



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 663 OF 2013

(FORMERLY MISC. CIVIL APPLICATION NO. 104 OF 2011)

SAMOW EDIN OSMAN.....APPLICANT

VERSUS

THE MINISTER OFFICE OF THE PRESIDENT PROVINCIAL

ADMINISTRATION & INTERNAL SECURITY.....1ST RESPONDENT

THE PERMANENT SECRETARY OFFICE OF THE

PRESIDENT PROVINCIAL ADMINISTRATION

AND INTERNAL SECURITY.....2ND RESPONDENT

THE MINISTER MINISTRY OF STATE

FOR DEFENCE.....3RD RESPONDENT

THE PERMANENT SECRETARY

MINISTRY OF STATE FOR DEFENCE.....4TH RESPONDENT

THE AIR FORCE COMMANDANT

EASTLEIGH AIRBASE.....5TH RESPONDENT

HON. ATTORNEY GENERAL.....6TH RESPONDENT

JUDGEMENT

1. Through the application dated 16/12/2011, the *ex parte* Applicant sought an order to quash the Respondents' decision to demolish buildings within 12 meters of the boundary of the Moi Airbase and buildings within 30 meters of the airbase with more than two floors. The Applicant also sought an order to prohibit the Respondents from demolishing buildings which are more than 30 meters from the boundary and fence of Moi Airbase on land reference numbers (L.R. No.) 36/111/109, 36/111/110 and 36/111/218 Eastleigh, Nairobi ("the Suit Property").

2. The application was made on the grounds that the Respondents had taken a decision to demolish the Applicant's buildings erected on the Suit Property without giving the Applicant notice. The Applicant averred that the Respondents had started demolishing buildings within 30 meters of the boundary of the Moi Airbase.

3. The application was supported by the Applicant's verifying affidavit sworn on 29/11/2011 in which he deponed that he is the registered

owner of the Suit Property situated in Eastleigh Nairobi, and annexed copies of the conveyances and indentures of conveyances dated 20/8/2007. He averred that there was a modern five storeyed building known as Barakat Hotel on L.R. No. 36/111/218 comprising eighty executive fully furnished rooms, shops, hotel and conference halls. He averred that this parcel of land was situated more than fifty meters from the boundary and fence of Eastleigh Airbase. A ten storeyed modern building comprising 164 furnished rooms, conference halls, gyms and modern offices occupied by Kenya Commercial Bank had been erected on L.R. Nos. 36/111/109 and 36/111/110. The Applicant gave the estimate value of these two parcels of land at the time as Kshs. 1,500,000,000 and that of L.R. No. 36/111/218 was Kshs. 400,000,000/=.

4. The Applicant averred that the buildings on the Suit Property were built with the full knowledge and approval of the City Council of Nairobi which approved the architectural drawings. He deponed that on 22/11/2011 bulldozers under the supervision of police officers and officers from the Kenya Air Force started demolishing buildings near the fence of the Moi Air Base Eastleigh. He deponed that the Suit Property was marked in red paint to show that the buildings were earmarked for demolition even though nobody had told him that the Suit Property was to be demolished. At the time he swore the affidavit, the Applicant was apprehensive that the demolition exercise being carried out in his neighbourhood would in a matter of time reach the Suit Property. He deponed that over six hundred employees working in the Suit Property would be rendered jobless and that he would suffer substantial loss which cannot be compensated in damages if the demolition of the Suit Property was undertaken by the Respondents.

5. He added that the demolition would be contrary to Article 40 (3) of the Constitution and that no notice of the threatened demolition was given to him. He annexed photographs showing the Grand Royal Hotel, the conference rooms and the self-contained rooms. He also annexed a copy of the certificate of occupation dated 14/10/2010 issued by the City Council in respect of L.R. Numbers 36/III/109 and 36/III/110. He produced a copy of Form PPA2 issued by the City Council under Section 33 (1) (a) of the Physical Planning Act which gave approval for the development permission and change of user for the Suit Property from residential to commercial.

6. The court notes that the approval was subject to certain conditions including the plot not constituting disputed public utility land, compliance with Section 36, 41 and 52 of the Physical Planning Act and compliance with the approved Zoning Policy. The City Council of Nairobi gave the approval on 10/11/2009. The approval for development permission in respect of L.R. No. 36/III/218 was given on 25/5/2004 to David N. Gichohi under conditions similar to the approvals for L.R. No. 36/III/109 and 110. The Applicant annexed copies of the building plans and the payments he made to the City Council of Nairobi.

7. The Applicant obtained orders on 30/11/2011 from the High Court staying the demolition of the Suit Property when the court granted him leave to commence these judicial review proceedings. The suit was transferred to the Environment and Land Court for determination.

8. Major Vincent Perra, Force Number 21032, Commanding Officer, Moi Airbase Headquarter Wing of the Kenya Air Force swore the Replying Affidavit on 23/4/2012 opposing the application for judicial review. Major Perra swore the affidavit as the officer in charge of the Moi Airbase Ground Operations who was tasked with Airbase grounds. He deponed that there had been illegal construction on the land surrounding Moi Airbase and encroachment of the Kenya Airbase land. He explained that Mathare bordered the Moi Airbase to the North while Huruma/Kariobangi were situated to the East of the Airbase. Buruburu/Eastleigh Section 3 lies to the South of the Airbase and Eastleigh to its West.

9. He deponed that the original boundaries for the Moi Airbase were delineated in a 1940 survey plan for L.R. No. 36/3 giving its size as 1035 acres. In 1961 the Kenya Air Force Aerodrome at Eastleigh Nairobi was published as a protected area through Legal Notice number 309 of 1961 pursuant to Section III of the Protected Areas Act. That gazette notice has never been revoked which means that the alienation of any part of Moi Airbase land had to be approved by Ministry of State for Defence and the allocation could only be done with the approval of the President of Kenya. A part development plan (pdp) was prepared in 2001 and another one in 2004 for the Moi Airbase land. A letter of allotment was issued to the Ministry of State for Defence for the unsurveyed land for the Moi Airbase Eastleigh measuring 480.5 ha in 2002.

10. He deponed that there had been proliferation of informal settlements such as Kiambiu slums and Muungano Mashimoni number 10 Group around the Airbase which pose a security threat to the vital installations at the Moi Airbase. There had been constructions of highrise buildings near the Airbase perimeter fence from which there is a non-restricted view of the base which can easily be used to spy on the operations of the Airbase. The buildings provide a vantage point from which missile attacks on aircraft parked in the base may be launched. There is also possible attack of the vital installations and the personnel in the Airbase. The developments have led to a threat to national security against the Airbase and the Kenya Air Force which have forced the Airbase to take additional security measures at enormous cost by erecting the earth mounds to prevent the direct view and possible attack of aircrafts parked at the airbase. Despite this, the airplanes landing and taking off from the airbase remain in full view of the occupants of the buildings surrounding the Airbase and any person with ill motives can take advantage of this vulnerability. The Airbase was also forced to build high walls with razor wires for protection. He added that these measures were not adequate to protect aircraft taking off and landing and other vital installations at the Airbase which jeopardises the ability of the Kenya Air Force to defend the Kenyan airspace.

11. He deponed that some of the buildings were constructed without following the laid down procedures especially those within a kilometre of the Airbase. He stated that previously, before buildings were constructed around the Airbase, approval had to be obtained from the Kenya Airbase besides the City Council planning approval. The applications for approval would be deliberated by the respective Air Force officers who would either recommend approval of the applications or turn down some of the requests in accordance with the International Chicago Convention on Aviation Safety Standards, Kenyan Civil Aviation Act and the Kenya Airport Authority Act. He faulted the City Council of Nairobi for abrogating itself the duty to approve construction of highrise buildings next to the air base in disregard of the International Chicago Convention on Aviation Safety Standards. He clarified that the buildings threatened with demolition were those which did not conform to the legal requirements.

12. He deponed that under the International Civil Aviation Organization (ICAO) Regulations, buildings within a radius of a kilometre from the runway touchdown area should not exceed a height of 30 feet from the ground and those within 2 kilometers should not exceed 60 feet in height. This translates to 2 floors and 4 floors from the ground level respectively. He urged the court to decline to grant the orders sought and allow the demolitions to go on in order to protect the safety of the Kenyan Air Force so as not to compromise the country's security and defence.

13. Major Apolo Aloka also swore a replying affidavit on 23/4/2012 opposing the suit. He averred that he was a Kenya Air Force pilot stationed at the Moi Airbase and was in charge of flight safety at the Kenya Air Force headquarters. He deponed that the Applicant's building was clearly visible from the airbase runway and was an obstacle which could affect airplanes using the runway. The building contravened the International Civil Aviation Organization annex 14 Chapter 4 on Obstacle, Restriction and Removal.

14. He added that runways and the surrounding space are protected to enhance flight safety and avoid catastrophic aircrafts accidents involving crushing into vertical obstacles. The protection of the aerodromes is also to prevent them from becoming unusable. He stated that the protected surfaces span outwards from the runway and includes various reference points such as the inner approach surface, the approach surface, the inner horizontal surface, conical surface and the transitional surface. Any developments near the Moi Airbase must take into consideration the height restriction in relation to the obstacles limitation surfaces. The protected surfaces cater for the vital approach funnel where no obstacles are allowed to allow an aircraft continuous descent as it lands or when it takes off at the recommended 3 degrees slope. He added that no building taller than 30 feet should be constructed within 200 meters of the touchdown area of the runway. The International Convention was ignored when the Applicant was granted approval by the City Council to construct next to the Airbase.

15. He added that the safety of aircraft operating in and out of Moi Airbase must be guaranteed and guarded at all times in light of the fact that they discharge the task of carrying State sponsored passengers and cargo. An aircraft accident could lead to loss of expensive equipment and human life. In addition, pilot students are trained at the Moi Airbase by the Kenya Air Force Flying School which calls for more stringent protection and the elimination of obstacles to guarantee the safety of the student pilots. He concluded that it would be useful for the court to visit the Moi Airbase, Eastleigh to appreciate the danger posed by the Applicant's building.

16. Parties filed submissions which the court has considered. The Applicant submitted that the Respondents acted unlawfully, irrationally and in excess of their jurisdiction contrary to the provisions of the law in arriving at the decision to demolish the Applicant's building. He urged that demolition would be oppressive and illegal. He submitted that the court exercises the power to review the administrative action where illegality, irrationality or procedural impropriety has been proved urging that administrative action must be lawful, reasonable and procedurally fair.

17. Taking into consideration the facts touching on national security deponed to in the replying affidavits of Major Apolo Aloka and Major Vincent Perra both from the Moi Airbase at Eastleigh which are uncontroverted, the court is not persuaded that the Respondents' decision to demolish buildings constructed close to the Moi Airbase at Eastleigh was irrational, oppressive or illegal. Considering the danger posed to national security by the proximity of buildings to the Moi Airbase; and the threat to the Kenya Air Force officers and public safety in the event that planes crush into buildings constructed close to or along the runway, the court is not convinced that it should exercise its discretion in favour of the Applicant and grant the orders sought.

18. Whatever damage and loss the Applicant may suffer from the demolition of his buildings on the Suit Property can be compensated by damages if it is found that the approvals to construct the buildings near the Moi Air Base were lawfully given and that there was compliance with the aviation safety regulations and standards..

19. The court declines to grant the orders sought by the Applicant in the application dated 16/12/2011. Each party will bear its own costs.

Dated and delivered at Nairobi this 13th day of December 2019.

K. BOR

JUDGE

In the presence of: -

Mr. K. Rono holding brief for Ms. Chepkong'a for the Applicant

Mr. A. Kamau for the Respondents

Mr. V. Owuor- Court Assistant