



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO. 46 OF 2018

EVERLINE SANDE NGULAMU.....1ST PETITIONER

MARY WAMBUI NJOROGE.....2ND PETITIONER

GEORGE NJOROGE NJOKI.....3RD PETITIONER

(Suing in the public interest, on their own behalf and on behalf of the 647 residents of Deep Sea informal settlement located in Highbridge, Parklands area facing eviction)

=VERSUS=

KENYA URBAN ROADS AUTHORITY.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE CHAIRPERSON, NATIONAL CONSULTATIVE COORDINATION

COMMITTEE ON INTERNALLY DISPLACED PERSONS.....3RD RESPONDENT

CABINET SECRETARY, MINISTRY OF TRANSPORT,INFRASTRUCTURE,

HOUSING AND URBAN DEVELOPMENT.....4TH RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT.....5TH RESPONDENT

INSPECTOR GENERAL OF POLICE.....6TH RESPONDENT

NATIONAL LAND COMMISSION.....7TH RESPONDENT

KENYA NATIONAL COMMISSION ON

HUMAN RIGHTS.....8TH RESPONDENT

LAW SOCIETY OF KENYA.....1ST INTERESTED PARTY

KATIBA INSTITUTE.....2ND INTERESTED PARTY

RULING

1. The petitioners’ application is by way of notice of motion dated 27th July 2018 brought pursuant to Section 1A and 3A of the Civil Procedure Act and all other enabling provisions of the law.

2. It seeks order:-

(1) Spent

(2) That pending the hearing and determination of the application and petition herein interpartes this honourable court be pleased to issue an order of declaration that oral eviction notice to the petitioners and other residents of Deep Sea informal settlement is illegal, irregular and un-procedural, and is in breach of several provisions of the Constitution of Kenya 2010, the Land Act 2012, the Land Laws Amendment Act, the Land Regulations 2017, the Fair Administrative Action Act 2015, the Prevention Protection and Assistance to Internally Displaced Persons and Affected Communities Act 2012 and several International Law Instruments and I therefore invalid and void ab initio.

(3) That pending hearing and determination of the Application and Petition herein interpartes, this honourable court be pleased to issue an ex parte order compelling the 1st respondent to produce and present the Resettlement Action Plan (RAP) relating to the Missing Link No 154 Ring Road Parklands Nairobi Project being undertaken around the Deep Sea Informal Settlements before this court within 48 hours of service of this application.

(4) That pending the hearing and determination of the application and petition herein interpartes this honourable court be pleased to issue an ex parte conservatory order restraining the 1st respondent by themselves, their agents, servants, employees or assigns and or any other person whomsoever from demolishing structures belonging to the petitioners and other residents of Deep Sea Informal Settlement and evicting them without fully complying with the law.

(5) That pending the hearing and determination of the application and petition herein interpartes this honourable court be pleased to issue a declaration that upon eviction from Deep Sea informal settlement the petitioners and other residents of Deep Sea Informal Settlement are entitled to adequate and reasonable compensation and relocation to another land or alternative shelter with access to education facilities, clean water, health care and food at the state's expense.

(6) That the applicant be at liberty to apply to this honourable court for such further directions and orders for purposes of meeting the ends of justice.

(7) That the cost of the application be provided for.

3. The grounds are on the face of the application and are listed as in paragraph 1 to 9.

4. The application is supported by the affidavit of Everline Sande Ngulamu the 1st petitioner/applicant sworn on the 27th July 2018.

5. The application is opposed. There is a replying affidavit by Josiah Mwangi Wanduraa, the Assistant Director Social Safeguards of the 1st Respondent sworn on the 31st July 2018.

6. There is also a replying affidavit by Bernard Mogesa the Secretary/Chief Executive Officer of the Kenya National Commission on Human Rights, the 8th respondent sworn on the 9th August 2018.

7. Mr Kamau for the 1st, 2nd and 6th Respondents stated that they were relying on the affidavit sworn by Josiah Mwangi Wanduraa the Assistant Director of Social Safeguards of the 1st Respondent. The 2nd respondent did not file any responses but it associated itself with the submissions of the 1st, 3rd – 6th respondents. The 7th respondent did not file any response to the Notice of Motion.

The 1st interested party did not file any response to the application but made oral submissions. No responses were filed on behalf of the 2nd interested party but oral submissions were made.

8. I have considered the notice of motion, the affidavit in support, the replying affidavits, the oral submissions of counsel and the authorities cited.

9. The issues for determination are:-

(i) Whether the petitioners/applicants' application meets the threshold for granting of interim conservatory orders.

(ii) Who should bear costs?

10. Briefly the facts are that the Government of Kenya in conjunction with the European Union through the 1st Respondent has commenced the implementation of the **Nairobi-Eastern Missing Link, Road Project** which includes non-motorized transport facilities, grade levels separate interchanges and other associated facilities. The project runs through an informal settlements scheme known as "Deep Sea" where the petitioners/applicants reside and carry out their businesses. The settlement is situated on a road reserve known as Ringroad Parklands (or Missing Link No –M154). Prior to commencement of the project the parties held consultative meetings on the resettlement of the "Deep Sea" residents to pave way for the project.

11. The gist of the instant application is that on 19th July 2018, the 1st respondent (Kenya Urban Roads Authority) hereinafter referred to as the authority) through public media interview given on KTN News by Mr. John Cheboi who is a communications officer working for the 1st

respondent, who was commenting on the aftermath of the Kibera eviction and went ahead to state that they (KURA) would undertake demolitions and evictions on would be section within Ringroad Parklands called “Deep Sea”. That the threatened forced eviction is ultravires section 152C of the Lands Act 2012 and would violate the petitioners right to housing and freedom from forced eviction under Article 43 and 40(4) together with their rights under Article 25(a) of the Constitution of Kenya, 2010.

12. It is the petitioner/applicants’ case that the oral notice is illegal, unprocedural and contrary to Article 40 of the Constitution of Kenya, 2010. That their rights stands infringed as no written notice was issued. The Land Act, 2012 outlines the process of evicting persons from public land. That Section 15 of the National Land Commission Act and Section 152 of the Land Act 2012 have not been complied with.

13. Further that the talks have been going on for years yet no resolution has been reached. The threat of eviction is real hence they seek the protection of this court. They have established a prima facie case with a probability of success and that the petition will be rendered nugatory if the orders are not granted.

14. Miss Kanama for the 2nd interested party (“Katiba Institute”) stated that they supported the petitioners’ application and urged the court to consider the guiding principles in issuing conservatory orders. They put forward the cases of: **Susan Waithera Karuki & 4 others vs The Town Clerk Nairobi City Council [2011] eKLR, Satros Ayuma & 11 Others vs Registered Trustees of the Kenya Railways Staff Retirements Benefit Schem & 2 Others [2011] eKLR AND Center for Human Rights and Eductaion vs AG HCCC No 16 of 2011** among others. They urge the court to consider whether the applicants have established a prima facie case, the specific issues of law and the likelihood of success.

15. Mr. Kanyonge for the 1st interested party (Law Society of Kenya) stated that they supported the petitioners’ application. They also urge the court to take judicial notice of the many evictions being undertaken by the 1st respondent and that the threat of eviction of the petitioners herein in real.

16. Mr. Kamau for the 1st, 3rd – 6th respondents submitted that no eviction was being undertaken by the 1st respondent. That the clip annexed confirming the oral eviction notice is not admissible under section 106 (b) of the Evidence Act, (Cap 80) Laws of Kenya). That the petitioners’/applicants’ are settled on a road reserve. The negotiations are ongoing between the 1st respondent and the petitioner to provide alternative settlement.

17. Further that no prima facie case has been established to warrant the grant of the orders ought and that public interest does not favour the grant of the orders sought.

18. Mr. Wahome for the 2nd respondent associated himself with the submissions of Mr. Kamau. He further submitted that prayer (2) of the application as sought amounts to a final order, were it to be granted at this stage. There is no basis for seeking a mandatory order at an interlocutory stage. The application does not meet the threshold for grant of the orders sought as no decision to evict has been made in order to involve the National Land Commission. Further that the application does not rise any issue of public interest. He urged the court not to grant the orders sought.

19. It is now appropriate to consider the facts that have emerged and the legal principles applicable. The principles were laid down in the precedent selling case of **Giella vs Cassman brown & Company Limited [1973] EA 358**. The petitioners/applicants have relied on a clip to confirm the existence of an oral eviction notice. I have considered the provisions of Section 106 (b) of the Evidence Act (Cap 80 Laws of Kenya). I find that the said clip is not admissible. The 1st respondent has maintained that no eviction is being undertaken at Deep Sea informal settlement.

20. It is not in dispute that various processes and consultations have been going on between the petitioners/applicants and the 1st respondent on the resettlement issue. The petition as well as the application was presented by the petitioners on behalf of 647 residents of “Deep Sea” informal settlement located in Highridge, Parklands. I have considered the facts presented by the petitioners/applicants. I find that they have not demonstrated a prima facie case with a likelihood of success. They have not demonstrated the existence of an oral notice hence their fear of imminent eviction are unfounded.

21. The courts have relied on the provisions of the Constitution in ensuring that evictions are carried out in a humane manner and to protect the fundamental rights enjoyed by those affected by evictions. I would have applied the same provisions in the instant case if I have found that the petitioners/applicants are facing a threat of eviction.

22. The petitioners/applicants have no right to remain on a road reserve. In the case of **Veronica Njeri Waweru & 4 others vs The City Council of Nairobi & Others [2012] Eklr**, Mumbi J held:

“The petitioners have readily conceded that they have been occupying public property, a road reserve for the last ten years. They have licences to operate businesses but have not proprietary interest on the land. Clearly, therefore their claim that their rights under Article 40 have been violated has no basis. They do not own the land and they therefore cannot be deprived of that which they have no rights over”.

I am guided by the above authority.

I find that the petitioners/applicants have failed to show that they have a prima facie case with a probability of success.

23. I also find that they have failed to demonstrate that they stand to suffer irreparable loss. If these orders are not granted. They have conceded that there have been ongoing negotiations on a resettlement plan between them and the 1st respondent. Prayer (2) of the

application is a confirmation of this. I find that the petitioners/applicants herein have no rights capable of protection by this court. They have failed to demonstrate that their fundamental rights and freedoms have been violated or are likely to be violated. The balance of convenience tilts in favour not granting the orders.

24. I agree with counsel for the 2nd respondent that prayer (2) of the application as sought amounts to granting of final orders. It cannot be granted at this stage.

25. I find that this application lacks merit. It is another of the petitioners/applicants tactic to delay the implementation of the project I am of the view that the issues raised in this application had been raised in ELC No 425 of 2015 (OS).

26. In conclusion I find that the application herein fails to meet the threshold for granting of interim conservatory orders. The same is dismissed. The costs of the application do abide the outcome of the petition.

It is so ordered.

Dated, signed and delivered in Nairobi on this 18th day of OCTOBER 2018

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L. KOMINGOI

JUDGE