



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO.198 OF 2011

IN THE MATTER OF ARTICLE 20,21,22,& 258 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

=AND=

**IN THE MATTER OF IMMINENT THREATENED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 20,21(1) , 40(1) , 40(3),47 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

=BETWEEN=

NEBANGE LIMITED.....PETITIONER

=AND=

THE ATTORNEY GENERAL & 4 OTHERS.....RESPONDENTS

JUDGEMENT

1. The Petitioner is the registered owner of **LR NO 36/11/1057** (suit property) which is situated at Eastleigh area in Nairobi. The Petitioner had acquired the suit property which was then known as **LR No.36/11/240** from Continental Credit Finance Limited. The Petitioner had applied for approval of construction of two shops and 15 bedsitters on the suit property.
2. The Petitioner later applied for change of user to Nairobi City Council on 15th April 2009. The application for change of user was approved on 23rd June 2009. The building plans which had been submitted by the petitioner were approved on 15th July 2009. The change of user application was approved by the Ministry of Land on 4th August 2009 and a new title issued on 1st August 2009 for 99 years.
3. The petitioner submitted new building plans to Nairobi City Council. The new plans were approved by the Nairobi City Council on 4th November 2011. The National Environment Management Authority (NEMA) had already granted their approval for the construction on 29th April 2010. The Petitioner embarked on construction of a storey building on the suit property. The building was expected to be completed on or before 1st February 2012. The petitioner had put in about kshs.85,000,000/- towards construction of the building.
4. On 22nd November 2011 officers from the Kenya Defence Forces and National Police Service comprised of police officers and Administration Police Officers entered the suit property and marked the building "**Demolish**". The Petitioner was asked to demolish four floors of the building failing which the building was to be demolished.
5. On 25th November 2011, the Petitioner and other building owners who had been given similar notices moved to court and filed Constitutional Petitions alleging that their Constitutional Rights to property had been threatened with violation. The Petitions were filed in the Constitutional and Human Rights Division of the High Court. The Petitioner was granted conservatory orders stopping the impending demolition following its application filed on 25th November 2011.
6. Directions were later given regarding the hearing of this Petition together with a number of similar Petitions. These directions were given by justice Majanja who was by then in the constitutional and Human Rights Division of the High Court. Petition numbers 262/11,264/11,265/11,275/11,272/11, 296/11, and 334/11 were to be heard together but the holding file was to be Petition No.296/11. The files were however transferred to the Environment & Land Court where they are being heard separately as there was no order consolidating the same.
7. The Petitioner had sued the Attorney General, the Ministry of State for Defence and the Ministry of State for Provincial Administration and Internal Security. In the directions given by justice Majanja on 3rd May 2012, Kenya Civil Aviation Authority and the National

Environment Management Authority [NEMA] were granted leave to come into all the Petitions indicated in paragraph 6 herein above as interested parties.

8. As per the directions given by justice Majanja on 3rd May 2012, the Attorney General was granted leave to withdraw the replying affidavit filed by Major Vincent Pera and file it a fresh in all the petitions which were to be heard together. The directions were complied with and a replying affidavit by the Attorney General which was sworn by Major Vincent Pera was filed in Petition No.296 of 2011 on 16th May 2012.

9. The replying affidavit details what informed the action which was intended to be taken. In the other Petitions, the houses had already been pulled down. The deponent of the affidavit stated that Kenya Airforce Aerodrome in Eastleigh area was published as a protected area in 1961 through Legal Notice number 309 of 1961. This was pursuant to Section 3 of the Protected Areas Act Cap 204 Laws of Kenya. The buildings which are outside the Airbase but are taller than the permitted height pose a threat to the aircrafts. As an example, the deponent attached a photograph of a high-rise building next to the fence of the Airbase.

10. The deponent of the affidavit stated that there are buildings around the Airbase which were constructed without approval. In the period prior to 2000, any person who wished to construct a building within the vicinity of the Airbase had to seek approval from the Kenya Airforce. This practice however was ignored after the year 2000 where developers could only seek approval from the City Council of Nairobi. The deponent attached some of the deliberations where approvals were sought. Some were approved and others declined.

11. The approvals are done in accordance with the International Chicago Convention on Aviation Safety Standards and the Kenya Civil Aviation Act. He further stated that in accordance with the International Civil Aviation Organization (ICAO) any building within a radius of one kilometre from the runway touch down area is not supposed to exceed 30 feet which is equivalent to two floors while those within a two kilometre radius are not supposed to be more than 60 feet which is equivalent to four floors from the ground level.

12. The first interested party Kenya Civil Aviation Authority filed its affidavit sworn by Peter M Munyao on 5th October 2012. This deponent is a pilot by profession. His tasks involved licencing of aerodromes and approvals of all buildings and structures around aerodromes in Kenya. He is also engaged in investigations of aircraft accidents. He states that as a general rule in Air Navigation Aircraft Operations is that airports must have airspace free from obstacles in order for aircrafts to approach and depart safely from the airport.

13. For the sake of aircraft safety the authority is charged with the task of enforcing the international standards and recommended practices set out in annex 14 to the convention on International Civil Aviation Chapter 4. This convention was ratified by Kenya in 1963 and later domesticated in Kenya Laws vide the Civil Aviation (Aerodromes) Regulations of 1978 and 1986 through Legal Notice No.231 of 1986 and later Civil Aviation (Aerodromes) Regulations 2008. In discharge of its responsibilities, the authority coordinates its activities with other organs of the Government including the Department of Defence and the Police.

14. Though Moi Airbase Eastleigh is a military aerodrome, it has accepted to be subject to the ICAO convention and may vary the standards in consultation with the Kenya Civil Aviation Authority. Where a person intends to put up a structure within a declared area, he is under duty to seek approval from the Authority where upon an aeronautical study of the effect of the construction is carried out. In case of military aerodromes, the study is carried out in consultations with the Department of Defence .

15. The suit property herein falls within vicinity of Eastleigh aerodrome. There was no approval sought to put up the building on the suit property. The deponent therefore concludes that the suit property is illegal as no approval was sought as required.

16. I have considered the petitioner's petition as well as the opposition to the same by the respondents and the first interest party. I have also considered the submissions by the Petitioner. The other parties to this Petition did not file any submissions. The Petitioner is seeking the following reliefs:-

1. Spent

2. A declaration do issue that the Petitioner is the lawful owner of the suit property and is entitled to the quiet enjoyment thereof together with the development thereon.

3. A declaration that the intended and/or threatened action by the State to enter upon the suit property and demolish the development thereon is in breach of the Petitioner's Constitutional Right to acquire and own property of any description in any part of Kenya and to the quiet enjoyment thereof.

4. A declaration that the intended and/or threatened action by the state to enter upon the suit property and demolish the development thereon is in breach of the petitioner's constitutional right of :-

i. The Legitimate expectation that the State and every State organ shall observe respect, promote and fulfil the rights and fundamental freedoms conferred upon the petitioner by the Constitution of Kenya.

ii. It's Right to fair Administrative Action.

5. A declaration that the rights of the Petitioner to the property are threatened by the imminent acts of the State.

6. A declaration that the imminent threat by the State to enter upon the suit property and demolish the development thereon being unconstitutional is therefore null and void.

7. This Honourable Court do issue such orders and gives such directions as it may deem fit and just and appropriate in all the circumstances of this matter.

8. The costs of the Petition be awarded to the Petitioner.

17. The Petitioner contends that his constitutional rights under Articles 40(1) 40(3) and 47 of the Constitution have been threatened with violation. Article 40(1) and (3) provides as follows:-

“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

“The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-

i. requires prompt payment in full, of just compensation to the person; and

ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.

18. In a Constitutional Petition the Petitioner is expected to set out with a reasonable degree of precision the provision that which he complains about and the manner in which the provision is said to have been infringed. **See Anarita Karimi Njeru Vs Republic (1976-1980) KLR 127.** I have set out what Article 40(1) of the Constitution states. The Petitioner’s right to own property has not been threatened. The Petitioner was asked to remove or demolish four floors of the building he was putting up. The right to own property is one of those rights which can be limited as provided for in Article 24 of the constitution. We have the Civil Aviation Act Cap 394 Laws of Kenya which clearly provides that any building which is an obstacle in an area declared as an aerodrome may be ordered to be removed. Any building within the vicinity of an aerodrome must not exceed a certain height.

19. The international conventions as regards safety of aerodromes have been domesticated in our laws. For example there is the International Chicago convention on Aviation Safety Standards. There is also the convention on International Civil Aviation Chapter 4. This convention was ratified in Kenya in 1963 and later domesticated in Kenya Laws vide the Civil Aviation (Aerodromes) Regulations of 1978 and 1986 through legal notice No.231 of 1986 and later the Civil Aviation (Aerodromes) Regulations 2008. Article 2(6) of the Constitution provides that any treaty or convention ratified by Kenya shall form part of the laws of Kenya under the Constitution.

20. The Civil Aviation Act of Kenya and the International Conventions which have been ratified by Kenya provide on the heights to be maintained within the vicinity of any aerodrome. It is clear that though the Moi Airbase or Eastleigh aerodrome is a military aerodrome, the military has agreed to be subjected to the ICAO regulations subject to variations which can be done in consultations with the department of defence. This is why it has been the practice that if anyone wants to construct any structure within the vicinity of Eastleigh aerodrome, the military officers to be consulted.

21. In the instant case, the Petitioner did not consult and there was no aeronautical study carried out. The respondents were acting in accordance with the law by asking the Petitioner to demolish four floors of his building. From the photographs annexed to the Petition, the Petitioner had already put up six floors. He was asked to remove four floors to be left with two which are within the internationally recommended height within the vicinity of an aerodrome. There was therefore no threat to violation of the Petitioner’s rights under Article 40(1) and 40(3) of the Constitution.

22. The Petitioner also alleged that his right under Article 47 of the Constitution had been threatened. Article 47 (3) of the Constitution provides that parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall:-

a) Provide for the review of administrative action by a court or, if appropriate an independent and impartial tribunal; and

b) Promote efficient administration.

Pursuant to Article 47(3), parliament enacted the Fair Administrative Action Act No.4 of 2015 which provides for the procedures to be followed in seeking redress.

23. The respondents had not taken any step or action which would have been capable of review by the court. What the Petitioner complained about is that his building had been marked “**demolish**”. Other than that nothing more has happened as to call for any review. This is therefore not the right forum to call for judicial review. I therefore find that the Petitioner’s Petition lacks merit. The same is hereby dismissed with costs to the respondents and the first interested party.

Dated, Signed and delivered at Nairobi on this 28th day of June 2018.

E.O.OBAGA

JUDGE

In the absence of parties who were served with notice of delivery of

Judgement.

Court Clerk: Hilda

E.O.OBAGA

JUDGE