REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC PETITION NO. 17 OF 2017

RASHID KHAMIS MWAKIREMBO & 5 OTHERS.....PETITIONERS

-VERSUS-

NATIONAL HOUSING CORPORATION….....RESPONDENT

RULING

1. For determination is the Petitioners' Chamber Summons application dated 24th July 2017 and brought under the provisions of rule 20 & 21 of the Constitution of Kenya (supervisory Jurisdiction & protection of fundamental rights and freedoms of the individual) and articles 22 and 23 of the Constitution and the Inherent Powers of the Court. The applicants seek that the following orders be granted.

1) Spent

2) Spent

3) That this Honourable Court does issue a permanent order of injunction restraining and/or prohibiting the Respondent, their agents, servants and whomsoever howsoever from evicting and/or in any way interfering with the Petitioners/Applicants enjoyment of the houses L40, L41, L42, L43, L44 and L45 pending the hearing and determination of this Petition.

4) That the Honourable Court do direct the involvement of the Petitioners by the Respondent on issues pertaining to renovation and/or redevelopment, the Petitioners directly being affected by the actions of the Respondent on houses L40, L41, L42, L43, L44 and L45 occupied by them.

5) That cost be provided for.

2. The application is supported by the seven (7) grounds listed on its face including inter alia that the petitioners/applicants are tenants on the mentioned houses and the Respondent failed to give a proper notice and any time frame at all when the project of redevelopment will commence and end, consideration of alternative housing and/or what criteria will be used to allow the petitioners back. The applicants state further that their Petition raises serious questions as to the level of their right to participation which should be accorded to them since the Respondent is a public body.

3. In the affidavit in support of the application, Mr David Mutuku Maluki deposed on behalf of his co-petitioners that they have been paying rent without fail and he annexed copies of bundles of the lease agreements as ***DMM – 1***. Mr Maluki gave dates when each of the Petitioners became tenants as 2004,

1999, 2009, 2002 2011 and 2015 respectively. He deposed further that they live in these houses with their school going children who will be affected if they are relocated. That the notices to vacate served on them violates their right to affordable housing and the notice served was too short. Mr Maluki deposed further that the action of the Respondent goes against articles 43 and 35 of the Constitution and article 7 of the UDHR which provides for equal protection of the law. He therefore urged the Court to grant the orders as sought in their chamber summons application.

4. The application is opposed by the Respondent via the replying affidavit sworn on its behalf by Dorine Wavua – their Manager Coast region dated 6.10.2017. Ms Wavua deposed that the Applicants are tenants in the said Likoni Residential Estate pursuant to the terms of the lease agreement annexed as ***"NHC1".*** That the houses were constructed more than 40 years ago and there is need to re develop the estate to accommodate and or house more people. Ms Wavua deposed further that they issued notices of such intention and annexed building plans for the proposed redevelopment as ***"NHC – 3".*** The Respondent contend that its notice clearly states that the Petitioners and the existing tenants shall be given first priority to occupy the newly developed houses hence the Petitioners shall suffer no prejudice. The Respondent also deposed that their relationship with the Petitioners is contractual hence it has no obligation to consult the Petitioners before redeveloping its properties as this is not what is envisaged under article 10 of the Constitution. The Respondent urged the Court to dismiss both the Petition and the application with costs.

5. Both parties filed written submissions which I have read and considered. It is not in dispute that the Petitioners are tenants of the Respondent pursuant to a lease agreement executed. It is also not in dispute that the Petitioners were served with two months' notice to vacate the suit houses. Both parties annexed the notice served in their respective affidavits. The Respondent gave the reasons for requiring the houses back in the notice i.e. to re – develop the whole place to accommodate more people.

6. In the standard lease executed between the parties herein and annexed as ***"DMM – 1"*** by the Petitioners, clause (d) under paragraph 21 it states thus;

> ***"If either the Corporation or tenant desires to terminate the lease in respect of the demised premises, the party terminating the lease shall serve on the other party <u>a one month notice</u> indicating notice of such termination." (****underline mine for emphasis).*
>
> Clause (e) ***"All notices required under this lease shall be in writing and shall in the case of a tenant be served on the tenant personally at the premises..."***

7. The lease agreement which created the relationship between the Petitioners and Respondent provided for service of **ONE MONTH NOTICE.** The Respondent instead gave them **TWO MONTHS**. The Petitioners have acknowledged receipt of the notices. The Petitioners have not specified the term of the lease that has been breached by the Respondent asking them to vacate. It is also not a term of the lease that there is an obligation upon the Respondent to provide the Petitioners with alternative housing in case they serve notice to terminate. Secondly the Petitioners have not pleaded and shown that in the neighbourhood where the suit houses are they cannot access alternative rental houses so that their school going children are not affected. Further the Petitioners had issues with the timing of the notice which was issued in mid-year hence relocating the students was not in their best interests. This Court gave them interim relief which during the time which pushed the stay to the end of the year thus this limb of the complaint is resolved although the Court was not shown there was a provision on restrictions of time when notice to terminate the lease was to be issued.

8. The Respondent has deposed that the relationship they have with the Petitioners is contractual. It is therefore not the duty of this Court where there observance of the law is issuing of notices to re – write the terms of the contracts for parties. In my view, the Petitioners are invoking the provisions of the Constitution to arm twist this Court to re – write a new lease between them and the Respondent to give provision of alternative housing. They have not explained how their economic & social rights under article 43 has been breached when the notice clearly states that they will be given priority when the re – development is completed. The letter stated in part thus:

"***Upon completion, you shall be given the first right of refusal".***

9. In regard to the provisions of article 35 of the Constitution the Petitioners did not show the Court that they wrote to the Respondent to be supplied with certain information and that such information was withheld. In any event a plan of the re-development has now been availed to them vide annexture ***"NHC – 3".*** They did not file a supplementary affidavit to indicate to this Court that they are asking for much more than the proposed plans and that the Respondent has declined and or refused to answer to their queries.

10. In light of the foregoing, it is my considered opinion and I so hold that the petitioners/Applicants have failed to demonstrate that they have a prima facie case with a probability of succeeding and or that they are likely to suffer loss that cannot be compensated by an award of damages if their Petition succeeds. The Petitioners have thus failed to lay a basis why this Court should grant them the orders whether of temporary or permanent injunction and or participation in the redevelopment process. The balance of convenience tilts in favour of the Respondent building more houses to accommodate more Kenyans the Petitioners included. I will not delve into the merits of the Petition at this stage as has been urged by the Respondent to have it dismissed. In the result, the chamber summons dated 24.7.2017 is found to be without merit and is hereby dismissed with an order of costs to abide the outcome of the Petition.

Dated, signed & delivered at Mombasa this 28th February 2018.

A. OMOLLO

JUDGE