



Commission for Human Rights and Justice v Mwakubo & 5 others (Environment & Land Petition 8 of 2021) [2024] KEELC 146 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELC 146 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 8 OF 2021
NA MATHEKA, J
JANUARY 25, 2024**

BETWEEN

COMMISSION FOR HUMAN RIGHTS AND JUSTICE PETITIONER

AND

MWAKA MULUNDONDA MWAKUBO 1ST RESPONDENT

LAND, PHYSICAL PLANNING AND HOUSING COUNTY GOVERNMENT OF MOMBASA 2ND RESPONDENT

KENYA HIGHWAY NATIONAL AUTHORITY 3RD RESPONDENT

KENYA NATIONAL CONSTRUCTION AUTHORITY 4TH RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 6TH RESPONDENT

JUDGMENT

1. The Petitioner avers that sometimes on the 19th of January 2021 while in its course of operation it came to their knowledge that the 1st Respondent had commenced construction on public land (road reserve) at Likoni adjacent to Plot No 203 / 1/Ms along the Likoni-Ukunda Road Opposite Likoni Post Office. That upon further inquiries and investigation the Petitioner established that the parcel of land on which the 1st Respondent is constructing a building was not available for private use as it has been reserved for road construction and/or expansion and the ongoing construction thereon was illegal and wrongful and was to the detriment of public in general and also it had hindered the members of the public access to their property being Plot Number 203/1/Ms and as result of the said construction they cannot access and/or develop their property. That further thereto the said construction which is on the road reserve had hindered free movement of both traffic and public in general and therefore



the rights to movement had been curtailed and the piling of the construction materials had blocked the road.

2. The Petitioner further conducted due diligence to established whether the relevant regulatory agencies of the government being 2nd, 3rd 4th and 5th Respondents had authorized and /or permitted the said construction of the building thereon and found out none of the said regulatory agency had been permitted and authorized the said construction and thus the building being constructed is an illegal fixture on land. The Petitioner states that it is wrong and illegal for the 1st Respondent to arrogate herself the right to violate and infringe the rights of other citizens of Kenya by virtue of being a member of Mombasa County Assembly and alienate and encroach public land and use it for her private benefit and use and denying the government and citizen of Kenya the right to enjoy use, public land for greater use of the public.
3. The Petitioners contend that the failure by civil servants to practice due diligence and uphold the rule of law is capricious and amenable to law and have immensely contributed to erosion of the wellbeing of the society by allowing illegal acts of fraudster to flourish and continue unabated violating the Constitution. The Petitioner furthers avers that the failure by the 2nd, 3rd, 4th and 6th Respondent to act and stop the said illegal construction has deprived the public chances of having public utilities and amenities on the suit parcel of land .That it behoves this court to declare the said alienation encroachment and construction illegal and a violation of the Constitution and infringement and denial of basic human Right and freedoms of individuals in orders to restore public confidence and integrity of the Constitution
4. The Petitioner submits that the overall purpose of this petition is to safeguard public interest ,equitable access to land, security of land rights as envisaged under article 10, 60, 61, 62 and 233 of the Constitution by ensuring public bodies and officers acts strictly to the law and to prevent abuse an misuse of power and theft of public land and/or property thus to put prior checks over the activities of public bodies in the make of the respondent and/or there officers to act within the four corners of the law failure to which it will be too late to remedy the results of illegal process, acts as damage will already been done .
5. The 2nd Respondent stated that they did not approve any construction adjacent to Plot No. 203. That the 2nd Respondent is therefore not responsible for the alleged illegal construction on the suit property and should not be made to the consequences of the Respondent's illegal actions by being ordered to utilise public resources to remove the alleged illegal structure on the suit property as per prayer of the Petition.
6. This court has considered the petition and the submissions therein. The petitioner has maintained that the 1st respondent has commenced an illegal construction on Land Parcel No. 203/1/Mn which is a road reserve hence denying the public its use; while the other respondents have issued permits and or allowed the illegality to persist at the detriment of the members of the public. The petitioner claimed to premise its petition on the protection of fundamental economic and social rights and the protection of public land and reserve for the provision of public utilities. Article 22 of the Constitution which grants every person the right to institute court proceedings claiming that a fundamental freedom in the Bill of Rights has been denied, violated or threatened. The issue at hand has some essence of public interest, which was defined by the Supreme Court in Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2014) eKLR as;

“Public Interest Litigation plays a transformational role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the Constitution's aim in enlarging *locus standi* in human rights and constitutional litigation. *Locus standi* has a close nexus to the right of access to justice. In instances where claims



in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the court has discretion on a case by case basis, to evaluate the terms and public nature of the matter *vis a vis* the status of the parties before it. The discretion is drawn from the command of article 259(1) to interpret the Constitution in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance.”

7. The petitioner maintained that the 1st respondent has alienated a road reserve on Land Parcel No. 203/I/Mn and commenced illegal construction of the same. The petitioner has outlined several Articles of the Constitution as the legal foundation of the petition. The petitioner referred to Articles 3 (1), 22, 48, 50, 60, 61 and 62 of the Constitution as well as Articles 258 as read with 259, 159, 22, 23, 10, 4 (2) and 1 (1) of the Constitution. The 1st respondent was said to have commenced construction on the suit property which is public land reserved for road construction.
8. I start by determining whether the petition has met the principles of drafting a constitutional petition which were set out in Anarita Karimi Njeru vs The Republic (1979) eKLR as follows;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

9. The petitioner ought to present before the court a petition that outlines the alleged contravened constitutional rights and freedoms, the manner in which they have been violated and the remedy sought for those violations. Then the court will consider the factual evidence presented in support of the said violations to determine whether there has been a violation. Lenaola J (as he then was) reiterated the principles in Anarita Karimi in Stephen Nyarangi Onsomu & another vs George Magoha & 7 others (2014) eKLR, where he stated;

“In answer to that issue, this Court has in the past expressed its concern about the manner in which parties coming before the Court and alleging a violation of constitutional rights have presented their cases. As a basic minimum, a Petitioner is required to cite the provisions of the Constitution which have allegedly been violated, and the manner in which they have been violated, and the remedy which he seeks for that violation - See Anarita Karimi Njeru v Republic (1976-1980) 1 KLR 1272. In demonstrating the manner in which there has been a violation, a Petitioner should present before the Court evidence of the factual basis upon which the court can make a determination whether or not there has been a violation. This basic rule has been affirmed by the Court of Appeal in the Mumo Matemu Case.”

10. In this petition, the petitioner has presented an omnibus petition, he has cited Articles petitioner referred to Article 3 (1), 22, 48, 50, 60, 61 and 62 of the Constitution as well as Articles 258 as read with 259, 159, 22, 23, 10, 4 (2) and 1 (1) of the Constitution but has failed to demonstrate to the court how the respondents have violated these specific Articles of the Constitution. The petition has further been supported by a verifying Affidavit as opposed to a Supporting Affidavit as required by Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012. The petitioner has then presented before the court a list of documents, which do not offer a factual or evidential basis as to how their rights have been violated or contravened by the respondents. The petitioner claims that the suit property has been



reserved for public use, however, there is no certificate of official search or even the certificate of title or any other title document that he has presented before the court to demonstrate the existence of the suit property of its registered proprietor. These allegations of fraud and illegality are best determined in a civil case where parties can be called to produce *vica voce* evidence that can be examined through cross-examination and not through affidavit evidence as is the case herein.

11. The petitioner's claim is that of declaration of illegal construction, injunctive orders, eviction and demolition orders which in my view can be best claimed under substantive law. The proper course of action for the petitioner would be to claim under a normal suit and not the Constitution, as the claims herein do not amount to constitutional questions that ought to be determined by this court as a constitutional petition. The Civil Procedure Act, Land Act and Land Registration Act afford a robust procedure and remedy which is an efficacious and satisfactory response to the petitioner's grievances. In Bethwell Allan Omondi Okai vs Telkom (K) Ltd (Founder) & 9 others (2013) eKLR Lenaola J (as he then was) said;

“While I am alive to this Court's unlimited jurisdiction under Article 165 (3) (a) of the Constitution, I do not think as can be seen elsewhere above that the Petitioner has raised any constitutional matters to warrant the intervention of the Court under Article 165 (3) (a). In any event, this Court in International Center for Policy and Conflict & 4 Others v The Hon. Uhuru Kenyatta and Others, Petition No. 552 of 2012 held that the unlimited original jurisdiction of this Court could not be invoked where Parliament has specifically and expressly prescribed procedures for handling grievances such as the one raised by the Petitioners. The Court of Appeal has also upheld this reasoning in Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425, where it held that:-

“In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

12. The petition before this court does not raise any constitutional issue, in my view the petitioner is seeking declaratory reliefs i.e. cancellation of building permits, demolition and eviction orders which could have easily been sought out in a civil court. Litigants ought to restrain themselves from substituting ordinary civil dispute with a constitutional petition seeking redress for violation of fundamental rights when in fact the claim is an ordinary civil dispute. The court is of the view that this petition does not reveal any special or unique feature that would make a constitutional relief more efficacious or suitable that the redress that would be found in a normal suit before this court.
13. The court is aware of public spirited individuals and organisations such as the petitioner and is keen to protect the petitioner's right to access justice through Article 22 (1) of the Constitution, which grants every person the right to institute court proceedings claiming that a right of fundamental freedoms enshrined in the Bill of Rights has been denied, violated, infringed or threatened; however this right should not be abused. The court will not allow a petition which violates fundamental principles of law to stand and looking at the Petition again, there is nothing left for me to determine. The entire petition dated 22nd February 2021 is dismissed and let each party bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF JANUARY 2024.

N.A. MATHEKA

JUDGE

