



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

ELC PETITION NO. 044 OF 2021

IN THE MATTER OF: THE ENVIRONMENT AND LAND COURT ACT

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 2, 3, 10, 19, 20, 21, 22, 23, 27, 40, 47, 50 and 159

AND

IN THE MATTER OF: VIOLATION AND INFRINGEMENT OF THE RIGHTS AND FREEDOMS UNDER THE PHYSICAL AND LAND USE PLANNING

BETWEEN

ERIC KIPROTICH SOI & OSCAR KIBET SOI

(Suing as The Personal Representative of the late

LINAH CHELANGAT KIRUI.....APPLICANT/SPETITIONERS

AND

DIRECTOR GENERAL

NAIROBI METROPOLITAN SERVICES.....RESPONDENT

(Notice of motion dated 29th October 2021)

1. The Petitioners in their Notice of Motion Application pray for orders:

a) Spent

b) THAT Honourable Court be pleased to issue a temporary injunction restraining the Respondent by themselves, their agents, servants and or anybody under them from entering into trespassing and in any other way interfering with the Petitioners quiet possession and enjoyment of land parcels known as LR. No. 2327/28/1Original L.R No. 2327/28/2 pending hearing and determination of the Petition.

c) THAT this Honourable court be pleased issue an order allowing/ enabling the Petitioner to restore, reinstate the gate and perimeter wall that were partially demolished on land parcels known as LR. No. 2327/28/1Original L.R No. 2327/28/2 pending the hearing and determination of this Petition.

d) THAT this Honourable court be pleased to issue an order directing that the officer in charge Commanding Station, Hardy

Police station enforce compliance of the Order.

e) THAT the costs of this Application be provided for.

2. The Application is premised on the grounds on the face of the application and the affidavit of ERICK KIPROTICH SOI, one of the Petitioners.

3. The Petitioners are the administrators of the Estate of the late LINAH CHELANGAT KIRUI. The Petitioners' claim is that the deceased was the actual ostensible proprietor of a parcel of land known as L.R 2327/28/1 (originally known as L.R 2327/28/2) hereinafter referred to as the suit property by way of adverse possession. The Petitioners have indeed filed a claim for adverse possession over the said land via ELCOS No. 124 of 2020 which is still pending hearing and determination.

4. The Petitioners claim that the Respondent herein, the Director General Nairobi Metropolitan Services on or about 7th October 2021 irregularly, illegally and unprocedurally marked the suit property by placing an 'X' mark, indicating that it was targeted for demolition. Subsequently on 14th October 2021, the Petitioners were served with an enforcement notice by the Respondent requiring them to avail the development permission for verification and to remove an alleged illegal road barrier within 7 days.

5. The Petitioners being aggrieved by the enforcement notice lodged an appeal in accordance with the provisions of section 72 of the Physical and Land Use Planning Act. However, on 26th October 2021, the Respondent without any justifiable cause invaded and trespassed into the suit property and partially demolished a gate, a perimeter wall and a gate house. This was in spite of and before the appeal was heard and determined. The action by the Respondent has exposed the Petitioners to the risks of insecurity. The Respondent has threatened to go back to the suit property and continue with the illegal demolition. The Petitioners aver that the action by the Respondent amounts TO a violation of their rights under article 40 of the Constitution.

6. The Petitioners allege that the decision to demolish their property was instigated by the Respondents in the Land case ELCOS 124 of 2020, in order to circumvent the execution of the ruling issued on 22nd July 2021 by Hon. Lady Justice L. Komingoi and the subsequent orders issued on 11th August 2021.

7. The actions by the Respondent in this Petition, the Director General Nairobi Metropolitan Services in cahoots with the Respondents in ELCOS 124/2021 prompted the Petitioners to file this Constitutional Petition and off course the application for an interlocutory injunction pending the hearing and determination of the main Petition.

8. The Petitioner's application is opposed by the Respondent by way of a replying affidavit sworn by one, Wilfred Masinde, the Director of Lands, Housing, Urban renewal, Urban Planning and Development at the Metropolitan Services.

9. In their response, the Respondent alleges that the Applicants have not made any application for any construction/building of any structure and none has been issued to them in the said area. If there were any structures erected, the same must be deemed unlawful for failing to obtain approvals from the relevant authorities.

10. The Respondent confirms that an enforcement notice was indeed issued pursuant to the provisions of section 72 of the Physical and Land Use Planning Act, 2019. Accordingly, this Court lacks jurisdiction.

11. The Respondent alleges that the application by the Petitioners is an attempt to legalize an otherwise illegal process through the Court.

Directions by the Court.

12. The Court directed that the Petitioner's application be canvassed by way of written submissions. The Petitioners have complied and filed their submissions. The Respondent did not file any submissions.

Issues for Determination

13. The Petition and the application by the Petitioners for an order of temporary injunction raises a number of pertinent issues which this Court must determine. This is so because the Petitioners in their pleadings have disclosed about the existence of another case ELCOS 124/2021 that is pending hearing and determination before this Court. By 'this Court', I mean the Nairobi Environment and Land Court. Further, an appeal lodged before the Nairobi City County Physical and land Use Planning Liaison Committee is yet to be heard and determined. The Respondent on the other hand, in his Replying affidavit has raised the issue of the jurisdiction of this Court in light of the provisions of section 72 of the Physical and Land Use Planning Act.

14. The issues arising in this Court's opinion are:-

a) Whether the Petitioners have exhausted the existing dispute resolution mechanisms before invoking the jurisdiction of this Court.

b) In view of the existence of the case ELCOS 124/2020, whether the petition offends the doctrine of Constitutional avoidance.

15. These are issues which in this Court's opinion must be determined even before the merit of the application by the Petitioners is considered.

Analysis and Determination.

A. Whether the Petitioners have exhausted the existing Dispute Resolution Mechanisms before invoking the Jurisdiction of the Court.

16. The Petitioners in their petition aver that on 14th October 2021, they were served with an enforcement notice by officers working under the office of the Respondent requiring them to avail the development permission for verification and to remove an alleged illegal road barrier. The Petitioners state that they were aggrieved by the said enforcement notice and therefore lodged an appeal before the Nairobi County Physical and Land Use Planning Liaison Committee. This appeal is still pending before that Committee.

17. Section 73(4) of the Physical and Land Use planning Act provides that any party who is aggrieved by the determination of the County Physical and Land Use Liaison Committee may appeal to the Court (read Environment and Land Court) only on a matter of law.

18. The law is therefore clear that this Court, on matters falling under the provisions of the Physical and Land Use planning Act, enjoys appellate jurisdiction and on matters of law only.

19. The Petitioners have not come to this Court by way of an appeal. What they have filed instead is a Constitutional Petition while the appeal before the Nairobi County Liaison Committee is still pending.

20. The doctrine of exhaustion was explained by the Court of Appeal in the case of **Geoffrey Muthiga Kabiru & 2 Others Vs Samuel Munga Henry & 1756 others (2015) eKLR**. The Court expressed itself as follows; -

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked”.

21. The Court upheld the doctrine as a sound one and expressed the view that Courts ought to be fora of last resort and not the first ports of call any time that a dispute arises.

22. In as far as the grievance against the enforcement notice is concerned, this Court doesn't have the jurisdiction to consider it in the first instance in accordance with the provisions of the Statute. The same ought to be heard and determined in accordance with the provisions of section 72(3) of the Physical and Land Use Planning Act. The attempt by the Petitioners to circumvent the law by clothing it 'in the Bill of Rights language' and filing a Constitutional Petition before exhausting the mechanism provided for under the Statute is nothing but an abuse of the process of Court and clearly a violation of the doctrine of exhaustion.

B. Whether the petition by the Petitioners offend the Doctrine of Constitutional Avoidance in view of the existence of ELCOS 124/2021.

23. It is the petitioners case that the Respondents in ELCOS 124/2021 are using or colluding with the Respondent herein to frustrate the execution of orders issued by the Court in the said case (ELCOS 124/2021). This I must point out is a case pending before this Court. It is yet to be determined. Indeed the orders the Petitioners refer to were issued by Hon. Lady Justice L Komingoi, a Judge of the Environment and Land Court pursuant to an application by the Petitioners (who are the Plaintiffs in that case) for an order of temporary injunction against the Respondents 'restraining them whether by themselves, their agents and or servants from offering for sale, receiving monies or transferring, interfering or dealing with the property known as L R No. 2347/28/1 -original No. 2327/28/2, pending the hearing and determination of the suit'. The application is attached to the Petition as one of the exhibits.

24. The question that the Court is faced with is why the Petitioners should not seek the orders they now seek through this petition in the case ELCOS 124/2021 that is pending before Court. The Court before which the case ELCOS 124/2021 is being heard is a Court of competent jurisdiction that has the power to grant any such orders as may be necessary to preserve the substratum of the suit pending the finalization of the case. There is no reason why the Respondent in this petition should not be joined as an interested party in ELCOS 124/2021 and be compelled by way of conservatory/injunctive orders from interfering with the subject matter of that suit.

25. The doctrine of Constitutional avoidance interrogates whether there are other ways that a dispute may be resolved outside a Constitutional petition. The supreme court of Kenya in **Communications Commission of Kenya and 5 Others Vs Royal Medical Services & 5 Others** held that the Principle of avoidance entails that a Court will not determine a constitutional issue when a matter may properly be determined on another basis.

26. In the case of **COD & another Vs Nairobi City Water & Sewerage Company Petition 419 of 2015 (2015) eKLR**, the Court held that the constitution cannot be used as a general substitute for normal procedures. The mere allegation that a human right has been contravened is not itself sufficient to entitle the Applicant to invoke the jurisdiction of the Court under article 163. The Court sitting as a constitutional Court must through the doctrine of avoidance steer clear of determining disputes as if there were constitutional questions being raised.

27. The dispute in this petition from the above analysis is one that can and should in fact be resolved through the case already pending in Court that is ELCOS 124 of 2021 which is in relation to the same parcel of land.

28. The Court's finding therefore is that the petition violates the doctrine of Constitutional avoidance and amounts to an abuse of the process of Court.

Conclusion.

29. In summary, the Court makes the following findings:-

a) That the petition by the Petitioners herein violates the doctrine of exhaustion and amounts to an abuse of the process of Court in view of the provisions of Section 72(4) of the Physical and Land Use Planning Act.

b) The petition by the Petitioners herein violates the doctrine of Constitutional avoidance in view of the existence of ELCOS 124 of 2020 and is therefore an abuse of the process of Court.

30. Accordingly, this Court, exercising its inherent powers under the provisions of rule 3(8) of the Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice and Procedure Rules, 2013; in order to prevent abuse of the process of Court, orders that the Notice of Motion application dated 29th October 2021 and the entire Petition dated 29th October 2021 be and are hereby struck out with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY 2022.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Alan Kamau for the Respondent

Mr Nduati holding brief for Mr Mingo for the Petitioners/Applicants

Court Assistant: Hilda

M.D. MWANGI

JUDGE