



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

PETITION NO. 35 OF 2020

MWEMBELEGEZA COMMUNITY RESIDENTS.....PETITIONERS

AND

NATIONAL LAND COMMISSION & 5 OTHERS.....RESPONDENTS

AND

ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST INTERESTED PARTY

ATTORNEY GENERAL.....2ND INTERESTED PARTY

RULING

(Application for injunction; principles to be applied; petitioners being residents of Mwembelegeza area; petitioners filing suit stating that land set aside for building a nursery school has been taken over and on it is being built a mosque; petitioners further stating that no approvals from the statutory regulatory bodies have been obtained; there being evidence through the Registry Index Map, that the land was indeed set aside for use as a nursery school; no evidence of any EIA licence of construction licence; prima facie case established; orders of injunction issued)

1. The petitioners are residents of Mwembelegeza within Mombasa County and they filed this petition on 22 October 2020. The petition was subsequently amended on 26 January 2021 to add some necessary parties. The petitioners aver that when Mwembelegeza Scheme was subdivided, one plot, identified as Plot No. 1476 (hereinafter the suit land), was reserved as a public utility land for a nursery school. The petitioners aver that there has never been a change of user for this plot, and that the plot has been vacant, with the residents waiting for funding to help build the nursery school. The petitioners state that in September 2020, they noticed the commencement of a development on the suit land. When they inquired, they were told that it is a mosque which was being built. The petitioners point out that there are already two mosques within an area of 500 metres from the suit land and they wonder why land reserved for a school is being invaded to build another mosque. They also ponder why the persons building the mosque could not simply purchase land from other private owners to build their mosque. Thus in a nutshell, it is the petitioners' case that the construction on the suit land is illegal. The petitioners now seek to have orders of an injunction to restrain any further trespassing, construction, subdivision, transfer, entry, development, sale, or occupation, of the suit land.

2. The supporting affidavit is sworn by Ainea Ragen one of the residents of Mwembelegeza. Among the documents he has annexed is the Registry Index Map (RIM), and he has pointed out that in the same, the Plot No. 1476 is marked "Nursery School." He has further deposed that the development on the land has been going on without any approvals from the National Construction Authority (4th respondent) or the National Environment Management Authority (3rd respondent).

3. In response to the application, the 4th respondent filed an affidavit sworn by Stephen Mwilu, the Manager, Compliance. He has deposed that pursuant to the National Construction Authority Regulations, 2014, particularly Regulation No. 17, all construction works, contracts or projects, either in the public or private sector, must be registered with the 4th respondent. He has further deposed that Section 23 (3) (c) of the National Construction Authority Act empowers an officer of the Authority to order the suspension of works for want of compliance with the Act. He has further averred that on inspection of a site, their officers confirm, among other things, that there is a registered contractor on site and that there is a sign board showing all the approvals and the professionals engaged in the project. He has deposed that on 30 September 2020, the 4th respondent received a complaint from the petitioners regarding the development on the suit land. On 1 October 2020, its officers visited the site and found it non-compliant, and a suspension notice, being Suspension Notice No. C088692, was issued pursuant to Section 23 (3) (c) of the Act. He has deposed that the inspection showed inter alia that there was no registered contractor on site, that there was no signboard, that there was no NCA Compliance Certificate, nor sufficient hoarding and fencing. He has deposed that the construction does not meet the requirements of its statute and regulations.

4. The 2nd respondent filed a replying affidavit sworn by Dr. June Mwajuma, its Chief Officer in charge of Lands and Housing. She has firstly deposed that the application is defective as it only seeks interim orders pending hearing of the application. She has admitted that the suit plot was indeed set aside as a public utility for the community and that initial plans were for the construction of a nursery school, identified as the Kwa Bulu/Mwatamba School Project. She has deposed that the plans were however not actualised, and the land remained unutilised for a long time, eventually being converted into a car wash by some youth within the community. She has deposed that on 20 February 2020, members of the community held a meeting with the area Member of the County Assembly (MCA), one Hon. Francis Nzai, and that in the meeting, it was agreed that an alternative public amenity be constructed on the suit plot. She has annexed minutes said to be of the said meeting. She has deposed that a committee, known as Kwa Bullo Mosque Committee (5th respondent) was constituted, and that it was agreed that a mosque be constructed, with the sponsor being Al Nubal Charity Organisation (6th respondent). She has annexed an agreement said to be between the Mwembelegeza “Community Leaders and Owners” and Al Nubal Charity Organisation, where the former agrees to give out the suit land to the latter, for construction of a mosque and madrasa. She has stated that the Kwa Bullo Mosque Committee sought and obtained permission for its building plans and the 2nd respondent approved the same. She has averred that there was no illegal acquisition of the property since it is still being utilized as a public utility after public participation.

5. I have seen an affidavit sworn by one John Simba Mwaigo. He has disputed being in the alleged meeting of 20 February 2020 despite his name appearing as one of the persons present. He has stated that he could not have been in the meeting as he has been bedridden having suffered a stroke. He also disputed an alleged agreement said to have been made by “The Community Leaders or Owners” of Mwembelegeza, agreeing to the sponsorship by Al Nubal Charity Organisation. He has stated that he never signed that agreement and he contends it to be a forgery.

6. The 6th respondent, the Al Nubal Charity Organisation, filed an affidavit sworn by Abdul Rahim Ochieng, its Secretary. He has also raised issue that the application, as drawn, only seeks interim orders pending hearing of the application. He has further deposed that Al Nubal Charity Organisation is a duly registered charitable organisation with the objective of bettering the community, and does this, by among other things, fielding requests for assistance in construction of communal facilities such as religious premises. He admits that the suit plot was set aside as a public utility with initial plans for construction of a nursery school. He has deposed that sometimes in January (year not quoted), they received a request from the MCA requesting for construction of a mosque, citing declining morals, which request they heeded. He has stated that the MCA invited the Committee to a meeting on 20 February 2020 and the matter was discussed and agreed. The 6th respondent then entered into an agreement with the 5th respondent (Kwa Bullo Mosque Committee) approving construction of the mosque. He has averred that construction of the mosque is for the benefit of the community. He has stated further that on learning that the land had initially been set apart for construction of a nursery school, the 6th respondent added six classrooms to the structure for use as both a madrasa and any other educational purpose the community would deem fit. He states that the property is thus still being used as a public utility and that the 6th respondent has no private interest.

7. Despite not filing anything towards the application, The National Land Commission (1st respondent), The National Environment Management Authority (3rd respondent), The Ethics and Anti-Corruption Commission (1st interested party), and the Attorney General (2nd interested party), support the application.

8. I have considered the application. There is the preliminary issue raised that the application as drawn only seeks interim orders pending hearing of the application. That is true, but I am prepared to consider this as a technical error, for it is apparent to me, and also to all parties herein, that what the petitioners want is an order for an injunction pending hearing of the petition. As far as I can see, no party has been prejudiced by the inelegant drafting, as they have responded as if the application was seeking an order for an injunction pending hearing of the petition. I will therefore not give much prominence to the poor drafting of the application and will consider this as an application seeking an injunction pending hearing of the petition.

9. To succeed in an application for injunction, one needs to demonstrate a prima facie case with a probability of success; show that if the order of injunction is not granted then there will be suffered loss that may not be compensable by an award of damages; and finally, where the court is in doubt, it will decide the application on a balance of convenience.

10. The case of the petitioners is simple. They state that the suit land was set aside for construction of a nursery school and they wonder how come a mosque is being put up on the land. On this they have a point, for the RIM does indeed show that the land was set aside for the establishment of a nursery school. There must have been good reason why the planners thought it fit to have the land set aside as a nursery school, and indeed, a nursery school is an important facility to ensure the education of children. It does appear that the land was set aside for the public, and prima facie, the land is public land which should fall under the National Land Commission. I have not seen the involvement of the National Land Commission in the conversion of the use of the land from nursery school to a mosque. I have serious doubts whether some individuals, purporting to represent the community, and an MCA, have power, without the involvement of the National Land Commission, to convert land set aside for specific use, into a different kind of user. I have serious doubts on the legality of the purported meeting of 20 February 2020 and the subsequent “agreement” authorising the construction of a mosque. I have seen that the 6th respondent has stated that it has built a few classes which can be used as an ECD but the fact remains that the same will still be under Kwa Bullo Mosque Committee, and not every person, given the fact of religious differentiation, will be comfortable attending a school that is within a mosque. Either way, it still does not dispel the fact that there is a construction of a mosque where the land is set aside exclusively for a nursery school. A mosque is not by any stretch of imagination the same facility as a nursery school and neither do I have proof of the land being set aside for the mixed user of mosque and school.

11. Apart from the above, the National Construction Authority have stated that the development has never had their approval, and in fact, they issued a notice suspending any works on it. Neither have the 5th and 6th respondents, who are the developers, demonstrated that they obtained any EIA licence from NEMA before embarking on the development. There is thus a question to be tried as to whether the construction was legal in the first place, even putting aside the issue of the land being set apart for exclusive use as a nursery school. The integrity of a structure that is being put up, without first obtaining statutory approval, has to be in serious doubt.

12. From the foregoing, I am persuaded that the petitioners have demonstrated a prima facie case with a probability of success. On

substantial loss, the case herein is brought on behalf of the public. If the land is used against the intended user, then the public stand to suffer loss that may not be compensable by way of damages. Even if I was to consider the balance of convenience, it tilts towards preservation of the land until this case is decided. I am thus persuaded to make orders of injunction. The 3rd, 5th and 6th respondents, will nevertheless have a chance to demonstrate the legality of their actions at the full hearing of the petition, but further construction and/or use of the premises must be stopped, pending hearing of the suit.

13. For the above reasons, I make the following orders :-

(i) That pending the hearing and determination of this petition, there is issued an order of injunction, stopping the 5th and 6th respondents, or any other persons, from undertaking any construction or development, or any further construction and/or development, within the Plot No. 1476 Mwembelegeza Scheme. For the avoidance of doubt, all work must stop, and any construction and/or development of whatever nature on the Plot No. 1476 Mwembelegeza Scheme must cease forthwith. If there are any workmen, they must move out of site forthwith and stay away until this case is heard and determined.

(ii) That pending the hearing and determination of this petition, there is hereby issued an order of injunction, stopping any person from using, and/or utilising the Plot No. 1476 Mwembelegeza Scheme. For the avoidance of doubt the property should not be put into any kind of use until this case is heard and determined.

(iii) That the OCS Kadzandani Police Station is hereby ordered to ensure full compliance with the above orders.

(iv) The petitioners will have the costs of this application as against the 3rd, 5th and 6th respondents.

14. Orders accordingly.

DATED AND DELIVERED THIS 10TH DAY OF MAY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA