



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC PETITION NO. 13 OF 2013**

**PETER KOBIA.....PETITIONER**

**VERSUS**

**DISTRICT PHYSICAL PLANNING**

**OFFICER IGEMBE/TIGANIA DISTRICT.....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MERU.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**BACKGROUND**

The petitioner, Peter Kobia has instituted these petition proceedings against the respondents seeking the following orders:

- a) A declaration that the petitioner has a right to acquire own and utilize plot No. 16B ATHI MARKET without any inference by the respondents.**
- b) A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents their representatives, assigns, agents, employees and/or anybody else acting at their behest from in any way whatsoever interfering with the petitioner's right to own and utilize plot No. 16B ATHI MARKET.**
- c) A conservatory order be issued restraining the 1st and 2nd respondents from carrying out the enforcement notice dated 7<sup>th</sup> May, 2013.**
- d) Costs of the petition and interest thereon at court rates.**

In his claim, the petitioner averred that he lawfully acquired plot No. 16B ATHI MARKET. The petitioner further averred that sometime in the month of March and April 2013, he initiated the process of developing the plot and sought approvals from the relevant departments and institutions which approved the same including the building plan. Thereafter he mobilized resources for purposes of construction and on 30/04/2013 the 1st respondent in company of one Ntongai who owns a plot near the petitioner's visited the scene and allowed construction work to proceed. On 7th May, 2013, the 1st respondent implemented an Enforcement Notice dated the same date maliciously and without justifiable reason stopped the construction on the petitioner's plot. The petitioner contends that the actions by the 1st respondent are wrongful and a contravention of his right to own property which is protected by article 40 of the Constitution of Kenya, 2010.

The petitioner also filed a Chamber Summons simultaneously with that petition under Certificate of Urgency in which he sought similar orders to those in the petition but pending the hearing of that chamber summons. When the applicant/petitioner appeared before the duty court, the application was certified urgent to be heard in the first instance and the matter fixed for inter parties hearing on 15/8/2013 (past). When the matter came up next on 7/10/2013, the respondents were given 21 days to respond to the application and liberal leave given to the parties to respond as necessary. The court also granted temporary injunction orders in terms of prayer No. 2 pending inter parties hearing of the suit/petition.

Directions were later taken to have this petition canvassed by way of written submissions. The petitioner filed his submissions on 4/07/2014 and a second set of submissions on 27/04/2018. The Respondents filed theirs on 16<sup>th</sup> December, 2014.

**PETITIONER SUBMISSIONS**

The petitioner responded through the firm of Mbaabu M'Inoti advocates submitted that the petitioner is the registered owner of plot No. 16 B ATHI MARKET which he purchased in 2001 as shown by a bundle of documents attached to the pleadings. The counsel also stated that the petitioner sought and obtained approvals for development of the said plot. The learned counsel further submitted that the petitioner has proved on a balance of probabilities that the relevant approvals were acquired legally and the same produced as evidence in this case.

The learned counsel also submitted that the petitioner is being prevented from completing the construction and the actions by the respondent constitute a breach of his constitutional rights to property under Article 40 of the constitution. Counsel cited the following cases in support of this petition:

1. **Sound equipment Ltd -vs- Registrar of Titles and Another (2004) eKLR**
2. **Kuria Greens Ltd-vs- Registrar of Titles and Another (2011) eKLR**
3. **Patrick Thoithi Kanyuira -vs- Kenya Airports Authority Petition No. 83 of 2012 (Nairobi) Reported in (2014) eKLR.**

#### **RESPONDENTS SUBMISSIONS**

The respondents who are represented by litigation counsel instructed by the Hon. Attorney General Mr. E.M. Kieti, submitted that the application dated 30/7/2013 is misconceived, incompetent lacks merit and an abuse of court process. He referred to the petitioners attachments marked "PK5" in the supporting affidavit which is an enforcement notice. He stated that paragraph 5 of that Notice provides for mechanism available to any person aggrieved by that notice. That mechanism is set out under section 39 of the Physical Planning Act 6 of 1996 as follows:

**"If a person or whom an enforcement notice has been served under sub section (1) is aggrieved by the notice they may within the specific period in the notice appeal to the relevant liaison committee under section 13"**

The learned counsel further stated that the appellant/Petitioner has not demonstrated why they have not followed that provision which is available to them. He stated that invoking the constitutional jurisdiction yet there is available remedy is premature and an abuse of court process. Counsel stated that the Honourable court's jurisdiction ought to be resorted to as a final resort as there is a forum which is better placed to deal with issues of planning. He submitted that the court cannot substitute the established bodies which are supposed to deal with issues raised in the petition. It is only after the laid down procedure put down by law has been exhausted that this court can be moved. Mr. Kieti further submitted that the enforcement notice was issued pursuant to the physical planning Act No. 6 of 1996. That provision issued under a statute cannot be said to violate the constitutional rights of the petitioner as alleged. Mr. Kieti submitted that if the petitioner does not wish to comply with that provision, he can only challenge the constitutionality of the physical planning Act No. 6 of 1996. Counsel stated that if the provisions are not implemented by the 1st Respondent then the court would be lending a hand to an illegality. Learned counsel also stated that the petitioner has been indolent in that the impugned notice was issued on 7th May, 2013 and he only sought intervention on 30<sup>th</sup> July, 2013. Equity aids the vigilant and not the indolent. In conclusion the learned counsel submitted that the petitioner has not established a prima facie case to warrant the grant of the orders.

#### **ANALYSIS AND DECISION**

I have considered the petition and the chamber summons filed simultaneously with the petition. I have looked at the materials attached to the supporting affidavit in support of this petition. I have also considered the submissions by the litigation counsel Mr. E.M. Kieti in equal measure.

The petitioner has moved this Hon. Court citing violation of his constitutional right to own property under Article 40 of the constitution. The documents attached to the chamber summons dated 30/07/2013 include an enforcement Notice issued pursuant to the physical planning Act Cap 286 laws of Kenya.

The said notice which was issued on 7th May, 2013 requiring the petitioner to stop construction of a storey building on grounds that it had encroached a public street.

The enforcement notice was requiring the petitioner to stop construction and comply with the requirements of the physical planning Act No. 6 of 1996. That statute gives powers to the 1st respondent to enforce certain regulations and to implement the physical development plans for specific areas or zones. Owners of properties especially leasehold properties are not absolutely free to deal with properties registered in their favour without consulting the lessor e.g where a lessee wants to sale an interest in a lease hold property. These regulations are geared to towards proper planning in urban towns. Section 39 (4) of the physical planning act even provides for mechanisms where a party aggrieved by the issuance of an enforcement notice can seek relieve/redress.

The law gives the respondent the mandate to issue those notices. I agree with the submissions by Mr. Kieti litigation counsel that this mandate by a statute cannot be said to violate the constitutional rights of the petitioner. I also find that the purported enforcement issued by the respondent did not seek do deprive the petitioner his constitutional rights to property under Article 40 of the constitutional. To the contrary, the petitioner had a remedy, available to him if he was aggrieved by the notice issued by the respondent. Invoking the constitutional jurisdiction when there was a remedy available under some other legislative provision was improper. In the case of Hon. **Uhuru Kenyatta -vs- the Nairobi Star Ltd High Court petition No. 187 of 2012**, the court held as follows:

**"It is an established practice that where a matter can be disposed without recourse to the constitution, the constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan -vs- the state AIC (1956) Hyd .22) --- Courts will not normally**

**consider a constitutional question unless the existence of a remedy depends on it. If a remedy is available to an applicant under some other legislative provision or other basis, whether legal or factual, a court will usually decline to determine whether there is some other basis.”**

In the case of **Harrikisson -vs- Attorney General of Trinidad and Tobago (1980) AC 265** the privy council said as follows:-

**“... The mere allegations that a human rights or fundamental freedom of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the sub section 18. It is apparent that the allegation is frivolous or vexations or an abuse of the process of the court as being solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful, administrative action which involves no contravention of any human right or fundamental freedom.”**

I also find that the petitioner has not proved to the satisfaction of this court that he is entitled to the orders of injunction. He has not established a prima facie case with high chances of success. He has not also shown that damages will not be adequate remedy. Even if this court was to find that the petitioners constitutional rights and fundamental freedoms has been or is likely to be contravened and issue the injunction orders, there is still need to inquire whether the petitioner had encroached a public street or not. In the result I find no merit in this petition. The same is hereby dismissed with no orders as to costs.

**Read, delivered and signed in the open court this 6<sup>th</sup> day of July, 2018**

**MR. E. C. CHERONO**

**ELC JUDGE**

**In the presence of:**

1. M/s Mbijiwe for the interested party.
2. Mr. Abuur holding brief for Mbaabu for petitioner
3. CC: Galgalo/Janet