



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC PETITION NO. 83 OF 2018

MARINGO K.P. & T.C. ESTATE HOUSE OWNERS'

ASSOCIATION (MARINGO POSTA ESTATE.....PETITIONER

-VERSUS -

BOARD OF TRUSTEES, POSTAL

CORPORATION OF KENYA STAFF

PENSION SCHEME.....1ST RESPONDENT

NAIROBI CITY COUNTY.....2ND RESPONDENT

JUDGMENT

INTRODUCTION

1. The petitioner is an Association registered under the Provisions of the Societies Act. The members are owners of units within Maringo K.P. & T.C. Estate in Nairobi. The 1st respondent is a pension scheme which takes care of pension requirements of the employees of Postal Corporation of Kenya. The 2nd respondent is the County Government of Nairobi City County.

2. The petitioner filed a Constitutional Petition against the respondents in which it seeks the following reliefs:-

i. An order of judicial review of MANDAMUS do issue to compel and directed to the first and second respondents, their agents, staff, employees, servants and/or assigns to carry out their constitutional and statutory responsibilities in line with Articles 1, 10(2) (b), (C) & (D), 28, 40(1), 42, 43(1) (B), 64, 66, 69 and 70 of the Constitution of Kenya 2010, the Sectional Properties Act No. 21 of 1987 (Revised Edition 2012) and provisions of the Nairobi City County Solid Waste, Management Act, 2015 No. 5 of 2015 in order to restore command, dignity and sanity on L.R. No. 209/12577 now Sectional Title Number Nairobi/Block 51/184 including demolition orders directing that all illegal structures inside and on the surrounding areas/boundaries and drainage systems of the suit property be demolished.

ii. An order of judicial review of MANDAMUS do issue to compel the respondents to immediately release to the petitioner/applicant the sectional plan/the owners sectional plan no. certificate of survey stating the structure in the plan and certificate of local authority of the units structure on L.R. No. 209/12577 now Sectional Title Number Nairobi/Block 51/184 to the petitioner/applicant.

iii. An order of judicial review of MANDAMUS do issue to compel the 1st respondent, its agents, staff, employees, servants and/or assigns to immediately pay all outstanding annual land rents and interest accrued on L.R. No. 209/12577 now Sectional Title Number Nairobi/Block 51/184, conducts satisfactory repairs on the main underground water tank reservoir, waterproofing of all units roofs, install solar panel or energy on the units roofs, boundary live fences, compensates unit owners for the costs of repairs of damaged units and common areas on the suit properties.

iv. An order of declaration do issue declaring the petitioner is a management Corporation for purposes of enforcement of the Sectional Properties Act No. 21 of 1987 and the corporation by-laws and regulations on L.R. No. 209/12577 now Sectional Title Number Nairobi/Block 51/184.

v. An order of judicial review of MANDAMUS do issue to compel the 1ST respondent to immediately hand over the mother title and property known as parcel number 209/12577 now Sectional Title Number Nairobi/Block 51/184 to the management corporation.

vi. A declaration do issue declaring and or nullifying that the selling and subletting of the Community Center/Hall/Amenity to Nairobi Miracleland Worship Church a non-Unit owners is null and void ab initio.

vii. General and punitive damages and costs of the petition against the respondents jointly and severally.

viii. Any other/further order or relief that this Honourable court may deem fit to grant.

Petitioners' case.

3. The petitioner's members contend that they are owners of units of houses constructed on L.R. No. 209/12577 measuring 3.076 hectares. The units are comprised on a block of apartments whose ownership is governed by the provisions of the Sectional Properties Act No. 21 of 1987. It is the petitioner's contention that the 1st respondent has failed to surrender the mother title to the petitioner, that the 1st respondent has failed to incorporate a corporation to manage the estate as envisioned under the Sectional Properties Act No. 21 of 1987 and that the 1st respondent has failed to maintain the estate in good state of repair.

4. The 1st respondent is also accused of failing to pay annual land rent to the Ministry of Lands; failure to install solar water heaters, failure to maintain an underground tank and for refusing to refund the house owners who have repaired their units using their own resources.

5. The petitioner also accuses the 1st respondent of failure to ensure that there are no additional structures erected on the common areas, failure to submit land plans including block plans showing the positions of the buildings and systems of drainage for disposing of sewage and other waste waters, failure to ensure that the land and buildings are only used for residential purposes and failure to ensure that not more than 50 percent of the area is covered by buildings.

6. The petitioners further accuse the 1st respondent for failure to pay taxes or rates which are provided for in law, neglecting to pay cost of constructing and maintaining roads, drainages and sewers serving or adjoining the land, costs of electricity and water serving the common areas and breaching the provisions of Private Security Regulation Act No. 13 of 2016 and Nairobi City County Solid Waste, Management Act No. 5 of 2015.

7. The petitioner further accuses the 1st respondent for allowing the land to be used for dangerous or offensive purposes, parking of private and commercial vehicles in the compound in undesignated spaces and areas and allowing erection of buildings which interfere with the existing alignments, subletting the units', Community Hall to a church which does not own any unit and generally exposing the unit owners to ridicule and suffering.

8. On the part of the 2nd respondent the petitioners accuses the 2nd respondent for failing to oversee the overall delivery of services including provision of clean water and solid waste management. The 2nd respondent is also accused of failing to improve the dilapidated support infrastructure facilities in the estate, failure to provide a clean and healthy environment, failing to control public nuisances in the estate and allowing animals to be kept in the estate.

9. The 2nd respondent is also accused by the petitioners for failing to promote accountability to the unit owners, failing to ensure that there are no additional structures erected within the estate and for failure to ensure that the 1st respondent maintains the units in good repair and condition. The 2nd respondent is further accused of failing to tame the wanton destruction of public roads and drainage infrastructure in and around the estate, failing to stop construction of kiosks on top of drainage lines and allowing the common areas to be used for dangerous or offensive purposes. The 2nd respondent is further accused for allowing of parking of private and commercial cars and vehicles in the compound in undesignated areas or places.

10. The petitioners also accused the 2nd respondent for failure to compel the 1st respondent to install solar panels on top of their units and maintaining the underground water tank and for failure to comply with the Nairobi City County Solid Waste Management Act No. 5 of 2015 as well as the Private Security Regulation Act No. 5 of 2015. Finally the petitioners accuse the 2nd respondent for failing to ensure that the 1st respondent ensures that the properties are only used for residential purposes.

The 1st respondent's case.

11. The 1st respondent contends that the petitioner has no locus standi to bring this petition on behalf of the 254 Unit Owners as it is not a Management Corporation as envisaged under the Sectional Properties Act No. 21 of 1987. The 1st respondent further contends that it sold all the 254 units by 2007 and that it is the petitioner which has refused to co-operate with it to incorporate a Management Corporation as envisaged under the Sectional Properties Act No. 21 of 1987. The 1st respondent denies that it is responsible for payment of land rent as the same was passed on to the unit owners upon sale of the units.

12. The 1st respondent further denies that it is the one responsible for control over buildings and structures erected at the common areas and that it is the one responsible for ensuring that the land and buildings are only used for residential purposes or that it is the one responsible for maintenance of the buildings in good repair.

13. The 1st respondent further contends that it submitted all the land plans and sectional plans to the Ministry of Lands and that they have been pursuing the same as can be seen through correspondence to the Ministry of Lands written in 2018. On the issue of installations of solar panels, the 1st respondent argues that the requirements came in 2012 whereas it had sold the units by 2007 and is therefore under no obligation to install solar panels for the petitioners' members.

14. As regards the alleged lease of the Community Hall, the 1st respondent denies being privy to the alleged sale or lease to a church organization. On the issue of taxes, the 1st respondent denies that it is its obligation to pay taxes and further that it is its responsibility to construct and maintain roads and drainage and sewers adjoining the estate. On the issue of parking, the 1st respondent denies that it is the one responsible for parking arrangements or ensuring that the buildings are secure and free of offensive and dangerous activities.

15. As regards the title, the 1st respondent contends that the petitioner lacks capacity to handle the title and that its officials want the title for their own ulterior motives. The 1st respondent therefore submits that the petitioner's petition lacks merit and should be dismissed with costs.

The 2nd respondents case.

16. The 2nd respondent contends that the petitioner's petition is frivolous and misconceived. The 2nd respondent argues that the estate is a private estate but the respondent has gone out of its way to allow a youth group to collect garbage from the estate. The respondent argues that the petitioner's members have never approached the 2nd respondent with any complainants about the environment. The 2nd respondent further argues that it is not privy to the roles played by the 1st respondent and cannot therefore supervise them. The 2nd respondent denies any role in the management or transfer of the units to their respective owners.

Response by the petitioner to replying affidavits of the respondents

17. In answer to the 1st respondent's contention that the petitioner has no locus standi to bring this petition, the petitioners contend that as a registered association, it has mandate to represent the welfare of its members and this mandate stems from the Urban Areas and Cities Act 2011. On the issue of incorporation of a Management Corporation, the petitioners contend that the 1st respondent ought to have transferred the management to the petitioners after selling 51 units.

18. The petitioner contend that all the neighboring estates such as Jericho, Kimathi, Jerusalem, and Bahati have had their drainage systems upgraded and that they are the only ones left behind. The petitioners further argue that though the estate is private, that does not entitle the 2nd respondent to abdicate its duties.

Analysis and issues for determination

19. I have carefully considered the petitioners petition, the opposition to the same by the respondents as well as the submissions by the parties. The petitioner alleges that its members constitutional rights under Articles 1 (3), 10(2) (c) and (D), 22, 23, 28, 40(1), 42,43(1) (B) , 64, 69, 70 and 165 of the Constitution have been violated. As can be seen from the reliefs by the petitioner, most of the reliefs are of a judicial review in the nature of mandamus.

20. The scope and efficacy of an order of mandamus was captured in the Court of Appeal decision in the case of **Kenya National Examination Council – Vs- Republic Ex-parte Geoffrey Gathenji NJoroge & 9 Others** where the Court of Appeal stated thus:-

“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS” Once again we turn to HALSBURY’S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 paragraph 89. That learned treatise says:-

“ The order of mandamus is of most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end and that justice may be done, in all the cases where there is specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

“At paragraph 90 headed “the mandate” it is stated: “The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be at once. Where a statute, which imposes duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean “They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to extend the duty to be performed....”

Whether petitioner has locus standi.

21. I will deal with the issues in light of the guiding principles for grant of an order of mandamus. Before I deal with the issues touching on the reliefs sought, I will address the issue of locus standi. The 1st respondent has submitted that the petitioner has no locus standi to bring up

this Constitutional Petition on behalf of the Unit Owners at Maringo Estate. The 1st respondent submits that there are other Associations undertaking various activities on behalf of the Unit Owners and that it is not known on whose interest the petitioner is agitating this petition.

22. The 1st respondent gives the other entities as Maringo KP & TC Estate Home Owners Association, Maringo Teleposta Residents Management Limited, Maringo Welfare Association and Maringo Teleposta Welfare Association. In response to this submission, the petitioners contend that the issue of locus standi does not arise because the period post 2010 Constitution has expanded the scope of locus standi which includes incorporated and unincorporated entities. The petitioner being a duly registered society under the Societies Act is allowed to agitate the rights of its members.

23. Article 260 of the Constitution defines a person to include a company, association or other body of persons whether incorporated or unincorporated. It therefore means that the petitioner being an association duly registered under the Societies Act is mandated to file a constitutional petition alleging that the constitutional rights of its members have been infringed. I therefore find that the petitioner has locus standi to bring this petition.

Whether the petitioner's members rights under Article 40(1) have been violated.

24. Article 40(1) of the Constitution provides as follows

1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--

***(a) of any description; and
(b) in any part of Kenya.***

The petitioner has not stated in what manner the rights of its members have been violated under the above stated Article. Each of the 254 Unit Owners bought their units from the 1st respondent. There is no intention to deprive any of the Unit Owners their entitlement. What the petitioner is complaining about has nothing to do with infringement of Article 40(1) of the Constitution. I therefore find that the petitioners rights under Article 40(1) have not been infringed.

Whether the petitioner should be declared as a management corporation for purposes of enforcement of the Sectional Properties Act No. 21 of 1987.

25. The petitioner contends that the 1st respondent has failed to incorporate a Management Corporation for purpose of running the affairs of the estate as envisaged under the Sectional Properties Act No. 21 of 1987. Incorporation of a Management Corporation is envisaged under Section 17 of the Act which states as follows;

1) On the registration of a sectional plan there shall be constituted a Corporation under the name "The Owners, Sectional Plan No. (the number to be specified being the number given to the plan on registration)".

2) A Corporation shall consist of all those persons-

a) Who are the owners of units in the parcel to which the sectional plan relates; or

b) Who are entitled to the parcel when the sectional arrangement is terminated under this Act.

3) The Corporation shall have perpetual succession and a common seal.

4) The Corporation shall be regulated in accordance with this Act and the by- laws specified in the regulations shall subject thereto, have effect in relation to the corporation and its board.

5) The provisions of the Companies Act (Cap. 486) shall not apply to the Corporation.

26. It is clear from the provisions of Section 17 quoted hereinabove that the establishment of a Management Corporation is a process governed by the Act. The Management Corporation can only come into effect upon registration of a Sectional Plan. The evidence herein shows that the Sectional Plan is yet to be registered by the Ministry of Lands and there is no power given to the court to give such powers to any other entity other than the Corporation whose functions are spelt out in Section 20 of the Act. The court cannot therefore declare the petitioner as a Management Corporation.

Whether an order of mandamus should issue compelling the 1st respondent to hand over the mother title to the petitioner.

27. The person to hold the title is again an issue of statutory requirement. Once the 1st respondent completes the process of registration of the Sectional Plans and a Management Corporation is in place, the Act contemplates that title shall be held by the corporation as this is the body given the other powers to deal with the management of the common areas including insurance issues. There is therefore no way the court can give an order compelling the 1st respondent to hand over the mother title to the petitioner which is not a corporation as known under the Act.

Whether the petitioner's members rights under Article 43(b) were violated.

28. Article 43(b) provides that every person has a right to accessible and adequate housing and to reasonable standards of sanitation. The petitioner contends that its members rights under this Article have been violated. The petitioner's members are purchasers of units which were sold to them by the 1st respondent. The units range from one bedroom apartment to four bedroom apartments. The petitioner cannot therefore be heard to complain that its members right to accessible and adequate housing have been violated. The cases relied by the petitioner in its submissions particularly the South African cases were in respect of people living in informal settlements who had petitioned the Government to provide housing for them. This is not the case herein where the petitioner's members have purchased their own houses.

29. The petitioner has made general complaints on the state of sanitation within the estate. The Constitution provides that every person has a right to reasonable standards of sanitation. The petitioner's members have piped water which is provided by the 2nd respondent. They are connected to sewer line provided by the 2nd respondent. The pictures attached to the petition clearly show that the petitioners members have piped water and are connected to a sewer line. The houses are individually owned. There is even an underground tank and some house owners have tanks mounted on the roof top of the apartments. The petitioner cannot therefore claim that its members have been denied their right to reasonable sanitation. The 2nd respondent has gone out of its way to collect garbage from the estate which is privately owned and managed.

Whether the petitioner's members rights to clean environment has been violated.

30. The petitioner contends that the 2nd respondent has abdicated its duty of ensuring that the petitioner's members enjoy their right to clean environment. The 2nd respondent has stated that it collects garbage from the estate through a youth group even though the estate is privately owned with its own management arrangements. This has not been denied by the petitioner. If there are persons who have interfered with the drainage within the estate by constructing illegal structures, then this is a management issue which should be sorted by the members themselves. The 2nd respondent has not been engaged or its intervention sought to remove such structures. What the petitioners have only exhibited is a complaint letter addressed to the Governor of Nairobi City County.

31. The units having been sold out by 2007 by the 1st respondent, it was incumbent upon the petitioner's members to organize themselves and address the issue of the environment now that a Management Corporation is not in place. This was the holding in the case of **Vincent A. Chokaa & Another –Vs- Changdu Guangling Kenya Co. Ltd & 3 Others [2016] eKLR** where the court found that in a case where the Management Corporation is not in place, the house owners are under duty to mitigate their problems by letting whoever is managing the houses to do so.

32. The houses are individually owned. Neither the 1st nor the 2nd respondent can be expected to maintain a clean environment without the co-operation of the petitioner's members. It is the duty of the petitioners members to maintain a healthy and clean environment pending the establishment of the Management Corporation which will address some of the issues as the 2nd respondent also does its bit as it is doing with collection of garbage.

33. Article 69 of the Constitution obligates the state to encourage public participation in the management of, protection and conservation of the environment. Pursuant to this Article, the 2nd respondent through the County Assembly enacted the Nairobi City County Solid Waste Management Act No. 5 of 2015. Under this Act, the 2nd respondent is mandated to directly or indirectly undertake the collection of solid waste from the streets and any other public places. This Act obligates owners of the houses to clean the area around their houses to the extent of a ten metres radius but which shall not include a main road or street.

34. The petitioner now contends that the 2nd respondent is not undertaking its duties as provided for under the Act. As I have said hereinabove, Maringo Estate is a private estate and the petitioner cannot expect the 2nd respondent to clean it for them. The role of the 2nd respondent is complimentary in nature and the Act gives discretion to the 2nd respondent to carry out limited work like it is doing by collecting solid waste through a youth group. An order of mandamus cannot therefore issue in the circumstances. The duty of the 2nd respondent is only confined to public places and streets and not to individual houses. In the case where the owners want to have their waste collected by the 2nd respondent, the owners have to pay for the services.

Whether the petitioner's members rights to human dignity have been violated.

35. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity respected and protected. The petitioner has not demonstrated how its members right to dignity has been violated. The petitioner's members are owners of their own houses which were purchased from the 1st respondent. They are not living in a slum as to complain that their dignity and right to protection of their dignity has been violated. The petitioners have misapprehended the context in which the UN Convention touching on dignity and decent living have addressed the issue of dignity. The decisions relied on by the petitioner are not applicable in the circumstances as far as the right to dignity is concerned.

36. The petitioner wants the respondent compelled to pay rates and rent to the relevant authorities. There is no statute which obligates the 1st respondent to pay rates or rents on behalf of the petitioners. The problem here is a management issue. The 1st respondent sold out the units to the petitioner's members. Under the Sectional Properties Act No. 21 of 1987, there is a way in which rates and rents are to be assessed. Each unit is taken as a separate house but for the purposes of convenience the rates and rents are supposed to be paid on behalf of the Unit Owners by the Management Corporation. Now that the Management Corporation is not in place, the petitioner's members are supposed to organize themselves and share the rates due. The petitioner cannot expect the rates to be paid by the 1st respondent when already it has sold the units whose ownership is with the petitioner's members.

37. Neither the 1st nor the 2nd respondent can move to the estate and determine on how vehicles are to be parked within the estate. If commercial vehicles are being parked within the estate and in undesignated places, this is again a management issue just like the estate being used for offensive activities. This cannot be a constitutional issue to be sorted out by either the 1st and 2nd respondents.

38. The petitioner is complaining that its Community Hall has been either leased out to a church or sold out. Again this is a management issue. The petitioner cannot turn this into a constitutional issue which requires reliefs which are ordinarily given in constitutional petitions. This court cannot nullify the lease or sale without any background basis as to how such lease or sale came about. In any case, this is not a matter which should be sorted out through a constitutional petition.

Conclusion

39. The petitioners have failed to demonstrate that the respondents have abdicated their statutory duties as to call for this court to grant orders of mandamus in the manner prayed for. It therefore find that this petition fails and it is hereby dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi on this 30th day of January 2020.

E.O. OBAGA

JUDGE

In the presence of:

Mr. Omondi and Mr. Ondieki for petitioner

M/S Kioko for 1st respondent

M/S Ngoya for 2nd respondent

Court Assistant: Waweru

E. O. OBAGA

JUDGE