



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

JOSEPH IHUGO MWAURA & 82 OTHERS PETITIONERS

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

MINISTER OF LANDS 2ND RESPONDENT

COMMISSIONER OF LANDS 3RD RESPONDENT

RULING

Introduction

1. On 5th December 2011, I dismissed the petitioners' petition after full hearing. The petitioners had sought certain declarations alleging breach of their fundamental rights and freedoms in respect of the area they occupied known as Kibera Settlement Area. In concluding my judgment I stated as follows:

[62]The conclusions I have reached should not in any way diminish the suffering the petitioners have undergone because of the lack of proper provision for housing and other property rights. We gave ourselves a new Constitution precisely because the old legal regime had grave shortcomings which are evident from what I have stated herein.

[63]I hope the respondents, in implementing the Slum Upgrading project, will have regard to the obligations imposed on them by the Constitution particularly the rights set out in Article 43 of the Constitution, 2010. I would also draw their attention to the observations on my learned brother, Justice Musinga in the case of Susan Waithera Kariuki & Others v Town Clerk, City Council of Nairobi & Others Nairobi Petition No. 66 of 2010 (Unreported) and Satrose Ayuma & Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & Others Nairobi Petition No. 65 of 2010 (Unreported).

The Application

2. By Notice of Motion dated 8th December 2011 brought under **rule 33** of the *Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006* and **Article 22** and **23** of the Constitution the petitioner's moved the court for the following orders;

[2]The Honourable Court be pleased to issue an order of injunction restraining the Respondents, by themselves their servants and or agents from demolishing the homes of the Applicants herein or otherwise interfering with the quiet enjoyment of their homes or premises in Zone A, Soweto East within Kibera Settlement Scheme, or possession of their respective plots on which their semi-permanent structures are situated pending hearing and determination of this application.

[3]THAT the Honourable Court be pleased to issue an order of injunction restraining the respondents, by themselves, their servants and or agents from demolishing the homes of the Applicants herein or otherwise interfering with the quiet enjoyment of their homes or premises in Zone A, Soweto East within Kibera Settlement Scheme, or possession of their respective plots on which their semi-permanent structures are situated pending filing, hearing and determination of an intended appeal in the Court of Appeal against the judgment dated and delivered on 5th December 2011.

[4]That the costs of this application be borne by the respondents.

3. The application was supported by the affidavit of JOSEPH ODHIAMBO OUMA sworn on 8th December 2011. The tenor and effect of this deposition was that after the judgment was dismissed, the Assistant Minister for Housing, Hon. Margaret Wanjiru convened a public meeting at the Kibera decanting site where she stated that Government bulldozers would be moving into Soweto Area to remove people and demolish their houses and business premises. Since the petitioners intended to appeal against the judgment the intended eviction would render their appeal nugatory and it was proper that the court grants the order sought in the application.

4. The Notice of Motion came before me on 9th December 2011 under certificate of urgency and I made the following decision *ex parte*;

The effect of my judgment dated 5th December 2011 is that the petitioners may be evicted. They now wish to exercise their undoubted right of appeal. In the circumstances, I certify the Notice of Motion dated 8th December 2011 as urgent. In order to preserve the status quo pending appeal, I grant orders in terms of prayer 2 of the Motion pending hearing on 17th January 2012. The application to be served forthwith.

In making this order, I have taken into account the impending court vacation and the holiday season. The petitioners are urged to file their appeal with deliberate speed.

5. When the matter came up for hearing interpartes on 17th January 2012 counsel for the petitioners, Mr Mungai, informed the court that despite the order issued on 9th December 2011, the Ministry of Housing had proceeded on site and cleared the property of all persons and structures. Counsel for the respondent, requested time to take instructions on the matter and file an appropriate response, I therefore adjourned the matter to 6th February 2012.

6. On 6th February 2012, no response had been filed by the respondents. I adjourned the matter to 7th February 2012 with an order that the Permanent Secretary, Ministry of Housing, Mr Tirop Koskey, do appear in court to explain the circumstances surrounding the demolition.

7. I directed the Court Bailiff to serve summons on the Permanent Secretary to attend court on 7th February 2012 at 3 pm. It is only then that the Permanent Secretary came to court and confirmed that he was in a position to file an affidavit. A replying affidavit sworn by Mr Tirop Koskey sworn on 9th February 2012 was duly filed together with grounds of opposition dated 9th February 2012.

The Replying Affidavit

8. Mr Koskey in the replying affidavit stated that prior to the judgment the suit land was originally occupied by 12,000 households with a total population of about 4,000 people being persons who had

illegally settled in the area. During the implementation of phase one of the Kibera slum upgrading project 1,000 households voluntarily moved to the decanting site in support of the project while 100 made their own arrangement for accommodation. However, 83 remained on the suit land and sought court injunctions.

9. Mr Koskey depones that the group that moved out is quite anxious that the project be completed because they are sharing the units they were relocated to pending the completion of this project. It was mutually agreed that after completion of the project phase one, units would be decongested by moving the two families from the initial units to the new units where each family would now occupy a unit. Currently the families sharing units are having hardships.

10. The Permanent Secretary avers that there is tension in the area between the relocated persons and the petitioners as the latter group is seen to be frustrating and delaying the project.

11. It is anticipated that the second phase of the project will take 104 weeks that is 2 years to completion from the date of commencement and therefore requires a little patience from the applicants.

12. As regards the court order Mr Koskey depones that he has not disobeyed the court order for the following reasons;

(i) On 14th August 2009, a notice was issued to the petitioners to vacate the suit land by 15th September 2009.

(ii) That out of about 4,000 inhabitants of Kibera, Soweto East, Zone A 3917 moved apart from the 83 petitioners in this matter who elected to file this petition.

(iii) A conservatory order granted pending the hearing of the petition from August 2009 until the petitioners' petition was heard and dismissed. The respondents obeyed this order. After the suit was dismissed, the Ministry was advised by the Attorney General on the same day that they could proceed to demolish the structures.

(iv) That the structures were demolished on 12th January 2012 as there was no known orders barring the respondents from doing so.

(v) Mr Koskey was not aware of any order stopping the eviction and demolition as the court order had not been served on the Ministry of Housing.

(vi) Mr Koskey depones that he was informed of the court order by the Honourable Attorney General on the 18th January 2012 and therefore decided to stop all activities on the land until the determination of the new application.

13. It is the respondents position that if an injunction is granted it will deter the Government from realizing its Vision 2030 and implementation of **Article 43** of the Constitution of Kenya and the Government of Kenya has a duty to ensure that every Kenyan has accessible and adequate housing and to a reasonable standard of sanitation.

The Petitioners Response

14. The allegation by Mr Koskey on behalf of the respondents are answered by a further affidavit sworn by James Kiarie, the 4th respondent, sworn on 13th February 2012. In the affidavit he states that whereas it is true that tension is building in Soweto Area of Kibera, it is patently false that the said tension is between the petitioners and relocated persons who in any event live far away from the Soweto East Area A. The real cause of tension is the fact that the demolition of all premises on 12th January 2011 – despite a court order prohibiting the same – rendered over 5000 people homeless who are living or hanging about in Soweto Area awaiting this Honourable Court to determine the legality of the exercise.

15. Mr Kiarie confirms that on 12th January 2012 when the structures were demolished the orders of this Honourable Court were in force and the Minister for Housing, Hon. Soita Shitanda, the Housing Permanent Secretary, Mr Tirop Kosgey, the Kilimani OCPD and OCS were personally present and made aware of these orders by the petitioners. As the bulldozers arrived at the subject area to commence the demolition exercise a group of five petitioners, led by the 2nd petitioner, Joseph Odhiambo Auma and Mr Kiarie approached the Honourable Minister and Mr Tirop who were accompanied by the Kilimani OCPD and OCS, Peterson Mwangi. Mr Odhiambo addressed them on the petitioners' behalf and informed them that the High Court had issued an order on 9th December 2012 stopping the demolition until 17th January 2012 when the application was set down for hearing.

16. As Mr Odhiambo and Mr Kiarie sought to give copies of the Court's order to the Minister and his Permanent Secretary, Mr Peterson Mwangi intervened, told them to go and serve the order to their offices and ordered them to move out of the demolition site immediately without "*taka taka*" (garbage order). Upon the OCS using those contemptuous words the Minister and the OCS burst out in loud laughter as the police charged at the petitioners and the gathering residents and shocked structure owners.

The Submissions

17. In addition to the respective depositions, I heard the parties oral submissions. Mr Mungai submitted that the respondents were represented by Attorney General upon whom the court orders were served 14th December 2012. According to him though the petition was dismissed, the court did not grant an order of eviction or demolition to the respondents and in the absence of a specific court order the demolition is prima facie illegal and unconstitutional.

18. Mr Mungai contended that upon being served with the restraining orders, the Attorney General was enjoined to countermand the instructions given on 5th December 2011 so that any eviction process could be stayed until the eviction is resolved. Since this did not take place, this court may infer that the Attorney General did not advise of the demolition or that the state simply did not care about the legality of the demolition despite the court order as the evictions were carried on 12th January 2012 almost 30 days after service. Counsel maintained that the dignity of this court must be maintained and the actions of the respondents must be stopped in order to express dissatisfaction with the state of affairs.

19. As regards the issue of jurisdiction, counsel submitted that the petitioners are entitled to exercise their undoubted right of appeal and this right has now been prejudiced by the intentional acts of the respondents. Mr Mungai submitted that this court has jurisdiction grounded on a proper reading of **Article 22** and **23**. When this court is seized with **Article 22** jurisdiction it has full authority to enforce those rights including granting order of stay pending appeal or any additional orders as may be appropriate. The only way to ensure that the rights are preserved is to ensure that the rights are protected upto the appellate stage.

20. Counsel emphasised that the state's responsibility to the petitioners under **Article 43** does not cease merely because this court dismissed the judgment. Any person remaining on the suit premises was entitled to be treated in a manner consistent with constitutional values and the court directed the respondent's attention to these facts in its judgment.

21. In response Mr Moimbo, representing the respondents, relied on the affidavit of Mr Tirop Koskey and on the grounds of opposition dated 9th February 2012. He submitted that under the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006** do not provide for injunctions after judgment. Counsel contended that **rule 23** thereof only permits the High Court to issue an temporary stay pending appeal for fourteen days upon an informal application. The judgment was delivered on 8th December 2011 and no stay order was sought, therefore the court lacks jurisdiction to proceed and grant injunction. The jurisdiction to grant an order of injunction lies in the Court of Appeal under **rule 5(2)(b)** of the Court of Appeal rules. Counsel also contended that **Article 22** and **23** of the Constitution does not grant the petitioner the right sought under the circumstances.

22. Mr Moimbo argued **Article 43** seeks to strike a balance between the petitioner's intention to continue staying on the suit land and the government's responsibility to develop public land. The court dealt with this issue in its judgment and in striking the balance between 83 petitioners who allege they are staying on the property and the government's responsibility the court must take into account the larger interest. The court should consider this matter an abuse of process.

23. When I asked Mr Moimbo whether the Office of the Attorney General had informed the Ministry of Housing about the order he confirmed that there was no letter to the Ministry of Housing or Permanent Secretary. There were several meetings and telephone conversations regarding this matter between the Office of the Attorney General, the Ministry of Housing and the Permanent Secretary as stated in Mr Koskey's affidavit. Once Mr Koskey was informed of the court order by the Attorney General on 18th January 2012 and all activities were stopped on that date.

Rule of law, impunity and constitutional values

24. The matter before the court is an application for an injunction pending appeal. In ordinary circumstances, the matter would be easily disposed off, but this is not an ordinary matter it concerns the lives of many Kenyans and their expectations under the new Constitution which they joyfully ushered in on the 27th August 2010. I would be failing in my responsibility if I did not express my views regarding the conduct of the respondent.

25. In the penultimate paragraphs of my judgment I expressed the hope that the State in dealing with the petitioners would at least have regard to the provisions of the Constitution which were so ably amplified by my learned brother Justice Musinga in the decisions I cited. Those decisions give meaning to the constitutional expectation that all Kenyans expect the State and its citizens at whatever level to espouse the cause of human rights, social justice and rule of law as set out in the preamble to our Constitution. These values are given meaning in **Article 10** of the Constitution, which needless to state, bind all state organs, state officers, public officers and persons wherever any of them makes or implements policy decisions. It is also not in doubt that the Bill of Rights applies to all law and binds all state organs and all persons and the duty of State and public officers do not cease merely because a suit relating to the subject has been dismissed by the court.

26. Demolition of the petitioner's structures is not denied. It was clearly done without regard to the values and principles I have just cited. The facts and circumstances surrounding the eviction set out at paragraphs 15 and 16 above and which are not denied by the respondent clearly show public officers who have not come to terms with the new dispensation. What is more disconcerting is that the demolition was carried out in a manner that resulted in undermining the values of the Constitution and the authority and dignity of this court.

27. I am aware, that the proceedings before the court are not contempt proceedings. The court has not been moved to enforce its orders but the court cannot be expected to remain silent when there are ongoing activities that undermine the court's authority in the eyes of the public. After all Kenyans from whom judicial authority is derived, cannot expect the court to be mute and dumb where its dignity and standing is assaulted.

28. On 14th December 2011, the order I had issued on the previous day was served on the office of the Attorney General. According to Mr. Koskey, he was advised to proceed with demolition after the case was dismissed. No mention though is made by him whether he was informed of the order I had issued on 14th December 2011 and whether he was informed at any time until the demolition commenced.

29. The demolitions commenced on 12th January 2012 almost a month after I issued the order and during the pendency of the court orders. The only inference that can be drawn, and in this respect I agree with the applicant's counsel, that either the Office of the Attorney General did not inform the Ministry of Housing and advise the respondents of the pending court order or the court order was ignored as a mere "*taka taka*."

30. In my view, the Office of the Attorney General bears great responsibility in ensuring that the rule of law is not undermined. **Article 156** of the Constitution imposes on that office and all those officers who serve under it a specific obligation. **Article 156(6)** is clear that, “*the Attorney General shall promote, protect and uphold the rule of law and defend public interest.*” Clearly by permitting the demolition to proceed in light of a clear court order, the office of the Attorney General did not live up to its responsibilities and failure to live up to its responsibilities has undermined the rule of law and the petitioners’ rights under **Article 43**.

31. I would hold that it is the unconditional obligation of the Office of the Attorney General and those who act under it, to inform the every State organ, department, state organisation or any public officer affected by an existing of a court order immediately it is made or known and ensure compliance therewith. This is the duty cast upon by **Article 156(6)** and it cannot be avoided by trick or device.

32. The Permanent Secretary has argued that the eviction and consequent construction of the law cost housing is necessary for the government to achieve Vision 2030. This argument fails to realise that the foundation upon which we are building a new Kenya is that founded on human rights, social justice and the rule of law. A vision built on impunity, disrespect for court orders and disregard of the values of the Constitution and fundamental rights and freedoms is a vision built on a quick sand!

33. Finally, the petitioner’s counsel cannot escape criticism. The court does not execute its own orders. It expects that its officers and parties who appear before it and who are affected by failure to observe orders issued in their favour take steps to move the court for appropriate orders. It is the responsibility of the party in whose favour the order is made to serve the order on all parties who it is expected will obey the court order. If a party does not obey a court court order, the court must be moved appropriately so that it can take immediate steps to arrest the situation. In this case the court has acted so far as it is permitted by the law.

Determination of the Application

34. The matter before the court is an application for conservatory orders pending appeal and in that regard only two issues fall to be determined, that is;

(i) Whether the court has jurisdiction to issue an order of injunction pending an appeal from the High Court.

(ii) Whether on the facts of the case the court should grant the orders sought.

Whether this court has jurisdiction

35. The question as to whether this court has jurisdiction to grant orders of stay or injunction pending appeal must be seen in light of the provisions of **Article 22** and **23** of the Constitution.

36. The provisions of **Articles 22** and **23** are the gateway to the Bill of Rights in the sense that without them, the rights and fundamental freedoms guaranteed remain non-justiciable. It is the fact that the court can be moved to grant relief in case of infringement, violation or threat that gives the Bill of Rights teeth. Commenting on the effect on the equivalent provision of the former Constitution, Justice Shields stated in the case of *Felix Njagi Marete v Attorney General (1987) KLR 690* “*The Constitution is not a toothless bulldog nor is it a collection of pious platitudes. It has teeth and those teeth and in particular are to be found in Section 84*”.

37. **Article 23(3)** entitles the High Court to grant appropriate relief in respect of matters brought under **Article 22**. Apart from the specific relief in the nature of an injunction set out in **Article 23(2)** the Court can frame any relief that is appropriate in the circumstances. It follows therefore such relief must also include such as is necessary to secure the applicant’s right to appeal and ensure that the appeal is not rendered nugatory and the right thereby protected is watered down.

38. To argue that the relief secured by **Article 23** is diminished merely because there is lack of a specific provision in the Constitution or under the *Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practise and Procedure Rules, 2006* is to undermine the Bill of Rights and its efficacy. I do not read **rule 23** to prohibit the court from granting further relief after hearing and determining a matter.

39. I reject the respondent's argument that his court lacks jurisdiction to grant interim relief pending appeal. I find and hold that this court's exercise of its power under **Article 23(3)** is entitled to give orders that give effect to the Bill of Rights including such orders as are necessary to preserve the subject matter pending appeal.

40. In my view, it does not matter that the application to enforce fundamental rights has been dismissed. The applicant has an undoubted right of appeal and the appellate court may take a different view of the matter. It is the obligation of the trial court to consider the facts before it and decide whether interim relief pending appeal is warranted. To decline jurisdiction would be to undermine the very essence of the Bill of Rights.

41. Finally, I refer to the principle stated in the well known case of *Erinford Properties Ltd v Cheshire County Council (1974) 2 All E R. 488*. The principle is that a judge who has dismissed an interlocutory application for injunction is entitled to grant the unsuccessful applicant an injunction pending appeal against the dismissal. This principle is well established in our jurisdiction and there is no reason why such a principle should not apply to these proceedings. [See case of *United Insurance Company ltd v Lawrence Musyoka Wambua Nairobi HCCC No. 1427 of 2000 (Unreported)*].

Whether the court should grant orders

42. Notwithstanding the sentiments I have expressed regarding the conduct of the respondents, the application which is before the court must be considered on the basis of the facts as they exist.

43. The purpose of the order of injunction pending appeal would be to preserve the status quo in order that the intended appeal is not rendered nugatory. The matter before the court concerns the balancing of the petitioner's interest vis-a-vis those of the general public who are interested in the completion of the slum upgrading project.

44. It is common ground that the petitioners no longer have possession of the suit property. They were evicted and their structures demolished by the Ministry of Housing. If I grant the injunction sought, the effect will not be reinstate the petitioners to the status *quo ante* but to prevent the State from proceeding with further development of the scheme. In other words the injunction will not serve any purpose.

45. The substance of the petitioner's claim was that its right to property protected under **Section 75** of the former Constitution they claim had been infringed. Had I found in their favour, I would have awarded compensation for that is what is required under those provisions. Similarly, if the appellate court overturns my decision, the remedy for the petitioner will be compensation for their proprietary interest and damages which the State no doubt has the ability to make good. In the circumstances, the grant of an injunction pending appeal would not assist the petitioners.

46. Furthermore, it is clear that the government intends to build low cost housing on the subject property. In the event I issue an injunction, the cost of construction will escalate beyond what is reasonable to achieve the aim of the project.

Disposition

47. In the circumstances of this case, I am constrained to dismiss the petitioners' Notice of Motion dated 8th December 2011 with no order as to costs.

DELIVERED and **DATED** at **NAIROBI** this 2nd day of March 2012.

D.S. MAJANJA

JUDGE

Mr Mungai instructed by Kinoti & Kibe Advocates for the petitioners.

Mr Moimbo, Litigation Counsel, instructed by the State Law Office for the respondent.