



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 39 OF 2016

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1, 2(5), 2(6), 10, 22, 23, 28, 33, 35, 36, 42, 43(1) (B), 53 118(1)(B), 174(c), 196(2), 201 AND 232(1) (f) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF RULES 2, 3, 4, 11, 20 AND 23(1) OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS)

(PRACTICE AND PROCEDURE RULES, 2013 AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW

AND

IN THE MATTER OF ARTICLES 1, 7, 8, 12, 21 AND 25 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1984)

AND

IN THE MATTER OF ARTICLE 11(1) OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL & CULTURAL RIGHTS (1976)

AND

IN THE MATTER OF SECTIONS 3(A), 6, 87, 115 OF THE COUNTY GOVERNMENT ACT NO.17 OF 2012

AND

IN THE MATTER OF SECTIONS 3(1), 57(A), 58, 59, 68 AND 69 OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT NO.8 OF 1999

AND

IN THE MATTER OF SECTIONS PART III AND PART IV OF THE PRIVATIZATION ACT CAP 485 OF THE LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 11(C) (D), 33(4), 36(1) (B) (C) (D) (i) OF THE URBAN AREAS AND CITIES ACT NO.13 OF 2011

AND

IN THE MATTER OF PART VI OF THE PUBLIC PRIVATE PARTNERSHIPS ACT NO.15 OF 2013

AND

IN THE MATTER OF PART IV AND PART V OF THE PUBLIC PROCUMBENT AND DISPOSAL ACT CAP 412C OF THE LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 35, 36, 37, 42 OF THE PHYSICAL PLANNING ACT CAP... OF THE LAWS OF KENYA

AND

IN THE MATTER OF PART II OF THE SECTIONAL PROPERTIES ACT NO.21 OF 1997

BETWEEN

1. LEGAL ADVICE CENTRE
2. HAKI YETU ST. PATRICK'S
3. TRANSPARENCY INTERNATIONAL KENYA
4. JACK MAINA.....PETITIONERS

AND

1. THE COUNTY GOVERNMENT OF MOMBASA
2. COUNTY SECRETARY, COUNTY GOVERNMENT OF MOMBASA
3. COUNTY EXECUTIVE COMMITTEE MEMBER- LAND PLANING AND HOUSING DEPARTMENTRESPONDENTS

AND

1. MOMBASA COUNTY PUBLIC RENTAL ESTATES COUNCILINTENDED INTERESTED PARTY/APPLICANT
2. KENYA HUMAN RIGHTS COMMISSION.....2ND INTERESTED PARTY

J U D G M E N T

Outline of facts

1. By a petition dated 5/8/2016 and later amended on the 11/10/2016, the Petitioners sought a total of 11 orders against the Respondent basically faulting a project proposed by the Respondent and dubbed "MOMBASA URBAN RENEWAL & REDEVELOPMENT OF OLD ESTATES" as being in violation of the Right to housing, in violation of the Environmental Management and Coordination Act, the public private partnerships Act, the County Governments Act, the privatization Act and the Planning Act, and

therefore null and void for being in contravention of Articles 10, 174, (a), (c) (d) one 175(a) of the constitution for which reasons several declarations were sought together with permanent injunction to restrain the implementation of the project. The Petitioners equally prayed for costs of the petition and a prayer that the court grants to them “*any further relief or orders deemed just and fit*”. In the words of the petitioners this court is asked to grant to them orders crafted as :-

a) A declaration that the County Government of Mombasa Urban Renewal & Redevelopment of Old Estates within Mombasa County through joint venture partnership is a violation to the Right to Public Housing.

b) A Declaration that the County Government of Mombasa Urban Renewal & Redevelopment of Old Estates within Mombasa county through joint venture partnership violates the Environmental Management & Coordination Act.

c) A declaration that the County government of Mombasa Urban Renewal & Redevelopment of Old Estates within Mombasa County through joint venture partnership violates the Public Private Partnerships Act No.15 of 2013

d) A declaration that the County government of Mombasa Urban Renewal & Redevelopment of Old Estates within Mombasa County through joint venture partnership the Privatization Act No. 2 of 2005

e) A declaration that the County Government of Mombasa Urban Renewal & Redevelopment of Old Estates within Mombasa County through joint venture partnership violates the County Government Act 2012

f) A declaration that the County Government of Mombasa urban Renewal through joint venture partnership violates the Public Procurement & Disposal Act.

g) A declaration that he County government of Mombasa Urban Renewal through joint venture partnership violates the Physical Planning Act

h) A declaration that the County Government of Mombasa Urban Renewal and Redevelopment of Old Estates Programme is contrary to Articles 10, 174(a), (c), (d) and 175(a) of the Constitution of Kenya, 2010 for lack of public participation and therefore null and void

i) An order of permanent injunction restraining the Respondents form implementing the Mombasa urban Renewal & Redevelopment of Old Estates within Mombasa County through joint venture partnership.

j) Costs of this Petition

k) Any further Relief or Orders that this Honourable court shall deem just and fit to grant.

2. THAT petition was supported by the affidavit of Gertrude Nyausi Angote which reiterated the broad facts of the petition in details and exhibited documents the petitioners rely upon to support the petition. There is a further affidavit sworn by Wangui Gachiri whose content is largely to answer to the Replying affidavit of one Anthony Njaramba and Charles Okelo Loka and deny participation by the petitioners as alleged by respondents.

3. In opposition, there is filed a Replying Affidavit sworn on the 9th September 2016 by Anthony Njaramba, the County Executive Committee Member in-charge of Land, Planning and Housing and the 3rd Respondent. That affidavit gives the justification of the project, what has been done and what is due to be done.

4. In brief the deponent says there were a study and a valuation of the property and housing units subject

matter of the dispute which showed the estates as being dilapidated or just not suitable for human habitation. To the affidavit are annexed various list of names and minutes alleging that meetings had been held with various groups including what is called the umbrella body of the tenants and a list detailing the names of tenants and their telephone numbers and bank accounts and some money against such details. In the Respondent's view and contention, the petition is contrived and a fabrication of facts not founded on any justifiable application of threatened violation of any right. Respondent therefore opposes the petition and seeks that it be dismissed.

5. One, Mombasa County Rental Estates Council, who sought to be joined and was so joined as an interested party to these proceedings did file a Replying affidavit sworn by CHARLES OKELO LOKA, its Chairman. That party described itself as the umbrella organization representing the interests of the tenants who are over 388 households within the 10 housing estates. The deponent's position on oath is that the existing housing units are, to use his words, abysmal with poor infrastructure evident from the inadequate, roads, schools, health facilities, sewer, water, electricity and recreational facilities" which to him infringe on the right to adequate housing under the constitution as well as the right to healthy environment. At paragraphs 7, 8, 9, 10, 11 & 12 the deponent exudes knowledge of the project and confirms that the tenants were fully consulted and participated and were given assurances of their rights being granted on the end product. That affidavit exhibits various documents described as minutes of various meetings during which various resolutions were made including resolutions on compensation to those whose houses would be demolished. There is also given details of a meeting held on 16/3/2016 with the civil society, including the petitioners herein, among other civil society organizations. Equally exhibited are lists of tenants who allege to support the Redevelopment project with photographs of participants to boot. I may point out that interested party was joined to the proceeding by consent on the 22/9/2016.

6. When the matter came to court on the 14/10/2016 for hearing, there occurred new developments which necessitated directions to be given. One of such developments was an application by the Kenya Human Rights Commission to be joined to these proceedings. That application was, with the directions of the court, equally agreed to be allowed by consent but on terms that the participation of that party would be limited to making oral submissions on issues of law only and without the need to file any papers. It was also allowed to be joined and to participate as supporting the petition.

7. On that day there was conducted a case conference and four (4) issues were identified as availing themselves for determination by the court. The issues were framed as:-

1) Whether the "Mombasa County Urban Renewal And Redevelopment Of Old Estates Programme" was conceptualised and formulated with public participation under articles 10 & 174 of the constitution as well as sections 87 and 11(1) of the County Government Act?

2) Whether the Respondents breached the Petitioner's' constitutional rights to access information under Article 35 of the constitution.

3) Whether the "Mombasa County Urban Renewal And Redevelopment Of Old Estates Programme" threatens the rights to adequate housing under Article 43(1) b of the constitution.

4) Whether the programme, (Mombasa County Urban Renewal and Redevelopment of Old Estates Programme) is in breach of various statutory provisions listed in the petition – if this is answered in the negative whether the petition is an abuse of the Court process.

8. On that day the matter did not proceed to hearing due to lack of time and it was by consent stood over to the 24/10/2016 at 2.30pm with a further consent of all the parties that only the four(4) identified issues would be available for argument by the parties and determination by the court.

Submissions by the Parties

9. As at the date of issuing the hearing direction the parties had filed written submissions except the Kenya National Human Rights Commission who was admitted to the Proceedings late and who did file a list of authorities on 19th October 2016 and offered oral submissions at the hearing after being joined.

10. The Petitioner filed submissions and list of authorities both dated 12/10/2016 and filed the same date in court. For the Respondent, submissions were filed on 13/10/2016 together with a list of authorities. These are the documents which grounded the oral submissions by the parties.

11. In his opening remarks, Mr. Oluga who appeared for the petitioners stated that his clients were not opposed to the programme as proposed by the Respondents so long as it seeks to improve the housing conditions of the residents of Mombasa but, being law abiding, insist that the same be undertaken in compliance and conformity with the law. Mr. Oluga submitted that as conceptualized and being undertaken the project was in affront to the law in that:-

i) There was never public participation undertaken.

ii) There was outright refusal by the Respondents to provide the petitioners and the Residents of Mombasa with documents relating to the project.

iii) The Project breaches the right to adequate housing as far as the Residents of Mombasa are concerned.

iv) The Project breached the provisions of;

a) County Government Act. Section 3A, 6, 87 and 115.

b) Environment Management and Coordination Act section 3(i), 57A, 58, 59, 68 & 69.

c) Privatisation Act Part 3 & 4.

d) Public Procurement and Asset Disposal Act Part 4 & 5.

e) Physical Planning Act.

12. Mr. Oluga observed that it was agreed between all the parties that public participation for the project was not an option but a mandatory requirement. Articles 10(2)a and 174 (c) as well as section 87 and of the County Government Act were therefore cited to underscore the point that public participation was mandatory. Being mandatory requirement Mr. Oluga then set out to demonstrate to court that what the Respondents and the 1st Interested Party called public participation was no public participation. Reliance was then placed on the decision in **Robert N. Gakuru vs County Government of Kiambu, [2014]eKLR**, for the proposition that for public participation to suffice, the process need to be both quantitatively and qualitatively undertake and not just taken in a cursory and illusory manner.

13. He added that it is the duty of the state organ concerned to extort the public to participate in its process and therefore, places of worship, public baraza's as well as media houses need to be engaged to ensure wider coverage and reach. To the petitioners the Respondent failed on their duty to the law and therefore what was allegedly done did not amount to public participating. Reference was made to paragraph 20 of Mr. Njaramba's affidavit and submissions made that prior to the tender advertisement only two meetings with two groups of the estate residents had taken place and to the petitioner that was not sufficient as all residents of Mombasa County and the Kenyan public needed to participate. However Mr. Oluga went on to submit that even if the said meeting ever took place, there were no minutes to show what was discussed and resolutions passed. At the meetings with tenants, Members of County Assembly, Internal meeting between officers of the Respondent media briefings, meetings with Civil Societies and meeting between the Governor and members of parliament .

14. Mr. Oluga then referred the court to the affidavit of Wungu Gacheri which says the meeting with

those Civil Societies was limited for the purposes of seeking the documents regarding the project and that there would not have been any meaningful engagement without the project documents.

15. On denial of rights under article 35, Mr. Oluga submitted that there were exhibited attempts to get the documents but only the feasibility study was availed. On violation of the statutes, Mr. Oluga placed reliance on Section 3A of the Public Procurement and Asset Disposal Act which governs the principles upon which public procurement and Asset disposal must be undertaken. Reference was then made to the decision in **Erick Okeyo vs County Government of Kisumu and Others,[2014]eKLR**, where Muchelule J, cancelled an award of tender due to lack of public participation.

16. Mr. Oluga then would up his submissions on behalf of the petitioners by pointing out that the constitution vests on the people the last say on any public undertaking and that participation of the sovereign was of paramount importance and should never be glossed over.

17. Since the 2nd interested party, Kenya Human Right Commission, was in support of the petition, Mr. Mwakireti, for that party, associated himself with, and reiterated the submissions by Mr. Oluga fully. He in effect underscored the position that the project is not opposed by his client but reiterated that however beneficial, the project had no otherwise but to be executed and undertaken in compliance with the law. To him, since the project had an impact on all the Residents of Mombasa, all had to be consulted and given the opportunity to air their view over the same.

18. On access to information Mr. Mwakireti submitted that every citizen is entitled to information so as to enable and buttress the enjoyment of the rights guaranteed under the constitution and that without the information sought a citizens cannot meaningfully participate in the affairs of the society even those that have direct impacts on the citizens.

19. On the thresholds and the reliance on the decision in **Anarita Kirimi Njeru-vs republic [1979]1klr**, Mr. Mwakireti submitted that the decision was made under the old constitution and that with the promulgation of the new constitution the tests have since changed. Finally it was his submissions that the mere availability of other alternative remedies was not a bar to a party approaching the court by a Constitutional Petition. He equally urged the court to find that the petition is merited and to allow it.

20. On their part Mr. Amoko for the Respondent and Mr. Ouma for the 1st interested party opposed the Petition on more or less the same grounds. The grounds are broadly that there was sufficient public participation and that the petition as presented is not about the people of Mombasa but the perceived power and right of the petitioners as self-appointed prefects with power to veto and reverse the decisions and projects by the peoples' elected representatives.

21. In his submissions Mr. Amoko pointed out that the amended Petition at paragraph 47 had mutated from the original position that no public participation with the stakeholders was conducted by the respondents to a new and different level that there had been no adequate public participation by the petitioners and members of the public. He pointed out that owing to the unique location and physical area of Mombasa County and its population, there was need for optimal utilization of the land resources available. To him there is a dearth of adequate housing in Mombasa with the availability of only 3,000 dilapidated and inhabitable units which infringe on the right to adequate housing and therefore the only way to a meliorate the dearth was the project now sought to be frustrated by the Petitioners. To him the subject programme is designed to increase the supply of housing ten-folds and that 20% of the new units, about 6,000 units will be available for the proposed tenant purchase by the current sitting tenants and that during the construction there are plans to accommodate the sitting tenants elsewhere.

22. Mr. Amoko further submitted that owing to the constraints on the County Government on Financial Resources, resort had been made to section 33 of Cities and Urban Areas Act so as to involve private partners in designs, finances and construction in a joint venture to be undertaken in line with the provisions of the Public Procurement And Asset Disposal Act and in an open transparent manner. He however denied that the process was towards privatization of the Estates.

23. On public participation Mr. Amoko referred the Court to paragraphs 19-22 of Mr. Njambas' affidavit and annexure **GA 3(a)** in the Petitioners affidavit and submitted that there was evidently public participation and that the petitioners had been consulted and had taken time to study the designs, scope and scale of the programme and continued attending fora to discuss the project.

24. In the same annexure, Mr. Amoko pointed out that the petitioners' only complaint then was that the project would not benefit the Mombasa majority poor. The respondents see the petitioners as asserting the right to oversight and veto the Respondents in their legal mandate which, to him, is the constitutional mandate of other organs of the state and not the petitioners.

25. On relocation of the sitting tenants the Respondents take the stand that the joint partner would meet the costs of relocation and accommodation of the tenants as the construction proceeds and that that aspect was under discussion with the tenants.

26. On the requirement under Environment and Management and Coordination Act, Physical Planning Act the Respondents position is that those will be done at the relevant time but that stage has not reached. However the Respondents contend that even if there was to be demonstrated non-compliance with the statutes, it would present no constitutional issues to be determined in this petition as crafted but by a normal suit. In the submissions of the Respondents failure to comply with a statutory provision is not the same as a violation of the constitution and that where a statute provides a remedy, then such remedy must be exhausted prior to invoking the jurisdiction of the court by way of a constitutional petition. The decisions in **Peter Ochara Anam and other Vs Constituency Funds Board and \$ Others [2011]eKLR**, **The Speaker of National Assembly vs hon JamesNjenga Karume [2016]eKLR**, **Hon. Kanini Kega vs Okoa Kenya Movement & 6Others[2014] eKLR** and **DIANA KETHI KILONZO VS IEBC and others [2013] eKLR** were all cited for the proposition that not every breach of a statute is a Constitutional violation and that where a statute provides a remedy, the remedy need to be exhausted first prior to a resort to a remedy outside the statute even by a constitutional petition.

27. In conclusion Mr. Amoko urged the court to find that this is not a petition alleging or establishing a contravention of any constitutional provision but a self-anointed attempt at achieving personal rights of the petitioner.

28. For the 1st interested party Mr. Ouma submitted that his client, being a welfare group of tenants living in the housing units subject of the litigation, are the only persons directly affected by the proposed project. He pointed out that it is only after the court sought to know the authority of the petitioners that there was filed a supplementary affidavit of Wangu Gacheri exhibiting 1,000 or so signatures. He then referred to the affidavit sworn on his client's behalf by one Mr. Charles Okelo Loka which shows that there had been extensive public participation by which the tenants were placed on the first line followed by Civil Society Organizations and the media. The 1st interested party's affidavit and submissions urge the court to understand the plight of the tenants so as to understand the petition before court.

29. To the 1st interested party, the houses sought to be renewed and redeveloped lack basic utilities like water and electric power and are in deplorable state of disrepair to an extent that a valuation report exhibited declined to advice on rental income. To him it was the responsibility of the 1st Respondent in the Constitutional architecture of responsibilities to ensure the realization under article 43 and that it ought to be allowed to execute its mandate. He joined the Respondent in the prayer that the petition be dismissed to enable the Respondent perform its mandate to the Residents of Mombasa.

30. In closing submissions Mr. Oluga stressed the point that however worthwhile a project is seen to be, the need to comply with the law cannot be overemphasized. He reiterated that the project needed to comply with the provisions of Article 10 and 174 of the constitution as well as the provisions of the statutes said to have been sidestepped.

31. These are the summaries of respective positions taken by the parties in submissions on which the court should base its decision upon.

Analysis of the facts and the law and determinations

32. Even if I had not engaged the parties in a case conference to identify the issues and remove the question of whether or not this is a matter meriting being dealt with as a constitution petition, I would still have held that in so far as there is that premium placed on the constitutional value and principle requiring the sovereign to participate in every project of a public nature that has a direction effect on them, I would not, in a summary manner and knee-jerk way, others would say, adrenalin-high-fashion, have attempted to hold otherwise than that there exist a constitutional issue meriting consideration and determination by the court.

33. However, at the conference, parties were co-operative enough to settle on 4 issues for determination by the court and I must even at this early juncture appreciate the Counsel for that cooperation. I deem that to be the obligation placed on the parties and their counsel by the provision Rule 3 of the Constitution Of Kenya (Protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013, itself a normative derivative of the constitution, with supplemental force and value to the constitution and litigation undertaken thereunder.

34. To this court, a determination of the first issue, touching on whether or not there was a public participation, will be pivotal and setting pace and pointer to the final and ultimate determination of the entire or substantial part of the petition. I will hereafter seek to consider the issues seriatim.

Was the ‘Mombasa County Urban Renewal and Redevelopment of Old Estates Programme’ conceptualised and formulated with public participation?

40. The parties to this Petition take extremely and contradictory positions in the matter as would be expected. The Petitioner and the 2nd Interested Party are adamant that there was never public participation while the Respondent and the 1st Interested Party contend there was just not initial public participation but that the process continues and will be continuous.

41. Midstream, however, and in the Supplementary Affidavit of Wangu Gacheri, the Petitioner says there could have been public consultation but the same was insufficient as it only involved two estates’ residents prior to the tenders being floated. The deponent then exhibited minutes dated 12.2.2016 and 2.3.2016 which show that indeed there were documented meetings on the programme.

42. More telling, however, is the letter dated 12.4.2016 by the 2nd Petitioner whose content may only be understood better if reproduced here. The letter says:-

“...we have taken time to study its design, shape ad scale. We have consequently made extensive inquiries and consultations with your offices, attended several public and private meetings with various officials to seek more information and insight into the project with a view to understand full implication of this project on the people of Mombasa particularly the Urban Poor...”

We also note that the so called Public Participation that have been undertaken by the County Government have only targeted current tenants of the Old Housing Estates but it is not lost to us that these are for the most part facilities of current and former politicians or their cronies, employees of the county and their colleagues who do not represent the true urban poor who badly need housing. We have taken time to meet with the representatives if these tenants and residents of many informal settlements to discuss with them the project.”(Emphasis provided)

43. The only message one gets from the letter is that information was out there about the programme and valuable time had been employed on discussion around the project and equal time had been employed to study the design, scope and scale thereof. It is also confirmed that there had been consultations with the sitting tenants of the affected estates. These confirmed facts then beg the question of what exactly a state organ is expected to do so as to be seen to have met the dictate that public participation, as a critical principle and value of the constitution is undertaken.

44. Both parties to the Petition have cited to the Court decisions for the proposition that to qualify as having conducted adequate public participation, a state organ ought to demonstrate that it did what was reasonably practicable in the circumstances, regard being had to the nature of the undertaking and prevailing circumstances including time constraints. The decision by **G.V. Odunga J, in Robert Gakura & others V.s Governor Kiambu County and 3 others** was relied upon by both sides to help court determine what amounts to qualitative and quantitative public participation. That decision itself relied heavily on a South African Constitutional Court decision in **DOCTORS FERLEFE ITERNATIONAL VS. SPEAKER OF NATIONAL ASEMBLY & OTHERS (CCT 12/2005 (2005) EACC 11.**

45. In both decisions, it was not in doubt that there had never been attempt at engagement of the public in a legislative process. However, the Kenyan Courts, has already said, borrowing heavily form the South African Court. All the judges agree that there is no litmus test of what amounts to qualitative and quantitative public participation. The South African Court (Judge Ngcobo) said:-

“Where parliament has held public hearings but not admitted a person to make oral submissions on the grounds that it does not consider it necessary to hear oral submissions from that person, this court will be slow to interfere with Parliament judgment as to whom it wished to hear and whom not. (emphasis added)

Once again that person would have to show that it was clearly unreasonable for parliament not to have given him an opportunity to be heard. Parliaments’ judgment on this issue will be give considerable respect. The basic elements of public involvement include dissemination of information concerning legislation, under considerations, invitation to participate in the process and consultation on the legislation.”

46. Although the Judge was dealing with a matter concerned with legislation, the obligation on the 1st Respondent and its two officers are not very different under the Kenyan Constitution. Article 3 when read together with Articles 10 and 174, mandates the 1st Respondent and its organs, as well as officers acting on its behalf, to engage the public on their dealings as are bound to impact on the lives of the public. In the cause of such engagement it would be difficult to imagine or indeed expect unanimity and one has to go back to the basic of rule of democracy that the minority must be given their say even as the majority have their way. In the same judgment of **Doctors for life (supra)** Judge Sachs, while concurring with his brother Judge Ngcobo had this to say:-

“A vibrant democracy has a qualitative and not just quantitative dimension. Dialogue and deliberations go hand in hand. This is part of the tolerance and civility that characterise the respect for diversity the Constitution demands. Indeed, public involvement may be of special importance to those whose strongly held views have to cede to the majority opinion in the legislature. The minority groups should feel that even if their concerns are not strongly represented, they continue to be part of the body public with the full civil dignity that goes with citizenship in a Constitutional democracy.”

47. The duty to allow pubic participation being a running theme in the Constitution that permeates all undertakings of the organs to which the sovereign has delegated power is therefore a cornerstone for the due performance of the delegated power by the delegate. It is of a binding nature that all state organs have no option but to ensure compliance.

48. In the instant matter it is not only from the Respondents and the 1st Interested Party but also from the Petitioners themselves that there was some consultations albeit it is contended by the petitioners and @nd Interested Party that it did not meet the thresholds for having only dealt with the sitting tenants but not all the residents of Mombasa and the Kenyan public at large.

48. To this court, to expect that every resident of Mombasa County was to be consulted and expected to give opinion on the project would be make public participation a single and all grounding bottleneck to any execution of any mandate by the County government. In my understanding what the constitution

demands is that a reasonable and real opportunity be availed to the stakeholders to be heard on the project. The views availed would then be considered, at the discretion of the Respondent, and a decision made which to absorb and which not to absorb, regard being had to the practical realities of every situation including professional advice. Once again **G.V Odunga in David Ngige Tharu and 128 Others Vs. Principal Secretary, Ministry of Lands, Housing and Urban Development & 2 others (2016) eKLR** when addressing his mind to almost similar facts but on allocation of developed housing units had this to say:-

“It is not a requirement that all stakeholders must be heard.”

49. For this case, the Petitioners in the Supplementary Affidavit of wangu Gachiri contend at paragraph 11 that:-

“as far as the questionnaires are concerned, the same mere only done in respect of a few tenants. The same do not show that there was participation by the rest of the tenants and the Mombasa residents who are not tenants.”

50. In effect the Petitioners are saying that all residents of Mombasa had to be served with the questionnaire. That is the kind of demand and expectation that this court would consider an absolute impediment to the obligation of the Respondents to execute their constitutional mandate in ensuring adequate housing for its residents. And I need to add that there would be a sizeable number of residents of Mombasa who may not be interested on what kind of housing the respondent provide or don't provide purely because they have their own arrangements for housing or it just does not concern them. To such people it is not reasonable to expect that they must give an input. All that is expected is that the process is done transparently in that a chance and an opportunity is availed for all views to be made known.

51. In the circumstance of this case, I don't doubt that there was public participation. One may not go further than the letters from the Petitioners as aforesaid, the affidavit of Mr. Njambia and that of the 1st Interested Party sworn by Charles Okelo Loka. In any event, I also hold the view that it is now fashionable and desirable to have stakeholder come together under some umbrella organization if not for anything but to develop a uniform approach to address common problems which can also be seen as a driver to timely address and resolution of such issues. It is only logical that an issue involving a large group of people would be handled and dialogued upon in a more prompt and timely manner if the stakeholders are organized in a group or definite groups and representations made through such a group rather than having to hear and dialogue with each and every individual member.

52. It is for that reason that the 1st Interested Party must be seen and regarded as the voice and mouth-piece of the tenants, who I consider the first-in-line-stakeholders to the “Mombasa County Urban Renewal and Redevelopment of Old Estates Programme”.

53. On the documents filed, it is not difficult to see the critical role played by the 1st Interested Party to the Petition. There is exhibited ‘Minutes of a meeting held on the 9th March, 2016 at Tudor Pastoral Centre between the tenants of Housing Estates and the Civil Society’. The theme of the meeting as reflected in those minutes is that there had been engagement between the Respondents and the 1st Interested Party and that some understanding had been reached. All was well, save that the tenants wanted a guarantee on the ‘*resettlement, costs of the housing (affordability), use of open spaces and non-increment of rent*’.

54. The purpose of this litigation is clearly brought out in that document. It says:-

Min 4/9/2016: WAY FORWARD

- ***That they should form committees from the estates but first dissolve the umbrella body which will determine the outcome of the process.***
- ***Move to court process to get conservatory orders until clarity is sought.***

- **Out of court settlement can be considered.**
- **Sub tenants and those who inherited should engage the county government of Mombasa in order to rectify their documents.”**

At page three of the document, the first bullet, the document records:-

“Lack of participation in the whole process though the tenants were represented by an umbrella body which consists of all the chair persons of the estates.” (Emphasis mine)

I read the document to say that there was engagement with the tenants through their elected official.

55. Having found that there is no litmus test for what is the exact quantity and quality of public participation and that what was expected of the Respondent was a genuine and real chance for stakeholders to express views and that indeed opportunity was so availed, I find that what was done was sufficient and therefore the first issue is answered in the affirmative.

56. That however does not rest the question of public participation. In my opinion, public participation for a project of the magnitude in this matter cannot be deemed an event or one-off affair. As the Respondents contend in the affidavit of Mr. Njaramba, the process is ongoing or continuing. It is therefore the direction of this court that the Respondent shall live to the public expectation that it shall perform its functions with utmost fidelity to provisions of Article 10 of the constitution at every level of furthering the programme and there must be designed and strengthened a robust and continuing plan for public participation which to this court should include but not limited to continuous update on the progress made and the office alluded to by Mr. Njaramba at paragraph 22 of the Reply must be maintained at all times and equipped with necessary public participation safeguards to include provision of suggestion or complaint boxes monitored and opened every 30 days in the presence of all stakeholders who may wish to participate at such opening.

57. It is equally desirable that the press, both print and electronic, including local and national radio stations be engaged regularly once the implementation kicks off. This to the court will ensure continuous flow of information and avoid possibilities of further protracted and contested requests for such information.

58. For avoidance of doubt, the participation of the 1st Interested Party, Mombasa County Public Rental Estates Council, should never be downgraded or ignored just like the participation of the Petitioners herein. In case of demolition let the guidelines in **United Nations Basic Principles And Guidelines on development Based Evictions And Displacements** as appreciated in the decision in **Keper Omondi Onjuro and Others vs attorney general & Others, [2015]eKLR** be observed and complied with strictly.

Was the Petitioners right to access information under Article 36 infringed?

59. It is on record by the Petitioners and it is not denied that there was made a request for certain documents, which request was delivered to the 3rd Respondents' department on 24.5.2016. There is no answer to the contention by the Petitioners that that letter has not been answered to. Pursuant to Article 35 of the constitution, as read with section 87, County Government Act, it is the duty of the Respondent to avail such documents as are available or give a plausible justification why any of the requested documents should not be availed. Failure to respond in time and at all is prima facie a denial and therefore an infringement of the constitutional right.

60. I make this order noting that I have ordered that the public participation shall continue and be enabled to continue at every stage of the project and I appreciate that the documents sought may themselves be the tools to facilitate such participation.

Does the “Mombasa county Urban Renewal and Redevelopment of Old Estates Programme” threaten the applicants’ rights to adequate housing under Article 431(b) of the Constitution?

61. Based on the common position taken by all the parties that indeed the project is enviable and need not be opposed if the spirit and letter of the law is complied with, this issue is not one that merits the court's consideration. I however note that it is not enough to say that one's constitutional rights is threatened without more. I partly who alleges violation of a right has the single and inescapable duty to bring out the facts and demonstrate how those set of facts relied upon violate or threatened to violate his rights.

62. Beyond the pronouncements by the court in **Anarita Karimi Njeru Vs. Attorney General (supra)** and the need to align it with the current Constitution, it is the view of this court that the clarity of a complaint by a litigant, even if it be in a Constitutional Petition, cannot be overlooked or underrated. The complaint must be brought out clearly and succinctly so that the party against whom allegations of breach are made is made aware so as to mount a defence or offer an explanation. That to me is a dictate and an ingredient of the right to a fair hearing. At the same time the clarity of pleading help the court meet its obligation and objective to determine the dispute in an expedient and proportionate manner.

63. In the matter before me there is no demonstration how the project, which is intended to increase provision of modern housing units ten-folds is likely to threaten anybody rights under the provisions of the Constitution.

64. I find no substance in this complaint and rather I hold the view that the project clearly aims at achieving the constitutional function and obligation of the 1st respondent under not only Article 43(1)b but also sections 2(g) and 8(d) of Third Schedule.

Whether the Mombasa County Urban Renewal and Redevelopment of Old Estates is in breach of the various statutes named in the Petition

62. My understanding is that as we speak today, the 1st Respondent has invited tenders for the proposals from both local and international firms. At the hearing I was not told if indeed any bids were received, evaluated or tenders awarded. What has been challenged is that the bids were invited without the requisite public participation.

65. Having found that there had been public participation and that the same should be continuous, I take it that what would follow is a tendering process. That process is by law dictated to be open and transparent under section 3A of the Public Procurement and Asset Disposal act. That process once concluded would be followed by construction works which must fit itself within the statutory order of things for undertaking construction works. I take notice that the law forbids any construction to be undertaken akin to the one subject of this Petition without compliance with the provisions of PART VI (sections 58 to 65 and part VIII, sections 137 to 146) of the Environmental Management and Coordination Act. Additionally the provisions of PART V of the Physical Planning Act as read with Physical Planning (Building And Development) (Control) Rules are also mandatory for compliance.

66. There is an uncontroverted assertion by Mr. Njaramba at paragraph 17 that none of the aspects of the development is exempt form the existing regulatory regimes. This has been put on record and in public and he shall be held to his word as his bond. It is only necessary to point out here that if Mr. Njaramba may, for any reason, entertain the thought that, his averments were only for this matter, and that he may wish them away after this determination, then, he better stand reminded, that the averments were on oath, form part of a permanent record of the court and that national values and principles of governance are alive and binding upon him.

67. In fact, it should not be lost sight of that under both the Physical Planning Act and Environmental Management and Coordination Act, there are strict sanctions for failure to abide by the statutory requirements. Some of the sanctions invite severe penal consequences which to this court are sufficient safeguards for which this court appreciates there are statutory structures and institutions created to oversee. Since Mr. Njaramba says the stages for plan approvals and NEMA Licences have not been reached, it wold be pre-emptive to make any declarations in that regard just now.

68. In any event this court take the view and positions that these are specialized institutions created under

those statutes with clear mandates and are best equipped to ensure that the provisions of the Acts are followed and not breached or violated.

69. This court in a Constitutional Petition is not at liberty to self-appoint as the prefect of such institutions and bodies. It has been said and innumerable times that this court should not arrogate to itself the mandate of other statutory organs and bodies especially where the law provides statutory remedies. See **Kemrash Harrikisson Vs. A.G of Trinidad and Tohago (1979) 3WLR63** which has been cited by the courts of this country to the effect that constitutional Petitions should not be employed as a panacea for all ills lest its value be diminished if it be employed as a general substitute, always available for the control of every alleged breach of administrative action.

70. The reputation of the Petitioners, the 1st Petitioner in particular, in public interest litigations and as a watchdog over demonstrated administrative action excesses is well documented and in public domain. Let it not tire in its accolades but to continue being the premier civil society that safeguards the rights of the marginalised and the lowly in society. I entertain no doubt that any attempt to circumvent the law both under the Constitution and statute at or in implementing and executing the suit project will not escape their attention. I find no proof of violation of the statutes or any of them and decline to make any declaration in that regard.

CONCLUSION

71. This Petition was indeed not frivolous. It raised genuine concerns on the need for the Respondents to avail those various documents in its possession to enable the public participation in the project's implementation.

72. Save for the orders I have made that the documents be availed and that the law be complied with at every stage of implementing the project, all the prayers are declined and dismissed.

73. On costs I direct that each party shall bear own costs, this being a clearly demonstrated Public interest litigation.

Dated and delivered at Mombasa this 23rd day of December 2016

P.J. O. OTIENO

JUDGE

19.12.2016

Before – Hon. P.J.O. Otieno - Judge

Court Assistant – Linda

Mr. Nyange for the Petitioners

Mr Ananda for the Respondent

Mr. Obuya for the 1st Interested Party

Court – Judgment not ready. It is stood over to 23.12.2016.

23.12.2016

Before – Hon. P.J.O. Otieno – Judge

Court Assistant – Randu

Mr Kitonga for Mr oluga for 1st, 2nd and 3rd for the Petitioners and for Mr. Mwakireti for 2nd Interested Party

Mr. Makaya for Rateno for 1st Interested Party

Mr. Amoko for the Respondents.

Court – Judgment delivered in Open Court.

P.J.O. OTIENO

JUDGE

23.12.2016

Mr. Kitonga – The first Respondent have refused to collect rent at Khadija Estate where some houses were broke into and tenants evicted without notice or warning.

Mr. Amoko – I have no information on the allegations. However, the facts should be brought appropriately and not in this Petition. It can be dealt with appropriately elsewhere.

Mr. Kitonga – Nothing to add.

Court – With or without the pendency of this matter, all and including the 1st Respondent, being a creature of the law, must abide and uphold the law. The question of eviction of any tenants has been dealt with in this determination and it is hereby repeated that let none be done without compliance and full compliance with the guidelines in place. That does not require a court to pronounce itself upon. It is a dictate that Kenyans have chosen to be governed by the rule of law. I say no more even though I have no more than Mr. Kitonga’s complaint from the bar.

P.J.O. OTIENO

JUDGE

23.12.2016