



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 6 OF 2015**

**IN THE MATTER OF: AN APPLICATION BY SAID TAHIR, STEVEN**

**OGWAPIT AND HUBERT SEIFERT AS OFFICIALS OF NEW NYALI**

**RESIDENTS ASSOCIATION UNDER ARTICLE 22 OF THE**

**CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF: FUNDAMENTAL RIGHTS AND FREEDOMS UNDER**

**ARTICLES 19, 20, 21, 22, 23, 27, 42, 69 AND 70 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**1. SAID TAHIR**

**2. STEVEN OGWAPIT**

**3. HUBERT SEIFERT AS OFFICIALS OF**

**NEW NYALI RESIDENTS ASSOCIATION.....PETITIONERS**

**VERSUS**

**1. COUNTY GOVERNMENT OF MOMBASA**

**2. FRANCIS THOYA, CHIEF EXECUTIVE, LAND PLANNING &  
HOUSING, COUNTY GOVERNMENT OF MOMBASA**

**3. DIRECTOR OF TOWN PLANNING & ARCHITECTURE,  
COUNTY GOVERNMENT OF MOMBASA**

**4. NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY**

**5. FUAD MAHMOUD MOHAMED**

## 6. HYDRO LUXURIOUS APARTMENT LTD.....RESPONDENTS

### RULING

1. In a Ruling dated and delivered on 15<sup>th</sup> April, 2015, I lifted conservatory orders I had granted on *ex parte* basis, principally on the grounds that the Respondents' construction projects had been undertaken without the necessary approvals from the 1<sup>st</sup> to 4<sup>th</sup> Respondents inclusive, and on further ground that the Petitioner had not disclosed that there was HCCC No. 250 of 2014 between the Petitioners and the 1<sup>st</sup> to 3<sup>rd</sup> Respondents which sought substantially the same prayers or orders as sought in the Petition.
2. When counsel appeared before court on 24<sup>th</sup> April, 2015, Mr. Wameyo learned counsel for the Petitioners informed the court that the Petitioners would withdraw the petition against the 5<sup>th</sup> Respondent with no order as to costs. He argued that the duplicity between HCCC No. 250 of 2014 would be settled with the withdrawal of the Petition against the 5<sup>th</sup> Respondent.
3. However, Mr. Ngibuini Gikandi learned counsel for the 5<sup>th</sup> Respondent argued to the contrary, that even if the Petition against the 5<sup>th</sup> Respondent was withdrawn, the danger of duplicity would remain as the 1<sup>st</sup> – 4<sup>th</sup> Respondents in the Petition are the same Respondents/Defendants in the HCCC No. 250 of 2014. The danger of duplicity of suits would remain, and urged counsel for the Petitioners to drop the Petition as against the 1<sup>st</sup> – 4<sup>th</sup> Respondents as well. The issue counsel argued remained one, and that is, whether the issues raised in the Petition are the same or substantially the same ones raised in HCCC No. 250 of 2014 (the civil suit). This is the issue to be determined in this Ruling. To determine that issue it is necessary to look at principally the parties, and prayers sought in the civil suit and in the petition.
4. The parties in the civil suit are New Nyali Residents Association – whose officials are described in the Petition as Said Tahir, Steven Ogowapit, Hubert Seifert (officials of New Nyali Residents Association). The Defendants in the civil suit are **Fuad Mahmoud Mohamed, County Government of Mombasa and the National Environment Management Authority**. The Respondents in the Petition essentially remain the same, the Government of the County of Mombasa, expanded with the addition of the Chief Executive Land Planning and Housing, and the Director of Housing, Planning and Architecture, in the Government of the County of Mombasa, and the National Environment Management Authority (NEMA), Fuad Mahmoud Mohamed and Hydro Luxurious Apartments Limited as the 6<sup>th</sup> Respondent.
5. It is thus clear that, other than the inclusion of the 6<sup>th</sup> Respondent (as owner of the development), and the officials of the Government of the County of Mombasa as (the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents) the parties in the civil suit and the petition remain essentially the same. What about the remedies sought?
6. The Petitioners seek the following orders in the civil suit:-
  - (a) a declaration that the first Defendant's development and construction work currently going on Plot Number 3231/I/MN is illegal,
  - (b) a declaration that without the second Defendant's licence, the first Defendant has no right to carry out construction work on the subject plot,
  - (c) a declaration that all licences and approvals issued to the first Defendant by the second and third Defendants are null and void to the extent that the same do not conform to the constitutional and statutory requirements for public participation,
  - (d) an injunction restraining the first Defendant from carrying out any development on Plot No. 3231/I/MN or further development thereon without first obtaining proper approval and licences or due consultations with the Plaintiffs' members,
  - (e) a mandatory injunction to compel the first Defendant to demolish at his own cost any

development on Plot No. 3231/I/MN and in default the Plaintiffs be authorized to do so and recover the cost thereof from the first Defendant.

(f) costs and interest.

7. In contrast, the same Plaintiffs in the petition seek the following prayers or orders:-

(a) a declaration that since the Petitioners are entitled to a clean and healthy environment, they have a constitutional right to participate in the management, protection and conservation of the environment in Nyali and must therefore be consulted and appropriately notified of any intended development in the area that may have effect on the environment;

(b) a declaration that since the Respondents herein did not ensure that due process was not followed in the process leading to the issuance of respective licences and approvals, the resultant licences by the first and fourth Respondents, if at all, are null and void;

(c) an injunction restraining the Fifth and Sixth Respondents from carrying out any development on Plot No. 3231/I/MN or further developments thereon;

(d) an order for judicial review by way of an order of certiorari to quash the decisions of the first and third Respondents approving the Fifth and Sixth Respondents' applications for change of user with respect to Plot Nos. 3231/I/MN and 3128/I/MN;

(e) an order for judicial review by way of mandamus compelling the first, second, third and fourth Respondents to exercise their statutory mandate to stop the Fifth and Sixth Respondents from further construction on the subject properties and to demolish the offending structures on the said Plot No. 3231/I/MN and 3128/I/MN;

(f) costs of the petition.

8. Comparing and contrasting the prayers or orders sought in the civil suit and those in the petition, they are essentially alike and have the like effect, if successful, of stopping the Fifth and Sixth Respondents' projects. However, as counsel for the Petitioners indicated a wish to withdraw the Petition against the Fifth Respondent, there was no persuasive reason why the like order should not be sought against the Sixth Respondent. Its situation is not dissimilar with that of the Fifth Respondent except that it is not a party to the civil suit. However, because the Defendants in the civil suit are the same in the petition, there is no plausible reason why the civil suit should not be amended to include the Sixth Respondent and the legality or otherwise of its project be determined together with that of the Fifth Respondent against whom the Petition has been withdrawn. It would eliminate the duplicity of both suit and the Petition, against the same Defendants/Respondents, by the same Plaintiffs/Petitioners.

9. In his further Affidavit sworn and filed on 13<sup>th</sup> April, 2015, Hubert Seifert one of the Petitioners contends in paragraph 6, that since the Petition is not concerned with resolving private rights but with protection of the Petitioners' constitutional rights and that since the alleged breaches have been committed by the same parties, who are by law mandated to ensure that these constitutional rights are protected, the Petitioners' grievances can only be addressed by the Petition.

10. With respect, this contention cannot be correct. Contrary to conventional beliefs and perceptions, every court, whether established under the Constitution or pursuant to enabling legislation anchored under the Constitution has unfettered jurisdiction under the Constitution to determine issues under its mandate. The Divisions in the High Court are, until High Court Organization and Administration Bill (proposed) is enacted, merely administrative units of management for the purposes of expeditious disposal of cases within each Division's competency, and any question relating to the Petitioners' environmental rights can and would be fully determined in the civil suit.

11. It must be borne in mind under the Judicature Act, [Cap 8, Laws of Kenya] that the jurisdiction of

the superior courts and all subordinate courts is exercised in conformity with:-

- (a) the Constitution,
- (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to the Act, modified in accordance with Part II of that Schedule,
- (c) subject thereto, and in so far as those written laws do not extend and apply, the substance of the common law, the doctrine of equity and the status of general application in force in England on the 12<sup>th</sup> August, 1897, and the procedure and practice observed in courts of justice in England at that date, but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications and those circumstances may render necessary.

12. Though the Constitution of Kenya, 2010 does not in word and clause refer to doctrines of equity, Article 159 thereof clearly alludes to these principles. An argument such as that advanced in paragraph 6 of the Petitioners' Affidavit is therefore not borne out in law.

13. I think it needs no reminder to the Petitioners and their counsel that Article 162(2) of the Constitution of Kenya, 2010 provides for the establishment by the Act of Parliament of the environment and use and occupation, and title to land court. Similarly, no such reminder is necessary that Parliament established the Environment and Land Court under Section 4(1) of the Environment and Land Court Act, 2011 (No. 19 of 2011) and, under section 13(7) thereof, granted to the said court power to make any orders and grant any relief as the court deems fit and just including:-

- (a) interim or permanent preservation orders including injunctions,
- (b) prerogative orders,
- (c) award damages,
- (d) compensation,
- (e) specific performance,
- (f) restitution,
- (g) declaration, or
- (h) costs.

14. The essential issue raised in this Petition as well as in HCCC No. 250 of 2014 (which should be an Environment and Land Court matter), is one, namely, whether the sub-division of land in NYALI ESTATE (of Mombasa City) below certain area limits and the consequential approvals for, and the construction thereat, and thereon, of high density commercial and residential premises is contrary to Article 42 of the Constitution, and therefore a violation of the Petitioners constitutional rights to a clean and healthy environment.

15. Although the right to a clean and healthy environment is a right under the Bill of Rights (Chapter 4 of the Constitution), the determination of which is conferred upon the High Court under Article 23(1) of the Constitution, there is in my view, a duality of jurisdiction between the High Court and the Environment and Land Court by virtue of Article 162 (2) of the Constitution, and by virtue of the jurisdiction conferred upon the latter court by section 13(7) of the Environment and Land Act. The balance of convenience of jurisdiction lies with the Environment and Land Court by virtue of Article 70 of the Constitution which confers upon the court the power to make any order, or give any directions, it

considers appropriate –

- (a) to prevent, stop or discontinue any act or omission that is harmful to the environment, or
- (b) to any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment, or
- (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

16. In addition, the principal objective of the Environment and Land Act, like that of the Civil Procedure Act (Cap 21, Laws of Kenya) which govern the resolution of disputes before the superior courts, is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes, and the same sections enjoins the parties and their duly authorized representatives as the case may be, to assist the court to further the overriding objective and participate in the proceedings of the court. In brief these principles require that every court shall exercise its jurisdiction in every case so as to assure –

- (a) as far as possible, all matters in dispute between the parties are completely and finally determined;
- (b) as far as possible, all multiplicity of legal proceedings with respect to any of those matters is avoided.

17. It is thus clear to me that a party which maintains two parallel or a multiplicity of suits, one commenced by a Plaint, and the other commenced by a Petition against the same parties, and seeking essentially the same remedies against those parties is not only playing **Russian Roulette** with the mind of the court, but is engaged in abusing the process of the court and is far from assisting the court, and is in effect undermining the court's efforts in the just, expeditious, proportionate and affordable resolution of the dispute before court.

18. For those reasons, I make the following orders:-

- (1) Declare that the continuation of the Petition herein along with HCCC No. 250 of 2014 amounts to unwarranted multiplicity of suits among the same Plaintiffs/Petitioners claiming the same or substantially reliefs against the same Defendants/Respondents and is an abuse of the process of the court;
- (2) The Petition against the Fifth Respondent is hereby marked as withdrawn;
- (3) the Petitioners counsel shall within 30 days of the date hereof, apply for and effect amendments to HCCC No. 250 of 2014 as would include the Second, Third and Sixth Respondents in the Petition;
- (4) The Petitioners shall at the end of the said thirty (30) days file a Notice of Withdrawal of the Petition herein.
- (5) In default of compliance with sub-paragraph 3 above, the Petition herein shall be deemed struck out forty five (45) days after the date hereof.
- (6) The Petition herein being a public interest matter for aesthetic protection of the environmental, each of the parties herein shall bear its own costs.

19. There shall be orders accordingly.

**Dated, Signed and Delivered in Mombasa this 15<sup>th</sup> day of May, 2015.**

**M. J. ANYARA EMUKULE**

**JUDGE**

In the presence of:

Mr. Wameyo for Petitioners

Ms. Jadi for 1<sup>st</sup> to 3<sup>rd</sup> Respondents

Ms. Murage for 5<sup>th</sup> Respondent

Mrs. Oluoch holding brief Wambi for 6<sup>th</sup> Respondent

Court Assistant Kaunda