



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**CONSTITUTIONAL PETITION NO 339 OF 2016**

HUBAH DEROW.....1<sup>ST</sup> PETITIONER

SUSAN MUTHONI.....2<sup>ND</sup> PETITIONER

SWALEH RAJAB.....3<sup>RD</sup> PETITIONER

(SUING AS COMMITTEE MEMBERS OF EASTLEIGH LEADERS FORUM)

ALI MWANGI KARIUKI.....4<sup>TH</sup> PETITIONER

**VERSUS**

CITY COUNTY OF NAIROBI.....1<sup>ST</sup> RESPONDENT

MERCHANTS COMPANY LIMITED .....2<sup>ND</sup> RESPONDENT

**Ruling**

1. In a Petition dated 4<sup>th</sup> August 2016 the petitioners who describe themselves as adult residents of Eastleigh Area, Nairobi seek the following final orders:

**“PETITIONERS’ PRAYERS**

*A declaration as unlawful, null and void the construction of shops and stalls in place reserved for 2 lifts.*

*a. An order prohibiting the 2<sup>nd</sup> respondent from further construction/development on L.R. No 36/VII/1031 popularly known as Eastleigh Community Centre and Social Hall on account of the existing public/private partnership between itself and the 1<sup>st</sup> respondent.*

*b. A declaration as unlawful, null and void the existing public private that the partnership between and the 1<sup>st</sup> and 2<sup>nd</sup> respondent to re-develop L.R No 36/VII 1031 also known as Eastleigh Community Centre and Social Hall for having been obtained/Secured in breach of the law and for being unconstitutional.*

*c. A mandatory order for the respondent to develop construct or establish lift upon the space*

reserved for it, in order to allow the persons with disability and older persons in society have access and entry on the premises building known as EASTLEIGH SOCIAL HALL.

d. Costs of this suit.”

2. By a Notice of Motion dated 4<sup>th</sup> August 2016, the Petitioners seek interlocutory relief pending hearing of the Petition herein as follows:

**“NOTICE OF MOTION DATED 4<sup>TH</sup> AUGUST 2016**

1. That this application be certified as urgent and be heard ex-parte in the 1<sup>st</sup> instance.

2. That the Honourable court be pleased to issue a temporary injunction restraining the respondent jointly and severally, their agents, servants and or people working under them from running businesses shops in the reserved area for the lifts in the building or structure known as EASTLEIGH SOCIAL HALL constructed in the land parcel known as L.R.NO.36/VII/1031.

3. That the Honourable Court be pleased to order, in effecting closure immediately of rental business premises erected constructed and or develop upon the reserved area for lifts the premises known as in the building or structure known as EASTLEIGH SOCIAL HALL constructed in the land parcel known as L.R.NO.36/VII/1031.

4. A declaration as unlawful, illegal, unjust the construction or developed shops put up in place of lifts, in the structure known as EASTLEIGH SOCIAL HALL constructed in the land parcel known as L.R.MP.36/VII/1031.

5. Any other relief that the court deems suitable and fit to grant.

6. Costs be awarded to the applicants/petitioners.

3. The Notice of Motion was supported by the affidavit of the 1<sup>st</sup> Petitioner sworn on 4<sup>th</sup> August 2016 and based upon grounds set out in the application as follows:

**“GROUNDS**

a. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have failed to provide structural building plans and designs to the petitioners frustrate the petitioner attempt to protect and safeguard and public good and interest.

b. The 2<sup>nd</sup> respondent has without any colour of rights and illegally constructed shops and stalls in the space provided for lift to the building.

c. The 2<sup>nd</sup> respondent has breached the terms of the public private partnership/agreement and has further ignored and neglected to take into account input of the petitioners who are the lawful beneficiary of the PPPA.

d. The respondent herein has illegally and unjustly developed and or erected rental business shops on the ground 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> floor of the reserved area for lifts in the structure known as EASTLEIGH SOCIAL HALL building in L.R.NO36/VII/1031.

e. The respondent failed to consult, discuss or create a platform for participation and engagement with the community and specifically persons living with disability (PWD) on change of use of the lift to rental business shops.

f. The respondent has failed to incorporate or device other appropriate ways, suitable and appropriate for person living with disability(PWD) in accessing or having easy in the premises and

shops at different floors and levels in the building known as EASTLEIGH SOCIAL HALL building in L.R.NO 36/VII/1031.

g. The applicants right to access and enjoy easy access to premises in a structure with floors have been offended and infringed on upon contrary to Article 54(1),(a),(b), (c) 57(a) of the Constitution of the Republic of Kenya.

h. It is imperative therefore that this Honourable court intervenes to ensure that it safeguards and protects the rights of persons living with disabilities, older members of society and the general public at large.

i. The respondent has offended key provisions in the constitutional, By Laws procedures that related to housing.

j. It would be in the interest of substantive justice that the sought orders issue.”

4. In its reply the 1<sup>st</sup> Respondent filed an affidavit by its Director, Development Management and Regularization Department on 19<sup>th</sup> September 2016 where its case is set out in paragraphs 3-12 as follows:

**“REPLYING AFFIDAVIT OF DOMINIC MUTEGI DATED 19<sup>TH</sup> SEPTEMBER 2016**

3. **That** the agreement does not seek to construct a storey building without any lifts as clause 1.5 is very clear that the design for the project facility shall be in accordance with drawings and plans approved by the council and shall abide with all statutory and legal stipulations governing the development of the project facility.

4. **That** such multi storied building cannot be put up without lifts hence it is a misconception to aver that the spaces for lifts have been used as shops.

5. **That** clause C stipulates that the council is desirous of maximizing the income from the premises by constructing a modern social hall, a gymnasium, shops, offices and similar conveniences which means that the intention of having the improved facility is to improve the lives of the larger public.

6. **That** to the contrary the 1<sup>st</sup> respondent is incumbent and determined to change the lives of the larger public by affording them a facility that well caters for their needs hence persons living with disability have not been left out.

7. **That** the petitioners have only seen and annexed the public private partnership agreement but have not taken their time to look for and study the plans for the building to know whether their interest has been taken care of or not.

8. **That** the 1<sup>st</sup> respondent has not authorized any conversion of the reserved access road by either the 2<sup>nd</sup> respondent or any other party thereof and such conversion is illegal and surely unjust.

9. **That** there is no communication whatsoever between the applicant and the 1<sup>st</sup> respondent to prove that indeed the applicants engaged the 1<sup>st</sup> respondent as regards to the issues raised herein.

10. **That** the suit and/or petition herein then is premature as the steps recommended by the physical planning Act have not been allowed.

11. **That** the petitioners have not demonstrated how their rights as guaranteed by the constitution of Kenya have been violated, breached and/or interfered with or how they are about to be violated.

12. **That** it is not true that space meant for the lift has been utilized in putting up extra shops and

offices hence an assessor can be appointed to ascertain the facts herein and the petitioners' allegations."

### **Submissions**

5. The petitioners urged that the Respondents had violated the rights of older people and persons with disabilities under the Constitution in failing to make provision in the construction for the access and enjoyment thereof by disabled persons as follows:

*"Turning to the Replying affidavit filed by the 1<sup>st</sup> respondent it is our humble submissions that he 1<sup>st</sup> respondent is attempting to cover-up or explain the contravention, failures, illegalities and breaches of the PPPA that have been committed by the 2<sup>nd</sup> respondent. In paragraph 3 & 4 of the Replying Affidavit is asserted that the 2<sup>nd</sup> respondent will abide by the design for the project in accordance with drawings and plans as provided for in clause 1.5 of the PPPA and that such a multi storied building cannot be put up without lifts. The petitioners response to the above assertion are that the PPA provided that the project facility would be completed within 24 months (clause 1.12) while it is over eight years and no lift and rumps are in place.*

*Paragraphs 5 and 6 of the replying affidavit of the 1<sup>st</sup> respondent that he intention of the project facility is [to] improve the lives of the larger public by affording them a facility that caters for their needs is untrue and misleading as no provisions has been made for lifts and rumps that will ensure easy and convenient access to the facility by the young, elderly and persons living with disabilities."*

6. For their part, the 1<sup>st</sup> respondent asserted consciousness to the need for provision for disabled persons but urged that the construction had not been completed as follows:

*"In this case there is no demonstration whatsoever on how the rights of the petitioners have been infringed and an architectural plan would have proved that the construction site indeed has so many floors without a lift yet a lift was supposed yet be installed for use by the persons with disability.*

*It is the 1<sup>st</sup> respondents submission that the construction is not yet complete for technical reasons and when it shall be complete it shall have lifts as indeed enough space has been created for the same. Nairobi City County is caring and minds the existence of persons living with disability hence so much care has been taken to ensure persons living disability are well taken care of either in appointments or provisions of services."*

### **Issue**

7. The issue for determination is whether the court will at interlocutory stage make a mandatory injunction orders *"effecting closure immediately of rental business premises erected constructed and or develop upon the reserved area for lifts the premises known as in the building or structure known as EASTLEIGH SOCIAL HALL constructed in the land parcel known as L.R.NO.36/VII/1031 and a declaration as unlawful, illegal, unjust the construction or developed shops put up in place of lifts, in the structure."*

### **Determination**

8. The Court may, of course, not make the final Declaration sought at the interlocutory stage without hearing the full petition.

9. The principles for the grant of interlocutory mandatory injunction are well known. Although a mandatory Injunction may be granted at the interlocutory stage, the same will only be done in exceptional cases where a clear case is established. As this court held in ***Desmond Boi and Willis Oloo T/A Institute***

*“While the court has power to make mandatory injunction orders at the interlocutory stage, this jurisdiction is to be exercised cautiously and exceptionally where there is demonstrated a clear case in favour of the applicant which gives the Court, in the words of Megarry J. in **SHEPHARD HOMES LTD. VS. SANDHAM** (1970) 2 ALL ER 402 at 412, “assurance that at the trial it will appear that the injunction was rightly granted.” See **Kamau Muchuha v. The Ripples Ltd** Civil Application No. NAI. 186 OF 1992 (unreported) and this Court decision in **KENYA INTERNATIONAL FISHERIES DEVELOPMENT AND FISH SUPPLIES AGENCY LTD. V. AGRICULTURAL DEVELOPMENT CORPORATION and 2 Ors.**, Nairobi Pet. No. 355 of 2016.”*

10. In this case, not only is the right of persons with disabilities to such facilities as lifts to be established but also breach thereof by a construction by the respondents with due regard of the interests and welfare of such persons. The Court should also hear the persons who would be affected by an order for the removal of shops in the construction subject of the suit.

11. I consider that the petitioners have an arguable case for the provision of facility for persons with disabilities. The respondents do not deny this case and only respond that the construction is not complete and that when complete such facilities for lifts will be made the space for which has been provided. The petitioners’ case is that spaces provided for the installation of lifts have been utilized as shops and hence the mandatory order for removal of the shops.

12. Article 54 of the Constitution sets out the rights of persons with disabilities as follows:

*“54.(1) A person with any disability is entitled—*

*(a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;*

*(b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;*

*(c) to reasonable access to all places, public transport and information;*

*(d) to use Sign language, Braille or other appropriate means of communication; and*

*(e) to access materials and devices to overcome constraints arising from the person’s disability.*

*(2) The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.”*

13. I consider that the welfare of persons with disabilities is important enough for the court to seek to establish the true position on the ground and to promote their enjoyment of the rights if threatened or violated, in accordance with the duty of the Court under Article 20 (3) of the Constitution that –

*“(3) In applying a provision of the Bill of Rights, a court shall—*

*(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and*

*(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”*

14. The Court has power under rule 7 of the Constitution of Kenya (Protection of Rights on Fundamental Freedoms) Practice and Procedure Rules, 2013 to order to be joined into the proceedings persons who have an indentifiable interest in the matter subject of the suit, as follows:

**“Interested part**

7 (1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.

***(2) A court may on its own motion join any interested party to the proceedings before it.”***

15. As persons to be affected by any order of the Court to remove their shops, the operators of the affected shops are interested parties and I, accordingly, direct that they be joined as Interested Parties and the petition be amended as appropriate.

16. I consider that this is a proper case for the Court to visit the locus in quo for the court to observe structure in question and to understand the perspectives of the respective cases of the parties.

**Orders**

17. Accordingly for the reasons set out above, I direct that the owners/operators of the shops allegedly occupying the spaces provided for lifts in the suit premises be joined as Interested Parties and that the Notice of Motion herein dated 4<sup>th</sup> August 2016 be subsumed in, and be disposed of by way of an order for the hearing of, the main Petition and that the court does visit the ***locus in quo*** as part of the hearing.

18. Costs in the Cause.

**DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF DECEMBER 2016.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

M/S S. G. Wachira & Co. Advocates for petitioners

M/S Momanyi & Associates Advocates for the 1<sup>st</sup> Respondent

No appearance for the 2nd Respondent