



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**PETITION NO. 25 OF 2015**

IN THE MATTER OF: ARTICLES 22, 23, 40, 47, 48, 60 AND 165(3) OF CONSTITUTION OF  
KENYA 2010

AND

IN THE MATTER OF: PART III OF THE LAND ACT 2012

AND

IN THE MATTER OF: THE REGISTRATION OF LAND ACT 2012

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS TO OWN PRIVATE  
PROPERTY

**BETWEEN**

DIRECTORS AND SHAREHOLDERS OF  
NAKUMATT INVESTMENTS LIMITED.....PETITIONERS

AND

1. COUNTY GOVERNMENT OF MOMBASA  
2. NATIONAL LAND COMMISSION (NLC).....RESPONDENTS

**JUDGMENT**

1. This Judgment relates to a Petition dated and filed on 28<sup>th</sup> April, 2015 in which the Petitioner sought the following orders -

- (a) This Application be certified urgent and heard ex parte in the first instance.
- (b) The Honourable Court do issue a conservatory order by maintaining “status quo” over land parcel

LR No. MOMBASA/BLOCK XXV/122 pending the hearing and determination of this Application inter partes.

(c) The Honourable Court do issue a conservatory order by maintaining “status quo” over land parcel LR NO. MOMBASA/BLOCK XXV/122 pending the hearing and determination of the Petition.

(d) Costs of the Application be provided for and borne by the 1<sup>st</sup> Respondent in any event.

2.The Petition was supported by the Affidavit of Atul Shah sworn and filed on 14<sup>th</sup> September, 2015 and the Supplementary Affidavit of the said Atul Shah sworn and filed on 14<sup>th</sup> July, 2015 and the grounds on the face of the Petition. In addition, counsel for the Petitioner filed on 17<sup>th</sup> November, 2015 written submissions dated 5<sup>th</sup> November, 2015 and filed highlights dated 29<sup>th</sup> February, 2016.

3. The thrust of the Petitioner’s case, and argument by the Petitioner’s counsel was that the Petitioner is the registered proprietor of the parcels of land known as MOMBASA/BLOCK XXV/122, (the suit land), and framed the issues around it whether the Petitioner is the registered owner holding indefeasible title to the suit land and that the suit land is not public land, and asked the court to so find and hold, and grant the orders sought in the Petition.

4. The Petition was however opposed by the Respondent through the Replying Affidavit of Lucas Okoth Oruko sworn on 27<sup>th</sup> May, 2015 but filed on 28<sup>th</sup> May, 2015. The material part of the Replying Affidavit is paragraph 6 thereof where the deponent says –

**“6. That the approval of the said development plans was however issued on condition that the property to be developed “did not constitute part of public/private land or public utility land” .....(underlining added)”**

5. In addition to the Replying Affidavit, counsel for the Respondent also filed written submissions. The Respondent’s case is not a denial of the Petitioner’s title to suit land. The Respondent’s case is merely that the Petitioner has failed to follow the procedure laid down in the Physical Planning Act (Cap 286, Laws of Kenya) and that for that reason the Petition is incompetent and should be dismissed with costs.

### **Analysis of Arguments**

6. Though the Petition is couched in terms of a Petition against ownership and expropriation of property, the real question in my view, and to be answered is whether the First Respondent’s letter dated 13<sup>th</sup> February, 2015 cancelling the Notification of Approval PPA2 Serial No. 0001485 dated 16<sup>th</sup> December, 2014 of Development Plan P/422/13 on Plot No. 122/XXV/MI is or amounts to expropriation of property contrary to Article 40 of the Constitution and is therefore unconstitutional.

7.To answer this question, it is appropriate to look at the terms of approval dated 16<sup>th</sup> December, 2014, and the letter of 13<sup>th</sup> February, 2015 (the Enforcement Notice). **Firstly**, the terms of the approval of the Development Plan included condition (f) that the land on which the approved plans were to be constructed was not subject to any public or private dispute or claims. **Secondly**, the Enforcement Notice did refer to the condition (f) of the Approval.

8. In his Reply aforesaid, Lucas Okoth Oruko the First Respondent’s Chief Building Inspector depones inter alia that upon receipt of a complaint that the suit land was subject of a dispute, it advised the Petitioner against the commencement of construction on the subject land. The First Respondent also invited the Petitioner’s representatives to go and meet the First Respondent’s Chief Officers for Land Planning and Housing. The Petitioner ignored this advice and invitation. The First Respondent therefore contends that had the Petitioner taken its advice, and taken steps to exhaust the procedure for resolution of planning disputes, there would have been no need for the Petition, which it termed as premature.

9. The question is what does the law on physical planning say about resolution of disputes relating to physical planning? Section 38 of the Physical Act, (Cap 286, Laws of Kenya), provides as follows –

**“38(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, 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 they 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).**

10. What is referred to as the enforcement notice, is a notice served by a local authority (now the County Government) under the said Section 3 and 4 upon the owner, occupier or developer of the suit land requiring the owner, occupier or developer to comply with the provisions of that Section.

11. In this case the enforcement notice required the developer, that is to say, the Petitioner to comply with conditions of the development approval permission, that the land upon which the development was to take place, *“did not constitute part of disputed public/private land or public utility land”*.

12. The enforcement notice advised the Petitioner that the Permission/Approval granted to the Petitioner had been cancelled following a complaint from the Department of Water, Environment and National Resources, and which complaint constituted a dispute.

13. Under Section 38(4) of the Act, a person who is aggrieved by the notice served under subsection (1) is required within the period specified in the notice to appeal to the relevant liaison committee under Section 13 of the Act. Any person aggrieved by the decision of the Liaison Committee may appeal against such decision to the National Liaison Committee as prescribed under Section 15 of the Act (S.38(1)). An appeal against the decision of the National Liaison Committee may be made to the High Court in accordance with rules of procedure for the time being applicable to the High Court.

14. Section 38(7) of the Act requires that any development affecting any land to which an enforcement relates shall be discontinued and execution of the enforcement notice shall be stayed pending determination of an appeal made under subsection (4), (5) and (6) of the Act.

15. Though the provisions of Section (4), (5) and (6) of the Physical Planning Act are expressed in the discretionary language “may appeal to the relevant Liaison Committee” or “may appeal to the National Liaison Committee” what in effect these provisions do, is to provide an elaborate procedure for dispute resolution at the technical level before an appeal as of right to the High Court as provided under subsection (6) of Section 38 of the Act.

16. It is now settled law and judicial opinion that where the Constitution or any law provides a procedure for settlement of disputes, that procedure shall be followed before resort to the High Court or any other procedure provided by law. That is the effect of Articles 50(1) and 159(2) of the Constitution.

**“50(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent or impartial tribunal or body.”**

and Article 159(2) says –

**“159(1) .....**

**(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –**

**(a) justice shall be done to all, irrespective of status;**

**(b) justice shall not be delayed;**

**(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);**

**(d) justice shall be administered without undue regard to procedural technicalities; and**

**(e) the purpose and principles of this Constitution shall be protected and promoted.”**

17. With respect to the Petitioner the issue here is not about the right to or acquisition of property. The Respondent has not questioned that right. By the Enforcement Notice, the Respondent has merely reminded the Petitioner that until it clears the issues pertaining to its title to the property under development, the developmental approval first granted, is cancelled.

18. The procedure is laid down in the Physical Planning Act. The Petitioner however chose to ignore the clear procedures of both the Constitution and the relevant law, Section 38 of the Physical Planning Act, by instituting a Petition in the High Court. Under the clear provisions of Section 38(6) of the Act, the Petitioner could only come to the High Court by way of an Appeal. The Petition is thus incompetent and an abuse of the process of the Constitution.

19. For those reasons, I find no merit herein, and the Petition dated and filed on 28<sup>th</sup> April, 2015 is hereby dismissed with costs to the Respondent.

20. There shall be orders accordingly.

**Dated, Signed and Delivered in Mombasa this 7<sup>th</sup> day of April,2016.**

**M. J. ANYARA EMUKULE, MBS**

**JUDGE**

In the presence of:

Miss Ombogo holding brief Wasunna for Petitioner

No Appearance for 1<sup>st</sup> Respondent

No Appearance for 2<sup>nd</sup> Respondent

Mr. Silas Kaunda Court Assistant