



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

PETITION NO. 28 OF 2020

JULIUS CHAI MBARU & 11 OTHERSPETITIONERS

AND

MOMBASA COUNTY GOVERNMENT RESPONDENT

AND

NATIONAL LAND COMMISSION 1ST INTERESTED PARTY

BUXTON POINT APARTMENTS LIMITED 2ND INTERESTED PARTY

RULING

(Application by petitioners seeking constitution of a three judge bench to hear the matter; application considered and dismissed)

1. The application before me is that dated 16 October 2020 filed by the petitioners. What the application seeks is an order that this petition be certified as raising a substantial question of law and that it be heard by at least three judges. The application is brought pursuant to the provisions of Article 165(4) of the Constitution. The application is opposed.

2. To put matters into context, the applicants filed this petition on 28 September 2020, which petition is said to be brought pursuant to the provisions of Articles 1, 2 (5), 2(6) , 22, 23, 43 (1) (b) and 67 (a) of the Constitution, Articles 1, 7, 8, 12, 21, and 25 of the Universal Declaration of Human Rights (1948), Article 11 of the International Convention on Economic Social and Cultural Rights (1976), the Public Private Partnership Act, No. 15 of 2013, and the Public Procurement and Asset Disposal Act, 2015. The petitioners reside in Buxton Estate within Mombasa County, which is one of the estates managed by the County Government of Mombasa, the respondent in this petition. They are thus tenants of the respondent. What prompted this petition is that the respondent has actuated a project dubbed “Urban Renewal and Re-Development of Old Estates within Mombasa County” where it intends to demolish the houses in Buxton Estate (said to be 520 houses) and in place construct some new apartments (said to be about 1,500). The new apartments are to be constructed by the 2nd interested party with the project set to commence in January, 2021. A 90 day notice to vacate has already been issued to the petitioners.

3. It is the position of the petitioners that the intended project violates their fundamental rights, for reasons inter alia, that the project has not been approved by the National Land Commission, named as 1st interested party. The petitioners also do not see the justification of their being evicted to allow a private developer reap huge profits out of their plight. They aver that they stand to lose their secure accommodation because the houses that they occupy will be demolished, and in place, other houses will be built and sold to any willing buyer at commercial rates. They aver that many of them will not have the opportunity to purchase as they are persons of low income. They contend that public land will be alienated without the sanction of the NLC. They claim breach of the Public Private Partnership Act of 2013 and further contend that no Environmental Impact Assessment or Tenant Eviction Impact Assessment has been done. They further claim a right to housing under both the Constitution and the international instruments that they have cited. They also allege a breach of the right to information.

4. The prayers sought in the petition are as follows :-

(a) A declaration that the respondent has acted in violation of Articles 10, 47, 43 and 67 of the Constitution of Kenya, 2010, in the manner in which it has vested public land on the 2nd interested party.

(b) A declaration that the 2nd interested party does not have capacity to deal with any portion of the said 14 acres of land where Buxton estate stands.

(c) A declaration that the petitioners' fundamental right to quietly and peacefully continue occupying the flats in Buxton Estate and that the Respondent and the 2nd interested party do not have the power to interfere with the petitioners' quiet and peaceful occupation thereof.

(d) The court do issue such orders and give directions as it may deem fit to meet the ends of justice.

(e) Costs of the petition be provided for.

5. The subject application, seeking a three judge bench, is based on the following grounds :-

(i) That the petition is one for the enforcement of fundamental rights enshrined in the Bill of Rights in the Constitution of Kenya, 2010.

(ii) That the petition also deals with National Values and Principles of Governance.

(iii) That an issue of the interplay between the principle of res judicata and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012 has arisen and it appears that there is no authoritative decision as to the position of the Civil Procedure Act in a Constitutional Petition of this nature.

(iv) That crucially, a decision will have to be made as to whether a determination of the fundamental rights of an individual can be used to lock out another party from pursuing the enforcement of the same right on behalf of the latter party.

(v) That the petition raises a critical question as to whether a County Government has legal capacity to alienate land to a private person, which land that County Government holds as a trustee for the benefit of the general public. Considering the public private partnership that has been entered into between the respondent and the 2nd interested party, that question becomes even more complex. It appears that no decision has been made by any court with regard to such an issue. Hence it is appropriate that the matter be placed before an expanded Judge bench.

(vi) That the petition also affects the well being of over 500 households who are accommodated in Buxton Estate. Additionally, the outcome of this petition will have a great bearing on the status of many other tenants spread over Kenya in what is referred to as "council houses" (houses leased by County Governments at highly rebated monthly rates). Accordingly, it is proper, fair and just that this Petition be determined by a bench of at least three judges.

6. The main issue raised by the respondent and interested parties, in opposing this application, is that the petition does not raise any novel point of law that has not been dealt with before this court or the High Court and does not meet the threshold for a bench of more than one judge. It is their position that the matters raised in the petition are the ordinary causes of action that this court ordinarily handles. They contend that the issue of enforcement of fundamental rights is the very crux of the issues that the High Court, and this court, determine, and these are issues that every judge deals with on a day to day basis. They do not see anything extraordinary in this petition. They do not think that issues relating to National Values under Article 10 of the Constitution, or the issue of res judicata, raise any substantial question of law. They do not see anything complex in determinations of public land and they argue that not every case where there is a large number of people raises a substantial question of law.

7. I have considered the issues herein and also considered the elaborate submissions presented by Dr. Khaminwa and Mr. Gikandi for the petitioners, Mr. Amoko for the respondent, and Mr. Buti for the 2nd interested party. I have also taken note of the authorities that they supplied to me.

8. Generally, cases are heard by one Judge, but the Constitution does envisage situations where there is need for a bench of more than one Judge to hear a particular matter. This is provided for in Article 165 (4) of the Constitution which provides as follows :-

165 (4). Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

9. Clauses 3 (b) and (d) of Article 165 relate to the following :-

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between levels of government; and

(iv) a matter relating to conflict of laws under Article 191.

10. The above provision of the Constitution is echoed in the Environment and Land Court Act, which provides as follows at Section 21 on the quorum of the court :-

21. *Quorum of the Court*

(1) *The Court shall be properly constituted for the purposes of its proceedings under this Act by a single Judge.*

(2) *Notwithstanding subsection (1) any matter certified by the Court as raising a substantial question of law*

(a) under Article 165 (3) (b) or (d) of the Constitution; or

(b) concerning impact on the environment and land;

Shall be heard by an uneven number of judges, as determined by the Chief Justice.

11. One may very well argue that every issue relating to the interpretation of the constitution raises serious questions of law, so there must be something particularly weighty and peculiar, a not your ordinary question of law, for it to reach the threshold of being “substantial” , before the court can refer the matter to the Chief Justice for empanelling a bench of more than one Judge. As was held in the case of *Harrison Kinyanjui vs Attorney General, (2012)eKLR*, it is for each Judge to satisfy himself that the question in the case reaches the threshold. In the same case, the court (Majanja J), held that mere novelty of the questions being raised, or the complexity of the case, by itself, would not necessarily require empanelling of a bench of three or more judges. I am in agreement with the holding in this case. It is common knowledge that the number of judges is quite limited, and that in fact, we do have a shortage of judges. There is no need of calling judges from their usual stations, and asking them to put aside the cases that they would ordinarily hear, for a matter that can very well be heard by a single judge. Empanelling a bench of three or more judges should therefore be for matters that are fairly exceptional.

12. I have taken note of the issues being raised in this case. I do not find them to be uniquely outside the scope of what this court ordinarily does on a day to day basis. The main issues in contention here touch on the right of the petitioners to occupy the houses, their removal from the houses as the project is being undertaken, and the legality of the contracts sought to be entered into by the respondent. I do not see anything, in the questions that are to be determined here, that would require a bench of more than one judge.

13. One case that is not too far from the one before me is that of *Satrose Ayuma & 11 Others vs Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others, High Court Nairobi, Constitutional & Human Rights Division, Petition No. 65 of 2010* . In that case, the respondents, owners of Muthurwa Estate in Nairobi, wished to have the land where the houses were located, redeveloped, in a fashion not too dissimilar to what is intended by the respondent in this case. That case was heard by a single judge, Lenaola J, as he then was. We also have the case of *David Ngige Tharau & 128 Others vs Principal Secretary Ministry of Lands, Housing and Urban Development & 2 Others (2016) eKLR*, which related to the Soweto slum upgrade project, a project that involved the removal of occupants for construction of modern housing. That case was heard by a single judge, Odunga J. The issues in this case may not necessarily be on all fours with the two cases that I have pointed out, but there is a close relation to the matters that arose in those two cases, with what is being raised in this case. Both cases, as I have pointed out were heard by a single judge. I appreciate that there may be a couple of novel questions to be determined in this case, but I am not persuaded that what is being raised in this petition warrants the empanelling of a bench of more than one judge.

14. This application is therefore dismissed but I make no orders as to costs.

15. Orders accordingly.

DATED AND DELIVERED THIS 18 DAY OF NOVEMBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA