



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 7 OF 2015

IN THE MATTER OF: ARTICLES 2(6), 19, 20, 21, 22(2), 3(d), 23(1), (3) & 25, 28, 40, 165(3)(a),(b), (d),(i),(ii) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 26(1)(3), 27(1),(2),28, 29(c),(D) OF THE CONSTITUTION AND RULE 11(c) & 12 PROTECTION OF FUNDAMENTAL RIGHTS AND PROCEDURE RULE AND ALL OTHER RELEVANT ENABLING POWER AND PROVISIONS OF THE LAWS OF KENYA

AND

IN THE MATTER OF: ARTICLE 25 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

BETWEEN

- 1. STANLEY KAMERE**
- 2. FRANCIS OLOO**
- 3. DAVID MBOGHO & 24 OTHERSPETITIONERS**

VERSUS

- 1. NATIONAL HOUSING CORPORATION**
- 2. MINISTRY OF LANDS, HOUSING AND SETTLEMENT**
- 3. THE HON. ATTORNEY GENERALRESPONDENTS**

JUDGMENT

INTRODUCTION

1. The 1st Respondent is a statutory body established by the National Housing Corporation Act, Chapter 117 of the Laws of Kenya. Its principal mandate is to implement the Government's housing policies and programs with a view to housing the nation. It owns a number of houses, some of which are situate at the

Changamwe Residential Estate where the Petitioners reside. The petitioners are long time tenants of various houses in the said Estate each paying rent of Kshs.1,200/-, having each entered into standard lease agreements with the First Respondent for occupation of their respective premises. The lease agreement provides at clause 22(a) thereof that the First Respondent reserves the right to review the rent payable every year or after such intervals as it shall deem appropriate.

2. From the year 1988 the First Respondent has been increasing the rent gradually and as at 12th September, 2005 the rent was increased by notice from Kshs.1,200/- to Kshs.7,500/-. The Petitioners refused to pay the new rent and filed a suit to challenge the increment and distress for rent levied by the First Respondent at the time (vide **Mombasa CMCC No.2665 of 2008: Elistone Mbela & 20 others vs. National Housing Corporation**). Among the reasons cited by the plaintiffs in that suit was that the distress for rent was unauthorized since no notice of intention to increase rent had been issued to them. They also complained that the increment was unlawful and against public policy. The suit was heard and determined before the Resident Magistrate's Court (Hon. R. Kitagwa) in favour of the defendants. In its decision, the court noted that while the National Housing Corporation was established to provide low cost housing, it is subject to the prevailing economic situation at a given time and therefore it is empowered to review rents periodically to enable them to invest in more housing projects to cope with the rising demand based on population growth. The suit was dismissed on 27th March, 2014.

3. On 23rd April, 2014 the National Housing Corporation issued Rent Demand Notices to the tenants with arrears back-dated which had been earlier restrained by the court. Distress proclamation followed shortly with M/s Hamza Jeneby Auctioneers acting for the National Housing Corporation. Dissatisfied with the outcome, the plaintiffs appealed in **Mombasa High Court Civil Appeal No. 61 of 2014** which was found to be time barred, and **Mombasa High Court Civil Appeal No. 112 of 2014** which sought an additional prayer for extension of time to file an appeal, but failed by reason of **res judicata** leading to the filing of this petition.

4. On 28th August, 2014, the First Respondent through its employees, accompanied by their agent known as Jeneby auctioneers without prior notice visited some of the petitioners' homes and evicted them from their houses, rendering them homeless and destitute. The petitioners filed this petition seeking to restrain the respondents from evicting them or interfering with their occupation of the premises. The petitioners claim that they have been paying rent and continue to pay rent despite the First Respondent increasing the rent on several occasions using unknown procedures. They accused the First Respondent of commencing evictions in favour of “stand-by” tenants to whom the houses have been allocated unlawfully. The petitioners aver that since their household items were carried away, there has been no notice of sale of the property by the auctioneer, neither has the First Respondent made any communication in that regard. They accuse the auctioneer of having illegally broken into some of the petitioners' houses damaging property and assaulting family members resulting in criminal cases.

5. The Petitioners claimed that for a period of over 10 years the houses have never been repaired at all and thus any demands of rent increment is in total breach of the Petitioners' right as consumers. The Petitioners felt that it is only fair and just that they continue to pay the previous rent of Kshs.1,200/=. The First Respondent's demand for the payment of disputed rent arrears was said to be unreasonable considering the very poor condition of the houses and the environment. The First Respondent being a State Corporation, it was also claimed, it ought to have involved the petitioners in the decision making before the rent is increased and after repairs/renovations are done. They faulted the proposed rent of Kshs.7,500/= for being unreasonable in the circumstances, as it should be lower to accommodate low income earners. The First Respondent was also accused of discrimination in the eviction because in other areas like Makande Estate, Buxton and Tudor Estate the same houses are rented at a price of Kshs.2,500/= despite their proximity to the Central Business District.

THE PETITIONER'S PRAYER

6. The petitioners were apprehensive that their houses would be broken into (as some had) and their collective prayers are for:

(a) A declaration that the action by the respondents jointly and severally of evicting and/or threatening to evict the petitioners who are in physical occupation of the suit houses and paying rent thereby rendering the petitioners and their families homeless contravenes the provisions of article 2(5), 28, 43(1)(b), 47(1) of the Constitution of Kenya which guarantees adequate housing, dignity, respect, protection and the right to fair administrative action.

(b) That this honorable court do make such orders and/or issue such writs and give such directions as it deems appropriate to prohibit the respondents from interfering with the peaceful stay of the residents of the said houses until such time as the Ministry of Lands and Housing shall have addressed itself to the validity and correct rent to be paid and how the petitioners can settle arrears if any.

(c) A declaration that the forcible, violent and brutal eviction of the petitioners and their families without according them alternative shelter and/or accommodation leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental right to life guaranteed by article 26(1) and (3) of the Constitution of Kenya, and article 11 of the ICESCR and the physical and moral health of the family under articles 16 and 18 of the ACHPR as read with article 2(6) of the Constitution of Kenya.

(d) A declaration that the forcible, violent and brutal eviction of the petitioners and their families from their houses without according their children alternative shelter and/or accommodation and leaving the children to live in the open exposed to the elements and vagaries of nature is a violation of the fundamental rights of children to basic nutrition, shelter and health care and protection from abuse, neglect, and all forms of violence and inhuman treatment and to basic education guaranteed by article 53(1)(b), (c), (f) and (2) as read together with article 21(3) of the Constitution of Kenya, and Article 28 of the CRC as read with article 2(6) of the Constitution of Kenya.

(e) A declaration that the forcible, violent and brutal eviction of the petitioners disabled and other elderly persons from their homes without according them alternative shelter and/or accommodation rendering them to live in the open exposed to the elements and vagaries of nature is a violation of the fundamental rights of the elderly persons to the pursuit of personal development, to live in dignity, respect and freedom from abuse and to receive reasonable care and assistance from the State guaranteed by article 57(b), (c) and (d) as read with article 21(3) of the Constitution of Kenya.

(f) A declaration that the petitioners and their families are entitled to general, aggravated, exemplary and punitive damages against the respondents jointly and/or severally.

(g) Such general aggravated, exemplary and punitive damages as may be assessed by the court.

(h) Costs of the petition.

RESPONSE TO PETITION

7. The First Respondent opposed the Petition by a Replying Affidavit sworn by Dorine Martha Wavua sworn on 17th March 2015. She is the officer in charge of Coast Region of the First Respondent. She stated that the petitioners voluntarily executed the standard tenancy agreements which form the basis of binding contracts between the petitioners and the First Respondent. The petitioners were accused of using the courts to frustrate the First Respondent from implementing its core objective of housing the nation and in failing to pay rent, the First Respondent cannot get resources to construct more houses for other people. She added that the issues raised in the petition are contractual and there are no constitutional issues raised therein.

8. The Attorney-General entered appearance through Richard Ngari, Litigation Counsel for the Second and Third Respondents and filed a Statement of Grounds of Opposition. The grounds raised included that

the court lacks jurisdiction by virtue of the prayers sought and the Environment and Land Court Act. It was alleged that the Petition is an abuse of the court process as the relationship between the petitioners and the First Respondent is one of landlord and tenant. There was a civil suit involving some of the parties and the petitioners have withheld information regarding the civil suit, and do not merit the benefit of the court's discretion. Counsel faulted prayer 4, being presumptive, speculative and superfluous as the Ethics and Anti-Corruption Commission is capable of conducting its investigations without prompting by a court order. Finally, it was alleged that lawful eviction cannot amount to a violation of the rights of an individual.

9. Seven of the twenty seven petitioners listed have written to the First Respondent stating that they did not wish to be party to the suit, accusing the First Petitioner of having included their names without their authority. These petitioners are Mary Otinga Njiri, Margaret W. Wahome, Michael M. Ndivo, McDonald Mwanza, John Chege Ngigi, Boaz Omori Tala and Janet A. Koko. Their letters to that effect were annexed to the affidavit of Dorine Martha Wavua sworn on 17th March 2015 as “NHC – 7”. These petitioners are listed in the authority to act as Nos. 17, 24, 22, 21, 9, 25 and 20 respectively. The seven were not party to the previous proceedings before the Resident Magistrate's Court in CMCC No. 2665 of 2006. The Petitioners have stated that their signatures were obtained legally and voluntarily, denying any fraud or misrepresentation on their part.

SUBMISSIONS

(a) By the Petitioners

10. The matter came for hearing on 4th June, 2015 and parties agreed to proceed by way of written submissions. Counsel for the Second and Third Respondents sought to rely on the Grounds of Opposition of 13th March, 2015 in lieu of submissions. Ruling was set for 17th July, 2015.

11. The Petitioners in their written submission dated 2nd June, 2015 urged that although there exists a tenancy agreement between them and the First Respondent, the First Respondent is in breach of their Constitutional Rights thereby making this a constitutional matter and not a contractual matter. The Petitioners urged that the First Respondent constructed the suit houses to attract affordable rent. They cannot now turn back against the very people it was mandated to protect and who have been living in the said suit houses since the 1980's. The increase of rent was arbitrary and without consideration of the Petitioners or the First Respondent's objective. The First Respondent was said to have already given oral tenancy agreements to “**stand-by**” tenants without any consideration to the Petitioners who have lived in the houses over the years and have known the houses to be their homes.

12. They have urged the court to consider that the breaches of their constitutional rights begun on 28th August, 2014 and continued until such time as the court gave an order to maintain the status quo. They rely on the various provisions of the Constitution of Kenya particularized in the petition, alongside provisions of the International Covenant on Economic Social and Cultural Rights (ICESCR) and the African Charter on Human and People's Rights (ACHPR), all of which provide for the right to housing and protection from forced eviction. They claim that their right to human dignity has been violated by the First Respondent's action of forcefully evicting the Petitioners from their houses, rendering them homeless.

13. The First Respondent has also gone ahead to get alternative tenants forgetting that the petitioners have been in the houses since the 1990s, breaching their right to legal security of tenure and affordability. They faulted the increased rent of Kshs.7,500/= as compared with the market rate of Kshs.8,500/= considering that the First Respondent's objective is to provide cheaper housing for low income earners and not necessarily to compete with market value. They further cited the case of **Social Economic Rights Centre & Centre For Economic and Social Rights vs. Nigeria, Comm. No. 155/96 (2001)** where it was emphasized that forced evictions and demolitions of people's homes should always be measures of last resort with all other reasonable alternatives being explored, including mediation between the affected community, the land owners and the relevant housing authorities.

THE FIRST RESPONDENT'S SUBMISSION

14. The First Respondent in response urged that the petition is **res judicata**. Specifically, the issue of tenancy between the petitioners and the First Respondent was said to have been finally determined in CMCC No.2665 of 2008 culminating in the two appeals therefrom, HCCC No.112 of 2014 and HCCC No.61 of 2014. The case of **Retired Major Shadrack Mutia Muia vs Prof. Kivutha Kibwana & Others, Nairobi Petition No.281 of 2006** was cited on the power of the court to halt an abuse of its process in appropriate circumstances. The First Respondent urged that the petition had failed to raise any constitutional issue. Referring to the case of **Harrikissoon vs Attorney General of Trinidad and TOBAGO [1980] AC 265** and **Alphonse Mwangemi Munga vs. African Safari Club [2008] eKLR** this Petition was said to be an abuse of court process, as the petitioners herein only approached this court after being unsuccessful in other previous proceedings filed in court.

15. On the merits of the case, the First Respondent citing **L'Estrange vs F. Graucob Ltd. (1934) 2 K. B. 394** as quoted in **Securicor Couriers (K) Ltd vs. Benson David Onyango & Another (2008) eKLR**, stated that the Petitioners were bound by the tenancy leases signed with the First Respondent. Under the lease, the First Respondent is at liberty to review the rent payable. On 15th September, 2005, the First Respondent issued notices to the Petitioners herein increasing rent payable for the two bedroomed houses occupied by the Petitioners from Kshs.7,500/= to Kshs.8,500/=. This they urged is the fairest rate in the market.

16. They accused the petitioners of refusing to pay the rent and instead filing numerous court cases objecting to the rent payment which cases have been determined in favor of the First Respondent. Owing to the Petitioners' non-payment of the rent, the petitioners were in breach of the lease agreement and the First Respondent had a right to terminate the tenancy under clause 22(b). The court was asked to take into account that the notices increasing the rent were issued in 2005, ten years ago, and no new notices have been issued since then. The cases of **National Bank of Kenya Ltd. Vs Pipeplastic Samkolit (K) Ltd. & Another [2001] eKLR** and **Samuel Kamau Macharia vs Daima Bank Ltd. [2008] eKLR** were cited on the Court of Appeal's holding that the court ought not re-write the contract for parties unless coercion, fraud or undue influence are pleaded and proved.

DETERMINATION

17. Section 3(1) of the Housing Act Cap 117 of the Laws of Kenya establishes the National Housing Corporation as body corporate. Section 3(4) of the Act gives the Corporation power to enter into contracts, to hold and dispose of property both movable and immovable, and may sue and be sued in its corporate name. A general reading of the Act gives the clear impression that the Corporation though State owned, is expected to run its affairs on the principles of modern business, to make investments and generate returns. From the uncontroverted pleadings of the First Respondent, it is clear that that the First Respondent's rental houses are designed to generate revenue for the construction of more houses. There is nothing in the Act that requires them to provide social/ charitable public facilities. To have them step out into the role of providing free housing would be without basis and ultra vires their statutory mandate. They have adopted a policy of providing affordable housing and in light of that policy, the rent charged for their houses is lower than the market rate. That being said, the relationship between the parties is purely contractual. The Petitioners have not pleaded or proved that there was any fraud, coercion or undue influence in the course of the contract.

18. The First Respondent although a State Corporation, is not under obligation to consult with its tenants before reviewing its rent. This is not what is envisaged by Article 10 of the Constitution as the review of rent does not fit in the description of functions under Article 10. The Petitioners' failure to pay rent translates in reduced revenue available for the First Respondent to construct more houses for the benefit of the greater public who are in need of affordable housing.

19. This case may be distinguished from the case of **Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others**. This is a case of a landlord distressing for rent, whereas in the Satrose Ayuma case, the landlord was forcefully evicting its tenants

without notice and was withholding essential social amenities such as water and sanitation as a means of forcing compliance, in violation of the tenants' human rights. In this case, the landlord has effected a rent increase, notified the tenants and given notice of demand before engaging the auctioneer to distress for rent. The Petitioners have had opportunity to get the process of rent increment and distress for rent examined by the court in previous civil proceedings. The eviction carried out by the First Respondent in the circumstances does not fall into the category of the cases referred to such the Satrose Ayuma case.

20. The upshot is that the Petitioners have failed to demonstrate that there exists a constitutional issue over and above the contractual issue herein. In the premises, this Petition is dismissed with costs to the First Respondent only.

Dated, signed and Delivered in Mombasa this 17th day of July, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Miss Maina holding brief Shimaka for Petitioners

Miss Obat for First Respondent

No appearance for Second and Third Respondents

Mr. Kaunda Court Assistant