



Nyongesa v County Government of Nakuru & another (Land Case Petition E9 of 2021) [2022] KEELC 14454 (KLR) (28 October 2022) (Judgment)

Neutral citation: [2022] KEELC 14454 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
LAND CASE PETITION E9 OF 2021
FM NJOROGE, J
OCTOBER 28, 2022**

BETWEEN

PETER NYONGESA PETITIONER

AND

COUNTY GOVERNMENT OF NAKURU 1ST RESPONDENT

**ATTORNEY GENERAL (SUED ON BEHALF OF PRINCIPAL SECRETARY
STATE DEPARTMENT FOR PUBLIC WORKS) 2ND RESPONDENT**

JUDGMENT

1. The Petitioner filed a petition dated June 18, 2021 seeking the following orders:
 - a. A declaration that the Demolition Order Notices dated March 17, 2021 issued by the Respondents is an arbitrary deprivation of the Petitioner’s fundamental right to property and a violation of Article 40 of the Constitution.
 - b. A declaration that Demolition Order Notices dated March 17, 2021 issued by the Respondents is a violation of the Petitioner’s right to Fair Administrative Action and Principles of Natural Justice under Articles 22(3) (d) and 47 of the Constitution.
 - c. A declaration that the Demolition Order Notice dated March 17, 2021 issued by the Respondents is a violation of the Petitioner’s right to access of justice and fair hearing under Article 48 & 50 of the Constitution.
 - d. A declaration that the Demolition Order Notice by the County Director of Land & Physical Planning and Demolition Order Notice both dated March 17, 2021 is a violation of the Petitioner’s right to equal protection under the law and freedom from discrimination under Article 27 of the Constitution.



- e. A declaration that the Demolition Order Notices dated March 17, 2021 issued by the Respondents is a violation of the Petitioner's right not to be subjected to torture, cruelty and inhumanity under Article 29(d) of the Constitution.
 - f. A declaration that the Respondents have breached obligations under Article 73 of the Constitution as imposed upon them.
 - g. The 1st Respondent to pay the Petitioners special, general, and exemplary damages arising from their unconstitutional acts as pleaded in this petition.
 - h. Costs of this petition be borne by the 1st Respondent.
 - i. Any other relief.
2. The genesis of the petition is the demolishing by the respondents of the petitioner's residential building that was under construction on plot no LR Municipality Block 23/735 Naka Estate - Nakuru registered in his name. The petitioner avers that he had secured all the requisite regulatory approvals for the project and that it was supervised by a project architect and closely monitored by the 1st respondent, the County Government of Nakuru. When the structure under construction attained the 5th floor level, the officials of the 1st respondent started harassing the petitioner and construction workers and making unreasonable and illegal demands which the petitioner resisted. The County Executive Council Member of the 1st respondent issued an enforcement notice dated November 22, 2020 indefinitely halting all works with immediate effect without prior notice required under Section 72 of the Physical and Land Use Planning Act 2019 and he failed to grant the petitioner and his construction experts hired in the project a hearing and, without notifying the petitioner of his right to internal appeal as provided for under Section 72(3) of the Act. The County Director of Land and Physical Planning on his part issued a demolition order notice dated March 19, 2021, ordering the petitioner to safely demolish the structure immediately. The said demolition notice is also faulted as being illegal for allegedly contravening the provisions of article 22(3) (d) and article 47, 50, of the Constitution as well and section 72(1) of the Physical and Land Use Planning Act 2019. Alongside the Demolition Order Notice was also issued by the Principal Secretary State Department for Public Works an Enforcement Notice dated March 19, 2019 requiring the petitioner to demolish his structure. That Enforcement Notice is also alleged to be illegal and unconstitutional for being contrary to article 73 of the Constitution and section 72 (2) (c) of the Act.
 3. The petitioner further avers that the 1st respondent failed to constitute the County Physical & Land Use Liaison Committee thus denying the petitioner access to justice as guaranteed by article 48 of the Constitution.
 4. The petitioner's structure was demolished soon after these notices on March 29, 2021 as per paragraph 45(vii) and paragraph 47 which claim that the demolition was unlawful and unconstitutional. The said demolition is said to have had adverse effects on the petitioner's health and he claims damages in connection therewith. It is claimed that the respondent erected barriers which thwarted the petitioner's ability to rehabilitate the suit property and closed all avenues for the exercise of the petitioner's right to internal appeal mechanism by demolishing the suit property before service of the appropriate notice or without giving effective date of notices or a period for compliance. The petitioner also claims that the respondents discriminated against him because 80 other buildings were audited and 2 were found to be dangerous and condemned but the developers thereof were allowed to rehabilitate them and the approval for re-occupation was subsequently granted by the 1st respondent. The Petitioner claims to have suffered loss and damage, and he quantifies loss in the sum of Kshs 33, 131,637/=. The petitioner therefore claims that the respondents have violated his right to property, the right not to be subjected



to torture, cruelty inhuman treatment, the right not to be discriminated against, the right to fair administrative action, under articles 50(1) 27, 29,47, and 73 of the *Constitution*. The petitioner states that consequent upon the alleged violations of his rights, he has suffered and continues to suffer loss and damage hence the suit.

5. The petition is supported by the petitioner's sworn affidavit dated June 18, 2021. It reiterates the grounds laid out in the petition. He has exhibited in that affidavit copies of the following documents: receipts as evidence of payments made to the 1st defendant in connection with construction works on the suit land, the building plans, an approval of building plans letter, the supervising engineer's instructions, National Construction Authority's certificate of compliance, contractor's annual practicing license, contractors certificate of registration with the national construction authority, NCA skilled Construction worker cards for masons and supervisors, the National Environment Management Authority, Environment Impact Assessment (EIA) Licence with attached conditions, the petitioner's indemnity form to the 1st respondent, Enforcement Notice dated December 23, 2019, a forensic structural integrity report (audit summary) of the structure made by Tonygirth Engineers commissioned by the petitioner together with the author's Engineers' Board of Kenya certificate of good standing, letter dated March 9, 2020 from National Buildings Inspectorate stating the building does not meet minimum safety standards and an attached audit report prepared by the State Department for Public Works signed by one Engineer SN Charagu, correspondence between the 1st and 2nd respondents over the petitioner's structure; correspondence between the 1st respondent and the petitioner, proposal for correction of defects addressed to the 1st respondent dated January 29, 2021, the 1st respondents' CEC Lands' letter to other offices dated March 10, 2021 convening an inspection meeting for March 18, 2021, demolition order notice dated March 19, 2021 from the 1st respondent; Nguzo Engineering services letter on the structural strengthening of the building; enforcement notice dated March 19, 2021 from the 2nd respondent; letter to the 1st defendant from the 2nd defendant on the results of a buildings audit the 2nd defendant had carried out; the petitioner's bills of quantity, and a medical report on the petitioner's health after the demolition of his building.

The response

6. The 1st respondent filed the sworn Affidavit of Justine M Nyaroo, its Senior Planner dated October 18, 2021 in opposition to the petition. He stated in that affidavit that his role includes development control in liaison with other state departments and agencies. He added that sometime in 2017 the Petitioner applied for development permission for development of a multi-dwelling residential building on the suit property.
7. He explained that an approval was granted and the Petitioner was also required to apply for an environmental compliance certificate from NEMA as well as register his construction project with NCA. He further stated that on diverse dates in the month of December 2019, while conducting their routine inspections they noticed that the development of the suit property supported by secondary reinforcements of steel and timber, that on further inquiry they noticed that the Petitioner was adding more columns not in the original approved structural drawings submitted; it was also realized that the petitioner was proceeding with the project without inspection as is required by the Building Code.
8. He averred that an Enforcement Notice containing omissions and commissions by the Petitioner was issued to the developer and the Petitioner's agent Mr Wekesa. The 1st Respondent averred that the Notice required the Petitioner to stop further construction and engage a consultant engineer. He averred that despite having been issued with a Notice to stop development, the Petitioner did not honour the said notices but continued with development.



9. He contends that sometimes in February, 2020 the 1st respondents' officers visited the suit property and conducted material testing which results were communicated to the Petitioner vide a letter dated June 25, 2020; that the report recommended further structural assessment and cessation of further construction activities until the defects were remedied under the supervision of a competent structural engineer. He added that they also conducted an independent audit and inspection of 80 buildings in Nakuru and two of the buildings, including the Petitioners were found to be dangerous.
10. He averred that on June 30, 2020 the Petitioner's architect Mr Stephen Njuguna submitted the requested structural integrity report and built drawings together with signed indemnity forms, that the National Building Inspectorate vide their letter dated August 25, 2020 approved the methodology for retrofitting the defects of the building. The Petitioner was later issued with a notification to carry out remedial works as prescribed in the letter; the Petitioner was required to ensure that his Architect and Structural Engineer inspected the Building and submitted monthly reports to the 1st Respondent.
11. The 1st deponent averred that the Petitioner never submitted even a single report as was prescribed but he started casting the 5th slab of the building which in effect added more pressure to the building thus compromising the structural integrity of the building. He further averred that after noting that the Petitioner was unresponsive in submitting any reports relating to the development, they scheduled a meeting where they requested the developer to avail the project structural engineer and project architect together with their reports. They also requested for an NCA license from the Petitioner.
12. He further averred that they visited the suit property on December 7, 2020 for a scheduled meeting but they never found the Petitioner or any supervisors and this indicated that the Petitioner never used professionals to guide his construction project; that the 1st respondent wrote to the Petitioner on December 22, 2020 notifying him that they were aware of his continuing disregard for professional advice given by the National Buildings Inspectorate; that Notice was received by the Petitioner's agent and despite being issued with the said Notice, the Petitioner continued with the developments.
13. The deponent averred that they later organized a site inspection meeting where the inspection team noted that there were no construction activities on site and that some columns had been covered with polythene materials which when opened, revealed that the said columns had failed. He stated that they received communication from the Principal Secretary for State Department of Public Works which condemned the building and required the Petitioner to demolish it within 7 days.
14. He averred that after serving the Petitioner with an Enforcement Notice on March 19, 2021, with the help of NCA, they evacuated neighboring homes to ensure that when the Petitioner demolished his building there would be no injuries. However, afterwards, they did an unscheduled site visit to the suit property whereupon they found persons doing construction works and upon interrogation they said that they had been instructed by the Petitioner who had now hired Mr Wainaina Nguzo as the Project Engineer. The deponent stated that after reviewing the records of the Engineer's Board of Kenya, they noted that Wainaina Nguzo was not registered as an engineer nor was there any firm registered in the name of Nguzo Engineering Services.
15. He averred that they then convened a multi-stakeholder meeting which discussed the challenge posed by the condemned building and actions to be taken. That it was recommended from the meeting that the condemnation order be implemented through demolition for want of compliance on the part of the Petitioner. The deponent further averred that the 1st respondent is accountable to its constituents in all matters relating to public safety and that it is its assessment of structures through qualified professionals that counts.



16. He averred that the instant petition lacks merit and that the Petitioner is the author of his misfortunes for the reason that he deliberately chose to proceed with the construction of the condemned building in disregard of the issued notices. He contends that the Petitioner's actions are replete with illegality and pose a danger to the public and as such, his prayers are 'unenforceable.' He further contends that the court can only interfere where a party acts outside the law. In conclusion, he contends that the Petitioner has come to court with unclean hands and urged the court to dismiss the instant petition with costs.
17. I have perused the court record and found no response in response to the petition from the 2nd Respondent.
18. The Petitioner filed a reply to the Grounds of Opposition and the Replying Affidavit of the 1st respondent where he reiterated the contents of his affidavit in support of the petition. He denied the contents of the Replying Affidavit and added that there was no report that declared the construction dangerous to warrant the demolition of the building; that the 1st Respondent delayed in responding for a period of five months after the integrity report was submitted to it by the Petitioner, thus frustrating him in his plans of commencing remedial works.
19. The petitioner averred that before the demolition, he had already commenced the retrofitting and remedial works under the supervision of a registered contractor approved by NCA; that the 1st Respondent frustrated the Petitioner from complying with the conditions; that all the professionals engaged in the construction had been registered under their respective bodies. The Petitioner also admitted that one column of his building had been covered with polythene material as stated in the 1st respondent's Replying Affidavit but denied that it had failed.
20. It was further the petitioner's admission that the building had secondary reinforcement and that some columns had been stripped of concrete ready for reinforcement. He added that had the Respondent not interfered and stopped the process of retrofitting and rehabilitation on December 22, 2020, the process would have taken a short period. That the same was unreasonably prolonged, with eventual demolition of the building. The Petitioner averred that the decision by the Inter-Governmental Taskforce on safety was illegal and ultra vires as it is an illegal entity with no mandate to make decisions concerning issuance of development permission.
21. One Richard Mburu filed a supplementary Affidavit dated November 8, 2021 where he confirmed that he is duly registered as a contractor trading as 'RIMM Global Consultants Ltd.' He averred that he was a contractor for the Petitioner and a supervisor of the project. He added that at no point did the Respondents contact him about the construction until the demolition of the building.
22. Another deponent, Stephen Mwangi, also filed a supplementary affidavit dated November 8, 2021 where he averred that he is an Architect and that he had designed, presented and secured approval of the Petitioner's building. He averred that as a precondition for approval of the architectural design the 1st Respondent had approved him as the resident architect and structural engineer in the indemnity form. He further averred that at the time the retrofitting was stopped the remediation was on course to meet the standard as envisaged under the structural integrity report proposed and approved by the 2nd Respondent.
23. He averred that the 1st Respondent was obliged under the best construction practice to consult the architect and structural engineer before making any decision that would affect construction as they had given guarantee to indemnify for any loss that may have had occurred. He added that all weak columns had been identified and additional props had been introduced to allow demolition of the weak columns



and retrofitting process. In conclusion, he averred that had the 1st Respondent consulted him, the false allegations contained in the Replying affidavit would have been adequately explained to it.

Submissions

24. The Petitioner filed his submissions dated February 14, 2022 where he identified seven issues for determination. The first issue whether the Petition offends the provisions of Section 9(d) (3) & 14 of the *Fair Administrative Action Act* 2015 and Section 78 (d) of the Act. He submitted that the right to appeal against the decision of the County Executive Committee Member only existed on paper as the Respondent had not established the Liaison Committees at the time demolition took place. He also submitted that the nature of his constitutional violation was such that the exhaustion doctrine was envisaged under the said Act. He further submitted that failure to exhaust the internal mechanisms for appeal or review is not a bar to the Petitioner's seeking other reliefs arising from violation of his constitutional rights.
25. The second issue is whether the enforcement notice issued by the 2nd Respondent is ultra vires. The petitioner submitted that the action of the Principal Secretary State Department of Public Works to issue and serve enforcement notice of March 19, 2021 was ultra-vires.
26. The third issue is whether the 2nd Respondent served the Petitioner with their Enforcement Notice dated March 19, 2021. The Petitioner submitted that the Enforcement Notice had not been served prior to the demolition of the project building and the 2nd Respondent had not controverted the Petitioner's evidence on non-service of their Enforcement Notice.
27. The fourth issue is whether the demolition order notice issued by the 1st Respondent was ultra-vires. He relied on Section 72(2) of the *Physical and Land Use Planning Act* and submitted that the Demolition Order Notice is defective both in form and content, illegal and offends the clear provisions of Section 20(f) & 72(2) of the *Physical and Land Use Planning Act*. He submitted that the Demolition Order Notice had not been approved by the County Executive Committee Member as required under the said Act and that the said Committee could not delegate its authority to anyone else.
28. The fifth issue is whether the demolition of the Petitioner's development project was justified or reasonable and the legality of the demolition notices. He submitted in the affirmative and explained that had the Respondents afforded him a fair hearing his party would have professionally explained the action they were taking and thus have averted illegal demolition. He further submitted that the said demolition was premature as the Respondents never conducted any expert investigations. He added that the allegation that the building was dangerous remains unverified and this court should disregard the same as hearsay. The Petitioner cited the case of *Sunshine Villas Ltd V County Government of Kisumu & Another [2019] eKLR* and submitted that the Respondents violated his constitutional right under Article 50 and 25 (c) of the *Constitution* of Kenya.
29. The sixth issue is whether the Respondents violated the Petitioner's other constitutional rights guaranteed and protected under Articles 27, 29 (d) & (f) & 40. The Petitioner submitted that the unconstitutional and illegal manner in which the Respondents demolished the development project shows clear violation of the Petitioner's right to acquire, own and develop property.
30. The final issue is whether the Petitioner has proved his claim for general & special damages. He submitted that the claim for special and general damages is pleaded under paragraphs 41 of the petition as corroborated under paragraphs 59 of the supporting affidavit totaling to Kshs 33,131,627. He submitted that the Respondents have not controverted the pleadings and evidence in support of his claim hence he is therefore entitled to the same.



31. The 1st Respondent filed its submissions dated March 2, 2021 in which it gave a summary of the case and identified the main issue for determination to be whether based on the allegations made in the Petition, the Petitioner is entitled to the orders as prayed. It submitted that the Petitioner has failed to demonstrate that his right(s) have been infringed by the Respondents to warrant this court's intervention. It further submitted that the Petitioner has failed to place sufficient evidence before the court to validate his assertion that the Respondents acted illegally. It submitted that the Petitioner only submitted architectural drawings but failed to submit structural drawings which is a very critical component in the development process.
32. The 1st Respondent relied on the case of *Speaker of the National Assembly V James Njenga Karume [1992] eKLR* and submitted that the Petitioner ought to have sought to explore other available avenues including the County Physical and Land Use Planning Liaison Committee before approaching the court. It further submitted that the Petitioner did not adhere to the due process in putting up the condemned development on the suit property and urges this court disregard his Petition. The 1st Respondent also submitted that it is clothed with an exclusive constitutional mandate which cannot be interfered with save in exceptional circumstances, which circumstances have not been pleaded in the present case.
33. It also cited the case of *Metropolitan PSV Saccos Limited Union & 25 Others V County of Nairobi Government & 3 Others [2013] eKLR* and submitted that the court has no role in the matter as the 1st Respondent's actions are constitutionally mandated for the greater good of the society and the general public. It submitted that there was sufficient horizontal and vertical consultations culminating in a unanimous and objective recommendation; that the Petitioner has not placed any material or evidence to prove his allegation of discrimination by the Respondents, and that the suit is vexatious, designed to intimidate and harass the Respondents and prevent them from discharging their statutory mandate.
34. In conclusion, the 1st Respondent relied on the case of *County Council of Nandi V Ezekiel Kibet Rutto & 6 Others [2013] eKLR* and submitted that the instant suit ought to be struck out for being frivolous and vexatious. It also submitted that the suit should not be allowed as it seeks to circumvent the law and scuttle the Respondent's statutory mandate.
35. The 2nd Respondent also filed its submissions dated January 18, 2022 where it identified two issues for determination. One is whether the Petition is merited or not. It relied on the case of *Cleophas Malala & Another V Speaker of the Senate & 2 Others; Stewart Madzayo & Another (Interested Parties) [2021] eKLR*. It submitted that the Petition lacks merit as it offends Section 9(2), 3 (c) and 4 of the Fair Administration Act and Section 78(d) of the *Physical and Land Use Planning Act, 2019*; that the Petitioner ought to have exhausted available remedies before coming to court.
36. The second issue is on costs, and the 2nd Respondent submits that the Petitioner ought to bear the costs of the suit as the building was constructed under his watch and that he failed to exhaust available remedies before coming to court.

Analysis & Determination

37. Upon considering the petition, replying affidavit and the submissions, it is this court's view that the principal issues for determination are: (1) whether this petition meets the threshold of a constitutional petition, (2) whether the petitioner has established a violation of his constitutional rights and (3) whether he is entitled to the reliefs sought.
38. Regarding the first issue, it is important to note that the court must guard against ventilation of normal disputes or ordinary issues of litigation under the guise of Constitutional Petitions for violation of



rights. This court appreciates that the existence of an alternative remedy or procedure may not oust the jurisdiction of the court, but the court, in deciding whether to entertain a suit must take into account the existence of such a remedy and its application to the issues at hand.

39. On whether this petition meets the constitutional threshold of a constitutional petition, the court in the case of *Anarita Karimi Njeru vs Republic (1979) eKLR* stated as follows:

' 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 a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be ingrained.'

40. The Court of Appeal in the case of *Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 others [2013] eKLR* reaffirmed the principle enunciated in the case of Anarita Karimi Njeru (supra) where at paragraph 44 of its judgment it stated as follows: -

' We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made a reference to in view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the 'epitome of precise, comprehensive, or elegant drafting', without requiring remedy by the 1st respondent'.

41. Has the Petition before this court met the aforementioned threshold? The Petitioners claim that the Respondents illegally demolished his project building despite the Petitioner having complied with all the conditions provided in the Enforcement Notice. The Petitioner states that the demolition was a clear violation of his constitutional right to acquire, own and develop property. It is not in dispute that both the Petitioner and the Respondents have tendered some documentary evidence of the professionals involved in construction of the petitioner's building or in the assessment of its integrity.

42. The 1st Respondent alleges that the Petitioner's building was not up to the required standard and that it was not safe. It is the Petitioner's case that had the Respondent afforded him a fair hearing, he would have professionally explained the action they took and thus have averted the allegedly illegal and premature demolition.

43. The Respondents on the other hand argue that Petitioner has failed to place sufficient evidence before the court to establish his assertion that the Respondents acted illegally. They also argue that the Petitioner did not adhere to the due process in putting up the condemned development on the suit property and that he should have explored other available avenues including the County Physical and Land Use Planning Liaison Committee before approaching the court with the present petition. The 1st Respondent contends that it is clothed with an exclusive constitutional mandate which cannot be interfered with save in exceptional circumstances which circumstances the Petitioner has failed to plead.

44. In the response of the 1st respondent an allegation is made that while on routine inspection tours, the 1st respondent's officers noted that the petitioner was adding more columns; that in itself, if proved, would be confirmation that even before the 1st respondent's officers came along the petitioner had



already realized that his structure was defective. Thus it is true that remedial measures on the structure were needed.

45. The Petitioner has adduced evidence to show that he had begun the said retrofitting and remedial works under the supervision of the registered contractor as approved by NCA. At the same time there is an allegation by the respondents that their guidelines were not adhered to in the remedial process thus leading to the decision to demolish the building.
46. The court at this juncture cannot confirm on the available evidence whether the building was up to the required standards or not, whether it needed to be condemned and demolished. I say so because in this case, where only competing expert reports from both sides have been submitted, the documentary evidence provided alone without oral evidence and cross-examination, is not sufficient enough to enable a conclusive determination.
47. In view of the admission by the petitioner that parts of his structure were weak, were there any implied undertakings on the part of the respondents to allow the petitioner to remedy his building to avoid demolition? Would they amount to an estoppel against the demolition by the respondents? What were the precise conditions for such forbearance by the respondents and did the petitioner comply with those conditions?
48. At this juncture, it can be seen in some of the issues for determination framed by the petitioner himself, very vital questions of fact, without the settlement of which no constitutional reliefs can be secured, arise in this suit. Other vital questions of fact that this court has detected as arising from the affidavits of the parties are as to whether:
 - a. The petitioner conducted remediation works as per instructions of the regulatory authorities, the respondents included;
 - b. The petitioner submitted any report of the progress of the remedial works as required by the 1st respondent is not resolved.
 - c. Whether Wainina Nguzo is registered as an Engineer, or that there is a firm known as Nguzo Engineering Services.
 - d. Whether the 1st respondent consulted the Architect and the Structural Engineer hired by the petitioner before the demolition.
 - e. How weak the identified columns were and whether they could be remedied;
 - f. If the petitioner submitted any proof of service would be necessary, and the process of establishing that fact may require oral evidence and cross-examination.
 - g. Whether appropriate notices were served or not and whether the demolition was premature.
 - h. Whether the petitioner sustained any damage to his health as a result of the demolition and the extent of such damage, and the quantum of damages payable if such damage is proved.
 - i. The petitioner's architectural drawings were competent;
 - j. The petitioner failed to submit any structural drawings for his project, which the 1st respondent terms as a very critical component of the development process.
 - k. There is truth in the petitioner's claim that the demolition had adverse effect on his health, and the inquiry as to damages awardable, if that claim is verified,



- l. The other persons were allowed to remedy their structures while the petitioner's was discriminated against;
 - m. Whether the petitioner was barred by hurdles erected by the 1st respondent from accessing justice through an internal appeal to the County Physical and Land Use Planning Liaison Committee and whether that Committee had been constituted in the first place, is still pending.
49. My brother Okongo J stated as follows in the case of *Petro Oil Kenya Limited v Kenya Urban Roads Authority [2018] eKLR*:
- ' A constitutional petition is not an ideal forum for investigating and determining contentious issues of fact as oral evidence is rarely called like in this case. Whether or not the suit property was hived from a road truncation is not an issue which I can determine on the affidavit evidence before me. If it is true that the suit property was hived from a road truncation, the title held by the Petitioner would not be valid since the property was not available for allocation to Wangs from whom the Petitioner purchased the suit property. Article 40 (6) of the *Constitution* provides that the protection accorded to property does not extend to the property which has been acquired unlawfully. Whether or not the Petitioner acquired the suit property lawfully is an issue that can only be determined in a civil suit and not in a Constitutional Petition. The courts have said over and again that the mere fact that constitutional rights are alleged to have been violated or are threatened does not make the dispute a constitutional one calling for the filing of a petition under Article 22 of the *Constitution*. The court can still uphold constitutional rights in a normal civil suit.'
50. In the case of *Francis Oyagi Vs Samwel Motari Mangare and 2 Others (2018) eKLR* the court held as follows:
- ' The court must guard against improper transmission of normal disputes or ordinary issues of litigation being clothed in Constitutional petitions. I am aware that the existence of an alternative remedy or procedure may not oust the jurisdiction of the court. But the court in deciding whether to entertain a suit must take into account the existence of such a remedy and its application to the issues at hand.'
51. I therefore find that the Petition as pleaded does not satisfy the requisite constitutional threshold necessary for a Constitution Petition. It is also this court's view that it is not sufficient to merely enumerate various constitutional provisions alleged to have been violated in the heading of the Petition. It is necessary that the pleadings filed set out the particulars of the alleged violations while also relating the same to the constitutional provisions said to have been violated. Finally, there must be ability to read conclusivity of facts put forward by the parties so that the only issue that remains for the court is to interpret the factual matrix within the fabric of the *Constitution* to determine if any constitutional violations have been proved.
52. In the instant case there would be infinitesimal chance of the petitioner establishing violation of his constitutional rights while the truth regarding basic facts regarding whether the petitioner's building was capable of being salvaged, and the veracity of each sides' factual claims on whether or not the petitioner complied with regulatory bodies' directions (including the respondents') remains uncertain. The evidence attached to an Affidavit by the claimant is simply insufficient for the purpose. It is clear to this court that the allegations as raised would only be determined if the case is heard on merit in the ordinary fashion under a plaint where each party's allegations would be tested by way of tendering



documents, oral evidence and cross-examination. In my view, the stance the court took in the case of Petro Oil Kenya Limited applies in the present petition: the prior determination of the factual issues listed in paragraph 48 herein above is necessary for the determination of whether the petitioner's constitutional rights have been violated and if so, in what manner.

53. In the upshot, I find that the Petition before me does not meet the threshold of what constitutes a proper Constitutional Petition and that the claims therein are ordinary civil claims that can be canvassed through a plaint and not in a Constitutional Petition. The Petitioner has wrongly invoked this court's constitutional jurisdiction and thus the Petition is devoid of merit and is hereby struck out.
54. Each party shall bear its own costs of the Petition.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 28TH DAY OF OCTOBER, 2022.



MWANGI NJOROGE
JUDGE, ELC, NAKURU

