



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.293 OF 2014

BETWEEN

PETER NJERU MUGO.....PETITIONER

AND

NAIROBI CITY COUNTY.....RESPONDENT

JUDGMENT

1. The Petition dated 30th June 2014 is premised on **Articles 2(4) 21, 22(3), 23(3), 28, 29, 31(a), 40, 49, 50 and 165(6)** of the **Constitution**.
2. In the Petition and Supporting Affidavit sworn on the same date, the Petitioner has stated that he lives and works on land registered as L.R.209/5013 within Kileleshwa area of Nairobi which land he acquired in 1989. Sometime in 2013, he applied for and obtained authority from the Respondent to drill a borehole on the land. By letter dated 4th July 2013, addressed to him, the Director of City Planning gave conditions for the drilling works to commence and stated *inter-alia* that the authority to drill would last for three(3) months only.
3. The Petitioner contends that he completed the drilling of the borehole and installed a pump and water tanks before he begun selling water on a commercial basis. That he was surprised when the Respondent's employees and/or agents invaded his land and ordered him to move out to enable the destruction of the borehole, forcing him to file **J.R. No.53/2014** before this Court and Majanja J on 14th February 2014 granted him conservatory orders restraining the Respondent from taking any adverse action against him or his property.
4. The Petitioner claims that two weeks after the above orders had been issued, the Respondent issued a notice to him alleging that he had failed to comply with an analysis report on fluoride level requirements and maliciously proceeded to close his borehole and stopped him from selling water.
5. It is now his case that his fundamental rights have been violated, and the Constitution has similarly been violated, by the Respondent and so he is entitled to the following declarations;

“(1) A declaration that issuing a notice without a name of the person to be served and ordering the said un-named party to demolish a construction or stop construction in a 3rd part of his plot is unfair, unreasonable and un-

constitutional under Article 47(1) of the Constitution.

(2) A declaration that trespassing on Petitioner's Plot LR. No.209/3053 with over 50 strangers, a lorry, a pickup and a heavy earth moving machine and ordering the Petitioner's family to move out for the Respondent to flatten the construction for NO given reason and without a Notice is un-constitutional and a breach of Articles 28(d) 31(a) 29(c) and (d) 47, and the Court is entitled to order under Article 23(3) permanent preservatory Order do issue restricting Respondent by its self, its servants and or agents from trespassing into Petitioner's Plot LR 209/3053 along Kandara road Kileleshwa Nairobi or destroying any building or water project whatsoever is unconstitutional.

(3) A declaration that Respondent having authorised the Petitioner to dig a borehole and licensed the Petitioner to sell water to the public, the Respondent having supervised the construction all the way and the Petitioner having completed and started operation after the Respondent had issued the Petitioner with a license the Respondent is estopped from destroying the Petitioner's project on a technical omission and if it was an omission [it] is unconstitutional.

(4) A declaration that the Respondent and other authorities having approved the Petitioner's Project it is late to interfere with it now.

(5) A declaration that pouring water down and closing the Petitioner's water project without Notice to show cause is a breach of his Constitutional rights; under Article 40 of the Constitution selling water is the Petitioner's property rights and he could sue under Article 22.

(6) A declaration that the Respondent is in breach of Article 31(a) of the Constitution in trespassing in Petitioner's home with heavy earth moving machine vehicles and over 50 strangers. (sic)"

6. The Respondent filed a Replying Affidavit sworn on 21st August 2014 by one, J. M. Kathenge, Director of Planning in the Nairobi County Government.
7. In the said Affidavit, he deponed that while a single business permit was granted to the Petitioner, the same did not exempt him from compliance with other laws, a condition exhibited in the same business permit. That the Petitioner was served with an enforcement notice to provide an approved development plan for his premises but he has refused to do so.
8. Regarding **J.R. No.53/2014**, Mr. Kathenge deponed that it was never heard on its merits but that Parties to it agreed to set aside the enforcement notice, in that case and the Court also never determined whether the Applicant had valid development documents in respect of the land which was to be developed.
9. Lastly, that the Petitioner has come to Court prematurely as he has not exhausted the procedures provided for under the **Physical Planning Act** before rushing to this Court.
10. I have read the submissions filed by the Parties and will take them into account when determining the Petition. In that regard, the first question to address is whether the Petition is premature.
11. The Respondent on that issue submitted that **Section 38** of the **Physical Planning Act** grants any aggrieved developer, a right of appeal against an enforcement notice issued to him. That failure to invoke that right, invalidates any direct Petition to this Court. In his rejoinder Submissions, the Petitioner did not address that issue at all.
12. It is now trite that where the law creates a procedure to address any issue, that procedure, save in

exceptional circumstances, should always be followed – see **Narok County Council vs Transmara County Council (2000) I.EA 161**)

13. From the record, two notices by the Respondent's Public Health Department have been exhibited by the Petitioner; one dated 22nd May 2014 and the other dated 11th June 2014. The notices required the Petitioner to provide;

- i. a change of user of his premises from residential to commercial.
- ii. a approved building plan for the structures within the plot.

14. He was also ordered to stop selling water from his borehole until he had met the conditions set by the Government Analyst on fluoride levels.

15. I have also seen a notice under the **Physical Planning Act, Cap.286**. The notice states that the Petitioner was being given seven (7) days' notice to remove an illegal structure on his land. The notice further stated that the illegal structure is **“the construction of a building structure up to 2 levels and occupation of the same”** without a building development plan.

16. It would seem to me that all the notices are unacceptable to the Petitioner but the Respondent has argued that they are all lawful and it is the Petitioner who has come to Court prematurely and with unclean hands and should not be granted a hearing.

17. **Section 38** of the **Physical Planning Act**, which is headed, **“enforcement notice”**, provides as follows;

(1) When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.

(2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

(3) Unless an appeal has been lodged under subsection (4) the enforcement notice shall take effect after the expiration of such period as may be specified in the notice.

(4) If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice he may within the period specified in the notice appeal to the relevant liaison committee under Section 13.

(5) Any person who is aggrieved by a decision of the liaison committee may appeal against such decision to the National Liaison Committee under Section 15.

(6) An appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time

being applicable to the High Court.

(7) Any development affecting any land to which an enforcement notice relates shall be discontinued and execution of the enforcement notice shall be stayed pending determination of an appeal made under subsection (4), (5) or (6).

Section 13 provides as follows;

1. *Any person aggrieved by a decision of the Director concerning any physical development plan or matters connected therewith, may within sixty days of receipt by him of notice of such decision; appeal to the respective liaison committee in writing against the decision in such manner as may be prescribed.*
2. *Subject to subsection (3), the liaison committee may reverse, confirm or vary the decision appealed against and make such order as it deems necessary or expedient to give effect to its decision.*
3. *When a decision is reversed by liaison committee it shall, before making any order under subsection (2), afford the Director an opportunity of making representations as to any conditions or requirements which in his opinion ought to be included in the order, and shall also afford the appellant an opportunity to replying to such representations.*

18. Both Sections 13 and 38(5) entitle the Petitioner to an appeal to the National Liaison Committee but it is obvious that he did not invoke that procedure. Both Sections also create a role for the High Court only if a party is dissatisfied with the decisions of that committee and not before.

19. It is my view that whereas a party can approach the High Court directly under both its constitutional interpretation mandate and its civil law mandate, to avoid a clear procedure set by law is an abuse of Court process. If all Statutes were to be ignored and the Constitution invoked in every instance, then those Statutes would lose meaning and all statutory processes would be halted to eternal chaos in society.

20. I reiterate that where the law has set up procedures to be followed in addressing any complaint, those procedures must be followed.

21. Having so held, it follows that the Petition is premature and ought to be struck out and necessary orders shall be made at the end of this judgment.

22. But suppose the Petition was properly before me, is there any substance to it?

23. As can be seen above, the Petition basically challenges the notices issued to the Petitioner for the developments made on his land. Those are matters to be addressed by the National Liaison Committee and any other organ created by Statute to deal with it. The High Court's role is also clear and to say anything about the merits of the case would pre-judge matters not yet properly before it.

24. From the foregoing, it follows that the Petition before me is misconceived and must be struck off, which I hereby do. The only other order to make is that the orders herein are suspended for thirty days to enable the Petitioner take the necessary action.

25. As for costs, let each Party bear its own costs.

26. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 29TH DAY OF MAY 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Miron – Court clerk

No appearance for Parties

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE

29/5/2015