



Ng'anya & 2 others (Suing on their own behalf and on behalf of 26 others) v Mukabana (being Sued as the administrator of the estate of Peter Were - Deceased) & 5 others; National Environment Management Authority (NEMA) (Interested Party) (Environment & Land Petition 67 of 2019) [2022] KEELC 3544 (KLR) (12 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3544 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 67 OF 2019
OA ANGOTE, J
MAY 12, 2022
IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF INFRINGEMENT AND OR VIOLATION OF
THE PETITIONERS CONSTITUTIONAL RIGHTS CONTRARY
TO ARTICLES 19,21(1), 27(4), 47 (2), 22 (B), 23, 28, 29, 40,
42, 70 (1), 40 (4) AND 165 (3) OF THE NEW CONSTITUTION
OF KENYA, 2010

BETWEEN

CHRISTOPHER OWINO NG'ANYA 1ST PETITIONER
AGGREY MAGANGA APAMO 2ND PETITIONER
CATHERINE ADERO 3RD PETITIONER
SUING ON THEIR OWN BEHALF AND ON BEHALF OF 26 OTHERS

AND

NAMAN NDONJI MUKABANA (BEING SUED AS THE ADMINISTRATOR OF THE ESTATE OF PETER WERE - DECEASED) 1ST RESPONDENT
EVANS OCHIENG OTIENO, JUDITH GRACE, EVANS MUKABANA, KENNEDY OCHIENG T/A OFFICIAL AND MEMBERS OF KASARANI YOUTH PANORAMA ASSOCIATION (SUED AS AGENTS OF THE ESTATE OF PETER KEYA WERE - DECEASED) 2ND RESPONDENT
EVANS OCHIENG OTIENO, JUDITH GRACE, EVANS MUKABANA, KENNEDY OCHIENG T/A OFFICIAL AND MEMBERS OF BAMAYO



**DEVELOPMENT GROUP PROJECT (BEING SUED AS AGENTS OF THE
ESTATE OF PETER KEYA WERE - DECEASED) 3RD RESPONDENT**
KENYA BUILDERS CONCRETE CO. LTD 4TH RESPONDENT
CITY COUNTY GOVERNMENT OF NAIROBI 5TH RESPONDENT
INSPECTOR GENERAL OF POLICE 6TH RESPONDENT

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY
(NEMA) INTERESTED PARTY**

RULING

1. This ruling is in respect to the respondents' notice of preliminary objection dated June 22, 2021. In the said notice of preliminary objection, the 5th respondent averred that the suit is incompetent, bad in law, ill-conceived and an abuse of the court process.
2. The 5th respondent further averred that this court lacks jurisdiction since the plaintiff (sic) have commenced this suit without exhausting the relevant statutory dispute resolution mechanisms and that this suit is premature and not ready for litigation.
3. The 5th respondent lastly averred that this suit contravenes the mandatory provisions of section 78 of the Physical Planning Act, 2019 (sic) and that the application as filed offends the established jurisprudence and the rule of law.
4. The petitioners filed a replying affidavit in response to the notice of preliminary objection. In the replying affidavit, the petitioners deponed that the preliminary objection is brought on a non-existing provisions of law because there is no statute known as the Physical Planning Act, 2019(sic); that the petition arose from the illegal demolition of permanent houses at the instance of the 5th respondent and that the application of section 78 of the Physical and Land Use Planning Act, 2019 does not apply in this case.
5. The petitioners deponed that the provisions of section 78 of the Physical and Land Use Planning Act, 2019, which is a statutory provision cannot override the constitutional provisions wherein their constitutional rights have been violated by the 5th respondent.
6. The notice of preliminary objection proceeded by way of written submissions. The 5th respondent's counsel submitted that the petitioners knowing that there exists a county physical and land use planning liaison committee hurriedly lodged this suit without exhausting the relevant statutory dispute resolution mechanisms as provided under section 78 of the Physical and Land Use Planning Act.
7. It was submitted that the petitioners have not attached any complaint against the 5th respondent as provided under section 78 (a) of the Act and that the petitioners have tried to circumvent the correct procedure as provided under the Act. Counsel relied on several authorities which I have considered.
8. The 2nd respondent submitted that the preliminary objection relied on by the 5th respondent is not based on any point of law and as such does not meet the threshold set out in the case of *Mukisa Biscuit Manufacturing Co Limited v West End Distributors* (1969) EA 696.



9. Counsel for the 2nd respondent submitted that the petition relates to the illegal demolition of houses on land parcel number LR No 7086; that the Constitution grants to this court the mandate to determine disputes relating to environment and land and that under section 13 (3) of the Environment and Land Court Act, the court has the mandate of determining applications for redress of a threat to the rights and fundamental freedom relating to a clean and healthy environment under articles 42, 69 and 70 of the Constitution.
10. The petitioners' advocate submitted that the 5th respondent has not proved that its preliminary objection raises questions of law that can summarily determine the petition and that the same should fail.
11. This suit was commenced by way of a petition. In the petition, the petitioners averred that they purchased on diverse dates land from the 2nd and 3rd respondents who were the agents of the 1st respondent; and that the 5th respondent was at all material time the head lessor of the land described as LR No 7086 (original No 6825/1) (the suit property).
12. According to the petitioners, after the purchase of the suit property, they substantially developed their respective plots between the year 2010 to 2012; that on diverse dates in November, 2019, the 4th respondent's employees with the support of police officers from Kayole police station, and while acting on order, arbitrarily descended on the petitioners' developed houses and demolished them.
13. It was averred in the petition that the 4th respondent has recently erected a perimeter wall across the Ngong-Nairobi river passing through the Njiru-Mihango estates; that the Nairobi city county government and NEMA did not give approvals for the erection of the perimeter wall surrounding the petitioners' houses and that the erection of a permanent perimeter wall across the Ngong-Nairobi River and sewer line was in violation to the right to a clean environment as it interferes with the free flow of the river and the sewer line.
14. The petitioners have sought for the following orders in the amended petition;
 1. A declaration that the petitioners rights under articles 19,21 (1), 27 (4), 47 (2), 22 (b), 23, 28, 29, 40, 42, 70 (1), 40 (4) and 165 (3) of the Constitution of Kenya, 2010 has been infringed by the 1st, 2nd 3rd and 4th respondents jointly and severally.
 2. A declaration that the demolition of the petitioners houses by the 4th respondent in collusion with the 6th respondent was illegal, malicious and contravened the petitioners rights under article 27 (4), 28, 29, 40 (1), 47 and 50 of the Constitution of Kenya, 2010.
 3. An order that the petitioners are entitled to general and exemplary damages as against the 4th and 6th respondent jointly and severally for illegal demolition of the petitioners houses and for violation of the petitioners' rights under articles 27 (4), 28, 29, 40(1), 47 and 50 of the Constitution of Kenya, 2010.
 - 3)A. An order for compensation to the petitioner against the 4th respondents for material loss and damage caused to their respective parcels of land or plots totaling to Kenya Shillings sixty-two million, four hundred and twenty-four thousands nine hundred and ninety nine (kshs62,424,999/-) only.
 4. A declaration that the erection of a perimeter wall across Ngong-Nairobi river passing through the Njiru-Mihango estates and the underlying sewer line by the 4th respondent in collusion with the 5th respondent was in violation of the petitioners rights to a clean environment enshrined under article 42 and 70 70 (1) of the Constitution of Kenya, 2010.



5. An order directed to the 5th respondent and interested party to demolish the perimeter wall erected across Ngong-Nairobi river passing through the Njiru-Mihango estate and the underlying sewer line within 14 days after judgment.
 6. Costs of and incidental to this amended petition.
 7. Any further relief or order that the court shall deem just and fit to grant.
15. In the notice of preliminary objection, the only point of law that the 5th respondent has raised is that “the suit contravenes the mandatory provisions of section 78 of the Physical Planning Act, 2019 (sic). It would appear that the Act that the 5th respondent sought to quote is the *Physical and Land Use Planning Act*, 2019, whose section 78 reads as follows;
- “The functions of the county physical and land use planning liaison committee shall be to-
- (a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;
 - (b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;
 - (c) advise the county executive committee member on broad physical and land use planning policies, strategies and standards; and
 - (d) hear appeals with respect to enforcement notices.
16. As stated above, the petitioners complaint is that the 4th respondent, in cohorts with other people, demolished their houses on the suit property and thus infringed on their rights. In the amended petition, the petitioners have sought for a declaration that the demolition of their houses by the 4th respondent in collusion with the 6th respondent was illegal and contrary to articles 27 (4), 28, 29, 40 (1), 47 and 50 of the *Constitution*.
17. The petitioners have also sought for an order of compensation against the 4th respondent for material loss and damages to the tune of kshs 62,424,999 and for a declaration that the erection of a perimeter wall across Ngong-Nairobi river was in violation of their rights to a clean and healthy environment.
18. Section 78 of the *Physical and Land Use Planning Act* has nothing to do with the alleged violation of the petitioner’s right to own land as provided under article 40 of the *Constitution* and access to adequate housing pursuant to the provision of article 43 (1) of the *Constitution*.
19. Indeed, the functions of the county physical and land use planning liaison committee is to hear complaints made in respect to applications submitted to the planning authority and hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county.
20. The function of the county physical and land use planning liaison committee is restricted to check the authority granted to the county government to issue or grant development permission and enforcement notices.
21. The county physical and land use planning liaison committee established under the act has nothing to do with disputes regarding the infringement of people’s right to own land and the right to adequate housing. Considering that the petitioners are not complaining that the Nairobi county government declined to issue them with development plans, or that they demolished their houses pursuant to an



enforcement notice, it is the finding of this court that the liaison committee does not have jurisdiction to determine the petition.

22. To the contrary, it is this court, pursuant to the provisions of article 162 (2) (b) of the Constitution and section 13(3) of the Environment and Land Court Act that has the authority to hear and determine applications for redress of a denial, violation or infringement of, or threats to, rights or fundamental freedoms relating to the right to property, accessible and adequate housing and a clean and healthy environment.
23. That being so, it is the finding of this court that it has the requisite jurisdiction to determine the petition. For those reasons, the notice of preliminary objection dated June 22, 2021 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12TH DAY OF MAY, 2022

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Musungu for the Petitioner

Ms. Wawira for Mr. Ambani for the 2nd Respondent

Mr. Onindo for 4th Respondent

Ms. Katana h/b for Kithi for 5th Respondent

No appearance for the Interested Party

Court Assistant – John Okumu

