



Muthithi Investments Limited & another v Nairobi City County Government (Environment & Land Petition 90 of 2018) [2022] KEELC 2397 (KLR) (26 May 2022) (Judgment)

Neutral citation: [2022] KEELC 2397 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 90 OF 2018**

LN MBUGUA, J

MAY 26, 2022

BETWEEN

MUTHITHI INVESTMENTS LIMITED 1ST PETITIONER

MARBLE ARCH HOTEL LIMITED 2ND PETITIONER

AND

NAIROBI CITY COUNTY GOVERNMENT RESPONDENT

JUDGMENT

1. Vide the amended Petition dated January 30, 2019, the Petitioners seek the following orders:
 - i. The honourable court be pleased to hold and declare that the 1st petitioner is the legal and rightful proprietor of LR No. 209/11100 (IR 47666) and LR No. 209/11843 (IR No. 57355) located within the Nairobi Central Business District.
 - ii. A Conservatory Order permanently restraining the Respondent whether by itself, servants, agents or otherwise howsoever from in any way trespassing upon, demolishing, taking possession or interfering with the Petitioner's business and quiet possession of the properties known as LR No. 209/11100 and LR No. 209/11843 (IR No. 57355) located within the Nairobi Central Business District.
 - iii. A declaration that the Enforcement Notice issued by the respondent on December 21, 2018 is null and void.
 - iv. An order quashing the Enforcement notice issued by the respondent on December 21, 2018.
 - v. Damages on account of trespass and destruction of property.
 - vi. Costs of this suit.



2. This Petition supported by the sworn affidavit of the Director of the petitioners Mike Maina Kamau dated January 30, 2019 is premised on the grounds that on December 20, 2018, the Governor of the Respondent threatened the petitioners' Director that he would demolish and take possession of the 1st petitioner's properties. The threat was made good later that day when officers of the respondent marked the petitioners' LR No. 209/11100 wall with the words 'ILLEGAL' and later demolished it. On December 21, 2018, officers of the respondent also marked the hotel walls on LR No. 209/11843 with the words 'Illegal' and served the petitioners with an enforcement notice dated December 21, 2018 on the basis that the hotel was an illegal development having been constructed without approval of the County Government of Nairobi.
3. The 1st petitioner claims that it is the registered owner of the suit properties since 1995 and 1993 respectively, both located within the Nairobi Central Business District and the 2nd petitioner has been running the hotel located on LR No. 209/11843 since 1993 while using LR No. 209/11100 as its private parking space. That they have dutifully paid rates, rent and other approvals and licences for the said properties. As such, the impending demolition was illegal, had no basis and the Respondent had infringed on the petitioners' rights to property as enshrined under article 40 of the *Constitution*.
4. The suit was heard by way of written submissions. The Petitioners' submissions are dated 16th April 2021, where it is averred that 1st Petitioner is the registered owner of the suit properties and he had an absolute and indefeasible title as conferred by section 26(1) of the *Land Registration Act* and as outlined in *Gitwany Invetsment Ltd v Tajmal Limited & 3 others* [2006] eKLR, *Angela Mueni Mwandia v Josephat Kavati Muia & another* (2017)eKLR and *Virenda Ramji Gudka & 3 others v Attorney General* [2014].
5. It was further submitted that the Petitioners would suffer irreparable loss if the orders sought were not granted, but the respondent would not suffer any inconvenience. To this end, the case of *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR was cited.
6. On the issue of enforcement notice, it was submitted that the notice issued on December 21, 2018 was malicious and should be quashed evoking this court's supervisory jurisdiction. It was further submitted that the respondent trespassed and damaged the petitioners properties and the petitioners were thus entitled to an award of damages of Kshs. 2,000,000.
7. As noted in the ruling delivered by this court on March 2, 2022, the respondents did not file any response to the petition hence the suit proceeded as an undefended claim.

Determination

8. This court has considered the application, affidavits, rival submissions together with the relevant legal framework and the prevailing jurisprudence. The issue for determination is: Whether the prayers sought in this Petition are merited.
9. As already pointed out, the suit is undefended. However, that does not mean that the orders sought should be robotically granted. The merits of the petition have to be considered in terms of the provisions of section 107 and 108 of the *Evidence Act*. Also see; *Samson S Maitai & another v African Safari Club Limited & another* [2010] Eklr.
10. I have seen the enforcement notice dated December 21, 2018 and it reads: Illegal development and occupation of a building (Marble Arch Hotel) without permission from the County Government of Nairobi. You are hereby required to: Stop further illegal development forthwith; stop illegal occupation of the development; provide development approvals to city hall for verification including occupation certificate within a period of 14 days... This notice shall take effect on the December 21, 2018... If



you are aggrieved by this notice you may appeal to the Liaison committee as the case may be under provisions of ... 4th day of January 2019...

11. Section 72 of the *Physical and Land Use Planning Act*, 2019 provides grounds in which an Enforcement Notice ought to be issued. Subsection 3 and 4 of the said section provides:

“Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall hear and determine the appeal within thirty days of the appeal being filed.

- (4) Any party aggrieved with the determination of the county physical and land use planning liaison committee may appeal to the court only on a matter of law and the court shall hear and determine the appeal within thirty days”.

12. Noting that the enforcement notice is dated December 21, 2018 and the current Petition was filed 3 days later on December 24, 2018, it is clear that Petitioners violated the doctrine of exhaustion of remedies, by failure to lodge a case with the relevant liaison committee.

13. The Supreme Court of Kenya made it very clear in the case of *United Millers Limited v Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others* [2021] eKLR that:

“(26) We also take judicial notice that the superior courts’ findings on jurisdiction is in harmony with our finding in *Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others*; SC Petition No 3 of 2016, [2019] eKLR, wherein we stated that, even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute. We emphasized that where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by the constitution and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance.” (Emphasis own).

14. However, the petitioner must have discovered the error of their ways because in the further supplementary affidavit dated November 11, 2019 on paragraph 8, they aver that: On January 31, 2019, in compliance with the provisions of the *Physical Planning Act*, cap 286 Laws of Kenya, the Petitioners lodged an appeal with the County Physical Planning Liaison Committee... The petitioners in paragraph 14 and 15 of that affidavit further state that the Governor of the respondent sought to demolish the hotel on allegation that the titles to the properties were fraudulently acquired and the liaison committee did not have the power and jurisdiction to determine disputes in relation to authenticity of titles.

15. However, the above enforcement notice makes no reference to the authenticity of the Petitioners’ title to the suit property. The issues outlined on the enforcement notice are on issues of illegal development and occupation which were brought under section 30(1) of the *Physical Planning Act*, cap 286 (repealed). This section provided that: (1) No person shall carry out development within the area of a local authority without a development permission granted by the local authority under section 33... section 38 (1) further provided that: 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.

16. Without belabouring what the law stipulates and the Supreme Court holding cited above, it is crystal clear that the petitioner moved this court without following the laid down dispute resolution mechanisms. In the alternative, the dispute in question ought to be addressed in another manner and not as a petition as was held in the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR:

“(256) ... The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Ketrtridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

17. It follows that the issues raised by the petitioners ought to be addressed through the dispute resolution mechanisms available under the relevant statutes and in an ordinary suit. Thus the petition violates the doctrine of constitutional avoidance as well as the doctrine of exhaustion. The upshot of the findings of this court are that the suit is not merited. The same is hereby dismissed with no orders to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2022 THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

H. Kinyanjui for the Respondent

Anzala for the Petitioners

Court Assistant: Eddel

