as done in the case herein contrary to what is alleged by the Petitioners herein, the 2nd Respondent did not dispose off the property but rather, only swapped the property to the 3rd Respondent as a reprieve to relieve the Council from the heavy penalties being imposed on the 2nd Respondent for the late or non-remittance of the Pension Contribution from the 2nd Respondent’s employees. Your Honour, it has been sufficiently demonstrated in the affidavit of Tubmun Otieno that this was merely a transfer of an asset from one department under the Ministry of Local Government to another department within the same Ministry. This being the case therefore it is for this reason that we submit that the operations of the Public Procurement and Disposal Act did not apply.

Your Honour, it is our humble submission that the Petitioner’s Petition herein is not only misguided but an abuse of this court process and the prayers sought therein are incapable of being granted as the Petitioners being mere tenants have not locus standi to question the decision of the 2nd Respondent herein, a Local Authority and those of the Ministry of Local Government. We therefore urge your Honour to dismiss this Petition with costs to the Respondents.”

For the 3rd Respondent it was submitted that

“In opposing the Petition, the 3rd Respondent filed a Relying Affidavit sworn by KATHERINE KISILA ON 6th June, 2012. We rely on the contents of the said Affidavit in opposition to the Petition.

*To highlight the contents of the affidavit, we submit that as at the 28th of May, 2010, the 2nd Respondent herein owed the 3rd Respondent a sum of Ksh.392,029,309/= being outstanding pension contribution inclusive of penalties. The said sum was continuing to accrue interest as determined by the **Retirement Benefits Authority**.*

The Government of Kenya through the Ministry of Local Government and pursuant to provisions of the Local Authority Transfer Fund Act No. 8 of 1998 directed that all stator debts owed by local authorities be fully paid on or before the 30th June, 2010 failure to which the LATF funding shall cease to be available to the defaulting council.

*Pursuant to the aforesaid direction the 2nd and 3rd Respondents engaged in extensive negotiations for purposes of settling the aforesaid statutory debt owned to the 3rd Respondent before the 30th of June 2010. Parties agreed to enter into a debt swap agreement where the 2nd Respondent’s property Subdivision **No.2562/R/PART SECTION VI MAINLAND NORTH** situate in Changamwe Mombasa would be transferred to the 3rd Respondent to offset and or settle the debt amounting to Ksh.392,029,309.95. the debt properly swap agreement was prepared and executed on 28th May, 2010 as admitted in the Petitioner’s affidavit annexure marked “JO3” dated 28th June, 2010. The property was transferred at the time the agreement was signed and not the time the lease was registered because registration was just a formality. We are guided by the equity maxim providing that equity deems as done that which ought to be done.*

The issue therefore is which law is applicable in this case considering that the agreement was

executed on 28th May, 2010? Is it the current Constitution or the Repealed Constitution? It our submission that the Repealed Constitution apply.

It is our humble submission that the law applicable is the law in force at the time when the transaction was concluded and not the law that came into force after the event. Therefore the provisions of the repealed Constitution apply to this matter and not the provisions of the current Constitution as alleged by the Petitioners.

My Lord it is **trite law that Constitutional law does not apply retrospectively unless it is so specified in the constitution.**

My Lord, we have looked at the provisions of the current Constitution and in particular Article 43 (1) (b) dealing with the right to access to housing which provides as follows:-

“43. (1) Every person has the right-

(a).....

(b) to accessible and adequate housing, and to reasonable standards of sanitation.”

The said Article 43 does not at all put an obligation on the 2nd Respondent and or the state to provide housing to the Petitioners and or other citizens of this country. **Ensuring access to housing is not same as providing housing.**

The issue is whether the right to access has been infringed by the mere fact that the houses have now been transferred to the 3rd Respondent. We submit that the right to access housing has not been infringed at all.

My Lord if the 2nd Respondent owns houses occupied by the Petitioners as tenants and the 2nd Respondent decides to transfer the said houses to the 3rd Respondent for purposes of offsetting a statutory debt and then the 3rd Respondent as the new owner retains the Petitioners as tenants in the aforesaid houses we just don't see how the right to access to Housing infringed.

The petitioners are still occupying the said houses. Further the 3rd Respondent as the new Landlord has not in any threatened to evict the Petitioners. They are still occupying the same houses. They are still accessing the houses. The right to access housing is not infringed at all. The Petitioners petition is a misconception of what entail the right to access housing.

Issue for Determination

The only issue for determination is whether the transfer of the housing estate the subject of this suit by the 2nd respondent to the 3rd respondent and the 3rd respondent's subsequent increment of rent violated the rights of the petitioner tenants of the Estate under Article 43 (1) (b) and 47 (2) of the Constitution.

Determination

It is clear from the documents filed before the court that although the formal registration of the lease in favour of the 3rd Respondent 24th October 2011 was done on 18th April 2012, the transaction for the transfer of the suit property was accomplished by the grant of approval for the Council's resolution to transfer Changamwe Estate V to PapTrust in lieu of debts by the Deputy prime Minister and Minister for Local Government on 25th January 2010. In this regard, it was argued by the 2nd respondent that the Constitution of Kenya 2010 which came into force on 27th August 2010 after the transaction for the transfer save for the lease had been concluded cannot apply retrospectively to affect the long concluded transactions.

While I agree with the **Keroche** decision relied on by the 2nd respondent as authority for non-retroactivity of laws, I should, however, observe that whereas the Swap Agreement may have been valid *inter partes*, that is between the parties only, without formal registration of the lease, the transaction would not affect third parties and the parties to an agreement to lease would without registered Lease would only be entitled to sue for specific performance of the agreement for a lease. The principle in **Walsh v. Londale** (1882) 21 Ch D 9 that equity take s as done that which ought to be done has not been accepted as applicable in Kenya. See **Rogan Kamper v Lord Grosvenor** (NO. 2) (1977) KLR 123. I would, therefore, disagree that the new Constitution 2010 is not applicable to the transaction for transfer of the suit property whose registration of Lease is shown to have been done in December 2011 after the coming into force of the Constitution.

However, I have no hesitation in finding that the transfer of the Estate the subject of the suit property herein does not in any way violate the petitioners' rights under Article 43 (1) (b) of the Constitution. The Petitioner's right "**to accessible and adequate housing, and to reasonable standards of sanitation**" under Article 43 (1) (b) has not been hindered by a transfer of the suit property. The petitioners remain tenants on the suit property and accordingly have access to housing. The right of a land owner to increase rent is governed by law. If it is considered that the 3rd respondent wrongly increased rent, there is procedure under the Rent Restriction Act for the determination of such disputes. The Rule of Law is one of the principles of the Constitution under Article 10 of the new Constitution, 2010 following the procedure for the determination of dispute prescribed under an Act of Parliament is an imperative of the Rule of Law. See **The Speaker of the National Assembly v. Karume** (2008) EG&F 428 and **Narok County Council v. Transmara County Council & Another**, CA No. 25 of 2000.

I agree with the Commentary on the Right to Adequate Housing published as Fact Sheet NO. 21/Rev. 1 by Office of the United Nations High Commissioner on Human Rights that the right to adequate housing does not require the state to build housing for the entire population –

“Rather the right to adequate housing covers measures that are need to prevent homelessness, prohibit forced evictions, address discrimination, focus on the most vulnerable and marginalized groups, ensure security of tenure to all, and guarantee every one's housing is adequate. These measures can require intervention from the Government at various levels: legislative, administrative, policy or spending priorities. It can be implemented through an enabling approach to shelter where the Government, rather than playing the role of housing provider, becomes the facilitator of actions of all participants in the production and improvement of shelter.

In addition, the Lease having been registered, the 3rd Respondent has acquired an interest in land which can only be defeated in accordance with the Registration of Titles Act cap. 281 then applicable (replaced by the Land Registration Act, No. 3 of 2012 which commenced on 2nd May 2012 shortly after the time of filing suit on 3rd April 2012). A challenge on ownership of land is a matter for determination in accordance with by the Environment and Land Court in accordance with provisions of the Land Registration Act.

Moreover, the image of disadvantaged petitioners who are affected by a transfer of the suit property is false as there has been no threat of eviction from the suit premises and all the 3rd respondent transferee has demanded is the payment of rent. The petitioners are, indeed, monied persons who had offered to buy the suit premises from the 2nd respondent. As pointed out by the submissions of the 2nd respondent, the right to accessible and adequate housing is not a right to be provided with such housing but one of facilitating access thereto. I do not see how an increment of rent with the law may affect the petitioner's right to accessible housing under Article 43 (1) (b) unless it can be shown that the increment will lead to a deprivation of the only accessible and adequate housing. The petitioners' did not show that there was a general lack of availability of housing commensurate to the suit property, and in any event they have challenged the increment of rent in the rent tribunal.

It appears to the Court that the challenge on the transfer is that of sour losers who failed in a bid to purchase the premises as they had proposed to the vendor 2nd Respondent who chose to swap the suit

property in settlement of a debt owing to the 3rd respondent, an arrangement which was approved by the relevant government Ministry.

As regards Article 47(2) of the Constitution the duty to give reasons, the only decision that would call for reasons is the decision to increase rent. The decision to transfer being within the statutory competence of the 2nd respondent, under section 12(3) of the Local Government Act, as the owner of the property is not subject to giving of reasons to tenants in the property to be sold because the property would be transferred subjected to any lawful interests thereon such as protected tenancies, leases, if any.

Under the applicable landlord and tenant law, *The Transfer of Property Act*, ss. 108 and 109, a tenant has a duty to pay rent to the landlord and his transferee with the two having a duty to the tenant to maintain his tenancy, as follows:

“108. Rights and liabilities of lessor and lessee
In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:-

(A) Rights and liabilities of the lessor

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover;

(b) the lessor is bound on the lessee's request to put him in possession of the property;

(c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(B) Rights and liabilities of the lessee

(d) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease;

(e) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void:

PROVIDED that, if the inquiry be occasioned by the wrongful act or default of the lessee, he shall be entitled to avail himself of the benefit of this provision;

(f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor;

(g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor;

(h) the lessee may even after the determination of the lease remove, at any time whilst he is in

possession of the property leased but not afterwards all things which he has attached to the earth; provided he leaves the property in the state in which he received it;

(i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them;

(j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease;

nothing in this clause shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee;

(k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take of which the lessee is, and the lessor is not aware, and which materially increases the value of such interest;

(l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf;

(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left;

(n) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor;

(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings belonging to the lessor, or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto;

(p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes;

(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

109. Rights of lessor's transferee

If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:

PROVIDED that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any court having jurisdiction to entertain a suit for the possession of the property leased.”

The petitioners' rights as tenants do not include being informed of or being given reasons for the transfer of the property; the tenants' right on the property is to keep the tenancy notwithstanding the transfer. There is no breach of any right under Article 47 (2) by a landlord who transfers his property without informing the tenants of the transfers. The increase of rent by the new purchaser is a different matter.

However, the Court finds that the 3rd respondent, by the letters of 14th December 2011 annexed as exhibit “JO3” to the affidavit in support of the Petition giving notice for the new arrangement for the amount and payment of rent, did in fact give the reasons for the transfer as a swap for debts owed by the 2nd respondent to the 3rd respondent, in its first paragraph as follows:

“The Local Authorities Pension trust (LAPTRUST) is a pension administrator for employees of the local authorities and Associated Companies of which the City Council of Mombasa is one of the sponsors. However, over the years the City Council of Mombasa has accumulated arrears in terms of unremitted deduction from its staff members and it is for this reason that the Council and LAPTRUST entered into a mutual agreement to transfer by lease some of its properties to the Trust in settlement of the debt owed. This arrangement has now been concluded and approved by the Ministry of Local Government, and LAPTRUST has proceeded to take over part of the Estate, of which the house you occupy is amongst the units transferred to LAPTRUST with effect from 1st December 2011.”

I do not see that the provisions of Article 47 were violated as reasons for the decision to lease the houses anew to the tenants is explained as the changeover of ownership to the 3rd respondent. Having been so informed of the change, the petitioners are as tenants of the new landlord, the 3rd respondent were at liberty to seek determination of rent payable by the appropriate tribunal in accordance with the principle that a tenant cannot challenge the right of the landlord to recover rent.

The petitioners present their Petition as an enforcement of the right to access to housing and to be given reasons for the decisions to transfer the suit property by the vendor, and by the purchaser to increase rent. The suggestion that the transfer was in breach of procurement law was not fully canvassed. The Petitioners did not refer to it in their submissions but the 2nd respondent contended that the 2nd and 3rd respondent was government departments the dealings between which did call for application of the Public Procurement and Disposal Act. The Court was not adequately served with detailed submissions on the point and I do not propose to make concluded views thereon. It appears to me according to the description of the 3rd respondent by its own Board secretary that is a private enterprise for the pension benefit of the employees of Local Authorities. However, on account of the finding by the court that the transfer did not violate the petitioners' right under Article 43 and 47 of the Constitution, the Petition must fail on the merits.

Conclusion

There was no constitutional issue for determination by the constitutional Court. The petitioners were bitter that they were not allowed to buy the 2nd respondent's housing estate in which they were tenants and which the 2nd respondent had transferred to the 3rd respondent who, as new owner and consistently with a landlord's right sought to recover rent from the petitioners as its tenants. A tenant cannot enforce a private bid to buy property by relying on alleged breach of public procedures in the disposal of property, which do not affect his rights as a tenant. It is an abuse of the process of the court. The petition is clearly

a challenge on increment of rent which should have been filed in appropriate forum for determination.

Orders

Accordingly, for the reasons set out above, the petitioners' Petition herein dated 3rd April 2012 is dismissed with costs to the 2nd and 3rd Respondents.

The conservatory order granted herein pending the hearing and determination of the Petition is discharged.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 30TH DAY OF OCTOBER, 2017.

E. K. OGOLA

JUDGE

Appearances: -

M/S Balala & Abed Advocates for the Petitioners

Mr. Eredi for 1st respondent

M/S Muturi Gakuo Advocates for the 2nd Respondent

M/S Cootow & Associates, Advocates for the 3rd Respondent.