



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MILIMANI**  
**ELC CASE NO. 157 OF 2016**  
**(CONSOLIDATED WITH ELC 381 OF 2014)**

**CAROLINE NYAKIRINGA NDUNGU**

**NUZHAT A. MWINZANGU**

**BERNICE N. MWENDWA**

**MARGARET A. OCHIENG**

**CHARLES MACHOKA**

**DAVID GOKO NDERITU**

**HELLEN CHEPCHUMBA**

**ZEDDY NASERIAN.....PLAINTIFFS**

**VERSUS**

**REGISTERED TRUSTEES OF TELEPOSTA PENSION SCHEME....RESPONDENT**

**AND**

**BERNARD KARIUKI WATAARI**

**REBECCA LETANGULE**

**REMGIOUS OKEYO**

**FAITH NJOROGE**

**JACQUELINE KEZIA**

**BEATRICE KALENDA**

**CATHERINE KIRARA**

**KENNEDY BWOSI**

**JENNIFER BWOSI**

**JENNIFER OKOTH**

**LAWRENCE MUGAMBI**

**JUDGEMENT**

What is before Court for determination are two consolidated suits namely ELC 157 of 2016 and ELC 381 of 2014. In ELC 157 of 2016 the Plaintiffs are seeking the following orders from the Defendant:

- a) A mandatory injunction compelling the Defendant to repair or cause to repair its leaking water tanks, water and waste water pipes.
- b) A permanent injunction restraining the Defendants by themselves, their servants, agents or otherwise howsoever from continuing to maintain and keep their said structure and premises so as to be a nuisance to the Plaintiffs.
- c) Ordering and directing Defendant to form the Corporation in terms of sections 17 and 27 of the Sectional Property Act No. 21 of 1987.
- d) In the event that the Defendant fails to establish and or form the Corporation aforesaid, within fourteen days, then the Plaintiffs be permitted to establish such a Corporation.
- e) General Damages
- f) Special Damages
- g) Costs of the suit be granted to the Plaintiffs
- h) Interest at court rates
- i) Such other and further order as the Honourable Court deems just and fit to grant

In ELC 381 of 2014 by an Amended Plaint dated the 2<sup>nd</sup> April, 2017, the Plaintiffs seek the following orders against the Defendant:

- a) An order of permanent injunction to restrain the Defendant whether by themselves and/or through Teleposta Pension Scheme its servants, agents, representatives, advocates or auctioneer or any of them or otherwise howsoever be restrained by a temporary order of injunction from doing the following acts or any of them that is to say from advertising for sale, disposing or selling by public auction, tender, bids, or private treaty howsoever at any time completely by conveyance, transfer or any sale concluded by auction, private treaty leasing, letting or otherwise howsoever interfering with the Plaintiffs/Applicants peaceful and priority right to purchase house situated on LR No. NRB BLK 23/301 (1 – 20) known as House No(s) 3B, 5A, 7A, 9A, 1B, 2B, 5B, 6B, 7B, 9B and 4A Kangundo/ Kileleshwa Road pending the hearing and determination of this suit.
- b) An order of temporary injunction to restrain the Defendant, its servants, agents from issuing, threatening, evicting and/or otherwise interfering with the Plaintiffs quiet enjoyment of the suit premises in Kangundo Road – Kileleshwa houses situated on LR NO. NRB BLK 23/301 (1 -20) pending the hearing and determination of this suit and/or until further orders of the Honourable Court.
- c) A declaration that the decision of the Defendant not to offer the Plaintiffs the first priority and not offer at all to purchase the houses situated within Kangundo Kileleshwa Road is unlawful, discriminating and is ultra vires the Defendant terms and/or conditions of offer of its houses and the same is for rescinding.
- d) A declaration that the Defendant through Teleposta Pension Scheme is estopped through the Doctrine of Equitable Estoppel from alienating the Plaintiff's priority right to purchase their respective homes.
- e) An order of permanent injunction to restrain the Defendant, its servants and/or Agents from issuing, threatening and or otherwise interfering with the Plaintiffs quiet enjoyment of the suit premises in Kangundo Road Kileleshwa houses.
- f) An order of specific performance compelling the Defendant to issue a letter of offer to offer for sale to each of the Plaintiffs their respective units of the suit premises within Kangundo Road – Kileleshwa situated on LR No. BLK 23/301(1 – 20).
- g) Costs of the suit.
- h) Any other relief this Honourable Court may deem fit to grant.

The Defendant filed its Defence where it denied the Plaintiffs averments in the Plaint except for the descriptive and jurisdiction.

It denied failing to maintain the suit premises by not undertaking repairs on the water pipe. It denied being responsible for the damages to the premises. It contended that the third parties have barred it from entering into the suit premises to effect repairs. It insisted that it is the third parties who should be responsible to the Plaintiffs' claim.

**Evidence of the Plaintiffs**

The Plaintiffs in ELC 157 of 2016 entered into a consent judgement with the Defendant to undertake repair works to the premises and form a Corporation in terms of sections 17 and 27 of the Sectional Properties Act. The only issue that was left for determination was the question of costs.

The Plaintiffs in ELC 381 of 2014 also referred to as 'Third Parties' in the consolidated suit, called three witnesses who stated that they were former employees of TELKOM (k) Ltd. It was their testimonies that in 2003, the Defendant offered various houses for sale to members of its scheme wherein the houses were first allocated to the staff who were in occupation at that time. The terms of offer were that the houses were to be allocated to the current occupants to purchase at a certain price. Further, the individual purchasing the house was expected to meet all the expenses including stamp duty as well as registration fees. The scheme members were to be given first priority over their houses before the offer could be extended to the public. When the Plaintiffs received the offer from the Defendant, they immediately filled in a FORM 'A' which had been prescribed by the Defendant to be filled in by individuals expressing an interest to purchase their respective houses No(s) 3B, 5A, 7A, 9A, 1B, 2B, 5B, 6B, 7B, 9B and 4A Kangundo Road / Kileleshwa, which form they forwarded to the Defendant. The Plaintiffs believed the Expression of Interest they submitted to the Defendant, would be acted upon by it, through issuing them with a Letter of Offer for their respective houses to enable them purchase them. However, the Defendant unilaterally disregarded the Plaintiffs and issued them with notices to quit their respective houses. The Plaintiffs contend that the Defendant discriminated against them and breached the terms of giving them the first priority to purchase their houses No(s) 3B, 5A, 7A, 9A, 1B, 2B, 5B, 6B, 7B, 9B and 4A Kangundo Road / Kileleshwa on a tenant purchase scheme but instead offered their houses to third parties. They insist they did not waive their right to first priority and it was discriminatory for only a few persons to be offered their houses to purchase instead of all them. Further, that the Defendant increased the rent without consulting them, which culminated in their filing a suit which was dismissed. They averred that the Defendant even distressed them for rent and took away some of their properties. They reiterated that the Defendant declined to receive their rent and returned to them the monies they had so far paid. They claim the Defendant should be compelled to sell to them the individual houses that they occupy on Kangundo Road, Kileleshwa estate. They however admit that they have never paid their respect rents from 2005 but continue to receive their pension from the Defendant. Further, that eight (8) people were allocated their houses to purchase but twelve (12) of them were never priority to purchase their House No(s) 3B, 5A, 7A, 9A, 1B, 2B, 5B, 6B, 7B, 9B and 4A Kangundo Road/ Kileleshwa. They had complained about the increment in rent and contend that from 2002 no repairs were done to their respective houses. They explained that the employer TELKOM (K) stopped the check off system in 2005 and they were advised to pay rent Defendant. Further, the Defendant advised them to channel their rent through a company called GIMCO but before doing so, they were expected to sign fresh Tenancy Agreements which they did not do, since they had already signed FORM 'A' to express an interest to purchase their respective houses. They admitted refusing to vacate their respective houses and sought the court's intervention to direct the Defendant to offer them the said houses for Sale.

### **Evidence of the Defendant**

The Defendant through DW1 stated that the Plaintiffs are in occupation of their respect houses in the suit premises but have refused to pay rent or vacate the same to enable it carry out repairs. It was DW1's testimony that the Plaintiffs herein had refused to vacate their respective houses as directed by Justice Mwera to enable it carry out renovations. Further, that the Plaintiffs maintain that they are entitled to remain in their respective Houses No(s) 3B, 5A, 7A, 9A, 1B, 2B, 5B, 6B, 7B, 9B and 4A Kangundo Road / Kileleshwa as they have a priority right over them. DW1 claimed the Plaintiffs entered the suit premises as tenants and were supposed to fulfill certain terms before the suit premises could be sold to each of them, which terms they failed to adhere to. DW1 explained that the terms included signing a fresh Tenancy Agreement; Paying Outstanding Rent; Signing a Letter of Offer; Paying deposit of 10% of the purchase price and paying the outstanding amount of purchase price in 90 days. It was DW1's testimony that there were certain members of the pension scheme who were sold for their respective houses after they adhered to the terms set out by it. The Defendant's witness insisted it was its mandate to give members a priority to purchase their respective houses but it was not a Policy. The Defendant's witness confirmed that they rejected the rents paid by the Plaintiffs' occupying houses No(s) 3B, 5A, 7A, 9A, 1B, 2B, 5B, 6B, 7B, 9B and 4A Kangundo Road / Kileleshwa because it was the previous low rent they were paying but they wanted to enforce the new rents. Further, that prior to July, 2005, there were no rent arrears as rent used to be recovered through a check off system. DW1 reiterated that at the time the Plaintiff' were told to express an interest to purchase their respective houses, there were no rent arrears. He divulged that the suit the Plaintiffs filed to challenge rent increment was dismissed and they did not appeal. DW1 averred that the persons who were given letters of offer, all signed new tenancy agreements and paid outstanding rents.

The Plaintiffs and the Defendant filed their respective submissions that I have considered.

### **Analysis and Determination**

Upon perusal of the pleadings and materials filed in respect of ELC 157 of 2016 and ELC 381 of 2014 as well as hearing testimonies of all the witnesses, I note ELC 157 of 2016 has been determined except for the issue of costs and hence my analysis is mainly dealing with ELC 381 of 2014. The following are the issues for determination:

- Whether the Plaintiffs in 381 of 2014 had legitimate expectation from the Defendant to give them first priority to purchase their houses No(s) 3B, 5A, 7A, 9A, 1B, 2B, 5B, 6B, 7B, 9B and 4A situated on Kangundo Road, Kileleshwa.
- Whether the Defendant is in breach of its obligation
- Who should bear the costs of the suit.

As to Whether the Plaintiffs in 381 of 2014 had legitimate expectation from the Defendant to give them first priority to purchase their houses No(s) 3B, 5A, 7A, 9A, 1B, 2B, 5B, 6B, 7B, 9B and 4A situated on Kangundo Road, Kileleshwa and Whether the Defendant is in breach of its obligation. It was the Plaintiffs contention that the Defendant was supposed to give them first priority to purchase their respective houses, which are indicated above. They aver that the Defendant discriminated against them by failing to sell to them the houses despite submitting an expression of interest through FORM 'A'. They claimed the Defendant only offered eight (8) occupants their respective houses to purchase. They heavily relied on the Defendant's Letter dated the 31<sup>st</sup> October, 2003 which invited them to express an interest to purchase their respective houses, that I have reproduced hereinbelow:

**'REQUEST FOR EXPRESSION OF INTEREST TO PURCHASE SCHEME PROPERTIES KANGUNDO RD-KILELESHWA NAIROBI FLAT NO. B2**

*The Board of Trustees is in the process of considering the possibility of selling House No. ....located at Kangundo Rd Kileleshwa Nairobi.*

*The provisional sale price is Kshs. 2, 530,000.00 to be paid within Ninety (90) days on receipt of a sale offer and execution of a sale agreement.*

*In addition the Purchaser is expected to meet the legal fees and relevant statutory charges.*

*Our records show that you currently occupy the above house.*

*In case you currently occupy the house and are interested in purchasing the same and able to do so, please fill FORM A and return to Scheme Offices within one (1) month of the date of this letter.*

*In case you are not able to purchase the house, please fill FORM B and return to Scheme Offices within one (2) month of the date of this letter.*

*It is emphasized that:-*

- a) The above indicated sale price is provisional and the actual: price will be confirmed at the time of sale in case the latter place.*
- b) The filling and returning of the attached form to the Scheme is merely an expression of interest and does not constitute a sale contract between the scheme and yourself.*

*Yours faithfully*

*For and Behalf of TELPOSTA PENSION SCHEME*

*David Kabunge*

*Pension Manager*

The Plaintiffs stated that upon receipt of the said letter from the Defendant, they filled FORM A which they sent to the Defendant's office, which FORM A I have also reproduced below:

**POSSIBLE SALE OF KANGUNDO RD-KILELESHWA NAIROBI FLAT NO. A4**

*I refer to your letter Ref No. TPS/6640/01/03 dated 25/10/2003 on the above subject.*

*I hereby confirm that I am currently occupying the above house and interested in buying the same. I further confirm that I am able to pay the total price of the house which is provisionally stated at Kshs-----within Ninety (90) days on receipt of the sale offer together with legal fees an any statutory charges.*

*I request the Board of Trustees to consider me in case the house is being sold".*

As a result of the two letters that I have reproduced above, the Plaintiffs believed they each had legitimate expectation to be given first priority to purchase the houses they were each occupying at that time. The Plaintiffs' witnesses claimed they were initially allocated their houses in lieu of house allowance but when the said houses were vested in the Defendant they were advised to pay rent directly to it and their employers commenced giving them their house allowance after that. They admitted receiving their pension from the Defendant. In cross examination, the witnesses all admitted that they had not been paying the rent to the Defendant from 2005 to date. They explained that the rent had been increased and they were advised to pay rent to a company called GIMCO which they failed to do. The Defendant insisted that the letter dated the 25<sup>th</sup> October, 2003 was an invitation to express an interest and did not constitute a contract between the parties. It contended that the Plaintiffs were unable to demonstrate that there was a legally binding policy to entitle them to priority right of purchase and the Defendant was estopped from reneging on the same. The Defendant further claimed that the Plaintiff did not provide any evidence to prove they had refused to receive rent. Further, that they admitted they had filed a suit challenging rental increment, which was dismissed.

In the text book by; **POLLARD, PARP WORTH AND HUGHES** writing at page 583 in the 4<sup>th</sup> edition of **CONSTITUTIONAL AND ADMINISTRATIVE LAW: TEXT WITH MATERIAL** the learned authors posited as thus: -

**"Legitimate expectation refers to the principle of good administration or administrative fairness that, if a public authority leads a person or body to expect that the public authority will, in the future, continue to act in a way either in which it has regularly (or even always) acted in the past or on the basis of a past promise or statement which represents how it proposes to act, then, prima facie, the public authority should not, without an overriding reason in the public interest, resale from that representation and unilaterally cancel the expectation of the person or body that the state of affairs will continue. This is of particular importance if an individual has acted on the representation to his or her detriment".**

Also In 4th Edition, Vol. 1 (1) at page 151, paragraph 81 of **HALSBURY'S LAWS OF ENGLAND**, legitimate expectation is outlined as follows: -

**"A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by authority, including an implied representation, or from consistent past practice".**

The Court of Appeal in the case of **Involate Wacike Siboe v Kenya Railways Corporation & another [2017] eKLR** dismissed an Appeal filed by the Appellant, a former employee/tenant of the 1<sup>st</sup> Respondent, **Kenya Railways Corporation**, whose Judicial Review Application seeking mandamus order to have the Respondent sell to her the house at concessionary rates as it had earlier undertaken to do was dismissed by Hon. Justice Odunga. The Appellant relied on the doctrines of estoppel and legitimate expectation. The Court of Appeal on the issue of legitimate expectation held that *'...The same position applies to legitimate expectation; no legitimate expectation can arise if effectuating the expectation would result in violation of a statute. The contours of the doctrine are well mapped. Legitimate expectation arises where representation by a decision maker has created a genuine expectation that it is within his power to honour and make good. The law however does not protect every expectation; it protects only legitimate expectations. Where the representation is one, which the decision maker is not competent to make, reliance on it cannot in law give rise to legitimate expectation. Hence legitimate expectation cannot arise when the decision maker is acting ultra vires his or her powers. In addition, where the words of a statute are clear and express, they must override any expectation to the contrary that a party may claim to have. On the same note, where a public authority has made a representation that it does not have power to make, it is not estopped from asserting the correct position in law...'*

Further, in the case of **Jimmy Odari & 6 others v Minister for Local Government & 2 others [2017] eKLR**, Honourable Justice Muriithi held that *'...under the applicable landlord and tenant law, The Transfer of Property Act, ss. 108 and 109, a tenant has a duty to pay rent to the landlord and his transferee with the two having a duty to the tenant to maintain his tenancy...the petitioners' rights as tenants do not include being informed of or being given reasons for the transfer of the property; the tenants' right on the property is to keep the tenancy notwithstanding the transfer. There is no breach of any right under Article 47 (2) by a landlord who transfers his property without informing the tenants of the transfers...There was no constitutional issue for determination by the constitutional Court. The petitioners were bitter that they were not allowed to buy the 2<sup>nd</sup> respondent's housing estate in which they were tenants and which the 2<sup>nd</sup> respondent had transferred to the 3<sup>rd</sup> respondent who, as new owner and consistently with a landlord's right sought to recover rent from the petitioners as its tenants. A tenant cannot enforce a private bid to buy property by relying on alleged breach of public procedures in the disposal of property, which do not affect his rights as a tenant. It is an abuse of the process of the court. The petition is clearly a challenge on increment of rent which should have been filed in appropriate forum for determination...'*

Based on the materials presented and relying on the authorities cited above, I find that the Defendant's letter dated 31<sup>st</sup> October, 2003 was an invitation to the Plaintiffs' to express an interest to purchase the houses they occupy. Further, the Plaintiffs have not demonstrated if the Defendant had a Policy document that entitled them to be given first priority to purchase the houses they occupied. Even the Form 'A' which the Plaintiffs had heavily relied, had a clear rider requesting the Board to consider the expression of interest. There was no automatic clause in the FORM "A" conferring first priority to the Plaintiffs' to purchase their houses. To my mind it seems the Plaintiffs anticipated being offered their Houses No(s) 3B, 5A, 7A, 9A, 1B, 2B, 5B, 6B, 7B, 9B and 4A Kangundo Road, Kileleshwa to purchase, and became bitter when the Defendant did not do so, culminating in this suit. The Defendant had conditions, which included signing a fresh Tenancy Agreement; Paying Outstanding Rent; Signing a Letter of Offer; Paying deposit of 10% of the purchase price and paying the outstanding amount in 90 days before the said houses parties occupied could be sold to them. However from the Plaintiffs evidence, it emerged only eight (8) occupants adhered to the said conditions but the occupants in Houses No(s) 3B, 5A, 7A, 9A, 1B, 2B, 5B, 6B, 7B, 9B and 4A Kangundo Road / Kileleshwa Road, had failed to comply which led to the Defendant offering the houses to third parties. It has also emerged that it was the mandate of the Defendant to give members a priority to purchase their houses but it was not a policy. Further, since they admitted receiving their pension from the Defendant and it was the DW1's contention that they were selling the houses to raise pension, I do not see how their rights to purchase was violated.

In the circumstances, I find that the Plaintiffs should not have any legitimate expectation from the Defendant to give them first priority to sell Houses No(s) 3B, 5A, 7A, 9A, 1B, 2B, 5B, 6B, 7B, 9B and 4A Kangundo/ Kileleshwa Road. Further, I do not find the Defendant's failure to sell the houses to them as a breach of its obligation.

It is against the foregoing that I find that the Plaintiffs in ELC 381 of 2014 also referred to as 'Third parties' in the consolidated suit have not proved their case on a balance of probability and will proceed to dismiss it with costs to the Defendant. As for ELC 157 of 2016 insofar as they entered into a consent judgment, issue of costs had not been determined and I will award the Plaintiffs therein the costs to be borne by the Defendant.

**Dated and Delivered in Nairobi this 29th day of April, 2019**

**CHRISTINE OCHIENG**

**JUDGE**

**In the presence of:**

Caroline Sagina-Court Assistant