



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT AND LAND DIVISION

ELC PETITION NO. 47 OF 2018

(FORMERLY CONSTITUTIONAL PETITION NO. 264 OF 2018) IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23(1) & (3), 26, 27(1) & (2), 28, 29, 32, 40(1), 43, 47, 53, 54, 57, 165(3) (b) & (6) AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 26, 27(1) & (2), 28, 29, 32, 40(1), 43(1) (B) AND (f), 47, 53, 54, AND 57 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS (3) AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF SECTIONS 152C, F AND G OF THE LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF SECTION 5 AND 6 OF THE PREVENTION, PROTECTION AND ASSISTANCE TO INTERNALLY DISPLACED PERSONS AND AFFECTED COMMUNITIES NO. 56 OF 2012

AND

IN THE MATTER OF SECTION 10 OF THE PUBLIC OFFICERS ETHICS ACT NO. 4 OF 2003

BETWEEN

MAGDALENE NJERI.....1ST PETITIONER

JANE ROSE RUGURU.....2ND PETITIONER

ROSE ODHIAMBO.....3RD PETITIONER

BEATRICE KAGEHA.....4TH PETITIONER

JENIPHER APONDI.....5TH PETITIONER

PRISCILLA WAWIRA.....6TH PETITIONER

MICHAEL NJIRU.....7TH PETITIONER

JOHN MUNGAI MURIGU.....8TH PETITIONER

KATIBA INSTITUTE.....9TH PETITIONER

(suing on their own behalf, in the public interest, and on behalf of the affected residents of Kaloleni, Makongeni, Mbotela, Mutindwa, Dandora, Kenyatta University (Kamae) Langata sub county headquarters, Wilson Airport, Langata Wilson South C link road reserve, in the class threatened with illegal and eviction by the respondents)

VERSUS

MOSES NYAKIONGORA.....1ST RESPONDENT

NATIONAL BUILDING INSPECTORATE AND MULTI

SECTORAL COMMITTEE ON UNSAFE STRUCTURES.....2ND RESPONDENT

MINISTRY OF TRANSPORT, INFRASTRUCTURE, HOUSING,

URBAN DEVELOPMENT AND PUBLIC WORKS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

AND

NATIONAL LAND COMMISSION.....1ST INTERESTED PARTY

KENYA NATIONAL COMMISSION ON

HUMAN RIGHTS COMMISSION.....2ND INTERESTED PARTY

RULING

1.This is a ruling in respect of a notice of motion dated 30th July 2018. The applicants had filed a constitutional petition before the Constitutional and Human Rights Division of the High Court on 20th July 2018. They contemporaneously filed the notice of motion in which they sought the following orders:-

i. Spent

ii. Spent

iii. Spent

iv. That pending the hearing and determination of the Petition filed herewith, conservatory orders of stay do issue to restrain the respondents, either by themselves, their assigns, representatives, employees or agents, from carrying out the threatened demolition, burning or in any way, the destruction of the homes, schools, business and other properties situated at Kaloleni, Makongeni, Mbotela, Mutindwa, Dandora, Kenyatta University (Kamae) Langata sub county headquarters, Wilson Airport, Langata Wilson South C link road reserve.

v. That pending the hearing and determination of the Petition, a conservatory order be issued to restrain the respondents, either by themselves, their assigns, representatives, employees or agents, from carrying out the threatened demolition, forceful removal or causing in any other way, the destruction of the homes, schools, business and other properties situated at Kaloleni, Makongeni, Mbotela, Mutindwa, Dandora, Kenyatta University (Kamae) Langata sub county headquarters, Wilson Airport, Langata Wilson South C link road reserve without complying to the satisfaction of this court, as conditions precedent, issuance of the statutory notice, a resettlement action plan, compensation and provision of alternative housing or shelter.

vi. That an order be and hereby issued that the 2nd interested party shall monitor the compliance of the interim orders issued by this court in this cause and to promptly bring to the attention of this court any non-compliance, by the respondents or anyone else, with any declaration or order of this court.

vii. That costs of this application be in the cause.

2. The Notice of Motion together with the petition was placed before Justice Mwita on 31st July 2018 who directed that the petition be served and responses be filed. The matter was fixed for directions on 20th September 2018. On 1st August 2018, the petitioners filed a chamber summons seeking the matter to be certified urgent for hearing during the court recess. The file was placed before Justice Nyamweya of Judicial Review Division of the High Court who transferred it to the Environment and Land Court.

3. The file was placed before Justice Gacheru who certified the matter as urgent and directed that the same be heard during the recess. Further directions were given that the respondents be served. The respondents who were duly served did not attend court during the hearing on 6th August 2018. The hearing of the notice of motion therefore proceeded ex-parte.

4. At the hearing of the notice of motion, Mr Ochieng who was appearing together with M/S Kinama for Mr Lempaa for the petitioners argued that the first respondent had issued two notices dated 19th July 2018 and 26th July 2018 seeking removal of illegal structures from the areas named in the two notices, He contended that the notices were issued illegally and that already some of the petitioners had been evicted from Kaloleni area and that more evictions were being carried out pursuant to the said notices.

5. Mr Ochieng further submitted that the eviction was being carried out in an inhuman manner at the time when it is cold and that therefore evictions should be halted. He therefore prayed for conservatory orders in terms of prayer 4, 5 and 6 of the notice of motion dated 30th July 2018.

6. I have considered the notice of motion, the supporting affidavit as well as the submissions by the petitioners counsel, The only issue for determination is whether in the circumstances, there should be conservatory orders granted. The basis of the petition and the notice of motion are the two notices dated 19th July 2018 and 26th July 2018. The two notices were issued by the first respondent who is also the secretary of the National Building Inspectorate and Chairman of Multi- Sectoral Committee on Unsafe Structures.

7. In the notice dated 19th July 2018, the first respondent gave notice to all persons who had erected illegal structures along Kenya Power and Kenya Railway reserves in Kaloleni, Makongeni, Mbotela, Mutindwa, Dandora and Kenyatta University (Kamae) to remove them by 1st August 2018. In the notice dated 26th July 2018, the first respondent gave notice to those who had illegal structures along Langata sub county headquarters, Wilson Airport, Langata Wilson South C link road reserve to remove them by 9th of August 2018. In the two notices, the affected persons were warned that if they did not remove the illegal structures the same would be removed at the expiry of the notice period.

8. One of deponents of the supporting affidavit is Magdaline Njeri, the 1st petitioner. The other is Yash Pal Ghai, the Chairperson of the Board of Directors of the 9th petitioner. The 1st petitioner contends that she has lived in Kaloleni area for the last 5 years; that she is a widow having six children three of whom attend Kariobangi South Primary School. From the information given by her co-petitioners and others, the petitioners are mainly widows who live or are eking a living from the various areas mentioned in the notices. The eviction of the petitioners will cause them inconvenience as their school going children will be affected and that the time given is too short for them to re-locate without anywhere to re-locate to. She contends that the notices issued were illegal

9. On his part, Yash Pal Ghai has narrated on how similar notices affecting those on Ngong Road- Kibera- Kungu Karumba- Langata Link Road were treated. He contends that the notices as issued in the instant case are illegal.

10. I have looked at the notices which were issued. The targeted illegal structures are along Kenya Power lines and Kenya Railway reserves. The person who issued the notices is the secretary of the National Building Inspectorate. He is also the Chairman of the Multi- Sectoral Committee on unsafe structures. It is within the mandate of the 1st respondent and the bodies where he is an official to ensure that unsafe structures are removed. The affected persons were given notice to remove those structures.

11. The Kibera issue which seems to form the basis of the petition and the notice of motion under it is quite different from what the petitioners herein are seeking to prevent. There is no evidence that the illegal structures being targeted are places of residence of the petitioners or that the petitioners are internally displaced persons residing on those areas. The provisions of Section 152 C of the Land Act 2012 on evictions is not applicable when it comes to removal of unsafe or illegal structures.

12. The petitioners have clearly not demonstrated that they deserve conservatory orders as sought. I find no merit in the notice of motion which is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi on this 8th day of August 2018.

E.O.OBAGA

JUDGE

In the presence of;-

Mr Oshiel and M/s Kinama for applicants

Mr Sekwe for Respondents

Mr Wahome for 1st Interested Party

Mr Maweu for 2nd Interested Party

Court Assistant - Hilda

E.O.OBAGA

JUDGE