



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO. 4 OF 2018

ANTHONY NJOROGЕ1 ST PETITIONER

SUSAN NYAWIRA MATHENGE2 ND PETITIONER

JANTO INVESTMENTS LIMITED3 RD PETITIONER

VERSUS

COUNTY GOVERNMENT OF NAIROBI.....1 ST RESPONDENT

THE ATTORNEY GENERAL 2 ND RESPONDENT

JUDGMENT

1. The above three petitioners lodged this petition in the High Court on 12/8/2016. They sought the following verbatim orders against the two respondents:

a. A declaration that Sections 38 and 39 of the Physical Planning Act is unconstitutional as it is inconsistent with Article 50 of the Constitution.

b. Damages against the 1st respondent for breach of the petitioners' rights under Article 40 of the Constitution.

c. Costs of this petition be awarded to the petitioners

2. On 22/1/2018, Mwita J transferred the petition to this court. The petition was subsequently canvassed before me through both written and oral submissions. On 26/2/2000, the petitioners, through oral submissions by their counsel, Mr Wambua, abandoned **prayer (a)** of the petition. This was largely because prayer (a) sought the court's invalidation of Sections 38 and 39 of the now repealed Physical Planning Act. At the time of making the withdrawal application, the said legal framework had been repealed by the Physical and Land Use Planning Act, No 13 of 2019.

3. With prayer (a) abandoned, what remained of the petition was a plea for damages against the 1st respondent, for breach of the petitioners' rights under Article 40 of the Constitution. The petitioners also sought costs of the petition.

4. What prompted this petition was the demolition of a perimeter wall and a metal gate erected around a borehole and water transmitter plant which the 2nd petitioner had caused to be erected on **Land Reference Number 1330/130** located at Mukima Drive, Garden Estate, Nairobi (**the suit property**). The petitioners contended that both the borehole and the water transmission plant were destroyed.

5. It was contended in the petition that the 1st and 2nd petitioners were husband and wife and were directors of the 3rd petitioner. It was further contended that the 1st and 2nd petitioners were the lawful owners of the suit property, residing in the suit property. On 19/8/2015, they obtained authorization from Water Resources Management Authority, to drill a borehole on the suit property. On 4/3/2015, they obtained a no objection letter from the Nairobi Water & Sewerage Company Limited. On 9/6/2016, they obtained a single business permit relating to the borehole, from the 1st respondent. On 20/2/2015, they applied for change of user of the suit property and paid the requisite fees of Kshs 121,000 to the 1st respondent. They thereafter engaged M/s The Insta Pumps Engineering Limited to drill the borehole to completion. On 5/7/2016, officers of the 1st respondent went to the suit property with bull-dozers and, without any notice or warning, demolished the perimeter wall, metal gate and transmitter erected on the suit property in what the petitioners described as an illegal exercise which lasted for 15 minutes. The petitioners averred that the 1st respondent's actions were unconstitutional, malicious and illegal.

6. The 1st respondent did not file a response to the petition despite accommodation by the court. The 2nd respondent filed grounds of opposition dated 28/4/2017 opposing the petition on the following verbatim grounds:

1) That the alleged demolition action on Land Reference Number 13330/130 were done pursuant to Section 38 and 39 of the Physical Planning Act and due process was followed

2) That the petitioner's application only seeks to circumvent on the mandate of the 1st respondent under the Physical Planning Act.

3) That the application is made in bad faith and is in turn a total waste of the court's time.

7. The petition was canvassed through written submissions dated 25/2/2019 and oral submissions made on 26/2/2020. Mr Wambua, counsel for the petitioners, framed the following as the three issues falling for determination: (i) was there gross violation of Articles 40 and 47 of the petitioner's constitutional rights; (sic) (ii) is the petitioner entitled to damages; and (iii) which party ought to bear costs for this petition?

8. Counsel contended that the actions of the 1st respondent contravened Article 47 of the Constitution and Sections 38 and 39 of the now repealed **Physical Planning Act**. Counsel faulted the 1st respondent for not issuing an enforcement notice, arguing that the purpose of the enforcement notice is to ensure that the affected party is granted the right to be heard. Counsel relied on the decisions in (i) **Republic v County Director of Education, Nairobi & 4 others exparte Abdukadir Elmi Roblesh [2018] eKLR**; (ii) **Geothermal Development Company Limited v Attorney General & 3 others [2013] eKLR**; (iii) **General Medical Council v Spackmou (1943) 2 ALL ER 337**; and (iv) **Msagha v Chief Justice & 7 Others, Nairobi HCMCA No 1062 of 2004**.

9. On the second issue, counsel submitted that the petitioners were entitled to special damages of Kshs 5,347,4000 as per the valuation report prepared by M/S Planet Valuers. Reliance was placed on the decision in **Rahimkhan Afzakh Khan Rahmkan & 4 others v Chief Land Registrar & 2 others [2017] eKLR**. On the issue of costs, counsel submitted that costs follow the event.

10. The 1st respondent did not file written submissions. In his brief oral submissions, Mr Muriungi, counsel for the 1st respondent, argued that the petitioners had admitted that Sections 38 and 39 empowered the County Government to remove illegal structures from the suit property. He contended that it was within its mandate, under the above framework, that the 1st respondent removed the illegal structures on the suit property. It was the case of the 1st respondent that the prayers sought in the petition were misplaced.

11. The 2nd respondent filed written submissions dated 14/3/2019 through Ms Fatma Ali, State Counsel. The Learned State Counsel submitted that the petition herein offended the principle in **Anarita Karima's Case** as reiterated in **Northern Nomadic Disabled Persons Organization (NNDO) v Governor, County Government of Garissa & another [2013] eKLR** in which the Court emphasized that a claimant seeking redress in the High Court on a matter which involves reference to the Constitution is obligated to set out with reasonable degree of precision his complaint, the provisions of the Constitution said to have been infringed, and the manner in which the provisions are alleged to have been infringed. It was contended that the petitioners had merely cited sections in the Physical Planning Act alleged to be infringing the Constitution but had not given any particulars of the alleged violations. Relying on the decision in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**, the 2nd respondent urged the court to find the petition to be defective.

12. On whether Sections 38 and 39 of the Physical Planning Act were unconstitutional, the Learned State Counsel submitted that the petitioners had not dissipated the general but rebuttable presumption that a statute or statutory provision is constitutional and the burden is on the person alleging unconstitutionality to prove that the statute or its provisions is constitutionally invalid.

13. On the issue of costs, the 2nd respondent submitted that the petition did not disclose any cause of action against the 2nd respondent; the actions complained of were done by the 1st respondent; and the 2nd respondent was not responsible for the actions of the 1st respondent. Counsel urged the court not to burden the 2nd respondent with costs.

14. I have considered the petition, the grounds of opposition by the 2nd respondent, and the parties' respective submissions. I have similarly considered the relevant constitutional and statutory frameworks and jurisprudence. The petitioners sought three orders. The first prayer was a declaration that Sections 38 and 39 of the Physical Planning Act was unconstitutional and inconsistent with Article 50 of the Constitution. This particular prayer was abandoned by the petitioners during the plenary hearing of the petition on 26/2/2020. The second prayer was a plea for damages against the 1st respondent, in relation to the alleged breach of the petitioners' rights under Article 40 of the Constitution. The third prayer relates to costs of the petition.

15. The import of the petitioners' decision to abandon **prayer (a)** of the petition is that, effectively, the suit against the 2nd respondent was wholly abandoned. I say so because prayer (b) is specifically directed against the 1st respondent. There is therefore no suit against the 2nd respondent. The 2nd respondent had raised the issue of jurisdiction of this court. In my view, the suit against the 2nd respondent having been abandoned, I will not focus on the 2nd respondent's grounds of opposition and or submissions.

16. Four key issues fall for determination in this petition within the context of the remaining two prayers. The first issue is whether causes of action against the 1st respondent are disclosed in the respective claims of the three petitioners. The second issue is whether all or any of the petitioners have made out cases of breach of any of the rights under Article 40 of the Constitution. The third issue relates to quantum of damages in the event the answer to the second issue is in the affirmative. The fourth issue relates to costs of this petition. I will make brief sequential pronouncements on the four issues in the order in which they are itemized.

17. The three petitioners jointly brought this petition and jointly seek damages for alleged breach of their rights under Article 40 of the Constitution by the 1st respondent. The title to the suit property was at all material times in the name of the 2nd petitioner. The damaged properties were developments on the suit property. The 1st petitioner has not demonstrated on what basis he considers himself to have a cause of action under Article 40 of the Constitution against the 1st respondent. There is no conclusive evidence of co-ownership of the suit

property with the 2nd petitioner to entitle him to a claim under Article 40 of the Constitution

18. Similarly, the third petitioner is a distinct legal entity. It did not own the suit property. It has not presented evidence upon which it considers itself to have a valid cause of action against the 1st respondent under Article 40 of the Constitution.

19. From the evidential materials presented to the court, the 2nd petitioner was the registered proprietor of the suit property at the time the cause of action accrued. She was therefore properly protected by the framework in Article 40 of the Constitution. She is, in my view, the only petitioner whose claim discloses a cause of action against the 1st respondent. Consequently, my finding on the first issue is that there is a cause of action disclosed against the 1st respondent in the suit by the 2nd petitioner. There is, however, no cause of action disclosed against the 1st respondent in the claims by the 1st and 3rd petitioners.

20. The second issue is whether the petitioners (or any of them) have made out cases of breach of any of their rights under Article 40 of the Constitution. Article 40 of the Constitution provides as follows:

40. (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.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description;

or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(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) If 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.

(4) Provision may be made for compensation to be paid to occupants in good faith and land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under the Article do not extend to any property that has been found to have been unlawfully acquired

21. My understanding of the framework in Article 40 of the Constitution is that it confers the right to acquire and own property of any description. Secondly, it forbids the enactment of any law which arbitrarily deprives a person of property or limits or in any way restricts the enjoyment of the right to acquire and own property on a discriminatory ground. Thirdly, it forbids the state against depriving a person of property unless the deprivation is an acquisition of land carried out under the framework in Chapter Five of the Constitution or is for a public purpose or in the public interest. Fourthly, it provides for compensation in the event of acquisition of private property by the state. Fifth, it obligates the state to promote and protect the intellectual property rights of the people of Kenya.

22. The key grievance of the 2nd petitioner is that the 1st respondent demolished and destroyed her developments (perimeter wall, gate, and borehole water transmission plant) on the suit property without due process. In the process of demolition, the 1st respondent damaged water pumping installations which the 2nd respondent had erected on the suit property.

23. The 1st respondent was accorded the opportunity to respond to the petition by way of an affidavit or grounds of opposition. From 2016 (when this petition was filed and served) to 26/2/2020 (when the petition was heard), the 1st respondent did not bother to respond to the petition. Consequently, the evidence presented to the court in support of the petition is wholly unchallenged by the 1st respondent.

24. I have considered the 2nd petitioner's claim against the above background. The impugned demolition was carried out on 5/6/2016. The

applicable legal framework at that time was the now repealed Physical Planning Act. The Act contained a due process framework under Sections 38 and 39 in the following terms:

38. 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, 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).*

39. Supplementary provisions as to enforcement

- 1) If, within the period specified in the enforcement notice or within such further period as the local authority may determine any measures required to be taken (other than discontinuance of any use of land) have not been taken, the [Rev. 2012] CAP. 286 Physical Planning 23 [Issue 1] local authority may enter on the land and take those measures and may, without prejudice to any penalties that may be imposed or any other action that may be taken under this Act, recover from the person on whom the enforcement notice is served, any expenses reasonably incurred by it in connection with the taking of those measures.*
- 2) If such person has not lodged an appeal under Section 38 he shall not be entitled to question the validity of any action taken by the local authority under subsection (1) upon any grounds, that could have been raised in such appeal.*
- 3) Where a local authority has taken action under subsection (1), any material removed by it from the land in pursuance of such action shall, unless the owner claims and removes such material within thirty days, be sold and the proceeds thereof, after deduction of any expenses reasonably incurred by the local authority in connection with such action and sale, be paid to the owner.*
- 4) Any person who obstructs, or otherwise interferes with, a local authority in the execution of its functions under subsection (1) shall be guilty of an offence and shall be liable to a fine not exceeding fifty thousand shillings or to an imprisonment not exceeding two years or to both.*

25. It is apparent from the above framework that the 1st respondent was required to issue and serve an enforcement notice before demolishing any developments erected in contravention of the Act and the Regulations made thereunder. The 2nd petitioner contends that the impugned demolition was carried out without any prior enforcement notice. That allegation has not been contested or controverted. The net result is that, in the absence of evidence to demonstrate that there was compliance with the requirement for an enforcement notice, the court is satisfied that the impugned demolition constituted a violation of the 2nd petitioner's right to property under Article 40 of the Constitution.

26. Not too long ago, the **Court of Appeal** rendered itself on the question of unprocedural or unlawful demolition of property or eviction in **Moi Education Centre Co Ltd v William Musembi & 16 Others [2017] eKLR**. The Court of Appeal emphasized the centrality of due process when carrying out demolitions or evictions.

27. In light of the above reasons, it is my finding that the 2nd petitioner has made out a case of breach of her right to property by the 1st respondent under Article 40 of the Constitution. She is accordingly entitled to damages.

28. The third question relates to quantum of damages payable to the successful petitioners. Counsel for the petitioners urged the court to grant them the value of the damaged property in the sum of Kshs 5,347,400. Counsel further urged the court to award the petitioners Kshs

20,000,000 as general damages to assuage the petitioners for the deep scars they suffered from the infractions of their constitutional rights by the 1st respondent. Counsel also urged the court to award the petitioners Kshs 10,000,000 as punitive damages.

29. I have considered those submissions. It is not lost to the court that the petitioners did not present to the court any evidence to demonstrate that the demolished developments were approved. The only reason why the 1st respondent has been found to have breached the 2nd petitioner's right to property is that it did not accord the 2nd petitioner due process before demolishing the structures. Bearing that in mind, it is my view that no more than the value of the damaged property is deserved by the 2nd petitioner in the circumstances of this petition. To award the 2nd petitioner general and punitive damages would not be appropriate in view of the apparent illegality she appears to have engaged in.

30. Two uncontroverted pieces of evidence were placed before the court in relation to the value of the damaged property. The first piece of evidence was a loss assessment report dated 14/7/2016 by M/s The Insta-Pumps Engineering Limited. They assessed the cost of replacing the entire damaged borehole plant at between Kshs 4,400,000 and Kshs 4,500,000. The second piece of evidence was a valuation report by M/s Planet Valuers. They assessed the value of the borehole plant together with the other damaged developments at Kshs 5,347,400. M/s Planet Valuers assessed the value of the borehole plant alone at Kshs 4,800,000. The other items in the report by M/s Planet Valuers make a total of Kshs 547,4000.

31. M/s The Insta-Pumps Engineering Limited is an engineering firm which drilled the borehole and installed it to completion. They were the technical people in that area. I will in the circumstances accept their figure of Kshs 4,400,000 as the reasonable cost of replacing the borehole plant. In addition, I will accept the lower figure of Kshs 547,400 assessed by M/s Planet Valuers in relation to the other damaged items on the land. The two items make a total of Kshs 4,947,400 which I hereby award the 2nd petitioner as damages under prayer (b) of the petition.

32. On costs, the 2nd respondent is a constitutional office holder. He did not ask for costs. I will therefore not award him costs.

Disposal Orders

33. In light of the above findings, I make the following disposal orders:

(a) The petition against the 2nd respondent is marked abandoned with no order as to costs.

(b) The petition by the 1st and 3rd petitioners is dismissed for lack of merit, with costs to the 1st respondent.

(c) The petition by the 2nd petitioner succeeds as against the 1st respondent and the 2nd petitioner is awarded damages of Kshs 4,947,400 plus costs of the petition against the 1st respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF JULY 2020

B M EBOSO

JUDGE

In the presence of: -

Mr Wambua for the petitioners

Ms Fatma for the 2nd respondent

Court clerk - June Nafula