



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION 204 OF 2020

TERESIA WAITITU AND 128 OTHERS.....PETITIONERS

VERSUS

PRINCIPAL SECRETARY MINISTRY OF TRANSPORT,

INFRASTRUCTURE AND URBAN PLANNING.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

PETITION

1. The Petitioner through a Petition dated 17th June 2020 seek the following reliefs:-

- a) A declaration that the threatened evictions by Respondents violate the principles of the Constitution and are thus unconstitutional.*
- b) A declaration that failure to issue the Petitioners Special identification and yet they have been enumerated violates the principle of expeditious, efficient, lawful, reasonable and procedurally fair administrative actions enshrined in Articles 27, 47, 48 and 50 of the Constitution.*
- c) The Respondents be compelled to compensate and issue the Petitioners with the Unique Identification Cards issued to the beneficiaries of the slum upgrading programme.*
- d) That the said unique identification Cards be issued through the advocates on record for the Petitioners.*
- e) Costs of this Petition.*
- f) Any other or further relief that this Honourable Court considers appropriate and just to grant.*

THE APPLICATION

2. The Petitioner / Applicant through a Notice of Motion dated 17th June 2020 seeks the following orders:-

- a. This Application be Certified urgent and service be dispensed with and be heard ex parte in the first instance;*
- b. Pending the hearing and determination of this application and the main suit, this Honourable Court be pleased to grant an injunction restraining the Respondent either by itself, its servants, employees, agents, officers or any person, body or authority from evicting the Petitioners and demolishing the structures that are still standing on Soweto Zone B slums for purposes of reviewing and granting the beneficiaries of the slum upgrading programme their full compensation and unique identification cards.*
- c. Pending the hearing and determination of this application this Honourable Court be pleased to compel the Respondent either by itself, its servants, employees, agents, officers or any person, body or authority to avail the Master Register for all the*

beneficiaries of Soweto Zone B Nairobi Slum Upgrading Project to the Petitioners advocates herein.

d. Pending the hearing and determination of this suit this Honourable Court be pleased to compel the Respondents by itself, its servants, employees, agents, officers or any person, body or authority to provide the Master Register containing all the beneficiaries of the Kibera Soweto Zone B Nairobi Slum Upgrading Project.

3. The Application is based on grounds that the 1st Respondent has failed and/or neglected to issue the unique identification cards to the Petitioners as well as compensate them appropriately as required in the agreement entered between the 1st Respondent and the Local Area Committee, an organ of the 1st Respondent at the local level.

4. The Applicants contend that their right to property guaranteed under **Article 40 and 43 (1) (b) of the Constitution** would be gravely prejudiced if the Respondent is not restrained from evicting and demolishing the Applicant's structures and especially when they have not been compensated. The Applicants further asserts that they would be gravely prejudiced and will suffer irreparable loss and damage if the Respondent is allowed to continue with the exercise.

THE 1ST RESPONDENTS RESPONSE

5. The 1st Respondent filed its Replying Affidavit dated 1st July 2020 sworn by George C. Omondi, who is the Deputy Director of Slum Upgrading Department in the Ministry of Land Housing & Urban Development.

6. The 1st Respondent contends that the Petition herein is related to land use, planning and environment planning which is, pursuant to **Article 162 of the Constitution and Section 13 of the Environment and Land Court Act**, a preserve of the Environment and Land Court. Therefore, the Court herein does not have the jurisdiction to entertain the Petition.

7. The 1st Respondent further asserts that the Petition is premature since the facilitation process for both the tenants and the structure owners is still ongoing, and hence, the Petitioners should be patient to allow the Dispute Resolution Committee to look into their issues. Moreover, the conservatory injunction orders are meant to preserve property and maintain the status quo. The ground/site in issue is already coded and in preparation for the project to commence. Therefore, there is nothing on the ground to warrant an order injunction, since the Court cannot grant orders in vain.

PARTIES SUBMISSIONS

APPLICANTS' SUBMISSIONS

8. The Applicants filed their submissions dated 4th March 2021 in relation to a Preliminary Objection raised by the Respondents. The Applicants submit that this Court has jurisdiction to entertain this Petition as the issues herein transcend land and natural resources. The threatened violations touch on various rights that affect the future location of persons from public land. Furthermore, there is no issue touching on ownership of land. Reliance is placed on several cases including **Kinyanjui v Attorney-General [2005] 2 KKLR 454; Sollo Nzukiv Salaries and Remuneration Commission & 2 others [2019] eKLR; and Peter Nganga Muiruri v Credit Bank Limited & another Civil Appeal No. 203 of 2006** on the jurisdiction of the High Court.

THE 1ST RESPONDENT'S SUBMISSIONS

9. The 1st Respondents' filed Written Submission dated 11th December 2020 and submits that the issues for determination are:-

a) Whether this Court has jurisdiction in the matter; and

b) Whether the Petitioners are entitled to a conservatory injunction notwithstanding issue 1.

10. On the first issue, the Respondent submit that that the issues herein involve the use of affordable, accessible and adequate housing for people living and working in slums and informal settlements in urban areas in Kenya. The Respondents refer to **Article 162 (2) (b) of the Constitution of Kenya and Section 13 (2) of the Environment and Land Court Act** and the decisions in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** and **Kenya Ports Authority v Modern Holdings (E.A) Limited [2017] eKLR** to support their assertion that the Environment and Land Court has jurisdiction to handle this matter.

11. On the second issue, the Respondents submit that the Applicants have applied for conservatory orders in the face of a process to ensure that Kenyans living in informal settlements in urban areas have access to affordable, accessible and adequate housing. These are in accordance with the public interest and constitutional values, and therefore granting conservatory orders would endanger the public interest as anticipated by the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** and **Platinum Distillers Limited v Kenya Revenue Authority [2019] eKLR** on the public interest considerations on granting conservatory orders.

ANALYSIS AND DETERMINATION

12. Upon perusal of the application, the Replying Affidavit and Preliminary Objection raised thereto, as well as the parties rival submissions, the following issues arise for consideration:-

a) Whether the Court has jurisdiction to hear and determine this matter.

b) Whether the Petitioners are entitled to a conservatory injunction notwithstanding issues no. (a) above.

A. WHETHER THE COURT HAS JURISDICTION TO HEAR AND DETERMINE THIS MATTER.

13. The Respondent contended that the Petitioners filed their case before the Constitutional and Human Rights Division of the High Court, notwithstanding the issue in this matter involves the use of affordable, accessible, and adequate housing for people living and working in slums and informal settlements in urban areas in Kenya.

14. Looking at the Petition, it is clear that the Petitioners are seeking declaration that the threatened evictions by Respondents violate the principle of the constitution and thus unconstitutional, that failure to issue Petitioners special identification violates, the principle of expeditious, efficient, lawful, reasonable and procedurally fair administrative action enshrined in **Article 27, 47, 48 and 50 of the Constitution**, that the Respondent's be compelled to compensate and issue Petitioners with unique identification cards issued to the beneficiaries of the slum upgrading programme.

15. It is Respondents averment that according to **Article 162(2)(b) of the Constitution** "**parliament shall establish courts with the status of the High Court to hear and determine disputes relating to – (b) the environment and the use and occupation of, and title to, land.**"

16. It contended further that **Article 162(2)(b) of the Constitution** as read with **Section 13(2) of the Environment and Land Court Act** empowers the Environment and Land Court to handle all matters within its scope, which include this matter.

17. The Petitioners on issue of jurisdiction of this Court in this matter contended, that the issues herein transcends land and natural resources. They urged that the threatened violations touch on various rights that affects the future relocation of persons from public land. In addition they asserted in any case there is no issue touching on ownership of land.

18. The Petitioners sought reliance in the case of *Nganga Murirui Vs. Credit Bank Limited & another Civil Appeal No. 203 of 2006* where the Court expressed itself thus:

"The part of the Constitution which deals with the establishment and jurisdiction of courts in Kenya are headed "The Judiciary" and the Constitution establishes the High Court with "unlimited original jurisdiction in Civil and Criminal matters and such other jurisdiction and powers as may be conferred on it by the constitution or any other law." Although the Constitution stipulates that the jurisdiction of the High Court in criminal and civil matters is unlimited, it is circumscribed by rules of practice and procedure to enable the Court to function side by side with courts and tribunals subordinate to it and to guide it in the manner of exercising its jurisdiction and powers. There is no provision in the Constitution, which establishes what, is referred to as Constitutional Court. In Kenya we have a division of the high Court at Nairobi referred to as "Constitutional and Judicial Review Division which is not an independent Court by merely a division of the high Court."

19. The Constitution on the issue of jurisdiction of the High Court under **Article 165(5)(a) and (b)** clearly provides that the High Court shall not have jurisdiction in respect of matters; reserved for the exclusive jurisdiction of Supreme Court under the Constitution or falling within the jurisdiction of the Courts contemplated in **Article 162(2)**. The Courts contemplated under **Article 162(2)** area (i) **Employment and Labour Relations Court** and (ii) **the Environment and Land Court**.

20. **Article 162(2)** provides that Parliament shall establish Courts with the status of the High Court to hear and determine dispute relating to:-

- a) Employment and Labour Relations and
- b) The Environment and the use of occupation of and title to land.

21. **Section 13(2) of the Environment and Land Act** clearly sets out what matters the Environment and Land Court in exercise of its jurisdiction under **Article 162(2)(b) of the Constitution** is empowered to hear and determine. The disputes thereto are as follows:-

- a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;***
- b) Relating to compulsory acquisition of land;***
- c) Relating to land administration and management;***
- d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and***
- e) Any other dispute relating to environment and land."***

22. Looking at the pleadings herein, it is clear, that the dispute herein revolves around the affordable, accessible and adequate housing for people living and working in slum's and informal settlement in urban areas in Kenya. I find from the nature of the dispute herein the same by virtue of **Article 162(2) (b) of the Constitution** and **Section 13(2) of the Environment and Land Act** falls within the ambit of Environment and Land Court jurisdiction, which Court is appropriate and required to determine the dispute. However it is noted the Petition also raises other Constitutional issues, which this court has jurisdiction to handle save the predominant issue related to use and occupation of the land which can solely be dealt with by

B. WHETHER THE PETITIONERS ARE ENTITLED TO A CONSERVATORY INJUNCTION NOTWITHSTANDING ISSUES NO. (A) ABOVE.

23. In the instant Petition, and application the Petitioners are praying for conservatory orders to preserve the subject property status quo, notwithstanding, that it has been coded in preparation of the project. The grounds for seeking conservatory orders are laid down under **Article 23(3)(c) of the Constitution** as reliefs to infringement of human rights contained in the Bill of rights. It is noted, that the Supreme Court, highlighted the conditions for granting of conservatory orders in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others (2014) eKLR** at paragraph 86 as follows:-

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case: or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

24. The Respondents further placed reliance in opposing granting of conservatory orders in the case of **Platinum Distillers Limited v. Kenya Revenue Authority [2019] eKLR**, where it was stated that even if an Applicant for conservatory orders satisfies the prima facie case requirement and likelihood of harm should he or she be denied the conservatory orders, they shall be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, a priority levels attributable to the relevant causes.

25. In the instant Petition, and the Application, it is clear that the Petitioners have applied for conservatory orders in face of a process to ensure that Kenyans living in informal settlements in urban areas have access to affordable, accessible, and adequate housing. It is contended by the Respondents that not only is the Government of Kenya providing this right but it has set up mechanisms to ensure that no individual is disenfranchised during this process. For example, the Settlement Executive Committee and the Dispute Resolution Committee, all these are in accordance with the public interest and constitutional values. I find in view of the steps the Government has commenced, and the fact also that the land is now coded in anticipation of affordable housing programme, granting conservatory orders would endanger the public interest.

26. That though the Petitioners have raised constitutional issues in this Petition which this Court has jurisdiction to hear and determine, I find that do not in itself, bar the Environment and Land Court, from hearing and determining the predominant issue herein, being related to Land and also determine the Constitutional issues raised thereto, related to use, occupation, title and administration and management of land and any other dispute relating to environment and land.

27. The upshot is that the application is without merit and is declined. Further this matter cannot be decided in peace meal as this Court cannot deal with land related issues though it can deal with Constitutional issues as raised; hence in the interest of doing substantive justice, this Petition is accordingly transferred to Milimani, Environment and Land Court for hearing and determination under Rule 8(2) of the Constitution of Kenya (Protection of Rights and Fundamental practice and Procedure Rules 2013 (otherwise referred to as “Mutunga Rules”).

28. Costs follow event, however in this suit the Petition has not been determined on merits but only transferred to the Court that has jurisdiction on all issues raised, pending determination on merits, I order that costs do abide by the outcome of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF JULY, 2021.

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J. A. MAKAU

JUDGE