



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 46 OF 2013

IN THE MATTER OF: HIGH COURT CIVIL APPEAL NO. 178 OF 2002 BETWEEN PARK HOUSE LIMITED -VERSUS- MADHAVJI HARJI AND SONS & BEATRICE KABIRU

A N D

IN THE MATTER OF: THE CONSTITUTION OF KENYA AND BILL OF RIGHTS

A N D

IN THE MATTER OF: ARTICLES 3,10,19,20,21,22,23,27,40,50 AND 165 OF CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE LANDLORD AND TENANT (SHOPS, HOTELS AND CATERING ESTABLISHMENTS ACT CAP 301 LAWS OF KENYA

BETWEEN

BEATRICE KABIRUPETITIONER

VERSUS

PARK HOUSE LIMITED1ST RESPONDENT

THE CHIEF BUILDING INSPECTOR, CITY

MUNICIPAL COUNCIL OF MOMBASA,

MOMBASA COUNTY.....2ND RESPONDENT

THE SENIOR RESIDENT MAGISTRATE’S

COURT MOMBASA.....3RD REPENDENT

J U D G M E N T

1 There is no doubt that if any Kenyan was asked today about the Constitution of Kenya 2010 they

would respond by saying that the Constitution herald immense freedoms and rights that Kenyan as a country, and considering its past history never contemplated as achievable. We as a country now have National Value and Principles of governance. Under that banner we declared to ourselves amongst others that we would be governed by the rule of Law; everybody would be afforded human dignity, there will be social justice; and non discrimination. The courts now have been unleashed by those freedoms and rights to boldly address the many allegations of violations by the citizenry which in times past would have been viewed as treasonable.

2 This case is a case where the petitioner BEARICE KABIRU seeks to have her constitutional rights recognized and enforced.

3 In her petition the petitioner sought the following prayers:

(a) A DECARTION that the Senior resident Magistrate's decision in criminal case No. M 4579 of 2012 that the directed demolition of the building on Plot No. MOMBASA/BLOCK XXI 280 is unconstitutional and a nullity for being in violation of Article 10,40 and 50 of the Constitution.

(b) The proceedings and decision in Criminal Case No. M 4679 of 2012 be nullified.

(c) A judicial review order prohibiting further implementation/execution of the Senior Resident Magistrate's (3rd respondent's) orders in Criminal Case No M 4579 of 2012 directing demolition of the building on Plot No MOMBASA/BLOCK XXI 280

(d) A mandatory injunction compelling the 1st respondent by itself, its officers, servants and /or agents to restore the suit premises to its original condition as before the unlawful eviction and demolition and to reinstate the petitioners as tenant therein.

(e) Damages for the destroyed properties, lost business opportunity inconvenience including punitive damages for the un lawful acts.

(f) Costs of the petition.

4 Petitioner brought this action against PARK HOUSE LIMUTED, 1st respondents and the registered owner of plot number MOMBASA/BLOCK/XXI 280 (herein after referred to as the suit property) against THE CHIEF BULDING INSPECTOR, CITY MUNICIPAL COUNCIL OF MOMBASA,, MOMBASA COUNTY, the 2nd respondent, and against THE SENIOR RESIDENT MAGISTRATE COURT, MOMBASA, the 3rd respondent.

5 On the suit property there was a building which the petitioner stated that she began to occupy as a tenant some 37 years ago. According to my calculation that would mean the petitioner entered into the suit property in 1976. She began trading in what she called tourism business up to 1996. She later changed the business and began to deal with imported clothes. Thereafter she changed again and began to deal with "freemark" style of business.

6 Petitioner informed the court that the suit property was owned by three others entities previously and the 1st respondent was its fourth owner. Petitioner then stated that it was during this period of 1st respondent's ownership of the suit property that she had to file a reference at the business Premises rent tribunal 9(BPRT) after 1st respondent served her and her co-tenant with a notice to terminate tenancy on the ground that the 1st respondent intended to carryout substantial construction on the suit property. BPRT disallowed the 1st respondents said notice and 1st respondent filed an appeal against that decision, being Mombasa HCCA No. 178 of 2002. That appeal is still pending before this court.

7 What however compelled petitioner to file this actions are the events of 16th August 2013. The petitioner in her affidavit evidence refers to those events as being mischievous and unlawful on the part of

the respondents herein.

8 The events of 16th August 2013 were preceded by a notice at the instance of the Town Clerk of the Municipal Council of Mombasa dated 16th February 2012. That notice is vital to the issues being considered herein and accordingly I will reproduce it in this judgment as follows:

Office of the Town Clerk

Municipal Council of Mombasa

Ref: B1/02/RDS/280/XXI/M1

Date: 16th February 2012

Park House Limited

P.O. Box 97155

MOMBASA

Dear Sir,

RE: NOTICE UNDER LOCAL GOVERNMENT BUILDING BYLAWS.

Whereas you are the owner of a building standing on Plot No. 280/XXI/MI in Ganjoni area. The said premise was visited by Charles J Omwodo (Ag Chief Building Inspector /Dev Control Senior Officer) and wherein the following contraventions of the Local Building bylaws were observed.

Contrary to Local Government Building bylaw 243(i) you have left your building to be in a ruinous dangerous and dilapidated condition,

After a site visit the following defects were found:

- 1) Concrete ceiling falling and roof slab can fall anytime.
- 2) Window pens are broken
- 3) Wall plasters are falling
- 4) Staircase broken and
- 5) Paint work to the walls have turned black from white
- 6) Door shatters are dilapidating.
- 7) Walls have huge plants growing on them causing cracks to wall which are already falling.

Take notice therefore that under powers conferred to me by the local government (Adoptive bylaws) Building grade 10 order of 1968, I the Town Clerk to the Mombasa Municipal Council do hereby require you within 7 (seven) days on receipt of this notice to demolish.

Failure or neglect to comply with the aforementioned mentioned requirements will constitute an offence rendering you liable to certain penalties.

Yours faithfully,

Ag CHIEF BUILDING INSPECTOR/DEVELOPMENT

CONTROL SENIOR OFFICER

For: TOWN CLERK

Cc. Town Clerk

Cc. Director of Inspectorate

Cc. Director & Arch

9 The time period given to the 1st respondent to demolish the building that is 7 days, was not complied with by the 1st respondent. Consequently 1st respondent, through its property manager, SAMSON ADIPO ODUL, was arraigned before the court of the 3rd respondent. The 1st respondent pleaded guilty to the offence of failing to comply with the requisition of building notice served on it under By-Law 252 (1) as read with By-Law 243 (1) as read with By -Law 257 of the building code, local government (Adoptive) by laws, building orders 1968.

10 The following is how the Criminal case No M 4579 of 2012 proceeded before the presiding learned magistrate. On 7th November 2012 1st respondent property manager pleaded guilty to the charge. On the guilty plea being recorded by the learned magistrate the prosecution requested for a demolition order of the building on the suit property. He informed the court that the building was in dilapidated condition and that it posed a health risk. The presiding magistrate made the following order:

“The prosecution to file photographs of the said building and accused person to avail documents of ownership.”

The matter was to be mentioned later that day at 2.30 pm.

11 At 3 Pm on that day the residing magistrate noted that five photographs of the building had been availed. The learned magistrate then noted in the proceedings the following that was stated by the prosecution:

“From the photographs it is clear that the roof is falling, there are huge cracks on the wall, the canopy of the building is peeling off and has cracks which pose as (sic) a danger to the members of public. See photo No.3 the building in poor condition. It is a disaster in waiting. There are no occupants.”

12 The 1st respondent’s property manager informed the court thus:

“I am unable to demolish the structure. The Municipal Council to assist me and I undertake to foot the costs.”

13 The court on that day ordered for the demolition of the building by the council and also ordered the 1st respondent to meet the costs.

14 What I believe was 23rd November 2012, because the proceedings are not clear on the date, the court made the following order:

“Summons to issue to the tenants.”

15 The property manager of 1st respondent in evidence stated that he informed the court that there were tenant in occupation of the building and the court then ordered summons to issue for those tenants. He further stated that the court requested him to effect service on the four tenants on the building, and alleged that the court directed him to pin the summons on the doors of those tenant after he informed the court the tenant had refused to accept those summons personally.

16 Apart from the order by the magistrate that summons do issue to the tenants the court proceedings do not reflect why that order was made and do not reflect that the court requested the property manager to personally effect service of the summons or that he was requested to pin those summon on the respective tenants doors.

17 The learned magistrate who presided on those proceedings wrote a letter dated 1st October 2013 which was addressed to the State Law Office as an explanation of the orders he made. The pertinent part of that letter are as follows:

“ Based on the circumstances, the accused having raised no objection and in the public interest, I granted the orders for demolition.

I subsequently slated the matter for mention on the 23rd November 2012 for the compliance of the court orders. When the matter came up, and though not on record, the accused person alluded in court that there were tenants in the said building who had obstructed him from complying with the court order. I issued summons to the tenants.

Kindly note that I had already granted the demolition orders and summons to the tenants was to ascertain whether the prosecution had misled the court to think there were no occupants in the suit building whereas there were for appropriate action.

The charges could not have been preferred against the tenants because they were just tenants they had no control over the building.

Consequently, I was transferred from the Municipal Court and the matter was taken over by Hon. Wasike (RM) from the 18th December 2012.

The import of the summons to the tenants was to arrest any injustices. From the proceedings, it is clear that the tenants were served but failed to heed the summons.

That is all.

EKHUBI B M.”

18 The demolition order mentioned above is reproduced here:

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 4579 OF 2012

MUNICIPAL.....PROSECUTOR

V E R S U S

THE MANAGER

PARK HOUSE LIMITED.....ACCUSED

IN OPEN COURT BEFORE HON. B.M. EKHUBI (SR)

ON 7TH NOVEMBER 2012

TO THE TOWN CLERK

CITY COUNCIL OF MOMBASA

ORDER

The accused having failed to demolish the dilapidated building Plot No. 280/XXXI/MN, Ganjoni Area, Mombasa as per court order of 7th November, 2012

Further following his request on the 7th November, 2012 seeking the assistance of Municipal Council of Mombasa in the demolition of the said building and further following a memo from the chief building Inspector dated the 16th day of February, 2012.

You are hereby directed to enforce the same order by demolishing the dilapidated building on the said plot.

The accused to pay for the charges and costs involved in the demolition as per the memo dated the 7th November, 2012.

A compliance report to be produced in court.

Matter will be mentioned on 23rd November, 2012 to ensure compliance.

ISSUED at MOMBASA this 3RD day of November, 2012

B.M. EKHUBI

SENIOR RESIDENT MAGISTRATE

MUNICIPAL COURT

GIVEN under my hands and Seal of this court at MOMBASA this 23rd day of November, 2012.

19 The petitioner deponed in her affidavit sworn on 9th September 2013 as follows:

THAT I aver the statutory Notice dated 15th September, 2011 produced at page 60 of the bundle sought to terminate the petitioner's tenancy on the ground:-

The Landlord intends to reconstruct and carry out substantial work of construction on the premises and cannot reasonably do so without obtaining possession of the premises.

THAT I aver that it is clear from page 5, 6 and 60 of the bundle of exhibit that the reasons that were being advanced for seeking termination of tenancy are similar or substantially the same.

THAT I aver that the 1st and 2nd Respondents acting in cahoots so as to unlawfully/unconstitutionally deprive the Petitioner occupation/tenancy of premises situated at Plot no. MOMBASA BLOCK XXIX/280 MOMBASA ISLAND continues with harassment of the petitioner to the extent of lodging criminal proceedings now dismissed/discontinued on 22nd May, 2013 under CR No. M1289 of 2012 that required a tenant/petitioner to paint the outer parts/wall of the building which otherwise is an obligation of a landlord/property owner. A true copy of the Notice to Attend Court issued by the Town Clerk with the serial number 17439.

THAT I aver that in furtherance of the unconstitutional/unlawful acts intended to steal a match as against the petitioner the 1st Respondent acting in cahoots with the 2nd Respondent lodged

proceedings before a Court presided over by the 3rd Respondent being Criminal Case No. M4579 of 2012 in which orders were obtained directing the demolition of the building that forms the tenancy premises occupied by the Petitioner on Plot No. 280/XXI/MI Ganjoni area, Mombasa without notification on involvement of the Petitioner as a party contrary to the rules of natural justice and the provisions of Article 50 of the Constitution of Kenya.

THAT I aver that the Criminal Case No. M4579 of 2012 was never brought to my attention and neither was I made a party to the proceedings that ordered the demolition of the tenancy premises and hence the right to fair hearing was not accorded but rather I was condemned unheard contrary to the provisions of Article 50 of the Constitution of Kenya consequent to which the process of eviction and demolition has arbitrary been initiated depriving me the tenancy interest in the said Plot No. MOMBASA BLOCK XXI/280 in breach of Article 40 of the Constitution of Kenya.

THAT I further aver that the eviction is unconstitutional and unlawful for being in breach of the rule of law as even the Orders in Criminal Case No. M4579 of 2012 did not specifically provide for eviction and hence it was incumbent upon the 1st and 2nd Respondents to seek specific eviction orders with notice to the deponent to be heard as required by the rules of natural justice and Article 50 of the Constitution of Kenya.

THAT I aver that the mischievous and unlawful actions on the part of the Respondents amount to stealing of a match as against the Petitioner in relation to the occupation of the suit premises so as to deprive the right to occupy and derive a benefit therefrom as protected by the provisions of Article 40 of the Constitution.

THAT I aver that the actions of the Respondents in so far as they are unconstitutional are null and void *abinito* as it is also incumbent upon the 3rd Respondent [Senior Resident Magistrate] to ensure proper administration of justice by giving an opportunity to all to be heard and to condemn or issue orders adversely affecting parties not before him.

20 Petitioner seeks damages both special and general. Petitioner in her evidence stated that when employees of the Municipal Council of Mombasa on 16th August 2013 went to the building at about 11am to effect the demolition order there was chaos. Petitioner was not there at the building but she was called by her employed called Jacob and arrived an hour later. She said she found street boys looting her property from her shop. She did however find her computer, printer and Scanner intact.

21 Her account of that day is refuted and denied Inspector James Sandimba an employee of the Municipal Council. He is an enforcement officer of the council. He was incharge of enforcement of the demolition order on 16th August 2013. He said before going on site he informed the police through central Police Station Mombasa. That he told the police he did not need their assistance but said if he, in course of the demolition needed their assistance he would request for it. This witness stated that he had sufficient security with him. He had 15 municipal Councils 'askari.' This is what he stated in evidence in chief:

“We found below there were tenants. On the upper floor no tenant we found first shop tailoring (sic). There (sic) two Asians and two Africans. We told them of the court order. We requested them to remove their belongings, they said they were unaware. We showed them the order. They seemed to resist – we pulled the doors. They realized we were serious. They asked for time. They brought a canter (two) to remove the goods and took them back door. When others in the third shop (sic) they began to remove their goods. We gave them time to remove their goods. We then broke the doors and windows – we removed their glass. By then all had moved out. There was no one there. We did not carry away anything. We had askaris so the passers by could not get near the building. The tenants moved their goods without anyone taking their property. On that day we did not pull down the walls. We had no equipment. That was done another day.”

22. I had an opportunity to hear this witness testify and observe him. I believed his testimony.

2. The issues that emerge for consideration are

- a. Was the petitioner an interested party or affected party by the order of demolition;
- b. If the answer to (a) is positive, were the petitioner's constitutional rights violated; and
- c. If answer to (b) above is positive what remedy should the petitioner get.

FIRST ISSUE

23 The principle set out by the two judge case of REPUBLIC –V – KABUE KIGERA (1986) eKLR was that in a case such as the criminal case where the demolition order was issued the court before making final orders either that the building is not fit for human habitation or, as in this case the building ought to be demolished the court should summon before it all persons who are reasonably likely to be affected by an order proposed to be made.

24 The presiding Learned Magistrate M.Ekhubi seemed to be aware of this procedure and did order the tenants of the building on the suit property be served with the summons. The Learned Magistrate did not specify, as far as the court record shows, who was to effect that service. The 1st respondent stated through its property manager that service was affected by pinning the summons on the outdoors of the tenants businesses.

25 Going by the principle of Republic –v- Kabue Kigera (supra) was the petitioner a person reasonably affected by the order of demolition?

26 Although petitioner stated she first took tenancy in the suit property 37 years ago and proceeded to describe her business as tourist based and then selling of imported goods, that was as far as she could say of her businesses. When she began to testify in chief she was so confused and her evidence was marked by prolonged silence even after her counsel repeated his questions. This was more evident when petitioner began to give details of her business just before the demolition was done. This prolonged silence even led me to interject and say “can witness answer the question of counsel.” To help her give evidence petitioner requested her counsel to allow her to use her list prepared previously. This continued until her learned counsel told the court that the counsels had agreed the petitioner was to rely on the handwritten statement. That statement is before court.

27 That inability to express herself in regard to what the petitioner claimed she lost as a consequences of the demolition should be viewed in the background that two witnesses gave evidence that the petitioner was not running any business on the suit property.

28 1st respondent's property manager in evidence in chief stated that the petitioner had sublet her business premises to a person by the name of Jacob. The petitioner's Learned counsel did not cross examine the property manager on that issue and it is therefore assumed to be corrected. Interestingly on the 16th August 2013 petitioner stated in her testimony that she was not at the shop but that she was called by one of her workers called Jacob who told her that demolition was taking place. That person called Jacob was not called by the petitioner. Although Section 143 of the Evidence Act Cap 80 provides that there is no particular number of witnesses that should be called in any case I find Jacob was a vital witness and ought to have been called as witness. Section 143 is in the following terms:

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

Despite that provision the case of the petitioner is that much more weaker for lack of the evidence of Jacob.

29. But I believe the more decisive evidence on the first issue is that which was tendered by 1st respondent's witness TABBY MUTHONI. She testified that between the year 2009 and 2010 she was a sub-tenant of the petitioner on the building on the suit property. This is what she stated in her statement

that she adopted in her evidence:

“During my tenancy period Beatrice Kabiru had several tenants who were paying rent to her on monthly basis. The space that she rented out was not partitioned and only had tables which were used by the other tenants to display their wares. The building was in a deplorable state and the only space that was occupied by tenants was the ground floor only. The mezzanine floor did not have shops save that Beatrice Kabiru had constructed a semi-permanent structure with cupboard and/or wood in one corner, which she used as her office and we paid rent to her from the said structure.

Beatrice Kabiru never owned any shop and/or business and the rest of the tenants referred to her as the landlady.

I operated a type setting bureau and eventually I started selling beauty products in the same shop.”

30. I make a finding that the petitioner was not a party who either was interested or affected by the order of demolition as and as per Republic – v- Kabure Kigera(supra). She was not a person contemplated as requiring to be served with the summons before determination of the order of demolition. The first issue is therefore found in the negative.

SECOND ISSUE

31. Having determined the first issue in the negative I find that the petitioner’s constitutional rights were not violated. The petitioner had no direct interest in the building on the suit property.

THIRD ISSUE

32. The petitioner not been a person affected by the demolition and not having had her constitutional rights violated in not entitled to any remedy from this court.

33. Over and above that the petitioner’s evidence on what she lost, if any, during the demolition was incoherent that it would be difficult to determine her loss, if at all. This is probably because the property did not belong to her and its real owner did not come to court.

34. I have also examined page 70 of the affidavit in support of Notice of Motion dated 9th September 2013 sworn by the petitioner. That page has two pictures of the building. The first picture shows doors, burglar proofs and expandable metal doors lying down. Could those be the one the petitioner claims she lost? On the second picture one sees shelving leaning on the wall outside and others standing upright. Are those part of petitioner’s property? If they are the petitioner had an obligation to mitigate her loss by taking possession of those goods.

PRAYERS OF THE PETITION

35. The decision of the Learned Magistrate ordering demolition was the subject of Revision proceedings in Mombasa High Court Revision No. 81 and 82 of 2013.

36. Justice Muya by his revision order of 24th October 2013 made a finding that the interested/affected parties were not heard before the demolition order was made. The learned judge proceeded to vacate the demolition order and referred the Magistrate’s Court file back for retrial to enable the interested/affected parties to be granted a hearing. Unfortunatley by then the building had completely been demolished.

37. It follows that Justice Muya having made that order that the prayers No. (a) (b) and (c) of the petition become redundant.

38. Prayer (d) sought the issue of mandatory injunction. In view of the above findings the petitioner is not a party deserving mandatory injunction. Above that, such an order that the 1st respondent be ordered to restore the suit premises to its original condition and be ordered to reinstate the petitioner as a tenant

would be absolutely impossible to police and to ensure its implementation. The court could very well find itself having to examine the nitty gritty of building, that is confirming architectural drawings amongst others. Mandatory injunction as prayed in the petition cannot be granted.

39. Prayer (e) of the petition was determined by the third issue above.

40. I have reached a decision that this petition should be dismissed. Who then should, if at all, bear the costs.

41. The petitioner brought this action on the ground that the 1st respondent, who had always wanted to evict the tenants, connived with the 2nd respondent to use the process of the 3rd respondent to effectively evict the tenants by having the building demolished. Unless this court was to be guided by supposition, innuendos and suspicion there was nothing before court that pointed to such conspiracy. As I began by stating before in this judgment Kenyans as a people chose to be governed by the rule of Law. The Law requires that a party who alleges must prove. The petitioner had an obligation to prove her claim. She failed. It is for that reason she shall bear the costs of this petition.

CONCLUSION

42. The petition is hereby dismissed and the petitioner shall bear the costs of the 1st and 2nd respondent.

DATED and DELIVERED at MOMBASA this 24th day of AUGUST, 2015.

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

C/Assistant:

For Appellant:

For Respondent:

Court

Judgment delivered in their presence/absence in open court.

MARY KASANGO

JUDGE