



**Republic v National Land Commission & 2 others; Mukonyoro & 3 others (Interested Parties); Wangai & 4 others (Exparte) (Environment and Land Judicial Review Case E6 of 2021) [2022] KEELC 12574 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12574 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E6 OF 2021**

**JM MUTUNGI, J**

**SEPTEMBER 27, 2022**

**IN THE MATTER OF AN APPLICATION BY NJORO KIWANJA  
NDEGE WELFARE ASSOCIATION, FOR LEAVE TO APPLY FOR  
JUDICIAL REVIEW ORDER OF CERTIORARI & PROHIBITION AND**

**IN THE MATTER OF THE GAZETTE NOTICE NO. 999 OF 28TH NOVEMBER, 2001**

**AND**

**IN THE MATTER OF THE PROVINCIAL PHYSICAL PLAN REF.R23/2001/3  
GAZETTED ON THE 28TH NOVEMBER, 2001 VIDE GAZETTE NOTICE NO.999**

**AND**

**IN THE MATTER OF AN APPLICATION BY REPUBLIC**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR PHYSICAL PLANNING ..... 2<sup>ND</sup> RESPONDENT**

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

**AND**

**KAMANGA MUKONYORO ..... INTERESTED PARTY**

**JOHN WACHIRA KARIERI ..... INTERESTED PARTY**

**JULUIYS KAREITHI ..... INTERESTED PARTY**

**JOHN MAINA GICHURU KANYI GACHUHI (THE REGISTERED TRUSTEES  
FF UHURU WELFARE ASSOCIATION ..... INTERESTED PARTY**



AND

JOSEPH CHEGE WANGAI ..... EXPARTE  
CHRISTOPHER MUREITHI MACHARIA ..... EXPARTE  
STEPHEN MUREITHI MACHARIA ..... EXPARTE  
STEPHEN MBUGUA KAMAU ..... EXPARTE  
JOHN MAIN GICHURU KANYI GACHUHI (OFFICIAL OF NJORO KIWANJA  
NDEGE WELFARE ASSOCIATION) ..... EXPARTE

JUDGMENT

1. The genesis of the instant suit is the existence of two-Part Development Plans (PDP's) over a parcel of land within Njoro subcounty in Nakuru County. The exparte applicants contended there was a PDP No. R23/98/7 which was approved by the Director of Physical Planning on 5<sup>th</sup> December, 1997 and certified by the Commissioner of Lands on 21<sup>st</sup> January, 1998. The exparte applicants state this was the PDP that was used to allocate its members the land. The other PDP that the exparte applicants contend was unlawfully and illegally issued is PDP No.R23/2001/3 issued by the Director of Physical Planning on or about 1<sup>st</sup> July 2004 and certified by the commissioner of Lands on 8<sup>th</sup> October, 2004. The exparte applicants contend the latter PDP was unprocedurally issued and have approached the court by way of Judicial Review vide the Notice of Motion dated 16<sup>th</sup> July 2021 for orders: -

1. That the 1<sup>st</sup> and 2<sup>nd</sup> respondent's resolution to re-allocate plot numbers Njoro Gold Squatters Phase I plot Nos.4,J4,J5,7,11,12,13,18,19,21,22,25,27,28,30,33,34,36,37,38,44,49,56,57,66,69,72,78 (Residential), Njoro Golf Squatters Phase II plot Nos.J2,3,8,9,13,15,16,J16,17,19,20,21,25,J25,J28,31,32,33,J33,J34,35,J35,37,J38,42,48,59,60,61,65,74,75,77, and Njoro Gold Squatters Phase III Nos.6,10,17,23,25,26,31,37,66,74,87,102(Residential) comprised in PDP No.R23/98/7 to the interested party herein vide PDP No.R23/2001/3 and the Gazettee Notice No.999 of 28<sup>th</sup> November, 2001 be quashed.
2. That the respondent either by itself, its employees, officers, agents and/or any other person claiming to exercise powers through the Respondent be prohibited from re-surveying, re-planning, re-allocating or in any way dealing with the plots numbers I plot Nos.4,J4,J5,7,11,12,13,18,19,21,22,25,27,28,30,33,34,36,37,38,44,49,56,57,66,69,72,78 (Residential), Njoro Golf Squatters Phase II plot Nos.J2,3,8,9,13,15,16,J16,17,19,20,21,25,J25,J28,31,32,33,J33,J34,35,J35,37,J38,42,48,59,60,61,65,74,75,77 (Residential) and Njoro Gold Squatters Phase III Plot Nos.6,10,17,23,25,26,31,37,66,74,87,102(Residential) comprised in PDP No.R23/98/7 comprised in the PDP No.R23/98/7 certified by the Director of Physical Planning on the 5<sup>th</sup> December, 1997 approved by the Commissioner of Lands on the 21<sup>st</sup> January, 1998.
3. That the costs of this application be borne by the Respondent and the interested party.

**The Exparte Applicants Case.**

2. The applicants application is premised on the grounds set out on the body of the application, the facts in the statutory statement and the affidavit sworn by Joseph Chege Wangai in verification of



the facts on 16<sup>th</sup> July 2021. Briefly put, it is the applicant's case that they had been in possession and occupants of the suit land prior to and after independence and that in or about 1996 they made an application to the Ministry of Lands and Settlement to be allocated the land. They contend that both the Director of Physical Planning and the Commissioner of Lands approved the allocation of the land to them vide PDP No. R23/98/97 on the basis of which the exparte applicants caused the land to be subdivided and individual plots allocated to its members. The applicants claim that the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents without any consultation or reference to the applicants subsequently issued a separate PDP No. R23/2001/3 over the same portion of land which was gazette vide Gazette Notice No.999 of 28<sup>th</sup> November 2001. The applicants contended that their allocation of the disputed property was earlier in time and that they had settled and developed the land over a long period of time and such developments included residential premises, commercial buildings, schools, churches and health facilities and other social amenities. The applicants stated that they had from time immemorial enjoyed quiet possession of the suit premises as attested by the immense development that they had effected on the grounds.

3. The exparte applicants averred that the interested party procured the impugned PDP No.R23/2001/3 and the Gazettement thereof amid protest and/or objection as enumerated under grounds 11 (a) – d as hereunder:-
  - (a) That on the 2<sup>nd</sup> March 2002, the Ministry of Lands and Settlement through the Commissioner of Lands, vide a letter Ref. No.22632/XII/91 of event date recommended withdrawal of the PDP No.R23/2001/3 noting that there were pending disputes relating to the suit parcels of land.
  - (b) That on the 15<sup>th</sup> March 2002 the Ministry of Lands and Settlement through the Director of Physical Planning, vide a letter Ref. No.PPD/23/III/134 of even date advised the District Physical Planning Officer, Nakuru to withdraw the impugned PDP No.R23/2001/3.
  - (c) That on the 21<sup>st</sup> January 2013, the County council of Nakuru, vide a letter of even date advised the Commissioner of Lands inter alia, that the suit parcels of land had high density residential developments with between 200 to 250 dwellings.
  - (d) That on the 31<sup>st</sup> January, 2013 the County Council of Nakuru vide a letter of even date, advised the Commissioner of Lands inter alia, that the suit parcels of land were already under occupation by squatters who possessed allotment letters from the Council and the Commissioner of Lands.
4. It is the exparte applicants position that the latter PDP No.R23/2001/3 was irregularly and unprocedurally issued as the applicants who had an interest in the affected land were not consulted and/or afforded an opportunity of being heard before the PDP was issued. The applicants contended the latter PDP was effectively reallocating land that had already been allocated to them. The applicant further contended the 2<sup>nd</sup> respondent's action of issuing PDP No.R23/2001/3 amidst protestations by the applicants and the 1<sup>st</sup> and 3<sup>rd</sup> Respondents was callous and violated the rules of natural justice enshrined in the Constitution under Articles 47 and 50.

### **The Respondents Case.**

5. The 1<sup>st</sup> Respondent, National Land Commission, did not file a response to the application. The 2<sup>nd</sup> Respondent, Director of Physical Planning, filed a replying affidavit through Moses Mugendi, an Assistant Director of Physical Planning of the 2<sup>nd</sup> Respondent. He averred that they had no correspondence relating to PDP No.R23/98/7 in their records and therefore the said plan could not



- be authenticated and he concluded the plan was not authentic. He averred as per their records they had no prior plan before Plan PDP No.23/2001/3 was approved as plan No.86 which he stated should be the basis of the allotment of the planned land.
6. The 3<sup>rd</sup> Respondent, the County Government of Nakuru, filed a replying affidavit sworn by Evans O Otieno, a Development Control officer of the County in response to the application. He deponed that the suit against the 3<sup>rd</sup> Respondent was misplaced as the County Government had no role in the preparation and issuing of the PDP's as that was the function of the National Government and the Commissioner of Lands.
  7. The interested party did not file a response to the application. The ex parte applicant filed a supplementary affidavit on 13<sup>th</sup> June 2022 to respond to the replying affidavit of the 2<sup>nd</sup> Respondent. The ex parte applicants joined issue with the affidavit sworn by Moses Mugendi and reiterated the objections that had been raised and the concerns that had been raised regarding the status on the ground which were not taken into account by the 2<sup>nd</sup> Respondent when it issued the contested PDP. The applicants reiterated that the 2<sup>nd</sup> Respondent in issuing allotment letters failed to take account of the fact that the applicants had been in physical occupation of the premises since 1935 and had carried out extensive developments thereon.
  8. The application was canvassed by way of written submissions. The ex parte applicant filed submissions on 1<sup>st</sup> February 2022. The 2<sup>nd</sup> Respondent filed their submissions on 12<sup>th</sup> July 2022 and the 3<sup>rd</sup> Respondent filed theirs on 8<sup>th</sup> July 2022.
  9. In the present matter it is evident that the ex parte applicants claim to have been allocated plots of land in the disputed land parcel pursuant to a PDP No. R23/98/7 issued by the 2<sup>nd</sup> Respondent on 5<sup>th</sup> December, 1997 and approved by the Commissioner of Lands on 21<sup>st</sup> January, 1998. The 2<sup>nd</sup> Respondent vide the replying affidavit sworn by Moses Mugendi stated that they had no records relating to the said PDP and averred that the alleged PDP No.R23/98/7 was not authentic as it was not issued from the 2<sup>nd</sup> Respondent's office. According to the 2<sup>nd</sup> Respondent, the only PDP they had on record and which was documented was PDP No.R23/2001/3 which was published and Gazetted vide Gazette Notice No.999 of 28<sup>th</sup> November 2001. The court has perused its record and notes that even though the applicants vide the affidavit by Joseph Chege Wangui verifying the statement of facts had under paragraph 2 (b) indicated the PDP No.R23/98/7 had been annexed and marked as "JCW III" the annexure was not included and the court had not had the benefit of scrutinizing the same.
  10. The parties acknowledged there had been previous litigation involving the suit land and touching on the impugned PDP No.R23/2001/3. In Nakuru HC Misc. App No.201 of 2008 the Interested party herein were the applicants and relying on the impugned PDP No.R23/2001/3 applied to quash the decision of the Ministry of Lands and the County Council of Nakuru ( now 3<sup>rd</sup> Respondent) to allocate plots to the members of the ex parte applicant herein. The Hon. Lady Justice Martha Koome (as she then was) held that the county council had no power and/or authority to allocate land within a Part Development Plan (PDP). The court quashed the decision to allocate land to the ex parte applicants herein and prohibited the local authority from re-planning, resurveying or in any manner dealing with the disputed land.
  11. The other case touching on the suit property was Nakuru CMCC No.773 of 2009 where both the ex parte applicants and interested parties were parties. In the suit the ex parte applicant were the plaintiffs and the interested parties were defendants. The ex parte applicants in the suit had claimed to be the legal owners of the suit property by virtue of adverse possession and sought to have the interested parties enjoined from entering and/or in any manner interfering with the ex parte applicants use of the suit property. The interested parties filed a defence denying the court had jurisdiction to entertain



the suit and further filed a counterclaim in the suit and claiming they were the persons entitled to the parcel of land by virtue of PDP No.R23/2001/3 and further averred that the allotment letters issued to the interested parties (now applicants) by the 3<sup>rd</sup> Respondent in the present matter were quashed by the High Court in a Judicial Review No.201 of 2008. The Interested parties prayed for an order of eviction against the exparte applicants. On application by the interested party, the exparte applicants suit in the lower court was struck out and upon hearing of the counterclaim, the interested party was granted an order to evict the exparte applicants. The eviction order is yet to be executed presumably owing to the status on the ground where the exparte applicants are in physical occupation of most of the disputed land. There are active proceedings in the file commenced before the subordinate court but the matter has since been transferred to the ELC Court and the file renumbered as Nakuru ELC No.437 of 2013.

12. I have reverted to the foregoing background to illustrate that the dispute between the exparte applicants and the interested party has been alive and active over the last 20 or so years and has been the subject of litigation. This background is not disputed by the parties and indeed at least the exparte applicant and the interested party have both been active participants in the previous litigations. The exparte applicant as through these proceedings opened a new front for combat. The issue however is whether given the attendant circumstances the reliefs sought by the exparte applicant by way of judicial review are justiciable.
13. A Part Development Plan (PDP) to be effectual has to have been prepared in accordance with the provisions of the *physical Planning and Land use Act*, 2019. Under the *Physical Planning Act*, Cap 286, which was applicable in 1997/98 when the applicants aver PDP No.R23/98/7 was prepared and issued, the PDP ought to have been issued in compliance with sections 24,25,26,27,and 28 of *the Act*. The Director of Physical Planning needed to have prepared the PDP, gazetted the same in the Kenya Gazette and invited objections from any affected and/or interested persons whereupon he could effect such amendments and/or modifications of the PDP before final approval was accorded to the plan by the Minister responsible for Lands; sections 26 and 27 of the *Physical Planning Act*, Cap 286 provides as follows:-
  26. (1) The Director shall later than thirty days after the preparation of a local physical development plan, publish a notice in the Gazette and in such other manner as he deems expedient to the effect that the plan is open for inspection at the place or places and at the times specified in the notice.  
(2) The provisions of Sub-Part “A” relating to the making of representations or objections to the Director concerning regional physical development plans and to the consideration by the Director of such representations or objections and to appeals shall apply mutatis mutandis to this section.
  27. (1) The provisions of Sub-Part “A” relating to the approval or disapproval of a regional physical development plan shall apply mutatis mutandis to the approval or disapproval of a local physical development plan by the Minister under this section.  
(2) A local physical development plan approved under subsection (1) shall not be altered in any manner without the prior written authorization of the Director.
14. There is no evidence that No.R23/98/7 that the applicants refer to was prepared in accordance with the provisions of the *Physical Planning Act*, Cap 286. Indeed the 2<sup>nd</sup> Respondent denied they had any record of the PDP maintaining that they only had records relating to PDP/No.R23/2001/3 that was Gazetted vide Gazette Notice No.999 of 28<sup>th</sup> November,2001. The court in the premises is of the view that the applicants have failed to demonstrate and satisfy the court that there was a valid



- PDP No.R23/98/7 upon which the allocation of plots to them was premised. To the contrary there is evidence that PDP No.R23/2001/3 was in fact processed and prepared by the Director of Physical Planning Act as attested by the Gazette Notice No.999 of 28<sup>th</sup> November 2001. The Gazette Notice was giving notice of completion of part Development Plan relating to “PDP No.R23/2001/3 for Existing site for Ex-Freedom Fighters Uhuru Welfare Association and subsequent Subdivision”.
15. In Nakuru HC Misc Application No.201 of 2008 referred to earlier in this judgment where both the ex parte applicant and the interested parties were involved, the court upheld the validity of PDP No.R23/2001/3 and ruled that the plots allocated to the current applicants by the County Council were a nullity as the County Council had no Power to allocate to the applicants plots over the land covered by PDP No.R23/2001/3. The applicants did not contest the ruling delivered by Hon. Martha Koome (as she then was) and consequently her decision still stands.
  16. Having come to the finding that the ex parte applicants have not demonstrated that the alleged PDP No.R23/98/7 was validly issued, it follows that the instant judicial review application has no foundation upon which it is anchored . The director of Physical Planning is mandated under the *Physical Planning Act*, to prepare a Part Development Plan (PDP) for any unalienated land for any specific purpose and any person can object to any part development Plan that the director issues but ultimately the PDP that is approved is applied to the area covered by the PDP. In the court’s view the issue that arises in this matter is not really one of competing PDP’s but rather who between the ex parte applicants and the interested parties ought to be allocated plots/land in the identified land. In my mind that ought to have been an administrative function of identifying who the genuine allottees should have been. It is clear one group or part of the group in this case the ex parte applicants, are in active physical possession while the other group comprising mostly the interested parties want the ex parte applicants to be uprooted perhaps by way of eviction to give way for the resettlement of their members. I do not consider that these proceedings can achieve such purpose.
  17. The ex parte applicants having failed to demonstrate they had what would have constituted a valid PDP in their favour cannot properly challenge the impugned PDP No.R23/2001/3 which I have held was issued properly in accordance with the provisions of the *Physical Planning Act*, Cap 286 Laws of Kenya. The only basis upon which the ex parte applicants would have been justified in challenging PDP No.R23/2001/3 was if they were able to demonstrate PDP No.R23/98/7 was properly issued by the Director of Physical Planning over the same land against which PDP No.R23/2001/3 was issued. This they were not able to demonstrate .
  18. In the final result it is my determination that the ex parte applicants Notice of motion dated 16<sup>th</sup> July 2021 lacks any merit and the same is ordered dismissed. Considering that the interested party did not participate in these proceedings, I, in exercise of my discretion order that the parties shall meet their own costs of the application.

**JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 27TH DAY OF SEPTEMBER 2022.**

**J M MUTUNGI**

**JUDGE**

