



REPUBLIC OF KENYA

High Court at Meru

Petition 13 of 2012

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

ENFORCEMENTS OF FUNDAMENTAL RIGHTS UNDER ARTICLE 10, 19, 20, 22, 23, 47, 50, 159, 258 AND 259 CONTITUTION OF KENYA

DORIS WANJIRU & 53 OTHERS.....PETITIONERS

VERSUS

THE CLERK MERU MUNICIPAL COUNCIL OF MERU.....RESPONDENTS

JUDGEMENT

1. The Petitioners have come by way of a Constitutional Petition dated 3rd July 2012, and filed in court on 4th July 2012. It is premised on Articles 10,19,20,22,23,47,50,159,258 and 259 of the Constitution of Kenya, 2010.

The Petitioners seek the following reliefs:

1.An order of declaration to the effect that the review of the rents by about 200% of the Respondents' premises (Angaine Estate) occupied by the Petitioners is unreasonable, irrational, contrary to rules of natural justice, unconstitutional and therefore null and void.

2.An order of prohibition to stop the Respondents from increasing the rent of premises subject therein without observing the provisions of Article 10 and 47 of the Constitution.

3.Costs and interests.

2.BACKGROUND

The Petitioners are tenants of the Respondents occupying the Respondents houses in Angaine Estate. The houses they occupy are in two categories and they were paying a monthly rent of Kshs. 1,200 for 1 bed roomed non self-contained houses and Kshs. 1,500 for the 1 bed roomed self-contained houses.

On or about 21st June, 2012 the Petitioners were served with a notice by the Respondents indicating that with effect from 1st July, 2012 the rent payable had been reviewed upward to Kshs. 3500 for the 1 bed roomed non self-contained houses and Kshs.4000 for the 1 bed roomed self-contained houses respectively.

3.THE PETITIONERS CASE

The Petitioners case is that they were not given reasons for the rent increment, nor were they asked to give views, and neither was their comments sought before such increment contrary to the provisions of Article 10 (2) and Article 47 of the Constitution of Kenya.

The Petitioners further argue that the increment is not justified by any measure of economic, financial or otherwise, nor did the Respondents intimate to the tenants to be affected by the increment of their intention to raise the same to such scale, hence the decision was unreasonable, irrational and contrary to the rules of natural justice.

The Petitioners further contend that the national values and principles of governance which the state organs, state officers, public officers and all persons have to comply with when applying the law namely, the principle of observing participation of the people, principle of equality and observation of social justice, were not observed by the Respondents and that in reviewing the said rent, the Respondents blatantly breached and violated the aforesaid Articles 10 and 47 of the Constitution, and that as a result the Petitioners rights have been violated and breached.

4.THE RESPONDENTS CASE

The Respondents on the other hand contend that it is indeed true that the Petitioners are some of their tenants occupying their residential premises in Angaine Estate. They contend that the 2nd Respondent has a specific relationship with each of the tenants individually. They contend further that sometimes in the year 2011, the Respondents decided to increase fees and charges for various services offered to the inhabitants of Meru Municipality. They contend that the rent payable by the occupants of the residential premises known as Angaine Estate was affected by the proposed increment.

The Respondents further contend that its decision to review the said fees and charges was informed by the desire to raise adequate resources to enable it meet its obligation of providing services to the inhabitants of its area of jurisdiction, and that the said decision was made after the Respondents had sought the Minister's consent which was duly given and the approved fees and charges gazetted on 15th June, 2012.

The Respondents further contend that it would be greatly prejudiced if the orders sought are granted as it would be denied resources that are greatly required in the discharge of the Council's mandate. It is the Respondents position that no administrative decision was taken by the council in respect of the Applicants since the only relationship between the Applicants and the Respondents is that of tenant and landlord. The Respondents aver that the terms of their relationship were not defined by the Constitution and that the Respondents have not breached any provisions of the Constitution in making the said decision, and that further the Petitioners did not challenge the said decision and that consequently the instant Petition has no merit at all.

BOLDNESS URGED

5. The Petitioners have urged the court to boldly enforce Article 20(3) of the Constitution in order to develop the law to give effect to the rights claimed by the Petitioners and also interpret the law in the manner that most favours the enforcement of their rights. The Petitioners also urged the court to interpret the law with its mind focused on the Provisions of Article 259(1) which stipulates as follows

“259. (1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.”

The Petitioners have urged the court to rise to the occasion and discharge its mandate as donated by the people of Kenya in the manner envisaged by Article 159(2)(a)(e) and enforce the Petitioners rights. The Articles Stipulates as follows:

“159.(1) ...

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) Justice shall be done to all, irrespective of status;

(b) ...

(c) ...

(d) ...

(e) The purpose and principles of this Constitution shall be protected and promoted.

The Petitioners urged the court to bear in mind the provisions of Article 20(1) of the Constitution which stipulates as follows:

“ 20. (1) **The Bill of Rights applies to all law and binds all State organs and all persons.**

(2)...

(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.”

ISSUES FOR DETERMINATION

6. I have carefully considered the pleadings, the written and oral submissions, together with the authorities by learned counsels for the parties. I have also considered the affidavits filed by the parties for and against the Petition. The issues for determination going by the submissions by counsels are:

A). whether the Respondents are State Officers and therefore if they breached Article 10 of the Constitution?

B). whether the Respondents action to raise rent of their houses was an administrative action, and whether they breached Article 47 of the Constitution?

C). whether the Petitioners tenancy was controlled by the Rent Restriction Act?

D).whether the orders sought should be granted?

ANALYSIS

A). whether the Respondents are State Officers and therefore whether they breached Article 10 of the Constitution?

7. The Petitioners fault the Respondents for having acted contrary to Article 10 of the Constitution. Mr. Muthomi for the Petitioners urged that the Respondents violated the Petitioners rights by failing to comply with Article 10 of the Constitution. The Petitioners contention is that Article 10(1) (a), (b) and (c)

describes the values of governance which bind state officers so that whenever they enact or apply any laws or make or implement any public policy decisions, they must apply these values. Under Article 10(2)(a) (b) and (c) these values are participation of the people, equity, justice, good governance, transparency and accountability. Mr. Muthomi urged that the Respondents did not involve participation of the people before making its decision to raise rent. That Article provides:

“10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) Applies or interprets this Constitution;

(b) Enacts, applies or interprets any law; or

(c) Makes or implements public policy decisions.

The Petitioners have to show first that the Respondents are public officers, secondly that they were either applying or interpreting the Constitution; enacting, applying or interpreting any law; or were making or implementing public policy decisions; and finally that they should have ensured there was participation of the people, equity, justice, good governance, transparency and accountability. It is by establishing the above facts that the Petitioners would have a case against the Respondents.

The counsels to the party have made no submissions regarding who a public officer is. However section 260 of the Constitution, which is the interpretation section, defines same as follows:

“public officer” means—

(a) any State officer; or

(b) any person, other than a State Officer, who holds a public office;

“public office” means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament;”

I have no doubt that the 1st Respondent, who is charged with the duty to execute the decisions of the 2nd Respondent, is a public officer.

8. The second fact that the Petitioners were to prove was that the action complained of was covered under Article 10 of the Constitution. No attempt was made by the Petitioners to demonstrate that the action taken by the Respondents fell within the provisions of Article 10 (1) of the Constitution. The only relevant duty they could have been performing, among those named under the Article, is implementing public policy decision. The Petitioners have not shown that the Respondents were implementing a public policy decision when they raised rent.

9. The 1st Respondent was executing the decision of the 2nd Respondent to raise the rents charged by the Council for certain categories of its houses, when he gazetted the rent raise. That decision has not been shown to be a public policy decision; or an act done in furtherance of any of the acts mentioned under Article 10. The Petitioners have not claimed that it was. Having failed to pass the second hurdle of proving that the act complained of was an implementation of public policy decision, or any one of the other acts specified under Article 10(1), I find that the Petitioners have failed to establish a case that the Respondents should have involved them in the decision making process before increasing the rent.

B). whether the Respondents action to raise rent of their houses was an administrative action, and whether they breached Article 47 of the Constitution?

10. The Petitioners contend that the Respondents breached Article 47(1) of the Constitution in that the Respondents took an administrative action that was unreasonable and that was procedurally unfair. The Petitioners urged that the Article requires that if a right or a fundamental freedom of a person has or is likely to be adversely affected by administrative action, such person has the right to be given written reasons for the action. The Petitioners contend that their rights were affected when the rent was raised and that in the circumstances they were entitled to be given written reasons for the decisions.

The Respondents on the other hand contend that it has not undertaken any administrative decision in respect of the Petitioners as the only relationship between the Petitioners and the Respondents is that of tenant/landlord, whose terms are not defined by the Constitution.

11. Article 47 of the Constitution stipulates as follows:

“47.(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be affected by administrative action, the person has a right to be given written reasons for the action.”

The Petitioners had the burden to prove that the action taken by the Respondents was an administrative action. No submission was given to that end. The Petitioners did not address the issue what constitutes an administrative action. All the Petitioners did was to allege that the decision was not reasonable or procedurally fair and that no written reasons were given even though the Petitioners were the ones affected by it. These were serious allegations and it was imperative upon the Petitioners to establish their case with cogent proof. I find no cogent proof adduced by the Petitioners. I find that the violation alleged under Article 47 of the Constitution was not established.

(C). Whether the Petitioners tenancy was controlled by the Rent Restriction Act?

12. Counsel for the Petitioners has submitted that the Petitioners are protected by the provisions which restrict the increase of rent. For that proposition, Counsel invoked the provisions of section 2 of the Rent Restriction Act CAP 296 of the Laws of Kenya. Counsel urged that since the Petitioners were paying rent below 2500/-, they were protected under the said Act.

The Respondents has on the other hand contended that the relationship between the parties is a private one governed by the provisions of the now repealed Registered Land Act CAP 300 since the Rent Restriction Act does not apply to the class of premises occupied by the Petitioners.

The Respondents in response to the Petitioners argument submitted that the Petitioners had not adduced in court the tenancy if any which they have with the Respondents and that in the circumstances the terms of the tenancy were not disclosed. The Respondents wondered whether those undisclosed terms restricted the Respondents from increasing rent. The Respondents urged that the Rent Restriction Act did not apply to the Class of premises occupied by the Petitioners.

13. Section 2 (1) of the Rent Restriction Act stipulates:

“2(1) This Act shall apply to all dwelling-houses other than-

(a) excepted dwelling-houses;

(b) ...

(c) dwelling-houses which have a standard rent exceeding two thousand five hundred shillings per month, furnished or unfurnished”

Section 3 goes further define what ‘**excepted dwelling-house**’ means as follows:

“a dwelling-house belonging to any class which the Minister may, by notice in the Gazette, except from the provisions of this Act”

On the face of the above provision, the Petitioners appear to be covered under that provision. The two sections should be read alongside the Subsidiary Legislation under the same Act titled, **“Classes of dwelling-house excepted from the provisions of the Act under section 3 (1) [definition of “excepted dwelling-house”]**

Under that legislation excepted dwelling-house include those which are the property of and let to the tenant by the local authority.

The law is clear that dwelling-houses belonging to a local authority and let to tenants are excepted from the application of the Rent Restriction Act.

D).whether the orders sought should be granted?

14. The Petitioners have urged the court to grant the orders sought. They rely on two cases which they have provided. I have carefully perused the authorities relied upon by the Petitioners. The case of **CENTER FOR RIGHTS EDUCATION AND AWARENESS AND OTHERS VS ATTORNEY GENERAL PETITION NOS. 207 & 208 OF 2012** challenged the constitutionality of the appointment of 47 County Commissioners by the President. That case is not applicable to the instant one since it deals with increment of rent. The case of **REPUBLIC VS CITY COUNCIL & OTHERS JUDICIAL REVIEW No. 323 of 2010** challenged the decision of the 1st Respondent to increase parking fees in Nairobi. The case is distinguishable with the instant one since the orders sought were Judicial Review Writs of certiorari while in the instant case the Petitioners seek declaratory orders.

The Respondents have urged the court to bear in mind that the relationship between the Petitioners and the Respondents was a contractual relationship, and that in the circumstances it was a private arrangement that was governed by the provisions of the Registered Land Act Cap 300 (now repealed), that was in force at the time. The Respondents urged that at the time these proceedings were instituted, the relationship between the Respondents and the Petitioners was governed by the provisions of the Land Act 2010, and that the proper forum for adjudication of any disputes arising there under is the Environmental and Land Court. The Respondents have urged the court to find that since this was a matter of contract entered into between parties the provisions of the Constitutions provision cited were inapplicable.

The Respondents have urged the court to rely on the replying affidavit and note that they followed the law before raising the rent. The Respondents urged that they first sought the consent of the relevant Minister which consent was obtained, after the decision to raise the rent was made by a Committee of the Respondent on the 2nd of December 2011. It was urged that the Committee decision was rectified by the 2nd Respondent on the 19th December, 2011. After the Ministers consent was obtained, the decision was gazetted in the Kenya Gazette Notice No. 8249 of 15th June, 2012. The Respondent urged that the Petitioners only open avenue was to seek Judicial Review orders quashing the decision of the 2nd Respondent.

15. The decision complained of was reached pursuant to Section 148 of the Local Government Act CAP 265 which deals with imposition of fees and charges. That section provides as follows:

“A local authority may:-

a). charge fees for any license or permit issued under this Act or any other written law or in respect of any person or matter, premises or trade, whom or which the local authority is empowered to control or license

b). impose fees or charges for any service or facility provided or goods or documents supplied by the local authority or any of its officers in pursuance of or in connection with the discharge of any

duty or power of the local authority or otherwise

2). All fees or charges imposed by a local authority shall be regulated by by-law, or if not regulated by by-law, may be imposed by resolution of the local authority with the consent of the minister and such consent may be given either in respect of specified fees or charges or may be given so as to allow a specified local authority to impose fees or charges by resolution in respect of a specified power or a particular matter.

3)...”

The Respondents have shown that before the increment was implemented, the Council held a meeting and a resolution passed to review fees and charges upwards. The Respondents have annexed the Minutes of the Special Finance Staff and General Purposes Committee Meeting held on 2nd December 2011. The Respondent has also shown that the Minister’s consent was sought and obtained, following which the approved fees and charges were gazetted on 15th June 2012, as per the annexed Gazette Notice. This was well within the meaning of section 148(2) of the Local Government Act CAP 265 which requires local authorities to make a resolution and seek the consent of the relevant Minister before levying or increasing any fees and charges.

Petitioners were duly informed by the Respondents of its decision to review the fees and charges upwards, vide a letter dated 21st June, 2012. The Petitioners, other than citing general provisions of the Constitution, have not stated the specific fundamental rights and freedoms that have been allegedly contravened by the Respondents.

The Petitioners ought to have sought to overturn the decision of the Respondents to review the fees and charges upwards, by way of Judicial Review Writ of certiorari. I find that no Constitutional matters arise in these proceedings.

I find that the Petitioners did not establish that any of it rights under the Constitution, 2010 were violated by the Respondents. They are therefore undeserving of the orders sought in this petition.

In the result:

1.I dismiss the Petitioners Petition in total.

2.The Petitioners will also pay the Respondents costs of this Petition.

DATED THIS 24TH DAY OF JANUARY 2013

LESIT, J.

JUDGE.

24th January, 2013

READ, SIGNED AND DELIVERED IN THE PRESENCE OF:

Jane/Kirimi.....CC

For Petitioners

For Respondents

LESIT, J.

JUDGE.