REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

CONSTITUTIONAL PETITION NO. 1 OF 2017

DAVID KEMBOI.....PETITIONER/APPLICANT

AND

CABINET SECRETARY, MINISTRY OF

LANDS AND PHYSICAL PLANNING.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2 ND RESPONDENT

NANDI COUNTY MANAGEMENT BOARD.....3RD RESPONDENT

COUNTY GOVERNMENT BOARD.....4TH RESPONDENT

AND

KAPSILE PRIMARY SCHOOL.....1ST INTERESTED PARTY

THE CHAIRMAN MUTWOT TRADING (MARKET) CENTRE....2ND INTERESTED PARTY

JUDGMENT

PETITIONERS' CASE

The petitioner, a retired chief of Mutwot location and a former chairman of Mutwot Trading center filed the petition herein seeking a declaration that the respondents illegally and unlawfully approved the 1990 physical development plan that proposes to reduce the Kapsile Primary School's land from 8 acres to 3 acres and as such violated the provisions of Article 40(1) and (20 as read together with Article 260 of the Constitution of Kenya ,2010 that guarantees and protects the 1st interested party's right to own property and as such violated the provisions of Article 47 as read with Article 260 of the Constitution of Kenya 2010 that guarantees and protects the 1st interested party's right to fair administrative action and also violated Article 51 that guarantees the right to fair hearing.

Moreover, that the action violated the provisions of Article 50(1) (b) and 2 of the Constitution of Kenya 2010 that guarantees and protects the right to free and compulsory basic education and best interests of children. He further prays for an injunction restraining the respondents their agents, servants and or employees from implementing the 1990 physical development plan that proposes to reduce the Kapsile's Primary school's land from 8 acres to 3 acres. He prays for a mandatory injunction to be issued compelling the respondent the respondent to adopt the 1994 development physical plan that proposes to award the school 8 acres and the market 11.3 acres.

The facts of the petition are that there are two physical development plans that were proposed with regard to the school and the market. The first plan was developed in 1990 which proposed to allocate Mutwot public market 16.3 acres and the school 3 acres. The second physical development plan was developed in 1994 and reviewed the 1990 plan and proposed to allocate Mutwot public market approximately 11.3 acres whereas Kapsile primary school was allocated 8 acres. It is alleged that on the 24th August 2015, the respondents illegally approved the 1990 plan without involving the public to participate and that the members of public are opposed to the 1990 plan as the school will lose 5 acres.

The petitioner submitted that there were 2 PDPs proposed in respect to Mutwot Trading Centre. The 1990 plan proposed to allocate the market 1 6.3 acres and the school 3 acres. The 1994 plan reviewed the 1990 plan and proposed to allocate the market 11.3 acres and the school 8 acres.
He submitted that the petition is anchored on Articles 22(2) (c) and 258(2) (c) of the constitution. Further, that the respondents irregularly and unlawfully approved the 1990 plan in 2015 without involving the public and thereby reducing the school land to 3 acres. This is what led to the petitioner filing the petition seeking a declaration that the respondents unlawfully approved the 1990 PDP.

The applicant submitted that he has locus to file the instant petition under Articles 221-, 22(2)(c), and 258 of the constitution. He further

relied on the cases of ***Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone [2012] eKLR and John Mining Temoi & Another v Governor of Bungoma County & 17 others [2014], eKLR*** to buttress the point that he has locus to file the suit as he is acting in the interest of the public.

The applicant submitted that there were no consultations with the public contrary to the letter by the County Land Management Board of Nandi County. If they were consulted it is clear that the primary school was never consulted. The school's right to property is guaranteed under Article 40 of the constitution and is under threat as the 3rd respondent had made a resolution to adopt the impugned PDP.

The instant petition is not premature as the recommendation violates article 47 of the constitution and Article 40. There was no consultation with the community thus violating their right to fair administrative action. The petitioner also relied on the case of ***Phillip K Tunoi & Anor v Judicial Service Commission & Another 2014, eKLR and Matatu Welfare Association & 3 others v Cabinet Secretary for Transport & Infrastructure & 6 others (2015), eKLR*** to submit that the petition was not premature.

The petitioner submitted that in light of the 3rd and 4th respondents' responses it is clear that the school was never consulted on the resolution to adopt the 1990 PDP which is detrimental to the school. The court has jurisdiction to grant the orders sought as per Article 23(3) petitioner seeks conservatory orders and direct that subsequent approvals to abide by the provisions of the constitution.

RESPONDENTS' CASE

The 4th respondent filed a replying affidavit, an answer to the petition and an affidavit in support of the response to the petition. The 4th respondent confirmed that none of the plans have been approved. The 1990 plan was objected to leading to the preparation of the 1994 plan. The 1994 plan was objected to by the Mutwot Centre committee who preferred the 1990 plan. This was evidenced by letters through their advocates M/s Chepseba Lagat & Associates. Due to this conflict the board made a resolution that the status quo be maintained and a new plan is to be made where all parties are involved and the same do pass through the process required by the physical planning act. There has been no subdivision and the Director of Physical Planning intimated that the same had to follow the process required before his office can approve the plan. As per the act, the petitioner has to object the planning decision through the director of physical planning where the matter will be heard before being brought to court. The respondents reiterated that there is no physical development plan that has been adopted as the plans were prepared way before the enactment of the Physical Planning Act.

The 4th respondent maintained that the 8 acres are in possession of the 1st interested party. The petitioner had lodged a complaint at the Department of Physical Planning and a decision was made on the same as per annexures Cl, C2 and C3.

The 4th respondent argues that the petition is a waste of the courts time and that there is no imminent threat as no plan has been approved.

ISSUES FOR DETERMINATION

a)Whether there has been violation of any constitutional rights

b)Whether the orders sought should be granted

WHETHER THERE HAS BEEN VIOLATION OF ANY CONSTITUTIONAL RIGHTS
In the case of **John Mining Temoi & another v Governor of Bungoma County & 17 others [2014] eKLR**, the court held at paragraph 81 that;

> **"As a basic minimum, the Petitioners are required to not only cite the provisions of the Constitution which have been violated but also the manner in which they have been violated with regard to them. See the case of Anarita Karimi Njeru (1976-80) 1 KLR 1272 and Trusted Society of Human Rights Alliance -v- Attorney General & Others High Court Petition No. 229 of 2012. In demonstrating the manner in which there has been a violation of their rights or of the Constitution, the Petitioners should present before the court evidence or a factual basis on which the court can make a determination whether or not there has been a violation."**

The petitioner has not provided any evidence that there has been subdivision of the said property or the implementation of any of the Physical Development Plans. There is no establishment of a factual basis upon which the claims that there has been a violation of the constitutional rights of the I interested party.

WHETHER THE ORDERS SOUGHT SHOULD BE GRANTED

The 1990 plan has not been approved and therefore it cannot be implemented as the process in the physical planning act will not have been followed. The plan has not been implemented and the petitioner has not proven that it has. Therefore, there is no merit for the mandatory injunctive orders sought by the petitioner.

The affidavits from the physical planner clearly indicate that there is no approved plan therefore a declaration that the 1994 plan be implemented will be in contravention of the Physical Planning Act and against the wishes of the community as there had been objections to the plans.

The petitioner has not made a case for the violation of constitutional rights and consequently, the petition is dismissed. No order as to costs.

Dated and delivered at Eldoret this 11th day of April, 2019.

A.OMBWAYO

JUDGE