



**Kathuku v County Government of Meru (Petition 8 of 2019)  
[2020] KEELC 3998 (KLR) (18 November 2020) (Judgment)**

Neutral citation: [2020] KEELC 3998 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
PETITION 8 OF 2019  
LN MBUGUA, J  
NOVEMBER 18, 2020**

**BETWEEN**

**EUSTACE KATHUKU ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF MERU ..... RESPONDENT**

**JUDGMENT**

1. Eustace Kathuku (the petitioner herein) filed the petition dated 1<sup>st</sup> May 2019 seeking the following Orders;
  - i. That this court do declare that the rights conferred upon the petitioner by the defunct Meru County Council and Nyambene County Council in relation to the petitioners rights of ownership, occupation and user of plot No. 26B Laare Township and all developments thereon must constitutionally be extended, respected and promoted by the respondent.
  - ii. That this court issues a declaration that the petitioners rights to acquisition, ownership, occupation and user of plot No. 26B Laare Township and the developments thereon cannot be arbitrarily deprived from the petitioner by the respondent and/or any other persons and/or body as the petitioners rights are protected under Article 40 of *the Constitution* of Kenya.
  - iii. The Court is invited to make any other and/or further orders, declarations and/or pronouncements that would guide the respondent and/or other devolved governments on the constitutional manner in which to deal with citizens property.
  - iv. Costs of this petition
2. The respondent, the County Government of Meru opposed the suit vide the Replying affidavit of the County physical planner one Ronald Mwenda filed in court on 29.7.2019 where it is contended that the petitioner has encroached on a road reserve.



3. The suit was heard by way of written submissions.

### **Case for the Petitioner**

4. The petitioner's case as contained in his petition, supporting affidavit and further supporting affidavit is that he bought the Plot No. 26 Laare Market as a fully developed commercial complex from Vigilio Munjiu in the year 1969. The plot was thereafter subdivided to Plots No. 26A which remained with the seller and plot 26B which belonged to the petitioner. The Petitioner made an application to the Meru County Council and plot No. 26B was transferred to his names.
5. In the year 2004 Nyambene County Council (where the suit plot is situated) decreed that all the Commercial buildings in the market townships under its jurisdiction should have building plans. The Petitioner and other owners of buildings without building plans were advised to make applications for late approval of building plans. That he made the same, the building was inspected by the District Physical planning officer, clerk of Nyambene County Council and the District Public Health officer. Upon inspection the building plans were approved and he was issued with an approved development plan in January 2005.
6. That he had fully paid the land rates and land rent to the now defunct Meru County Council and Nyambene County Council, which was succeeded by the respondent. Thus the respondent inherited all the duties, rights, assets, obligation and liabilities of Nyambene County Council.
7. That on 29/4/2019 an officer of the respondent named Ronald Mwenda came to his premises and affixed several red "X" marks on the walls of his development. The "X" marks are according to usage and customs understood to mark houses for demolition. That Ronald Mwenda informed him that the building was earmarked for demolition because the respondent had not granted him permission to undertake the developments. He also served him with a notice from the Director of physical planning dated 29/4/2019 informing him that no reasons were granted to undertake the developments. The notice requires him to demolish his building within seven (7) days failure to which the respondent would demolish the same.
8. It was his averment that when the suit plot was developed in the 1960s, there were only three permanent buildings in the whole of Laare Market area. That when he developed the same in the year 1969 there were only nine (9) other buildings present. That all public amenities, including government offices, religious worship premises, access roads, streets and roads have all been planned, surveyed and developed and all developers should taken cognizance of the existence of his premises and not otherwise.
9. The petitioner avers that the report availed by the respondent is of no probative value as it was prepared the same day their replying affidavits were also prepared hence the respondent should not create his own evidence.
10. He averred that he is amenable to the destruction of his property should the respondent agree to compensate him a sum of Kshs. 15,000,000/=.
11. In his submissions, the petitioner restated his position that the buildings alleged to have encroached on the road reserve were built in the 1960's. He took issue with the sketch map which was neither certified nor dated. He relied on a judgement of this court in the case of M' Munoru M' Mugwongo & 2 others v County Government of Meru [2020] eKLR



## Case for the Respondent

12. The respondent avers that petitioner's land measures 20 feet by 100 feet. He had however put up new developments measuring 35 feet wide to the supposedly 20 feet by 100 feet. That the said extension measures 15 feet hence grossly encroaching on the road reserve. That the demand notice only seeks to demolish the illegal extension and not the whole building as the petitioner suggests. That the actions of the petitioner has halted the construction of the ongoing upgrading of the road to cabro status.
13. The respondent submitted that the petitioner has not exhausted all the dispute resolution mechanisms available under the Physical Planning Act, specifically sections 38 and 39 thereof, hence rendering the petition a nullity. On this point, the respondent cited the case of Republic v Nairobi City County & another Ex parte Kenafric Properties Ltd & another [2019] eKLR.
14. On whether the petitioner is entitled to the reliefs sought, it was submitted that the petitioner cannot be allowed to encroach on a public access road and legitimately expect to get favourable orders or rewards for the aforesaid misdeeds. The respondent relied on the case of Multiple Hauliers East Africa Limited V Attorney General & 10 others [2013]eKLR.

## Analysis and Determination

15. On 23<sup>rd</sup> May 2019 this court ordered a site visit of the suit premises by the executive officer of the court who was to write a report to capture the nature and extent of the land use on the suit land. The court also directed the physical planner and surveyor to be present and file their own joint report as to the nature of the encroachment. The reports envisaged in the orders of 23.5.2019 were not filed as the petitioner declined and/or neglected to participate in the scene visit exercise. However, the physical planner conducted a site visit and filed a report on 24.9.2019 showing that the petitioner had encroached on the public road leaving the road with 6 meters instead of 9 meters. This is the report which the petitioner has opposed.
16. The issues which have emerged for determination are; whether this court has jurisdiction to hear the matter, and whether the petitioner is entitled to any relief.
17. The petitioners have relied on Article 40 of *the Constitution* which makes provisions for the protection of the right to property. The respondent on its part relies on the provisions of Section 38 of the Physical Planning Act where it is provided that;

### “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)”.
18. The enforcement notice was issued in line with the provisions of Section 38 of the Physical Planning Act (now the *Physical and Land Use Planning Act* of 2019). The Physical Planning Act established an elaborate mechanism for resolving any disputes/ complaints that may arise from exercise of powers donated by that Act to the respondents or any other public authority created under the Act. To this end, Section 7 of the Act established Physical planning Liaison Committees whose functions are set under Section 10 of the Act. Section 13 provided for the Appeals to liaison committees, while Section 15 also made provision for Appeals to the National liaison Committee and to the High Court.
19. In this case the petitioner did not exhaust the remedies available to him under the law. I agree with the determination made in *Republic v Nairobi City County & another Ex parte Kenafri Properties Ltd* (supra) that the petitioner ought to have pursued the procedure under Section 13 of the Physical Planning Act. I find fortress in the case of *Peter Ochara Anam & Others –V- Constituencies Development Fund CDF Board & Others Kisii Petition No.3 Of 2010* (unreported) (2011) eKLR, where Justice Makhandia stated that *the constitution* did not out law resort to other dispute resolution mechanisms set out in other statutes. The Judge was dealing with issues touching on the Constituency Development Fund Act (CDF) and he stated thus:
- “Coming to court by way of a constitutional petition is not expected either as much as *the constitution* is superior law to the statute aforesaid. In view of this provision and there being no allegations or evidence that the petitioners exhausted these remedies, in bringing this petition, the petitioners have deliberately avoided the procedure and remedy provided for under the Act. They have not proffered any explanation as to why they did not refer any of the complaints they have raised to the 1<sup>st</sup> respondent as required by law. It has been stated constantly that where there exists sufficient and adequate Legal Avenue, a party ought not to trivialize the jurisdiction of the court pursuant to *the constitution*. Indeed, such a party ought to seek redress under the relevant statutory provision; otherwise such available statutory provisions would be rendered otiose...”
20. The petitioner has urged this court to find that he is in a similar situation as the petitioners in the case *M’Munoru M’Muguongo & 2 Others vs, County Government of Meru* (2020)eKLR where



I delivered a judgment in favour of the petitioners whose plots were situated in the nearby Kiengu market. However, as pointed out by the respondents, that case is distinguishable from the present suit in that in the case of Kiengu market, the respondents claim was that the entire suit plots were illegal which claim was inconsistent with the enforcement notice issued by the County Government. In the present suit, the enforcement notice was issued because the petitioner had apparently encroached onto a public road of access. This is still the claim which has been maintained by the respondent during the trial. The respondents have not questioned the legality of the petitioner's entire plot. The dispute is about the extension unto the public road hence this is not a constitutional issue.

21. It is worthy to note that the court had directed that the scene be visited and reports be filed capturing inter-alia, nature and extent of the land use at the site. The petitioner however shunned the scene visits, thus denying the court an opportunity of ascertaining his averment, that his building is very old and that there are no new buildings. Section 107 of the *Evidence Act* provides that he who alleges must prove, hence it was incumbent upon the petitioner to prove his averments which he failed to do.
22. The intention of the Respondent is to upgrade the public road by putting cabro pavement. This development would be for the benefit of the public. There is nothing to justify the petitioners consistent hold unto the premises built on public land and on a road reserve.
23. In the end I do find that the petition herein lacks merits and the same is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT MERU THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 12.10.2020. In light of the declaration of measures restricting court operations due to the COVID-19 pandemic and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**

