



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**ENVIRONMENTAL & LAND DIVISION**

**ELC CASE NO. 871 OF 2012**

**IN THE MATTER OF ARTICLE 2(4), 22(2), 23(1) (3) OF**

**THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF**

**THE FUNDAMENTAL RIGHT AND FREEDOMS UNDER ARTICLES 43 (1) (B), 47 (1) (2) AND  
57 OF THE CONSTITUTION OF KENYA 2010**

**PETER NJUNGUNA KURIA.....1<sup>ST</sup> PETITIONER**

**OYUGI MWANDA.....2<sup>ND</sup> PETITIONER**

**-VERSUS-**

**CITY COUNCIL OF NAIROBI.....1<sup>ST</sup> RESPONDENT**

**THE MAYOR OF THE CITY OF NAIROBI.....2<sup>ND</sup> RESPONDENT**

**THE MINISTER FOR LOCAL GOVERNMENT-3<sup>RD</sup> RESPONDENT**

**THE TOWN CLERK,**

**CITY COUNCIL OF NAIROBI.....4<sup>TH</sup> RESPONDENT**

**CHIEF LAND REGISTRAR AND OR OFFERS WORKING**

**UNDER HIM KNOWN AS LAND REGISTRAR-5<sup>TH</sup> RESPONDENT**

**RULING**

The Petitioners have filed a Petition dated 25<sup>th</sup> October, 2012 and simultaneously with the Petition also filed the Chamber Summons the subject of this ruling on 2<sup>nd</sup> November, 2012. The Chamber Summons is expressed to be brought under Rules 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006, Articles 22 and 23 of the Constitution of the Republic of Kenya.

Inter alia the petitioners seek the following orders:

1. A conservatory Order of Prohibition be and is hereby issued prohibiting the 1<sup>st</sup> Respondent, its members, officers, employees, servants, agents and any other person acting under its name or authority from disposing of or transferring the houses/premises known as Old Ngara and New Ngara to LAP TRUST or to any other body corporate or person pending the hearing and determination of this petition or further orders of this court.
2. A Conservatory order of prohibition be and is hereby issued prohibiting the 2<sup>nd</sup> and 4<sup>th</sup> Respondents from attesting the sealing of any allotments, instrument conveyances any other document whatsoever purporting to dispose the estates known as Old Ngara and New Ngara situated in the City of Nairobi to LAP TRUST or any other body corporate or person pending the hearing and determination of this petition or further orders of this Honourable Court.
3. A conservatory order of Prohibition be and is hereby issued prohibiting the 3<sup>rd</sup> Respondent from approving the decision of the 1<sup>st</sup> Respondent set out in the minutes of special finance committee meeting held on 10<sup>th</sup> August 2012 and confirmed and adopted same day pending the hearing and determination of this petition.
4. A conservatory order of prohibition be and is hereby issued prohibiting the 5<sup>th</sup> Respondent and officers working under him known as land Registrars from Registering any disposition, transfer, conveyance or any other document whatsoever purporting to dispose or transfer any interest in or right to the estates situated in the City of Nairobi known as Old and New Ngara pending the hearing and determination of the petition or further orders of this Honourable Court.

The applicants base the application on the following grounds:-

1. That on 10<sup>th</sup> August 2012 the 1<sup>st</sup> Respondent resolved to clear statutory debts in respect of LAP TRUST and LAP FUND through asset swap, subject to valuation of the properties.
2. The properties to be swapped included Old and New Ngara estate where the petitioners reside and tenants of the 1<sup>st</sup> Respondent.
3. That under Section 177 of the Local Government Act the 1<sup>st</sup> Respondent is enjoined to charge reasonable rent for its houses, however if the two estates are disposed of, the new owner or owners will be at liberty to charge the market rent which the petitioners, the majority of whom are pensioners and older member of the society cannot afford.
4. That the petitioners will be adversely affected by the decision of the 1<sup>st</sup> Respondent referred to in paragraph (1) herein above within the meaning of article 47(2) of the constitution.
5. That article 2(4) of the said constitution provides inter alia that any act or omission in contravention of the constitution is invalid consequently; the decision of the 1<sup>st</sup> Respondent to clear statutory debts in respect to LAP TRUST and LAP FUND through asset swap without giving the petitioners written reasons for the same is invalid.

Mr. Peter Njuguna Kuria has additionally sworn an affidavit supporting the application on behalf of the petitioners that sets out further grounds.

On behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents Mr. P. T. Odongo the Town Clerk of the 1<sup>st</sup> respondent has sworn a replying affidavit dated 11<sup>th</sup> March, 2013 in opposition to the petitioners petition and chamber summons. Mr. P. T. Odongo under paragraph 4 of the replying affidavit makes admissions of the special finance committee meeting of 10<sup>th</sup> august 2012 and states the meeting discussed pertinent issues on the debts owned by council to LAP TRUST and LAP FUND and the effects of non payments of the debts as relates to other activities. The respondent state authority was given and approval sought and obtained

from the minister for Local Government to give effect to the resolution reached at the said meeting.

The respondents further aver that the petitioners were represented at the special finance meeting through their elected councillors and cannot claim their rights have been infringed when it is clear their elected representative were participants at the meeting where the resolution was taken. The respondents deny any constitutional rights of the petitioners have been breached and contend the petitioners proceedings herein are not sustainable and are an abuse of the court process and ought to be dismissed with costs.

The parties have filed written submissions where they each assert their respective positions as above. The respective counsel also made oral submissions before me on 6<sup>th</sup> May 2013 when they highlighted their submissions. The petitioners cite article 43(1) (b) of the constitution that provides as follows:-

***“Every person has the right:-***

***(a).....***

***(b) To accessible and adequate housing, and to reasonable standards of sanitation;”***

The petitioners aver that to the extent that their rights in regard to access to adequate housing were likely to be adversely affected by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents administrative action in case the resolution complained of was implemented they were entitled to be given written reasons for the action pursuant to article 47 (2) of the constitution which they claim the respondents did not do. Under the provisions of section 144 of the Local government Act Cap 265 laws of Kenya a Local Authority such as the 1<sup>st</sup> Respondent in this petition may with the approval of the minister in charge of Local Authorities deal with any land belonging to it in such manner as the Minister may approve.

The petitioners contend that being tenants in suit properties the 1<sup>st</sup> respondent is by virtue of Section 177 91) (d) of the Local Government Act Cap 265 of the Laws of Kenya obligated to charge and has been charging reasonable rent for the tenancy or occupation thereof and they fear that if the respondents are allowed to carry through and implement the resolution of the special finance Committee the new owners will not be obligated to charge reasonable rent and are likely to increase the rent to the prejudice of the petitioners.

It is not in dispute that the 1<sup>st</sup> respondent owes LAP TRUST and LAP FUND colossal amounts of money and until these funds are remitted to the two organisations many pensioners who may still be in service and/or have left service may not access their pension funds. Until the funds are remitted to LAP TRUST the pensioners are losing on the investments that the funds could have been put into to grow the fund and the ultimate sums payable to the individual pensioners. Every Retirement Pension Scheme registered with the Retirement Benefits Authority is expected to make remittance of all members’ contributions to the scheme timeously.

As I understand it the resolution passed by the Finance Committee was to enable the 1<sup>st</sup> Respondent to retire the debt owed to LAP TRUST and LAP FUND or at least part of it for the benefit of the petitioners.

The subject properties are owned by the 1<sup>st</sup> respondent and as holders of the proprietary interest the 1<sup>st</sup> respondent would in law be entitled to all the rights that accrue to the proprietor of a property including the right to dispose of the same. The 1<sup>st</sup> respondent has a right to deal with its property howsoever it pleases provided it seeks and obtains the approval of the Minister for the time being in charge of Local Authorities. The respondents state that they have obtained the requisite approval from the Local Government Minister (though no evidence of such approval has been furnished).

It is a matter of notoriety that the 1<sup>st</sup> Respondent has operated on a deficit budget for quite some time where the cash they are able to raise cannot meet their expenses and this is epitomised by the repeated instances of delayed salary payments and strikes by staff for non payment of salaries owing to cash flow

problems. Given this scenario it is understandable why the 1<sup>st</sup> Respondent was seeking an alternative way of settling the debt owed to LAP TRUST and LAP FUND as it was unlikely that the 1<sup>st</sup> Respondent would be in a position to raise “hand cash” from its operations to pay the debt. This petition has to be looked at within this context.

The Respondents have contended that the petitioners cannot be heard to complain about the City Council’s resolution since they were represented at the meeting at which the resolution was taken by their duly elected representatives (councillor) and that the city council acted within its mandate and there cannot be a breach of the petitioner’s constitutional rights as alleged. The argument by the respondents as I understand it is that the resolution to dispose off or swap the subject properties to retire the debt owed to LAP TRUST and LAP FUND was not arbitrarily taken as it involved consultations at which the petitioner’s elected representatives participated and that upon consideration of all the factors and the interest of all the parties the resolution was taken.

Article 24 of the Constitution provides for the instances where the limitation of rights and fundamental freedoms may be effected and one of the instances would be under article 24 (1) (d) that provides:-

***“24(1) (d). The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others”.***

Therefore in instances such as presented in this petition the court is called upon to determine on competing interests and in making that determination has to consider which of the rights serves the greater good in terms of public interest. The petitioners as I understand their claims are merely apprehensive that should the resolution be implemented the new owners of the suit properties will not be bound to charge reasonable rent and may increase the rent beyond the reach of the petitioners. Section 177 (1) (d) of the Local Government Act on which the petitioners hinge their petition does not state what reasonable rent is. Would reasonable rent be the operative market rent for similar units or does it mean the rent is subsidized.

There is nothing tendered to demonstrate that LAP TRUST and/or LAP FUND would charge unreasonable rent once they became the owners of the subject property.

Although the application before me is the petitioners chamber summons application dated 1<sup>st</sup> November, 2012 by reason of the orders sought both in the chamber summons and the petition it has become necessary to consider and evaluate all the material and evidence tendered in support of the main petition and the chamber summons to determine whether the conservatory order and the orders of prohibition can issue. I have in this regard considered the petitioners alleged violation of article 43(1) (b) of the constitution and I am unable to find any basis for the petitioners contention. The 1<sup>st</sup> respondent is the owner of the suit properties and as such owner there is no obligation on its part to give housing to the petitioners at the suit premises and even if the petitioners are its tenants it cannot be implied that the 1<sup>st</sup> respondents cannot deal with the suit premises without the sanction of the petitioners.

To my mind elevating the petitioners to such status would constitute placing a clog or an encumbrance on the 1<sup>st</sup> respondents rights of ownership. It is my view that provided the 1<sup>st</sup> respondent complies with the provisions of the law and in particular Section 144 of the Local Government Act which requires the Minister to approve all transactions affecting disposal, alienation or purchase of property the 1<sup>st</sup> respondent would be free to deal with the property.

To the extent that the petitioners considered their interests to be threatened and/or adversely affected my view is that the 1<sup>st</sup> Respondent to the extent that it functions through committees at which there are chosen representative of the people from the various wards comprising the local authority the petitioners like all the other residents in the city are represented at such fora by their elected representatives. In the circumstances of this matter the petitioners could not be entitled to be given written reasons for the resolution the 1<sup>st</sup> Respondent sought to have passed. Their interests were aptly represented during the committee meeting at which the impugned resolution was taken and I find there was no violation of

article 47(2) of the constitution as alleged.

The 1<sup>st</sup> respondent in taking the resolution was acting in good faith and its intentions was to find a solution to a long running debt problem with LAP TRUST and LAP FUND for the benefit of the pensioners who are either serving employees or those who have already retired. The petitioner’s private individual interest in my view cannot and should not be elevated to override the wider and greater interests of the pensioners who stand to benefit if the 1<sup>st</sup> respondents resolution is implemented as envisaged.

A party seeking a conservatory order must demonstrate that he has a prima facie case with a probability or likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution. I have considered the petitioners chamber summons and the affidavits in support and the petitioner’s submissions and I do not find there is any violation and/or threatened violation of the constitution and I hold that there is no basis to grant the conservatory order and/or the orders of prohibition sought by the petitioners.

In the premises I hold and find that the petitioner’s chamber summons is devoid of any merit and is an abuse of the due process of the court. As I have declined to grant a conservatory order and held the application to constitute an abuse of the process of the court the petition can also not stand. I therefore order the chamber summons dismissed and the petition to be struck out.

The interim order for status quo issued in this matter is hereby vacated.

There will be no orders for costs for the application and the petition and each party will bear their own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JUNE 2013.**

**J. M. MUTUNGI**

**JUDGE**

In the presence of:

..... for the Petitioners

..... for the Respondents