



**Biwott v Wingsdrive Community Based Organization & 3 others (Environment & Land Petition E005 of 2021) [2022] KEELC 2290 (KLR) (17 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2290 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND PETITION E005 OF 2021**

**EO OBAGA, J  
MAY 17, 2022**

**BETWEEN**

**WILLIAM KIPKORIR BIWOTT ..... PETITIONER**

**AND**

**WINGSDRIVE COMMUNITY BASED ORGANIZATION ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF OFFICER PHYSICAL PLANNING & URBAN DEVELOPMENT, UASIN  
GISHU COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF UASIN GISHU ..... 3<sup>RD</sup> RESPONDENT**

**TOWN CLERK UASIN GISHU COUNTY ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**BACKGROUND**

1. The Petitioner is the registered owner of LR. No Kiplombe/Kuinet Block 2 (Rotich & Birech) 102 (suit property) which he purchased from Patrick N. Mweni in the year 2012. The vendor had sold other plots within the area. The persons who had purchased their plots in the area came together and formed a community based organization known as Wingsdrive Community Organization which was duly registered as such on 22<sup>nd</sup> November, 2018.
2. The Community based organization which is the 1<sup>st</sup> Respondent then decided that the area was to be a gated Community with controlled construction designs. Members of the 1<sup>st</sup> Respondent were allowed to build bungalows and Maisonettes. Those who had plots abutting Eldoret/Ziwa road were allowed to put up a one storey building consisting of at least one bedroom apartments on condition that the entry and exit to such apartment was direct from the road without the tenants using the single gate entering and exiting the gated estate. The reason for this was due to security challenges and need to



control population including a proper solid waste management. The restriction was aimed at ensuring that there was a structured way of development geared at enhancing a gated community.

3. On 9<sup>th</sup> March, 2021, the Petitioner submitted building plans to the 2<sup>nd</sup> Respondent seeking approval to put up a three storey building consisting of bedsitters. In compliance with the requirements of the *Physical and Land Use Planning Act* No 13 of 2019 (The Act), the 2<sup>nd</sup> respondent called for comments from the area residents before the Petitioner's application could be considered. The 1<sup>st</sup> Respondent submitted its comments which indicated that what the Petitioner intended to do was prohibited under its constitution. On 24<sup>th</sup> March, 2021, the 2<sup>nd</sup> respondent wrote to the Petitioner informing him that his application had been deferred as it did not conform with the zoning regulations.
4. Prior to the communication from the 2<sup>nd</sup> Respondent deferring the Petitioner's application for approval of development plans, the 2<sup>nd</sup> Respondent had proposed to accommodate the Petitioner by asking him to put up a one storey structure comprising of at least one bedroomed apartments whose entry and exit was to face the Eldoret/Ziwa road. This meant that the Petitioner's tenants would not access the single gate entering and exiting the gated estate. This was meant to minimize the issue of security as bedsitters are affordable to criminals who find them convenient to operate from.
5. It is the deferment of the Petitioner's application for approval of development plans which prompted the Petitioner to file the present petition.

#### **The Petitioner's contention:**

6. In his petition, the Petitioner seeks the following reliefs;-
  - a) That a declaration do issue pursuant to article 2(4) of *the Constitution* of Kenya, 2010 that the acts and /or omissions of the Respondents in interfering with the lawful activities of the Petitioner on his land being land reference No. Kiplombe/Kuinet Block 2 (ROTICH & BIRECH) 102, denying the Petitioner building plans approvals without any reason are a nullity, invalid, unfair, arbitral, illegal and unconstitutional for failure of compliance with articles 1, 3, 10, 28, 40, 43, 47, 55, 57 and 186 of *the Constitution* of Kenya, 2010.
  - b) That the Respondent be ordered to pay compensation for the arbitrary denial of building plans and interruptions on the Petitioner's parcel being land reference No. Kiplombe/Kuinet Block2 (Rotich & Birech) 102 leading to halting of the Petitioner's construction and/or developing a residential multi-dwelling building (rental houses project) occasioning the petitioner loss and damages which amounts to blatant breach of the provisions of articles 10, 28, 40, 43, 47, 55, 57 and 186 of *the constitution* of Kenya, 2010.
  - c) An order of prohibition directed against the Respondents barring the Respondents from trespassing onto Petitioner's land reference No. Kiplombe/Kuinet Block2 (Rotich & Birech) 102, interfering with petitioner's activities on the said land and harassing the Petitioner.
  - d) An order of Mandamus directed against the 2<sup>nd</sup> Respondent compelling the 2<sup>nd</sup> Respondent to approve the Petitioner's submitted building plans to enable the petitioner to proceed with construction/development of residential multi-dwelling building (rental houses) on his land reference No. Kiplombe/Kuinet Block 2 (rotich & Birech) 102.
  - e) That the costs of the Petition be awarded to the petitioner.
7. The Petitioner contends that the Respondent's decision to deny him approval of his development plans was arbitrary and that as owner of the suit property, he is free to do whatever he wishes with his property



and that zoning regulations cannot supersede his constitutional rights to own property as enshrined in Article 40 of *the Constitution*.

8. The Petitioner further contends that the 1<sup>st</sup> Respondent incited members against him which action has caused him economic loss and that this is contrary to Article 43 of *the Constitution*. The Petitioner further states that the action of the 2<sup>nd</sup> Respondent is discriminatory against him as he is a non-local and that his neighbours have been allowed to put up multi storey building which they have rented out to tenants.
9. The Petitioner contends that the 2<sup>nd</sup> Respondent had given him a go ahead to pay for the approval of development plans and that based on that, he had gone ahead to secure loans and purchased building materials which he ferried to the site. The materials are wasting away yet he is servicing the bank loan he had taken but has been denied building plans approval. He states that prior to purchasing the suit property, he had carried out due diligence and confirmed that the suit property was not within a gated community.
10. The Petitioner takes issue with the fact that the 1<sup>st</sup> Respondent was registered in 2018 and that its Constitution is that of 2017. When the members of the 1<sup>st</sup> Respondent were deliberating on the development control issues, he was residing on the suit property yet he was not contacted and that in any case, there are about 109 members of the 1<sup>st</sup> Respondent but the decision to come up with the regulation barring construction of multi dwelling apartments was made by a few individuals. The Petitioner argues that the Respondent have destroyed his legitimate expectations and that there have been arbitrary inspection on the suit property by the Respondents.

#### **First Respondent's contention:**

11. The 1<sup>st</sup> Respondent contends that the Petitioner's petition is misconceived as the Petitioner was part of the people from the 1<sup>st</sup> Respondent who deliberated and came up with the regulations which are contained in the 1<sup>st</sup> Resident's Constitution. Prohibition of putting up rental houses and flats was put in place so as to curb insecurity and that when the developer was subdividing the land, he did not put up sufficient structures to accommodate a large population including a proper solid waste management system which could sustain a large population.
12. The 1<sup>st</sup> Respondent further contends that the Petitioner was aware of the 1<sup>st</sup> Respondent's Constitution and he contributed financially and used to attend meetings of the 1<sup>st</sup> Respondent. Despite being aware of the restrictions and having participated in meetings, he decided to go ahead to seek approval of what had been prohibited.
13. The 1<sup>st</sup> Respondent states that the 2<sup>nd</sup> Respondent invited members of the public to comment on the proposed development on the suit property. Pursuant to the notices given, the 1<sup>st</sup> Respondent further states that when the Petitioner's application was deferred, he had the option of preferring an appeal as provided for under sections 80 and 84 of the *Physical and Land Use Planning Act* No. 13 of 2019.
14. The 1<sup>st</sup> Respondent argues that this petition is premature as the Petitioner ought to have exhausted the internal mechanisms as provided under *the Act* and that in any case, the Petition does not raise any constitutional issues worth addressing.

#### **The Second and Third respondents' contention:**

15. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents contend that the Petitioner's petition is misconceived and ought to be dismissed. The Petitioner had submitted building plans for approval in which he wanted to put up a three story building comprising of bedsitters. The 3<sup>rd</sup> Respondent subsequently received complaints



mainly from the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent considered the concerns raised by the 1<sup>st</sup> Respondent in accordance with the provisions of the Act and deferred the Petitioners application. This decision was communicated to the Petitioner.

16. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents state that the Petitioner's application was deferred and that there are ongoing negotiations but they retain the right to give or withdraw the development approvals.

**Analysis:**

17. The parties were directed to file written submissions. The Petitioner filed his submissions dated 4<sup>th</sup> January, 2022. The 1<sup>st</sup> Respondent filed its submissions dated 2<sup>nd</sup> December, 2021. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not file submissions. I have carefully considered the petitioner's petition as well as the opposition to the same by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. I have also considered the submissions by the Petitioner and those of the 1<sup>st</sup> respondent. The issues which emerge for determination are firstly, whether this petition is properly before this court. Secondly, whether the Constitutional rights of the Petitioner were violated. Thirdly, is the petitioner entitled to any of the reliefs in the Petition.
18. What prompted the Petitioner to move to this court is a simple act of deferment of his application for approval of his development plans. His application was not rejected as he claims. It was deferred pending further consultations on the way forward. The replying affidavit by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents is clear on this. Approval or rejection or deferment of application for approval of development plans is governed by the *Physical and Land Use Planning Act* which commenced on 5<sup>th</sup> August, 2019. *The Act* is clear that if any person is aggrieved by the decision of a County Executive Committee is at liberty to appeal against the decision to the County Physical and Land Use Planning Liaison Committee. *The Act* further provides that any person who is aggrieved by the decision of the Committee may appeal against that decision to the Environment and Land Court.
19. Section 61(3) of the *Physical and Land Use Planning Act* 2019 provides as follows:-
- “An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.”
20. Further section 61(4) of *the Act* provides as follows:-
- “An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court.”
21. It has been held now and again that if a statute provides a mechanism for resolution of a dispute as provided in the *Physical and Land Use Planning Act* as in this case, that mechanism has to be exhausted before a party can be allowed to explore other options unless *the Act* provides for exemption which has to be applied for.
22. In the case of *John Hurun Mwau v Peter Gastrow & 3 others* (2014) eKLR the court held as follows:-
- “courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision



or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights.

.....it is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.”

23. In the case of Whitehorse Investments Limited v Nairobi City County (2020) eKLR, the court of Appeal upheld a decision of Justice Eboso who had held that the Appellant’s application for judicial review regarding an enforcement notice was filed prematurely as the Appellant had not exhausted the internal mechanism provided for under the Physical Planning Act and that the Appellant had not made any application to be exempted from exhausting the internal dispute resolution mechanism under the Fair Administrative Action Act.

24. In the instant case, the Petitioner did not bother to exhaust the mechanism provided for under the Act. As was held in the John Hurun Mwau case (supra), the Petitioner should not have invoked the provisions of the constitution particularly given the fact that his application for approval of development plan was not rejected but it was only deferred. The Petitioner therefore moved to court prematurely and the court cannot entertain this petition for that reason. This is enough to dispose of this petition but I will nevertheless proceed to consider whether the Petitioner’s rights were violated as alleged.

25. The principles regarding the need to put up the alleged violation of the constitution with a degree of precision which were set out over four decades ago in the case of Anarita Karimi Njeru v Attorney General (1979) KLR 154 still stand. In that case, it was stated thus:-

“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

26. In the case of Trusted Society Of Human Rights Alliance v Attorney General (2012) eKLR, the High Court held as follows:-

“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justifiable controversies. However, we are of the opinion that the proper test under the new constitution is whether a petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondent’s in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”



27. It is clear that the Petitioner has made generalized allegations regarding his alleged violation of his constitutional rights. This is contrary to the principles set out in the *Anarita Karimi Njeru case*(*supra*).

#### **Article 40 of the Constitution**

28. The Petitioner argues that under article 40 of *the Constitution*, he has right to own property. According to him, he has a right to do anything on his land and that there is nothing in as far as development control is concerned which can supersede his constitutional rights to own property. In as much as the Petitioner has a constitutional right to own property, that right is subject to regulations which are provided for in statutes which are meant to guide on the better enjoyment of that right in relation to the rights of other people. One of such statutes which regulate the proper enjoyment of ones right to property is the *Physical and Land Use Planning Act* of 2019. Section 61(1) of *the Act* provides as follows:-

“shall take into consideration the comments made by the members of the public on the application for development permission made by the person seeking to undertake development in a certain area; and”

29. Section 2 (c) of the third schedule of *the Act* provides as follows:-

“A county government shall when considering a development application submitted have regard to the health, safety, amenity, efficiency, aesthetics and conveniences of the community generally and to the proper planning and density of development and land use in the area.”

30. The Petitioner cannot argue that he has a right to do whatever he wishes with his property. If this was the position as regards rights to property, then there would have been no need for enactment of statutes like *physical and Land use planning Act*. What the Respondents did was within the Law and did not violate the Petitioner’s right to property.

#### **Article 27 of the Constitution**

31. The Petitioner contends that he was discriminated against as he is not a local. He goes on to state that his neighbours who own LR. Nos Kiplombe/Kuinet Block 2 (Rotich & Birech) 103 and 104 were granted permission to put up storey buildings whereas he was denied permission. The Petitioner did not give details of the alleged discrimination. For instance, when he claims that he is not a local, he does not say what he meant by this. As for his neighbours whom he alleges have been allowed to put up storey buildings, he does not state the nature of apartments which his neighbours put up.

32. It is clear that the 1<sup>st</sup> Respondent was willing to allow the Petitioner to put up a one floor apartment consisting of at least one bedroom each and not bed sitters. The 1<sup>st</sup> Respondent asked the Petitioner whose land abuts the Eldoret/Ziwa road to build his entry and exit to face the said road without his tenants accessing the gated community through the single gate which other house owners use. Given the fact that his application for development permission was deferred, he can still go ahead to comply with the regulations of the community and proceed to have the application approved.

33. *Black’s Law Dictionary* defines discrimination as follows:-

“Differential treatment; esp; a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.”



34. If the Petitioner would have demonstrated that the two neighbours were allowed to put babysitters and that he was denied, then he would have had a basis to complain that he was discriminated. As there is no evidence of any such treatment, I find no basis for holding that the Petitioner was discriminated. The Petitioner has also not expounded on what he means by a local and non-local.

#### **Article 47 of the Constitution**

35. The Petitioner alleged that he was not given a fair hearing. Materials in this petition show that when the Petitioner applied for approval of development plans, members of the public were invited to give their comments in accordance with *the Act*. The Petitioner also gave his comments. The 2<sup>nd</sup> Respondent considered the comments on the side of the Petitioner as well as the 1<sup>st</sup> Respondent and reached a decision that the Petitioner's application be deferred. The reason for deferment was given in a letter dated 24<sup>th</sup> March, 2021 which gave the reason for deferment as non-conformity with zoning regulations. The mere fact that the zoning had not been gazetted does not afford the Petitioner a leeway to do what he wants to do with his property. There is therefore no basis for arguing that the Petitioner was not given a fair hearing.

#### **Article 28 of the Constitution**

36. Article 28 of *the Constitution* provides that every person has inherent dignity and the right to have that dignity respected and protected. The petitioner has not stated in what manner his dignity was violated. There is therefore no basis upon which this court can make a finding on whether his dignity was violated.

#### **Article 31 of the Constitution**

37. Article 31 of *the Constitution* deals with right to privacy. The Petitioner has not stated in what manner his right to privacy has been infringed. The closest he comes to this is by alleging that the Respondents have been going to his property. He does not give any details on how this has infringed on his property. If the Respondents have been going to his property, it is in accordance with the requirements of the *Act* that no developments should be carried out without approval. The Petitioner has confirmed that he had already ferried building materials to the suit property even before being granted approval to build. There is therefore no basis upon which the court can make a finding that the Petitioner's right to privacy has been infringed.

38. The Petitioner having totally failed to prove that any of his Constitutional rights alleged were violated and the court having found that this petition was prematurely filed, I find that none of the reliefs sought by the Petitioner can be granted.

#### **Disposition:**

39. The court finds that the Petitioner's petition is devoid of merit. The same is hereby dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 17<sup>TH</sup> DAY OF MAY, 2021.**

**E. OBAGA**

**JUDGE**

**In the virtual presence of;**

**Mr. Kagunza for Petitioner.**



**Ms. Koskei for Ms. Odwa for 1<sup>st</sup> Respondent.**

**Court Assistant –Albert**

**E. OBAGA**

**JUDGE**

