



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC PETITION NO. 17 OF 2015

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLE 40 OF THE CONSTITUTION OF KENYA**

M' MUNORU M' MUGWONGO.....1ST PETITIONER

FESTUS KABERIA M'MIRINAGA.....2ND PETITIONER

THE ESTATE OF THE LATE JASON KUBAI M'KIORU

(suing through widows and administrators of the estate:

MARGARET KANARIO & ANN NCHORORO.....3RD PETITIONER

VERSUS

COUNTY GOVERNMENT OF MERU.....RESPONDENT

JUDGMENT

1. The petitioners have identified themselves as residents of Kiengu Market. They filed this petition dated 13.7.2015 alleging that on various dates in the year 1990, they successfully applied to the defunct Nyambene County Council for the allocation of plots within Kiengu Market and were thus allocated Plots No. 47 to the 1st Petitioner and Plot No.48 to Jason Kubai M'Kioru (now deceased), whose estate is the 3rd Petitioner.
2. The 1st Petitioner would thereafter subdivide his plot No. 47 vide minute No. Ncc/8/96 dated 03/09/1996 into two sections Plot 47a and Plot 47b. He developed plot 47a by building 6 permanent shops which now have an estimated value of Kshs 5,500,000/=. The 2nd petitioner was allocated plot No. 47b to which he built 6 shops now valued at Kshs. 6,300,000/=. Jason Kubai M' Kioru (now deceased) would develop Plot No. 48 by building 6 shops currently valued at Kshs. 7,000,000/=.
3. The petitioners allege that they followed all the necessary steps in the application and allotment of the plots and they were paying rates to the defunct Nyambene County Council and to the Respondent.
4. The 1st petitioner has availed minutes of the council of 3.9.1996, photographs of his permanent structures, receipts that show payments of rent and rates to the City Council from the year 1993 and to the respondent, Certificate of indication of plot numbers issued by the said Council and the notice of demolition. He has also attached a letter from the then Clerk of Nyambene County which sought to evict one William Meme from Plot No. 47A in the year 1998 in order to pave way for the construction of the permanent structures.
5. The 2nd Petitioner has attached a letter of allotment for plot 47B, plot rent receipts and a copy of the building plans. He has also attached minutes that granted them permission to subdivide the ownership of Plot 47 to read Plot 47 (a) M'Munoru M' Muguongo and Plot 47 (b) Festus Kaberia.
6. The third petitioner has availed documents indicating the plot number, building plans as well as photographs of the suit premises.
7. The Petitioners aver that during the year 2003, when all the illegally constructed buildings were earmarked for demolition theirs were not affected, and they didn't also feature in the Ndungu Commission investigation. However, on 10.04.2015, officers from the respondent came to their commercial plots and earmarked them for demolition for having been illegally built. This was followed by the advertisement of the demolition of the suit premises on 24.06.2015 pursuant to the provisions of the Constitution of Kenya and Section 38 of the Physical Planning Act.

8. The petitioners therefore prayed for orders that the rights conferred to them by the defunct Nyambene County Council must be extended, promoted and respected by the respondent. They also sought for a declaration that their respective plots numbers 47a, 47b and 48 are privately owned property. As such, they should not be deprived of the suit properties arbitrarily. In the event that the respondents were to take over and demolish the suit plots and developments thereon, then the petitioners should be adequately compensated in the following manner:-

(i) 1st Petitioner – Kshs 5,500,000/=

(ii) 2nd Petitioner-Kshs 6,300,000/=

(iii) 3rd Petitioner-Kshs 7,000,000/= plus costs of the suit.

9. The Respondent opposed the petition via the replying affidavit (dated 27.7.2018) of one **Elizabeth Mburu** who is the Director Physical Planning in the department of Lands Physical Planning and Urban Development of the respondent herein. She averred that the Suit plots were illegally carved out of the open air market (Kiengu) by the petitioners which market is now overcrowded and small. She contends that the original Kiengu market layout does not have the said plots, hence the reason for marking the said plots for demolition and that the notice issued to the petitioners was only courtesy of compliance with the dictates of the Physical Planning Act (cap 286) of the laws of Kenya.

10. The respondent further states that no allocation of land ever took place, that there were no letters written by the petitioner seeking allocation of the respective plots, no minutes of either the District Plots allocation Committee or the Respondent and there were no allotment letters. The petitioners have thus failed to show how Kiengu market ended up to be excised to create Personal Plots and therefore, they have no proprietary rights in respect of the said plots.

11. The respondent contends that the annexures in support of the petition do not support the petitioners claim. In particular, the certificates indicating the plot numbers do not bear the signatures of either the 1st or 2nd Petitioner. The receipts alleged to be issued by the Respondent do not bear dates, the postal address do not belong to the Respondent and that annexure FK5 availed by the 2ND Petitioner is entirely tailor made.

12. The respondent also stated that in public interest, the structures on the plots have to be demolished to pave way for an open air market and in compliance with Article 60 (1) (c) of the Constitution of Kenya and the dictates of the Physical Planning Act, since changes have now been done on the original market allowing excision of the open air market.

13. On 18/3/2019 this Court directed that the parties canvass the petition through written submissions. Both parties have since filed their respective petitions which I have dully considered.

14. In their submissions, the petitioners restated their claim and relied on the import of Section 40 of the Constitution.

15. The Respondent on the other hand has submitted that the plots formed part of the market entrusted to the predecessor of the Respondent which under section 182 of the now repealed Cap 265 was not meant for alienation. In support of this point, the respondent relied on the case of **Niaz Mohammed Janmohammed vs the Commissioner of Lands and 4 others 1996 ECLR**.

16. It was also submitted that under section 29 of the Physical Planning Act, the mandate of physical planning lies with the Local Authority and that section gives the Local Authority exclusive mandate to control the development within its area of jurisdiction. That under Section 10 of the Act, persons aggrieved by the decision of the local authority or any liaison committee are to appeal to the National Liaison Committee and since the law is couched in mandatory terms the only recourse is in an appeal.

17. The Respondents therefore decried the petitioner's entitlement to compensation and stated that they actually grabbed the land as opposed to it being acquired legally. The respondents also relied on the cited cases of:

- **Mureithi & 2 others vs Attorney General & 5 Others Nbi Hcma No. 158 of 2005 (2006) 1 KLR 443.**
- **Joseph Tobiko Kelemu vs Cooperative Management Committees of Emparnet Farmers Dairy Co-operative Society Limited (2017) eCLR.**
- **Stephen Nyarangi Onsuma & another vs George Magoha & 7 others (2014) eCLR.**

ANALYSIS AND DETERMINATION

18. The issues which have emerged for determination are; **whether this court has jurisdiction to hear the matter, whether the suit land is public or private land and whether the petitioners are entitled to any relief.**

Jurisdiction

19. The petitioners have relied on Article 40 of the Constitution which makes provision for the protection of the right to property. The Respondent on its part relies on the provisions of **Section 38 of the Physical Planning Act** where it is provided that;

“Enforcement notice

(1) When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.

(2) An enforcement notice shall specify the development alleged to have been carried out without development permission (emphazise added)....., or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

(3) Unless an appeal has been lodged under subsection (4) an enforcement notice shall take effect after the expiration of such period as may be specified in the notice.

(4) If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice he may within the period specified in the notice appeal to the relevant liaison committee under section 13.

(5) Any person who is aggrieved by a decision of the liaison committee may appeal against such decision to the National Liaison Committee under section 15.

(6) An appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court.

(7) Any development affecting any land to which an enforcement notice relates shall be discontinued and execution of the enforcement notice shall be stayed pending determination of an appeal made under subsection (4), (5) or (6)".

20. A scrutiny of the notice given by the respondent indicates that the issue was **about encroachment on road reserves**. The contents of the replying affidavit of Elizabeth Mburu are not in tandem with the said notice. Indeed, the case for the respondent is that the suit land was illegally acquired. It follows that the issues at hand are not in the ambit of the dispute resolution mechanism set out under the Physical Planning Act.

21. The ELC was established pursuant to Article 162 (2) (b) of the Constitution of Kenya, 2010 which conferred power on Parliament to establish a court with the status of a High Court to hear and determine disputes relating to environment, the use and occupation of, and title to land. Section 13 (1) of the ELC Act has given the Environment and Land Court original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the constitution and the provisions of the ELC Act and any other written law relating to environment and land. (See, Christopher Wafula Mutoro v Richard Lordia Lokere [2017] eKLR.)

22. Section **40 (3) of the Constitution of Kenya** provides that;

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

23. The issues raised by both parties relate to the acquisition of land. The petitioners have been in occupation of the suit premises hence they have an interest in the land. The Respondent expressed its intention to demolish the said suit premises. Within the meaning of the **ELC Act** as well as **Article 162 and 40 of the Constitution**, this court has jurisdiction to entertain the petition.

Whether the suit land is private or public land

24. Section 107 of the Evidence Act provides that;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

25. There is a clear indication that the petitioners herein have been in permanent occupation of the suit land from the time they were allegedly allocated the same and when they constructed thereon. Going by the documents availed by the petitioners, this occupation/acquisition occurred way back in 1994, which is a period of over 20 years up to the time the petitioners were threatened with

demolition of their premises in June 2015. The petitioners have developed the premises and they have been paying rates to the respondent.

26. **Section 144** of the now repealed **Local Government Act Act Cap 265 Laws of Kenya** granted the Council's powers to deal with the acquisition of land. **Section 144(6)** granted the council powers to sell land in its possession. The same provided as follows;

“(6) Subject, in the case of land acquired in pursuance of subsection (2), to the provisions of the Land Acquisition Act, or to any written law replacing that Act, a local authority may, with the consent of the Minister—(a) sell any land which it may possess and which is not required for the purpose for which it was acquired or being used; (b) exchange any land which it may possess for other land, either with or without paying or receiving any money for equality of exchange”.

27. The averment by the Respondent therefore that the Respondent did not have the capacity to deal with the land is unfounded.

28. Whereas the petitioners have not attached the initial minutes that granted them the land, it is clear that it is on the basis of the first acquisition that they were able to pay land rates for the suit premises. It is also on the same basis that Plot No. 47 was subdivided into two plots. The subdivision was done at the behest of the defunct Nyambene Council. It is also peculiar that the Respondents have been collecting land rates and allowing the petitioners to carry on their business in the premises for close to 16 years in the pre-2010 constitution and for 5 years in the current constitution. Even if the transitional period was taken into account such that it may have taken considerable time before the Respondents commenced their duties as counties, the same does not justify the delay in instituting the enforcement notices against the petitioners. The delay has not been explained.

29. The Respondents have also not proved the alleged fraud and illegal encroachment of the suit land. Despite the allegation that the petitioners wrongly encroached onto the premises, the respondents have not attached any documentation to prove the wrongful encroachment and how it was perpetrated.

30. The indication given in the alleged **enforcement notice of June 2015 in a publication known as the County Times News** was to **demolish all developments encroaching on road reserves**. The notice has nothing to do with illegally acquired land, or that the Respondents wished to create the open air market based on the new physical plans or that the developments thereon were wrongly undertaken without the permission of the Respondent.

31. In the case of **Geoffrey K. Imathiu and Others vs. Meru county Government Meru elc no. 64 of 2004**, I was dealing with an almost similar case where the respondent had issued a notice to rate defaulters in a publication known as the EYE, but went ahead to demolish the property of the claimants at Thege Market in Meru. In that case, I observed that the respondent was not raising the issue of ownership or trespass in the notice. Likewise, in the instant suit, the respondents ought to put the correct information in their notices.

32. My conclusion on this point is that the beneficial interests in the suit plots lies with the petitioners and therefore any acquisition of the same by the respondent must be in accordance with the law applicable. I must also add that the respondent ought to embrace the principles of fair administrative action as well as legitimate expectation. The respondent has certainly been aware of the existence of the petitioner's properties. The buildings are visible and respondent has been levying rates upon the suit premises even by year 2013. If the respondent has reason to believe that the suit land was illegally acquired, then they ought to set in motion a lawful process to deal with the issue where the rules of natural justice are upheld.

The relief

33. The upshot of this determination is that the petitioners have proved their case on a balance of probabilities. This court therefore makes the following Orders;

(1) A declaration is hereby issued that the rights conferred to the petitioners by the defunct Nyambene County Council must be extended, promoted and respected by the respondent.

(2) A declaration is hereby issued that the 1st Petitioner's plot No. 47 a, 2nd Petitioners plot No. 47 b and 3rd Petitioner's plot No. 48 all within Kiengu Market and the developments thereon are private property and they should not be deprived of the same, unless there is adequate compensation.

(3) The respondents are condemned to pay costs of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 29TH JANUARY, 2020

IN THE PRESENCE OF:-

C/A: Kananu

Muriuki K. holding brief for Mbogo for petitioner

Maranya holding brief for Kiunga for respondent

HON. LUCY. N. MBUGUA

