



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO. 56 OF 2015

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010 ARTICLES 22, 23, 174 (h) & (i) AND PART 2 OF THE FOURTH SCHEDULE

AND

IN THE MATTER OF: THE PHYSICAL PLANNING ACT (CAP 286) LAWS OF KENYA & THE COUNTY GOVERNMENT ACT NO. 17 OF 2012

BETWEEN

THE COUNTY GOVERNMENT OF MOMBASA.....PETITIONER

VERSUS

WESTLANDS PROPERTIES LIMITED.....1ST RESPONDENT

MOMBASA COUNTY POLICE COMMANDER.....2ND RESPONDENT

THE ATTORNEY GENERAL..... 3RD RESPONDENT

RULING

Introduction

1. The Petitioner in this case filed an application dated 28th September, 2015 seeking the following orders: -

- a) This Application be certified urgent and be heard/considered *exparte* in the first instance.
- b) An injunction be granted to restrain the Respondents, their servants, agents and or employees from carrying out any developments, excavatory works, building of boundary/perimeter walls or any other related construction works on **Plot Numbers MN/VI/1227, 1228, 1229 and 1230** in Changamwe area within Mombasa County pending the hearing and determination of the Petition filed herein.
- c) A conservatory order be issued, to maintain the status quo existing on the ground in respect of properties known as **MN/VI/1227, 1228, 1229 and 1230** namely, that no construction works of whatever nature, developments and or building of a boundary/perimeter wall in or around the said properties should proceed beyond the current status until the hearing and final determination of the Petition filed herein.
- d) An order that prayers (b) and (c) above be granted and to remain in force until the hearing of this application *interpartes*.
- e) Costs of this application be provided for.

2. The Court proceeded and granted the conservatory orders on 30th September, 2015. The Petitioner's/Applicant's case may be gathered from the Petition as well as the Affidavits sworn in support of the Petition sworn by Francis Thoya on **28th September, 2015**.

3. It is the Petitioner's Case that on 22nd September, 2015 the deponent received information from the Member of Parliament, Changamwe Constituency Hon Omar that some persons in the company of Police Officers had descended upon the residents of Dunga Unuse Area. That he was well aware of the matter and that all matters relating to demolition of buildings fall within the purview of the County Government

which has to receive an application of the intended exercise for the County to either approve or make such recommendations in accordance with the Environment Act with regard to settlement of persons to be affected. The Deponent further avers that he proceeded to the affected areas and met the Director of Criminal Investigations Department, a lady from Changamwe whose name he was not given. The Lady then informed the Deponent that demolition was being carried out pursuant to a court order which was in possession of the court Bailiff issued in Mombasa CMCC No. 3134 of 2010 and that whereas the order made reference to Plot Numbers MN/VI/1227 to 1230 only the demolishers went beyond. However, upon pointing that out the error demolition was called off as the DCIO then asked the Court Bailiff to go and determine the respective boundaries of the affected plot.

4. On 26th September, 2015 the 1st and 2nd Respondent proceeded to the same area and demolished the dwelling houses that had previously been spared, constructed a perimeter wall and commenced construction works thereon. Consequently, the deponent caused notice to be issued to the 1st Respondent for their failure to apply for and obtain consent from the Petitioner as there were human settlements involved, which dictated that evictions be done humanly and that when executing the court order the 1st Respondents actions ought to have been done with regard to other laws and constitutional safeguards of those to be affected.

5. The Deponent avers that upon inquiry, the OCPD told the deponent that the OCPD was under strict instructions to ensure that the area was fully fenced with a complete boundary wall and any construction should not be interrupted in any manner. The OCPD was unhelpful in resolving the matter.

6. The Ex parte Applicant states that the 1st Respondent has never applied for any planning permission from the relevant department of the Petitioner for the commencement of its construction works on the suit property and that therefore all the construction works and other buildings and structures that the 1st Respondent continues to erect on the subject property are all being done without any approvals and or permission from the Petitioner which is the body constitutionally mandated to approve and give such development permission.

The Response

7. The Respondents opposed the Petition by way of a Replying Affidavit sworn by **Joseph Muthee** on **22nd October, 2015** on behalf of the **2nd and 3rd Respondents**. He avers to be the OCPD Changamwe. The Respondents state that the OCS received a court order from the Court Bailiff dated 18th September, 2015 asking him to ensure vacant possession on the suit land. The authenticity of the Order was confirmed by S. W Otieno a Senior Executive Officer at Mombasa Law Courts. The said eviction was carried out on 22nd September, 2015 and no injury was occasioned to any person. He further avers that his sole duty was provision of security as per the court order.

The 1st Respondent's Application

8. In what maybe a further response to the Petitioner's application, the 1st Respondent further filed an Application dated 7th October, 2015 seeking the following orders: -

- a) The Application be certified urgent and service thereof be dispensed within the first instance due to the said urgency.
- b) The Honourable Court be pleased to stay its order of injunction given on the 30th September, 2015 pending the interpartes hearing of this application.
- c) This Honourable Court be pleased to discharge, vary or set aside the ex-parte orders of injunction issued herein by court on the 30th September, 2015.
- d) Costs of this application be awarded to the 1st Respondent.

9. The Application is supported by affidavit of **Reuben Gikonyo Muno** sworn on the same date in which he avers to be a Director of the 1st Respondent and that the Application is made seeking ex parte orders to set aside the orders of the Court directing that the Respondents be restrained from carrying out any developments, excavatory works, building of boundary/perimeter walls or any other structures of any kind in the suit property. The deponent further avers that this Court was misled by the Petitioner as the 1st Respondent is the Legal owner of the suit land. A certificate of title was attached. The 1st Respondent's case is that upon noticing unauthorised habitation on the property the 1st Respondent obtained an order from Court in Mombasa CMCC No. 3134 of 2010 to properly evict the persons illegally dwelling on the property and to carry out demolitions and in enforcing that order the 1st Respondent requested the 2nd Respondent as a custodian of security to assist in the eviction. In exercising its constitutional right to privacy as envisaged under Article 31 of the Constitution the 1st Respondent saw it fit to construct a temporary perimeter wall around the property and notified the Petitioner for necessary approvals but the Petitioner ignored the application.

10. The 1st Respondent avers that the Petitioner is politicizing the matter while making unsubstantiated allegations in the media and accusing honourable people of perpetrating illegalities on the property while the actions of the Respondents were in full compliance with the law. That the County Execyutive Committee Member for Land, Planning & Housing one Mr. Thoya has gone on a media rampage to undermine court's authority by encouraging county residents not to comply with court orders issued and issuing threats to the 1st Respondent.

11. The 1st Respondent avers that a fundamental miscarriage of justice has been occasioned by the issuance of court orders without justification as the property belongs to the 1st Respondent. That the demolitions were carried out strictly within boundaries of the property as per a Survey Report and Deed plan that was attached by the 1st Respondents. The 1st Respondent states that the orders issued by this court enhances constitutional violation of the 1st Respondent's right to protection of property envisaged under Article 40 of the Constitution.

Petitioner's Response to the 1st Respondent's Application

12. The Petitioner opposed the 1st Respondent's Application by way of a Replying Affidavit sworn on **20th November, 2015** by **Francis Thoya** who avers to be the County Executive Member of the Petitioner in charge of the Department of Lands, Planning & Housing. He avers to have seen the Court Order issued by the Chief Magistrate's Court on 18th September, 2015 for the first time at the time of filing the Application.

13. The petitioner further avers that the complaints in the Petition against the 2nd Respondent are well founded as the evidence presented by the 1st Respondent supports the Petitioners contention and that this court has not been misled as alleged by the 1st Respondent as the Petitioner has no issue with the 1st Respondent developing the suit property provided it is done legally and within confines of the law fulfilling all necessary requirements.

14. The Deponent avers that the 1st Respondent in its application acknowledges that in order to construct a perimeter wall statutory provisions are required from the County Government and that it has been all along aware that it would be contrary to the law and committing an offence by failing to comply with the Statutory requirements of the Physical Planning Act, Cap 286 Laws of Kenya.

Submissions

15. With the leave of court parties filed submissions to the two applications before the court.

Analysis and Determination

16. I have considered this petition, the two applications before court as well as the submissions by the parties and authorities relied upon. The issue that the court is called upon to decide in the 1st Petitioner's application herein dated 7.10.15 is whether or not it ought to set aside the Conservatory orders granted on 30th September, 2015.

17. The jurisdiction of the Court to review its own orders is provided for in Section 80 of the Civil Procedure Act stipulates: -

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

18. Order 45 Rule 1 of the Civil Procedure Rules is couched in similar terms and goes on to provide the procedure and the conditions that an Applicant must satisfy as follows: -

“45(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

19. The 1st Respondent's Application has failed to demonstrate any discovery of new and important matter or evidence or error that is apparent on the face of the record.

20. For this reason the application dated 7.10.15 fails.

21. However, more importantly, this court finds that the Petitioner's application dated 28.9.15 lacks merit and is dismissed. Consequently, the conservatory orders issued on 30.9.15 are hereby set aside upon the hearing of the said application inter partes.

22. Both applications having failed parties shall bear own costs of the same.

23. Parties are directed to set the petition herein for hearing within 45 days from today.

Dated, Signed and Delivered at Mombasa this 18th day of November, 2019.

E. K. O. OGOLA

JUDGE

In the presence of:

Mrs. Ikegu holding brief Ondego for Petitioner

Mr. Fedha holding brief Makuto for Attorney General

Mr. Kaunda Court Assistant