



**Hassan & 3 others v Cabinet Secretary for Transport, Infrastructure  
Housing and Urban Development & 3 others (Environment & Land  
Petition 20 of 2019) [2022] KEELC 125 (KLR) (6 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 125 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND PETITION 20 OF 2019**

**A OMBWAYO, J**

**MAY 6, 2022**

**BETWEEN**

**SAID MUSA HASSAN ..... 1<sup>ST</sup> PETITIONER  
ATHMAN BADRU ..... 2<sup>ND</sup> PETITIONER  
RAMADHAN IBRAHIM ..... 3<sup>RD</sup> PETITIONER  
REHEMA MUKANZI ..... 4<sup>TH</sup> PETITIONER**

**AND**

**CABINET SECRETARY FOR TRANSPORT, INFRASTRUCTURE HOUSING  
AND URBAN DEVELOPMENT ..... 1<sup>ST</sup> RESPONDENT  
KENYA INFORMAL SETTLEMENT IMPROVEMENT PROJECT KISUMU  
COUNTY ..... 2<sup>ND</sup> RESPONDENT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioners have approached this court in their capacity as Landowners within the Kaloleni area of Kisumu town, alleging that the Respondents had conjured up a plan that if implemented will result in the shifting and reduction in size of their pieces of land. They aver that there is a plan by the 1st and 2nd Respondents to replace the original plan known as PDP No. N9/94/15 which was acceptable to them with another one that will be detrimental.



### Summary of facts

2. Vide their Petition dated 26th November 2019 the Petitioners aver that they are the owners of Uns. Res. Plot No.28- Kaloleni, Uns. Res. Plot No. 19- Kaloleni, Uns. Res. Plot No 98- Kaloleni and LR No. Kisumu Municipality Block 5/978 .
3. That there is a Part Development Plan covering the entire area of Kaloleni which had been approved and reached in line with the laid out procedures.
4. That the Respondents have introduced a new plan that is different and will have the resultant effect of altering their pieces of land. That the said plan is being introduced without the participation of the Petitioners.
5. It is their contention that this action by the Respondents has violated their rights under Article 40(1) and 35(1) of *the Constitution*. For which reason they seek a declaration that the Respondents' action is a violation of their rights to ownership of property, an order of permanent injunction directing the Respondents to stop implementation of the new Part Development Plan and an order of mandamus compelling the 2nd Respondent to give proper information on its activities in Kaloleni estate in line with Article 35 of *the Constitution*.
6. In response the 1st 2nd and 3rd Respondents via their replying affidavit dated 26th April 2021 sworn by Mr Charles Hinga the Principal Secretary department of Housing, stated that:
  1. It was the mandate of the Housing ministry to carry out development projects within informal sectors with the objective of improving the living conditions therein.
  2. That in the process of doing its work the settlement executive committee which comprises the local community members was involved. That as such all the activities undertaken in the Kaloleni area were done in a consultative and participatory manner as evidenced by meetings held on 9/5/2016 and 14/6/2016.
  3. That indeed there were previous plans from the year 1983 and 1994 which however cannot be implemented due to changes in the settlement. That these changes have necessitated re-planning to ensure appropriate use of the available space.
  4. That the residents of Kaloleni were walked through the re-planning process and they accepted the same as evidenced by the Survey Analysis and Harmonization document.
  5. That the Petitioners willingly participated in that process and the 4th Petitioner even wrote to the 1st Respondent dissociating herself from this petition.
  6. That the preparation of the current plan was approved after following all the laid down statutory requirements and incorporating the community's needs as per the planning alternatives generated.
  7. That the Petitioners have not demonstrated any grievance suffered as a result of the process and there are no specific complaints against the Respondents, therefore the petition should be dismissed with costs.
  8. The Fourth Respondent on its part did not file a response to the Petition.



## Submissions

7. Vide directions issued on 27/10/2021 the Petitioners were supposed to file their submissions within 30 days while the Respondents were supposed to file theirs within 30 days of service of the Petitioner's submissions. The Petitioners filed their submissions on 18/3/2022. There are however no submissions on record for the Respondents. In their submissions the Petitioners outlined the following issues for determination.
  1. Whether there was public participation.
  2. Whether they are entitled to the orders sought.
  3. Who bears the costs.
9. On the first issue it was their contention that all public organs are obligated to carry out public participation in implementation of any decision likely to impact the people of Kenya. They relied on the provision of Article 10(2) of *the Constitution* and the case of *Okoya Omtata Okoiti v Commissioner General KRA & 2 others*. [2018]eKLR.
10. It was their further submission that there was no public participation as the same did not meet the both the quantitative and qualitative test as set out in the case of *Robert N Gakuru v County Government of Kiambu* [2014]eKLR.
11. Moreover it was their further contention that they didn't attend the meetings and the attendance sheets did not indicate where the participants came from.
12. It was also the Petitioners' submissions that the Respondents neither issued a notice for public participation nor heeded the Petitioners' call for information on the project.
14. On the Second issue, the Petitioner submitted that the Respondents had contravened the provisions of Articles 10 (2)(a), 35 and 40 of *the Constitution*. It was their further contention that the Respondents' action of purporting to shift the position of their parcels of land was unconstitutional necessitating issuance of mandamus orders to compel the Respondents to give further information. Furthermore they contended that for people to fully engage in public participation they must be seized with the requisite information on the project. The Petitioners implored the court to allow the prayers sought to buttress this point they relied on *Susan Waitheba Kariuki & 4 others vs Town Clerk Nairobi City Council & 2 others*. Where the court held that the 1st Respondent had a duty to respect people's constitutional rights.

## Issues for Determination and Analysis

1. Whether the introduction of the new plan violates the Petitioner's right to acquisition and ownership of property.
2. Whether a permanent injunction should issue against the Respondents.
3. Whether an order of Mandamus should issue compelling the 2nd Respondent to give proper information on activities in Kaloleni.

## Whether the introduction of the new plan violates the Petitioners' right to acquisition and ownership of property

15. The Petitioner contended that the Respondents had come up with a new plan that had the effect of interfering with their pieces of land. The 1st, 2nd and 3rd Respondents in their Response indeed



acknowledged that a new plan had been formulated to replace the initial plan known as PDP No. N9/94/15. However, they contend that the said plan was formulated with the full involvement and participation of the residents of Kaloleni and the Petitioners herein. The petitioners have denied this stating that the new plan was formulated without public participation.

16. The Petitioners has merely spoken of there being alterations that will alter the sizes of their pieces of land thereby breaching their rights as provided by Article 40 of *the Constitution*. They have however not highlighted the salient differences between the plans that are likely to occasion a breach to their right acquisition and ownership of property. They have not also provided any evidence showing how the new plan has caused reduction in their pieces of land and to what extent.
17. It is trite law that the manner of infringement must be stated with precision as was held in the case of *Anarita Karimi Njeru v The Republic* (No 1) [1978] KLR 154. In this suit it is not easily decipherable what action by the Respondents has infringed upon the Petitioners' right to acquisition and ownership of property.
18. The Petitioners merely allege that the new plan will result in reduced acreage of their plots but there is no evidence of the same for scrutiny by the court. For this reason the petition fails to identify with precision the manner in which the Respondents will infringe on their rights to property.

#### **Whether a permanent injunction should issue against the Respondents**

19. The Petitioner has sought a permanent injunction against the Respondents ordering them to halt any processes of altering the part development plan no. PDP No.N9/94/15. Or interfering with the Petitioners' parcels of land.
20. The conditions to be met by a litigant who seeks injunctive relief were set out as follows in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others*, CA No 77 of 2012; [2014] eKLR,
21. In an interlocutory injunction application, the applicant has to satisfy the triple requirements that;
  - a. establishes his case only at a prima facie level,
  - b. demonstrates irreparable injury if a temporary injunction is not granted, and
  - c. allays any doubts as to (b) by showing that the balance of convenience is in his favour.
22. In the present case the Petitioners have not established a case for grant of judicial review orders for the reasons that they have not identified the salient differences between PDP NO.N9/94/15 and the current plan that will result in reduction of acreages of their property and they have not established how the Respondents' action will deprive them off their property. Having failed to establish case with probability of success this head of their claim should also fail and is hereby disallowed.

#### **Whether an order of Mandamus should issue compelling the 2nd Respondent to give proper information on activities in Kaloleni.**

23. Mandamus is a court order which commands a person or body to perform a public duty. It is a public law remedy. It enforces duties rather than powers though in certain cases a power may be coupled with a duty so that the donee of the power would be obliged to exercise it. See *Foulkes Administrative Law*, 7th Edition at Page 368. Article 23(3) (f) equally states that a court can grant an order of judicial review as a relief in a constitutional petition. The factors that must be present for a writ of mandamus to issue were clearly outlined in the cases of *Apotex Inc v Canada Attorney General*, and *Dragan vs. Canada (Minister of Citizenship and Immigration)*. As highlighted in the case of *Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another* [2018] eKLR: they were:



- (i) There must be a public legal duty to act;
  - (ii) The duty must be owed to the Applicants;
  - (iii) There must be a clear right to the performance of that duty, meaning that:
    - a. The Applicants have satisfied all conditions precedent; and
    - b. There must have been:
      - I. A prior demand for performance;
      - II. A reasonable time to comply with the demand, unless there was outright refusal; and
      - III. An express refusal, or an implied refusal through unreasonable delay;
  - (iv) No other adequate remedy is available to the Applicants;
  - (v) The Order sought must be of some practical value or effect;
  - (vi) There is no equitable bar to the relief sought;
  - (vii) On a balance of convenience, mandamus should lie.
24. The Petitioners are seeking information on the New plan from the 2nd Respondent. The 1st, 2nd and 3rd Respondents have however averred that the process was consultative and participatory. It is not in dispute that the Respondents have a duty to divulge information on the Intended project and the duty is owed to the Petitioners among others. There is however no proof that they demanded for information and they were denied. The Petitioners have not proved unreasonable delay or an express refusal on the part of the Respondents.
25. Grant of mandamus orders is discretionary, and on the strength of the evidence on record the Petitioners have not met the threshold for grant of the writ of mandamus.

### **Conclusion**

26. In view of the foregoing the application is unmerited and is hereby dismissed with costs to the respondent.

**DATED AT KISUMU THIS 6<sup>th</sup> DAY OF MAY, 2022**

**ANTONY OMBWAYO**

**JUDGE**

**This judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**

