



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 28 OF 2020**

**JUSTUS CHAI MBARU & 12 OTHERS.....PETITIONERS**

**AND**

**COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT**

**AND**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> INTERESTED PARTY**

**BUXTON POINT APARTMENTS LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**KHALIFA MOHAMED & 17 OTHERS.....3<sup>RD</sup> INTERESTED PARTIES**

**RULING**

*(Application for injunction pending appeal; petitioners having filed suit to stop the relocation of tenants in a residential estate owned by the respondent; respondent intending to demolish the estate in order to develop a new one; petitioners alleging inter alia that this would violate their constitutional rights; petition dismissed; petitioners filing a Notice of Appeal and now seeking an injunction pending appeal; factors to be considered; need to establish substantial loss; applicants compensated by an ex gratia payment to enable them seek alternative accommodation while the development is on-going; no demonstration of substantial loss; application dismissed)*

1. The substantive prayer in the application before me, dated 4 March 2021, is for an order of injunction to restrain the respondent and 2<sup>nd</sup> interested party, from interfering, entering upon, demolishing, alienating, disposing, evicting the petitioners, or otherwise dealing in any way whatsoever, with the suit properties (meaning the residences in Buxton Estate), pending hearing and determination of an intended appeal to the Court of Appeal against the judgment of this court delivered on 3 March 2021. The application is opposed.

2. By way of background, the applicants filed this petition to stop the implementation of the Urban Renewal and Regeneration Programme, within Buxton Estate. The project proposes to demolish some old houses, within 10 or so housing estates of the respondent, among them being Buxton Estate. In the context of Buxton Estate, the implementation of the project will involve the demolition of the existing housing units (about 520 housing units), and in place thereof, the construction of about 1,500 new units, which new units will be sold. The last tenants before the project will have a first right of purchase of a unit and the others will be offered to the public to purchase. While the project is being undertaken, the tenants will be compensated by a grant in the sum of Kshs. 240,000/= to enable them pay rent elsewhere as the project is being concluded. For those who will exercise the option to purchase, a deposit of Kshs. 60,000/= will be made on their behalf. The tender for the construction of the project at Buxton Estate has been awarded to the 2<sup>nd</sup> interested party through a public-private contract.

3. The applicants filed this petition contending that the implementation of the project in Buxton Estate will violate various of their constitutional rights including the right to housing. They argued inter alia that they pay accommodative rents for the units and that they will not be able to afford them for purchase. They also submitted that the project will violate the Public Private Partnership Act, and the Public Procurement and Asset Disposal Act. In particular, they argued that the land where the estate is located is public land which cannot be converted into private ownership which they averred will be the end product of the project. There was also contention that the project violates the Environmental Management and Coordination Act (EMCA) for failure to have an EIA. The petition was opposed by the respondent, the 2<sup>nd</sup> interested party, and the third parties, the latter comprising of a conglomeration of some other residents who reside in Buxton Estate and other estates within Mombasa, but who are in full support the project. Their collective position was firstly, that this petition is *res judicata*, and that in any event, the petitioners had not proved that the project violates any of their constitutional rights or statutes cited.

4. I heard the petition and delivered judgment on 3 March 2021. I found that the petition is *res judicata* in so far as it covers the concept of

the Urban Renewal and Regeneration project, for in my view, this was determined in the suit Mombasa High Court Petition No. 36 of 2016. I was of opinion that the judgment in that case covered the alleged alienation of public land; the right to housing; and the violations of the particular statutes, including EMCA, the Public Private Partnership Act and the Public Procurement and Asset Disposal Act. I further found that in that suit, the Court found that the project does not violate the right to housing of the tenants, and that in so far as statutory violations were concerned, the parties had been directed to commence proceedings within the mechanisms provided in the particular statutes. These would cover issues relating to EMCA, the Public Private Partnership Act and the Public Procurement and Asset Disposal Act. I was of the view that the only narrow point that could not have been determined in the previous litigation was the question of removal of the tenants from their houses, and on this, I found no violation of any constitutional or statutory rights. I did not find merit in the petition and I proceeded to dismiss it. Upon delivery of the judgment, the applicants, through their counsel, sought a stay of 180 days pending appeal. This was opposed. Upon consideration of the arguments, I was not persuaded to grant a stay in absence of a formal application. This application was thereafter filed on 4 March 2021, which I certified urgent and directed that it be heard on 11 March 2021. It was argued on that day.

5. The application is said to be brought pursuant to the provisions of Article 159 of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, and all other enabling provisions of the law and the inherent jurisdiction of the Court. The application is based on the grounds that the petitioners are aggrieved by the judgment and have filed a notice of appeal; that there is an imminent threat that the petitioners will be evicted, yet that is the substratum of the appeal, without the petitioners having alternative accommodation; that the court has a duty to preserve the subject of the appeal; that the court as a state organ has a legal duty under Article 10 of the Constitution to uphold the principles of natural justice and the rule of law so that the judicial process, particularly the right of appeal, is not wasted as that would amount to a failure to uphold the said national values and principles; that it is in the interest of justice that the injunction pending appeal be granted.

6. The application is supported by the affidavit of Justus Chai Mbaru, who is the lead petitioner. He has deposed that the petitioners are aggrieved by the judgment and that they filed a Notice of Appeal on 3 March 2021. He has stated that there is imminent threat of eviction. He has deposed that immediately after judgment, the respondent and 2<sup>nd</sup> interested party placed notices all over Buxton Estate requiring the tenants of the estate to collect their compensation. He fears that soon, the respondent and 2<sup>nd</sup> interested party will start the process of forcefully evicting the petitioners. He has annexed copies of the notices. He has deposed that from the end of January 2021, the respondent started refusing to collect rent from the petitioners and he has annexed a letter on this. He has deposed that the mass eviction of the families from the Estate will be a sight similar to the Israelites' exodus from Egypt, only that this time the exodus will not be to any promised land, but to a life of utter desolation. He has averred that the court has a duty to preserve the substratum of the intended appeal, so that if successful, it is not rendered nugatory.

7. In response to the application, the respondent filed a replying affidavit sworn by Dr. June J. Mwajuma, the Chief Officer Lands, Housing, Physical Planning and Urban Renewal of the County Government of Mombasa. She has reiterated the position of the respondent as argued in the petition, inter alia, that there had been public participation and widespread consultation on the relocation of the tenants which led to the consensus that the tenancy agreements would be terminated by giving a three month notice, that an *ex gratia* sum of Kshs. 240,000/= would be paid to the existing tenants; that there will be a three month waiver of rent; that the tenants would leave by 21 December 2020. She has pointed out that the court did not find this arrangement to be unconstitutional. She has deposed that after the petition was dismissed, the tenants, the respondent and the 2<sup>nd</sup> interested party, implemented the agreed relocation plan. She has deposed that as at 7 March 2021, 488 tenants had executed Tenancy Termination Agreements, voluntarily exited the flats, and collected the agreed *ex gratia* payments. She has annexed to her affidavit, copies of the executed Tenancy Termination Agreement, and a list of those who have received the *ex gratia* payment. She has averred that the outstanding payments to some 59 persons is due to typos or other holdups, which are being corrected, and should be corrected within a week. She has deposed that among those who have executed the Tenancy Termination Agreements and have received payments, include some of the petitioners, and she has mentioned Mr. Mbaru himself, the 4<sup>th</sup> petitioner, the 5<sup>th</sup> petitioner and the 10<sup>th</sup> petitioner. She has deposed that the 3<sup>rd</sup>, 8<sup>th</sup> and 13<sup>th</sup> petitioners, were not tenants, but were resident in the estate as their wives were tenants, and that their said wives have executed the Tenancy Termination Agreements. She has deposed that it is only upon such voluntary exit that the demolition of the premises commenced by removing windows and doors on 5 March 2021. She has deposed that by 9 March 2021, all the residents had exited the estate and that the only people around are the personnel demolishing the building, and further that the area has been hoarded for the safety of the general public. She has averred that the relief of injunction has been overtaken by events, and that either way, the petitioners have failed to place any adequate material before the court to warrant the grant of any relief in their favour. She further contends that the intended appeal is not arguable as the petitioners are merely recycling the same grounds and arguments rejected by this court.

8. The 2<sup>nd</sup> interested party opposed the application by filing grounds of opposition. It is averred that the relevance of Article 159 of the Constitution, as presented in the application and the orders prayed for, has not been articulated or explained by the petitioners. It adds that constitutional petitions and all applications therein are governed by the Constitution of Kenya (Protection of Fundamental Freedom) Practice and Procedure Rules (Mutunga Rules). It contends, that the principles governing civil proceeding found at 1A, 1B, 3B of Civil Procedure Act are irrelevant in the present application. It further states that Rule 32 of the Mutunga Rules provide for a stay pending appeal, and not an injunction. It avers that if the orders sought in the application are granted, they would have the effect of allowing the prayers in the petition that was dismissed on 3 March 2021. It states that the respondent and the 2<sup>nd</sup> interested party shall suffer substantial loss if the injunction is granted, as almost all residents have vacated the estate, and have already received their *ex gratia* payment.

9. The 3<sup>rd</sup> interested parties also filed Grounds of Opposition. They contend inter alia that the applicants have failed to demonstrate that they shall suffer substantial loss if stay is not granted, considering that they only enjoy the right of tenancy terminable by one month's notice; that Kshs 240,000/= has been set aside to cater for their accommodation for 12 months, and Kshs. 60,000/= set aside as deposit for their purchase of the new units; that the respondent, as landlord, is entitled to full enjoyment of its proprietary rights; that the project is being undertaken by use of public funds, and if stayed, the respondent, the 3<sup>rd</sup> interested parties and residents of Mombasa, stand to suffer huge financial losses unless the applicants give security equivalent to the value of the project; that granting stay will defeat the right to a fair hearing and the principle that justice be dispensed without delay; that the applicants in any event have not demonstrated that they have an arguable appeal with a probability of success.

10. Mr. Gikandi, learned counsel for the petitioners/applicants, beseeched me to allow the application. He referred me to various decisions though none were availed to court. He submitted that the purpose of granting an injunction pending appeal is to preserve the status quo so

that the appeal, if successful, will not be rendered nugatory. He submitted that it is the duty of the court to see to it that the appeal is not pyric. Counsel submitted that stay can still be granted even where partial execution has taken place. In the circumstances herein, he submitted that only windows have been removed and the property fenced off, and the land is still there. Counsel submitted that it is only fair that an order of status quo be made and there be no further demolitions pending appeal. Counsel submitted that the court has a duty to maintain the substratum of the appeal.

11. Dr. Khaminwa, learned co-counsel for the petitioners, associated himself with the submissions of Mr. Gikandi. He reminded the Court of the doctrine of legitimate expectation, public interest and fair administrative action. He submitted that these are substantive issues to be determined on appeal.

12. Mr. Amoko, learned counsel for the respondent, submitted that the application is defective for being founded under Article 159 of the Constitution, and Section 1A, 1B, 3A of the Civil Procedure Rules, which are interpretative, and not jurisdiction conferring provisions. He submitted that the petitioners' prayers in the application cannot be granted under the said provisions. He further submitted that The Mutunga Rules apply. He added that the supporting affidavit is very thin, and it was incumbent on the petitioners to provide material for grant of the relief. He submitted that annexing a Notice of Appeal and a letter not to accept rent was not good enough. Mr. Amoko submitted that in compliance with the relocation agreement, the tenants have moved out, and that it was not an eviction. He pointed out that Mr. Mbaru, one of the petitioners, has executed the termination of tenancy agreement in return for payment of the ex-gratia payment, and that he has also reserved a 3 bedroom flat under the right of first refusal. Mr. Amoko further submitted that the tenants have received benefits which cannot be recovered.

13. Mr. Buti, learned counsel for the 2nd interested party, submitted that Rule 3 of the Mutunga Rules applies to constitutional petitions and other civil law provisions are excluded. He submitted that the application requests for injunction and no rule in the Mutunga Rules permit a grant of injunction after a decision. Mr. Buti referred to Rule 32 of the said Rules. He added that a party can apply for stay as an equitable remedy. He submitted that however, a party cannot apply for an equitable remedy to forestall a legal right, and if injunction is granted, it will amount to allowing the petition which has already been dismissed, and this will be a contradiction. Mr. Buti submitted that an injunction is predicated on a suit, and in this instance, it is anchored on a suit that has already been dismissed.

14. Mr. Aboubakar, learned counsel for the 3rd interested party, relied on his grounds of opposition, and supported the submissions of both Mr. Amoko and Mr. Buti.

15. Mr. Gikandi in his reply, submitted that the application is based on all other provisions of the law and the inherent jurisdiction of the court. He added that justice is not about technicalities.

16. I have considered all the above.

17. To start off, there are technical objections raised on the provisions of the law relied upon by the applicants. This suit is a Constitutional Petition and therefore, strictly speaking, it is *The Constitution of Kenya, (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (popularly referred to as "The Mutunga Rules") which ought to apply. However, it is not unusual to find the provisions of the Civil Procedure Rules also being applied to petitions, especially where there is a lacunae, within the Mutunga Rules. Neither is it unusual to find interpretations of some provisions of the Civil Procedure Rules, also being applied to the Practice and Procedure Rules governing the hearing of petitions. Either way, these are procedural guidelines, aimed at leading the parties towards a logical hearing of the suit, or of applications arising within the suit. We should thus be careful not to sacrifice substance over procedure especially where no prejudice is caused to the other party. In so far as this application is concerned, we can all see that what the petitioners want is an injunction, or an order to maintain the status quo of the subject matter, pending hearing of the appeal. It is immaterial to me that the applicants have thus cited Article 159 and Sections 1A, 1B and 1C of the Civil Procedure Rules, rather than Rule 32 of the Mutunga Rules, which explicitly covers stay pending appeal. I will thus not deem the application before me as incompetent based on any procedural technicality, but will proceed to deal with it on the merits.

18. What the applicants want is an order of injunction and maintenance of status quo pending appeal. I find the provisions of the Civil Procedure Rules, relating to stay pending appeal, also being of relevance in relation to stay pending appeal in Constitutional petitions, and I will borrow from the same. Order 42 Rule 6 (2) applies, and it provides as follows :-

*(2) No order for stay of execution shall be made under subrule (1) unless –*

*(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*

*(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.*

19. It will be observed from the above, that to succeed in an application for stay, or injunction pending appeal, one needs to demonstrate the following :-

*(1) That the application has been made without unreasonable delay;*

*(2) That the applicant stands to suffer substantial loss if the order of stay is not granted;*

*(3) That the applicant is ready to provide security for the due performance of the decree in the event that he loses the appeal.*

20. On the aspect of delay, the application was filed on the day after delivery of the judgment and it cannot therefore be argued that the applicants are guilty of any delay. The most crucial issue is whether the applicants stand to suffer substantial loss if the order of injunction, or status quo, is not made. In his supporting affidavit, Mr. Mbaru has deposed that if they are moved from the Estate, their lives will be destabilised. The counter-argument of the respondent is that there is a relocation plan which is being executed, and that relocation plan entails the provision of some *ex gratia* payment of Kshs. 240,000/= to enable the tenants find alternative accommodation while the project is ongoing. So far, it has been said, and it has not been disputed, that 488 residents have already been paid this amount of money and only 59 or so residents are pending. It means about 90% of the tenants have already received payment and have voluntarily moved out of the estate. I find ironical that Mr. Mbaru himself has also collected the Kshs. 240,000/= and has signed for a purchase of one of the new flats to be constructed, and so too the majority of the other petitioners, yet they are before court asking for an injunction pending appeal.

21. I also find it antithetical that the applicants would come seeking to stay orders which they themselves are executing. They cannot be receiving payment cheques and at the same time coming to court to seek injunction and/or status quo orders. That is akin to speaking from both sides of the mouth. I am not, in the circumstances, persuaded that the applicants have demonstrated to me that they stand to suffer substantial loss, if an injunction or status quo order is not granted. It is apparent that their stay outside the estate has already been mitigated, by the payment of Kshs. 240,000/= which is aimed at getting them alternative accommodation. If one has been compensated to seek alternative accommodation, I do not see what substantial loss such person stands to suffer, if he moves out of his current residence.

22. Having found that the applicants have failed the test of substantial loss, it is not necessary for me to consider the issue of security.

23. For the reason that I am not persuaded that the applicants have demonstrated that they stand to suffer substantial loss, I have no option but to dismiss this application, and it is so dismissed with costs.

24. Orders accordingly.

**DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF MARCH, 2021**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**