



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC PETITION CASE NO. 4 OF 2020

IN THE MATTER OF

ARTICLES 1(1), 2(1), 3, 10, 27, 28, 31, 35, 40(2), 47(1), 48,

50(1) AND 66 OF

THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF

THE ALLEGED CONTRAVENTION AND VIOLATION

OF THE NATIONAL VALUES AND PRINCIPLES OF

GOVERNANCE IN ARTICLES 1, 2, 3(1), 10(1) & (2)(A)

& (C), 19, 20, 27, 28, 31, 35, 40(2), 47(1), 48 AND 50(1) OF

THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF

THE ALLEGED CONTRAVENTION AND VIOLATION

OF THE RIGHTS AND FUNDAMENTAL FREEDOMS

UNDER ARTICLES 27, 28, 31, 35, 40(2), 47(1) 48 AND 50(1) OF

THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF

ARBITRARY DEPRIVATION OF THE RIGHT TO ENJOY

PROPERTY KNOWN AS TITLE NUMBER AGUTHI/GATITU/5642 BY

THE COUNTY GOVERNMENT OF NYERI

IN THE MATTER OF

THE CONSTITUTIONALITY AND LEGAL VALIDITY OF THE

ENFORCEMENT NOTICE WITH RESPECT TO TITLE NUMBER

AGUTHI/GATITU/5642 DATED 21ST MAY, 2020 ISSUED UNDER SECTION

BETWEEN

DEPAR LIMITED.....PETITIONER

-VERSUS-

COUNTY EXECUTIVE COMMITTEE

MEMBER FOR LANDS, PHYSICAL PLANNING,

HOUSING AND URBANIZATION.....1ST RESPONDENT

COUNTY GOVERNMENT OF NYERI.....2ND RESPONDENT

JUDGMENT

A. THE PETITIONER'S CASE

1. By a petition dated 29th May, 2020 grounded upon **Articles 1(1), 2(1), 3, 10, 27, 31, 35, 40(2), 47(1), 48, 50(1)**, the Petitioner sought the following reliefs against the Respondents:

(a) A declaration that the Enforcement Notice dated 21st May, 2020 issued by the Respondents is a violation of the Petitioner's right to equal protection under the law and freedom from discrimination under Article 27 of the Constitution.

(b) A declaration that the enforcement Notice dated 21st May, 2020 issued by the Respondents is a violation of the Petitioner's right to privacy and freedom from arbitrary searches and seizures under Article 31 of the Constitution.

(c) A declaration that the Enforcement Notice dated 21st May, 2020 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.

(d) A declaration that the Enforcement Notice dated 21st May, 2020 issued by the respondents is a violation of the Petitioners right to fair administrative action under Article 47 of the Constitution.

(e) A declaration that the Enforcement Notice dated 21st May, 2020 issued by the Respondents is a violation of the Petitioners right to access of justice under Article 48 of the constitution.

(e) A declaration that the Enforcement Notice dated 21st may, 2020 issued by the Respondents is a violation of the Petitioners right to access of justice under Article 48 of the Constitution.

(f) The prerogative order of Mandamus do issue against the Respondents, compelling the Respondents to constitute the County Physical and land Use Planning Liaison committee.

(g) The prerogative order of Certiorari do issue removing into this Court the Enforcement Notice dated 21st May, 2020 issued by the Respondents, for the purpose of its being quashed and that that Enforcement Notice be quashed.

(h) The prerogative order of Prohibition do issue against the Respondents, prohibiting the Respondents from arbitrarily depriving the Petitioner of its right to enjoy its property.

(i) All necessary and consequential orders or directions be given.

(j) The costs of this application be provided for.

2. The said petition was supported by an affidavit sworn by Engineer Linus Gitonga the Chief Executive Officer of the Petitioner on 29th May, 2020 together with the annexures thereto. The basis of the petition was that the Respondent had wrongfully, arbitrarily and unlawfully issued an enforcement notice upon the Petitioner requiring it to stop constructions works with immediate effect. The Petitioner contended that it had obtained all the relevant approvals and licences from all the concerned authorities including the Respondents before commencement of the works. The Petitioner contended that it had obtained approvals and licences from the Kenya National Highways Authority, the National Environment Management Authority, the Energy and Petroleum Regulatory Authority and the 2nd Respondent, the County Government of Nyeri.

3. The Petitioner contended that the enforcement notice dated 21st May, 2020 issued by the Respondents was done without lawful justification or excuse. The Petitioner contended that he was not in breach of any of the terms of the approvals and licences which allowed it

to undertake its construction project. The Petitioner further contended that the only reason given in the enforcement notice was that the notice was issued on account of a “public petition” whose details or particulars of complaint were not given. The Petitioner further pleaded that the said enforcement notice was issued without according it an opportunity of being heard. The Petitioner considered the Respondent’s actions to constitute a violation of **Articles 40 and 47 of the Constitution of Kenya** and the **Fair Administrative Action Act, 2015**.

4. The second limb of the Petitioner’s grievances was that the Respondents had failed to constitute the County Physical and Land Use Planning Liaison committee (*the Committee*) which is the statutory body empowered to hear and determine appeals against enforcement notices. It was contended that the Respondents had abdicated their statutory duty under **Sections 76 and 77 of the Physical and Land Use Planning Act, 2019** to set up the said committee with the consequence that it was unable to exercise its statutory right of appeal to.

B. THE RESPONDENT’S RESPONSE

5. The material on record shows that the Respondents did not file a replying affidavit either to dispute the Petitioner’s allegations or to render any justification for issuance of the enforcement notice dated 21st May, 2020.

6. The Respondents, however, filed a notice of preliminary objection dated 22nd March, 2021 whilst the matter was pending judgment and precisely 2 days before the date the petition was initially scheduled

for judgment. The gist of the said preliminary objection was that they had since appointed the Nyeri County Physical and Land Use Planning Liaison Committee hence the court had no jurisdiction to entertain the petition.

C. DIRECTIONS ON SUBMISSIONS

7. The material on record indicates that when the petition was listed for directions on 15th July, 2020 the Petitioner had already filed its written submissions on the petition. The Respondents were consequently granted 7 days to file their response(s) within 7 days and written submission within 14 days thereafter.

8. However, by the time the petition was mentioned again on 22nd February, 2021 the Respondents had not filed any submissions. They requested for a further 7 days to file a replying affidavit and written submissions. The Respondents’ wish was granted and they were granted 14 days to do the needful whereupon the petition was fixed for judgment on 24th March, 2021. However, it was not until 22nd March, 2021 that the Respondents filed their notice of preliminary objection and written submissions.

D. THE ISSUES FOR DETERMINATION

9. The court had considered the petition, the affidavit in support thereof and the exhibits annexed thereto as well as the Respondents’ notice of preliminary objection dated 22nd March, 2021. The court is of the opinion that the following issues arise for determination herein:

(a) *Whether the court has jurisdiction to entertain the petition.*

(b) *Whether the Petitioner is entitled to the reliefs sought in the petition.*

(c) *Who shall bear costs of the petition.*

E. ANALYSIS AND DETERMINATION

(a) Whether the court has jurisdiction to entertain the instant petition

10. The court has considered the material and submissions on record on this issue. The court has noted that the preliminary objection was not raised at the earliest possible opportunity to enable the court to consider and determine the same as a preliminary issue before the hearing of the petition. The Petitioner did not also have an opportunity to submit on the preliminary objection since it was raised when the petition was pending judgment.

11. In the case of owners of the **Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** it was held by the Court of Appeal that the jurisdiction of a court or tribunal to entertain a dispute is so crucial that whenever an objection to its jurisdiction is taken the issue should be decided right away as a preliminary matter. A court which has no jurisdiction has no business taking one more step in the matter. The court held, *inter alia*, that:

“...I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the question right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. When a court has no jurisdiction there would be no basis for continuation of proceedings pending further evidence ...”

13. The Respondents’ notice of preliminary objection is based on the ground that a challenge to the issuance of an enforcement notice is a matter which is reserved for the Committee under **Section 78 of the Physical and Land Use Planning Act, 2019**. The section stipulates

as follows:

“The functions of the County Physical and Land Use Planning Liaison Committee shall be to-

(a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;

(b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;

(c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and

(d) hear appeals with respect to enforcement notices”.

14. The Respondents submitted that they had appointed the said committee on 3rd July, 2021 hence the Petitioner ought to have ventilated its grievances before the said committee and not a court of law. The Respondents further submitted that where a specific procedure had been provided for the resolution of particular grievances, the concerned parties were obligated to strictly follow and exhaust such mechanisms. The Respondents cited the cases of **Republic v Nairobi City County Government ex-parte Ndiara Enterprises Ltd [2017] eKLR** and **Alice Mweru Ngai v Kenya Power and Lighting Company Ltd [2015] eKLR** in support of that submission.

15. However, the Respondents did not point out other relevant provisions of the law such as **Section 93 of the Physical and Land Use Planning Act** which has a bearing on the instant petition. The said section stipulates as follows:

“All disputes relating to physical and land use planning, before establishment of the national and county physical and land use liaison committees shall be heard and determined by the Environment and Land Court.”

16. The material on record indicates that by the time the enforcement notice dated 21st May, 2020 was issued and by the time the petition was filed on 2nd June, 2020 the said committee had not been constituted by the Respondents. It would, therefore, follow that the only option for redress that the Petitioner had was this court as provided for by the above cited statutory provision. The court is further of the opinion that jurisdiction is acquired at the commencement of proceedings and not at the end of such proceedings. So, if the court had jurisdiction at the commencement of the proceedings it could not be said to have lost it through the unilateral action of the Respondents. Consequently, the court finds and holds that it has jurisdiction to entertain the instant petition.

(b) Whether the petition is entitled to the reliefs sought in the petition

17. The court had considered the material and submissions on this issue. The Respondents did not submit on the merits of the petition. They simply argued their preliminary objection claiming that the court had no jurisdiction to entertain the petition. As indicated earlier, the Respondents did not file a replying affidavit to controvert the allegations contained in the petition. The Respondents did not render any justification for the issuance of an enforcement notice stopping the Petitioner’s project which was duly approved.

18. In the absence of a substantive response to the petition by the Respondents the court considers the Petitioner’s allegations in the petition as uncontroverted and as such the court is entitled to accept them as correct. See **Rumba Kinuthia v Attorney General Nairobi HCCC Misc. Application No. 1408 of 2004**. The consequence of that is that the court finds that the Respondents’ enforcement notice was issued arbitrarily and without any legal basis or justification. It was issued in violation of the Petitioner’s rights under **Article 47 of the Constitution** and the **Fair Administrative Action Act, 2015**.

19. The court is of the opinion that a public authority must act within the four corners of the law wherever it takes any administrative or executive action. Every action must be anchored in the law and it must have a lawful justification or excuse. No action should be taken capriciously, arbitrarily and without due process. That is what the rule of law is all about.

20 In the case of **Republic v Kombo and 3 Others ex-parte Waweru [2008] 3 KLR (EP) 478** which was cited by the Petitioner it was held, *inter alia*, that:

“The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong (such as taking a man’s land), or which infringes a man’s liberty (as by refusing him planning permission), must be able to justify its action as authorized by law and nearly in every case this will mean authorized directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order the court will invalidate the act, which he can safely disregard.”

21. The court is of the opinion that even though the Petitioner has demonstrated a violation of its legal and constitutional rights, it is not entitled to all the reliefs and declarations sought. It is evident from the material on record that the Petitioner’s main grievance relates to the issuance of an enforcement notice without due process and the Respondent’s failure to set up the committee. It would appear from the material on record that the Respondents have since established the said committee after the filing of the petition.

22. The court is thus of the opinion that the Petitioner is entitled only to prayers (d) and (g) of the petition to vindicate its rights. Accordingly, the court is inclined to grant a declaration to the effect that the Respondents' enforcement notice dated 21st May, 2020 was made in violation of the Petitioner's rights under **Article 47 of the Constitution of Kenya** and an order of *certiorari* to remove the said notice to this court for the purpose of being quashed. There is no evidence before court to demonstrate violation of **Article 27 and Article 40 of the Constitution** as alleged in the petition. The prayer for an order of prohibition appears to be speculative in that there is no evidence on record to demonstrate that the Respondents intend to issue further enforcement notices without due process.

(c) Who shall bear costs of the petition

23. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 28**. The court finds no good reason why the successful party should not be awarded costs of the action. Accordingly, the Petitioner shall be awarded costs of the petition.

G. CONCLUSION AND DISPOSAL

24. The upshot of the foregoing is that the court finds merit in the petition dated 29th May, 2020. Accordingly, the court makes the following orders for disposal thereof:

(a) A declaration be and is hereby made that the enforcement notice dated 21st May, 2020 issued by the Respondents was a violation of the Petitioner's right to fair administrative action under Article 47 of the Constitution of Kenya, 2010.

(b) An order of Certiorari be and is hereby issued to remove into this court and quash the enforcement notice 21st May, 2020.

(c) The rest of the prayers in the petition are hereby declined.

(d) The Petitioner is hereby awarded costs of the petition.

25. It is so ordered.

JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 19TH DAY OF MAY 2021.

In the presence of:

Mr. Omolo for the Petitioner

Ms Kihara holding brief for Mr. Njenga for the Respondents

Court assistant - Wario

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Y. M. ANGIMA

JUDGE

19.05.2021