



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 172 OF 2015

PEARL BEACH HOTEL LIMITED.....1ST PETITIONER

ALNOOR KANJI.....2ND PETITIONER

-Versus-

KENNETH STANLEY HAJI.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA.....2ND RESPONDENT

NEMA.....3RD RESPONDENT

JUDGMENT

Introduction

1. This Petition was filed on 28th July 2015. The Petitioners seek the following orders:

i. Orders of Declarations as contained in paragraphs A to D of the reliefs sought in the Petition.

E. **A JUDICIAL REVIEW ORDER OF MANDAMUS** to issue directing the 2nd Respondent to forthwith cancel and expunge all development approvals granted to the 1st Respondent dated the 28th day of March 2012 or any other subsequent approvals forthwith and with immediate effect.

F. **AN ORDER OF INJUNCTION** restraining the 1st Respondent herein from in any manner proceeding with any further developments and from purporting to act on any developments based on the development approvals by the issued by the 2nd Respondent dated the 28th of March 2012 and the approvals granted by the 3rd Respondent.

G. **AN ORDER** directing the restoration of the environmental concerns raised herein including but not limited to an order for the demolition of all un-procedural and unlawful developments being undertaken by the 1st Respondent at his own cost or any other appropriate order or relief that this Honourable Court may be pleased to issue

H. The cost of this petition be provided for.

2. The Petition was supported by facts set out in the Petition and the Affidavit of **ALNOOR KANJI**, the 2nd Petitioner sworn on 2nd July 2015.

3. In response to the Petition, the 1st Respondent filed a Replying Affidavit sworn by **KENNETH STANLEY HAJI** on 17th September 2015 while the 3rd Respondent filed a Replying Affidavit sworn by **GEOFFREY WAHUNGU** on 15th March 2016.

4. On 10th November 2015, **KENNETH STANLEY HAJI** and **ELIXIRS LIMITED** filed a Cross-Petition in which they named the Petitioners herein as Respondents.

The Petitioners' Case

5. The Petitioners' case in a nutshell is that the 1st Petitioner is engaged in the hotel business where it operates beach resort with modern facilities known as ENGLISH POINT MARINA in Nyali, Mombasa County. That the said business is situate on a beach plot known as LAND REFERENCE NUMBER SUBDIVISION NO. 62228 SECTION 1 MAINLAND NORTH. The Petitioners contended that the said hotel is strategically located at a place where it oversees the creek, the sea and other incredible sceneries such as Fort Jesus.

6. It is the Petitioners' case that the 1st Respondent owns LAND REFERENCE NO. 6304/MN/1 which is adjacent to the Petitioners' said property where the 1st Respondent has similarly set up a hotel business. That the 1st Respondent has purported to erect 8 storey development on his plot which development impedes the Petitioners' access to their property and blocks the Petitioners' view to the creek, the sea bed and other sceneries and thereby fundamentally interfering with the Petitioners' enjoyment and use of their property and poses great risk to the environment.

7. The Petitioners contend that the 1st Respondent's developments have been undertaken in total disregard to the environmental considerations and the same interfere with the natural status of the area.

8. The Petitioners faulted the 3rd Respondent for failing to take measures to ensure that there is effective public participation prior to considering approvals for the project, failing to hold consultative meetings with affected stakeholders and/or to adequately brief and notify the affected parties of any decisions regarding the 1st Respondent's developments.

9. The Petitioners contended that the 2nd and 3rd Respondents failed to enforce the applicable principles of the law, by-laws, guidelines and laws and regulations governing such developments within Mombasa County.

10. It is the Petitioners' case that by failing to ensure compliance with the applicable laws and regulations, the 2nd Respondent has fundamentally trampled upon their rights to a clean and healthy environment as espoused under **Article 42** as read with **Articles 69** and **70** of the Constitution of Kenya. The Petitioners further contended that the Respondents breached their right to public participation under **Articles 10** and **69 (d)** of the Constitution of Kenya and the right to fair administrative action under **Article 47** of the Constitution of Kenya.

11. The Petitioners also averred that the 2nd Respondent issued development approvals to the 1st Respondent in violation of the Physical Planning Act, Cap. 286 of the Laws of Kenya, the applicable Building Codes and in disregard of the objections raised by the Petitioners.

12. The Petitioners blamed the 2nd Respondent for failing to avail to them the reports of the 3rd Respondent on its evaluation of the impact and the risks posed on the environment by the 1st

Respondent's developments as well as the minutes of the meetings pursuant to which the approvals were made as required by **Article 35** of the Constitution of Kenya.

13. The Petitioners further contended that the proximity of the 1st Respondent's developments fundamentally encroach and impede on their right to easements and related property rights as espoused under **Article 40** of the Constitution.

14. The Petitioners contended that the 1st Respondent's developments which are four storeys higher than that of the Petitioners and characterized by its close proximity to the creek, is very close to the Petitioners' boundary wall and completely blocks the view to the creek, including Fort Jesus and impedes on the Petitioners' right to privacy.

15. It was also the Petitioners' contention that the close proximity of the developments by the 1st Respondent further interfere with the Petitioners' proposed jetty leading to its slipway and marina pontoons posing a safety risk and thereby impeding on the Petitioners' enjoyment and use of their property as guarded under **Article 40** of the Constitution of Kenya.

Response by the 1st Respondent

16. In his Replying Affidavit, the 1st Respondent stated that he purchased his **Plot No. 6304 Section I Mainland North** on 10th July 2002 and that when the Petitioners commenced development on their plot, the 1st Respondent was already residing on his said plot.

17. The 1st Respondent stated that when the Petitioners commenced their development, they failed to have regard to him as a neighbor on the adjoining plot and that he suffered prejudice throughout the period of construction.

18. The 1st Respondent accused the Petitioners of blocking access to the public beach by erecting a wall on the slipway and that it took the intervention of the residents of Mkomani to bring down the wall. The 1st Respondent further blamed the Petitioners of deliberately blocking his view of the creek and his direct access to the public beach.

19. The 1st Respondent contended that the Petitioners constructed the buildings forming part of English Point Marina right into the ocean and with absolutely no regard to the sensitive marine eco-system and with complete destruction of the flora and natural habitat at the sea front.

20. The 1st Respondent accused the Petitioners of erecting pillars for the jetty in a manner that blocks access for boats from the slipway as the jetty covers the entire seafront for the Petitioners' plot and partly obstructs the sea front for the 1st Respondent's plot.

21. The 1st Respondent averred that the Petitioners enjoy a completely unobstructed slipway from the English Point Marina into the ocean and there is no expected or conceivable obstruction by the 1st Respondent's developments.

22. The 1st Respondent stated that he commenced his construction in 2011 and has had several discussions with the Petitioners with a view to minimize conflicts.

23. The 1st Respondent contended that building plans for his developments have been severally approved and renewed over the years and appropriate building permits issued in respect of the development. The 1st Respondent further contended that the development was approved by the National Environmental Management Authority. The 1st Respondent exhibited the approvals.

24. It was the 1st Respondent's case that the Petitioners knew that the development on his plot was now

being undertaken by another company being Elixirs Limited yet the Petitioners went ahead to commence this action against him in bad faith.

25. The 1st Respondent stated that the development on his plot has been undertaken with due regard and consideration for the sensitive marine ecosystem and that the 30 meter distance from the high level mark was observed and the fauna and marine habitat absolutely preserved. That the 1st Respondent's development does not offend the zoning regulations and is consistent with other existing developments fronting the ocean that are not far from the Petitioners' property.

26. In the end, the 1st Respondent stated that the development on his plot has been undertaken in a manner that takes into consideration the provisions of all constitutional and statutory provisions and legal regulations.

The 2nd Respondent's Case

27. The 2nd Respondent responded to the Petition through a Replying Affidavit sworn on 18th April 2016 by JIMMY WALIAULA, the 2nd Respondent's Director of Legal Services.

28. The 2nd Respondents averred that the Petitioners are merely making allegations that are not substantiated by any evidence on the specific environmental risks that the developments approved by the 2nd Respondent shall pose. That the developments on the 1st Respondent's land are on land that does not fall within the definition of fragile land under the Land Act, 2012 and the Survey Act, Cap. 299 Laws of Kenya.

29. The 2nd Respondent's case is that in approving the 1st Respondent's development, its role was merely administrative as it relied on recommendations of other approving authorities. Further that the 2nd Respondent complied with the provisions of the Physical Planning Act.

30. The 2nd Respondent stated that in compliance with section 36 of the Physical Planning Act, it collected and considered views of the 1st Respondent's neighbors' including the Petitioners and so the Petitioners cannot purport that they were not afforded an opportunity to air their views.

31. In conclusion, the 2nd Respondent stated that the mere fact that the 1st Respondent's development might cause loss of aesthetic value to the Petitioners property does not warrant denial of development approvals by the 2nd Respondent since the 1st Respondent also has a right to property under **Article 40** of the Constitution of Kenya.

The 3rd Respondent's Case

32. The 3rd Respondent opposed the Petition through a Replying Affidavit sworn on 5th March 2016 by PROF. GEOFFREY WAHUNGU, its Chief Executive Officer. In a nutshell, the deponent opposed the Petition on the basis that it was filed in this court instead of at the National Environment Tribunal as per **section 129** of the Environmental Management and Coordination Act (EMCA).

33. The 3rd Respondent stated that no ecological considerations have been ignored or disregarded and that the Environmental Impact Assessment Report was commissioned, reviewed and an approval given as by law established.

34. The 3rd Respondent averred that the rightful owner of a property cannot be restrained from developing his property simply because such development may prejudice the aesthetic value of his neighbor's property.

The Petitioners' Submissions

35. The Petitioners submitted that the user of the 1st Respondent's parcel of land as per the conditions attached to the mother title is one of medium class hotel and that the development permission sought and approved by the 1st Respondents as at 29th July 2011 when the 1st Respondent first sought development permission were not in conformity with the user conditions attached to the title document. That, therefore, the Approved Development Plans as approved are outrightly illegal as at the time of seeking such approvals, the developments were in the first instance in violation of the conditions attached to the mother title. The Petitioners therefore submitted that the 2nd Respondent erred in law and was in violation of **section 41 (3)** of the Physical Planning Act and acted in excess of the law by considering the developments and approving the same. The Petitioners contended that for violating the condition in the mother title, the development permissions granted to the 1st Respondent are a nullity and susceptible for cancellation by this court.

36. While relying on the case of **HARDY RESIDENTS ASSOCIATION SUING THROUGH OFFICIALS WAINAINA KINYANJUI & 2 OTHERS V. ANDREW NG'ANG'A [2013] eKLR**, the Petitioners submitted that at the time of seeking development approvals, the 1st Respondent had not acquired a change of user and that the purported change of user was sourced after this Petition was filed which in any event does not cure the illegality on the face of the 1st Respondent's developments.

37. It was the Petitioners' submission that condition no. 6 in the conditions attached to the mother title dictate that the buildings shall not cover a greater area of land or such lesser area as may be laid down by the local authority by- laws. That the constructions being undertaken by the 1st Respondent appear to be in violation of this condition as the plot ratio defined under the conditions imposed on the title have not been complied with.

38. The Petitioners submitted that the 1st Respondent's developments are illegal and unlawful in the first instance because the 1st Respondent commenced construction without fulfilling the conditions attached to the title.

39. It was the Petitioners' submission that the approvals for the 1st Respondent's developments were not renewed but instead were amended over a period of time. That in 2014, the 1st Respondent lodged proposed amendments to its initial building plans which fundamentally differed from the initial approved plans. The Petitioners stated that the approval given by the 1st Respondent on 16th December 2014 was issued to Elixirs Limited yet the land is registered in the sole name of the 1st Respondent.

40. The Petitioners submitted that they were not aware of the development plans submitted by the applicant and that the approved development plans have never been furnished to the Petitioners despite requests for the same. It was also the Petitioners' submission that as at the time the Environmental Impact Assessment was being undertaken, they had not been supplied with architectural drawings despite requesting for the same.

41. The Petitioners submitted that the 2nd Respondent erred in law by purporting to approve the development plans as submitted by the 1st Respondent without the input of the Petitioners as envisaged by the provisions of the Physical Planning Act. That no notice was served upon the Petitioners as contemplated by **section 41 (3)** of the Physical Planning Act. Further, that in considering the applications for development approvals, the 2nd Respondent as a public body was exercising administrative action under **Article 47** of the Constitution and was therefore mandated to observe the Petitioners' constitutional rights enshrined in the said Article.

42. That by denying the Petitioners an opportunity to be heard, the Respondent acted in breach of the rules of natural justice and that the administrative decisions made by the 2nd Respondent in the approval of the 1st Petitioners development plans were unreasonable, unprocedural, unfair and in violation of the expectations set by **Article 47** of the Constitution. Further that the impugned approvals are in breach of the Petitioners' democratic, fundamental and inalienable right to equal protection and equal benefit of the

law and particularly the right to not to be discriminated against under **Article 27 (1), (4) and (5)** of the Constitution. The Petitioners also contended that the approvals were granted in contravention of their right to legitimate expectation created by the provisions of the Physical Planning Act.

43. On whether the approvals by National Environmental Authority (NEMA) violated the Petitioners' rights, the Petitioners submitted that although they were invited to make comments before NEMA approvals, they could not do so because they were not supplied with the architectural drawings submitted by the 1st Respondent.

44. Further, the Petitioners submitted that there seems to be a discrepancy in the development plans lodged for approval and the impact assessment conducted by the 3rd Respondent. That while the approved plans showed one block of apartments with 5 floors, the invitation by NEMA indicated the development related to a single building with 6 floors.

45. The Petitioners submitted that in spite of objections lodged by them, Royal Beach Apartments Limited and one Duncan Bandari, the 3rd Respondent proceeded to issue an Impact Assessment License to the 1st Respondent. Further, they submitted that the 3rd Respondent proceeded with the Impact Assessment without the requisite approvals by the 2nd Respondent in respect of the additional 6 units.

46. According to the Petitioners, the 1st Respondent having been issued with Development Plan No. P446/11 which purported to incorporate Blocks A and B to the initial Development Plan (P/446/11) which envisaged one building, it appears that no Environmental Impact Assessment was conducted by the 3rd Respondent in respect of the amendment of the development as per the Amended Plan. That no NEMA license was issued in respect of the amended approval.

47. The Petitioners further submitted that the 3rd Respondent failed to take into account measures that are necessary to ensure that there is effective public participation prior to considering and granting approvals regarding the 1st Respondent's projects. That by failing to consider their views, the Petitioners' right to a clean and healthy environment under **Article 42** of the Constitution was violated.

48. While relying on the case of **J.S MUIRU & 2 OTHERS V. TIGONI TREASURERS LIMITED [2014] eKLR**, the Petitioners submitted that the Environment Impact Assessment Licenses issued by the 3rd Respondent were issued in violation of procedural requirements of the Environment Management and Coordination Act, 1999 (EMCA) and the regulations made there under.

49. On whether their constitutional right to property under **Article 40** of the Constitution has been violated, the Petitioners submitted that the 1st Respondent's developments have vastly interfered with the enjoyment of the Petitioners' property. That the 1st Respondent's developments offend the Petitioners' enjoyment of their property as the same has hindered access to rightful easements such as direct sunlight, free flow of fresh breathing air, safety and views.

50. On the question of damages sought by the 1st Respondent as a result of the conservatory orders issued by the court, the Petitioners submitted that this court has no jurisdiction to issue damages for the period that the conservatory orders were in place. That the orders were issued lawfully and procedurally by the court upon analysis of the evidence adduced. Further, that the damages suffered have not been demonstrated.

The 2nd Respondent's Submissions

51. The 2nd Respondent filed its written submissions on 7th September 2016. The 2nd Respondent submitted that it had authority to approve the 1st Respondent's developments which authority it derived from **Article 186** and the **Fourth Schedule Part 8** of the Constitution of Kenya as well as **section 5** of the County Government Act, 2012.

52. On whether it followed the procedure in granting the approvals for the 1st Respondent's developments, the 2nd Respondent submitted that having considered the 1st Respondent's application and building plans through its experts and having received no objection from the members of the public including the Petitioners, it proceeded to notify the 1st Respondent of its approval in accordance with **section 32(2)** of the Physical Planning Act. That the 1st Respondent made an application for change of user from private residence to multiple dwelling developments and the said application was accompanied by the development plans as required by **section 31 (1) and (2)** of the Physical Planning Act. That there was no objection to the change of user from members of the public.

53. The 2nd Respondent submitted that it followed the law regarding approval of the 1st Respondent's developments and that in any case if the Petitioners were not satisfied with the decision of the 2nd Respondent, they had recourse under **section 13** of the Physical Planning Act to appeal within 60 days from the date of notification. The 2nd Respondent therefore submitted that this court lacks jurisdiction in this matter because the Petitioners are yet to exhaust all mechanisms and bodies established under the Physical Planning Act for dispute resolution. The 2nd Respondent relied in that regard on the case of **NAKURU HIGH COURT PETITION NO. 2 OF 2014: RAYMOND CHERUYOT & OTHERS V. ERICK KIBAARA NDERITU & 3 OTHERS** to submit that the court should exercise restraint in this matter and give an opportunity to the relevant bodies or State organs to deal with the dispute under the relevant law.

54. Before the hearing of this matter was concluded, I had an opportunity to visit the properties in dispute in the presence of the Petitioners' representative, the 1st Respondent and the advocates for the Petitioners, the 1st & 3rd Respondents. During that visit, the 1st Respondent showed the court where it intended to construct its jetty. The Petitioners' representative seemed to have no complaint on the location shown subject to the 1st Respondent keeping his word. Consequently, this court makes a finding that there is partial resolution of the dispute by consent which is subject to orders of review only if the 1st Respondent shall have shifted the location during the actual construction from the location shown during the court visit.

55. Having analysed the pleadings and the submissions filed, I pose the following questions for my determination;

- i. Whether this court has jurisdiction to determine this matter.
- ii. Whether there has been a violation of the Petitioners Constitutional rights as set out in the Petition and the reliefs sought.
- iii. Whether the 1st respondent is entitled to damages as contained in the Cross-Petition.
- iv. What orders are appropriate in the circumstances?

Jurisdiction

56. On Jurisdiction, I opt to adopt the findings of my learned brother Munyao J in the case of **Ken Kasing'a vs Daniel Kiplagat Kirui & 5 others Petition No.50 of 2013** cited by the Petitioners where NEMA (Now the 3rd Respondent here) raised the same objection that the Petitioners ought to have his complaint before the NET (National Environment Tribunal). Justice Munyao in reaching a finding that the Petition was properly filed before the ELC had this to say;

“The jurisdiction of the ELC as may be noted in article 162 (2) (b) of the constitution is to hear and determine disputes relating to the environment and urge and occupation of, and title to land. This jurisdiction is elaborated in Section 13 of ELCA. Section 13 (1) of ELCA gives the ELC both original and appellate jurisdiction to hear all disputes relating to the environment. Such disputes are provided in Section 13 (2) (a); 13 (2) states that what is set out in (a) to (d) is

not conclusive thus the ELC can hear any other dispute relating to the environment & Land.

57. According to Munyao J in this case, ELC has unlimited jurisdiction on any dispute categorized as being dispute over the environment. I cannot agree more with the Judge as he correctly quoted the Constitutional and Statutory provisions as regards the jurisdiction of the ELC. Similarly, the nature of the claim sought in this Petition involved claims against different parties such as the County Government of Mombasa whose approval of development plans could only be referred to the National Planning Liaison Committee hence it would have meant the Petitioners approaching the several institutions to resolve each dispute that is different yet related and can be resolved under one claim. For the reasons that article 162 (2) (b) of the Constitution and Section 13 of ELCA gives this court unlimited jurisdiction on matters relating to the use and enjoyment of environment, I find the objection on jurisdiction as unmerited. It is thus my holding that this Petition is properly before this court.

Constitutional & Statutory Violations;

58. At paragraph 35 of the Petition, the Petitioners contended that the 1st Respondent has purported to erect an 8 storey development on his plot no L.R. no 6304/MN/1 which is adjacent to the Petitioners' property. That this development impedes on the Petitioners' access to its property and which further blocks the Petitioners' view to the creek, sea bed and other sceneries including Fort Jesus.

59. Both Plots (the Petitioners' and the 1st Respondent) are served by a Public access road that is tarmacked. From the description of the Petitioners pleadings, the plots are adjacent to each other. The complaint by the Petitioners that the development impedes access into its property in my view is unfounded because they equally served by the public road. Secondly both plots have an open sea front of which the Petitioners have already fully developed their plot at the time this Petition was filed and or heard and it appears from what I observed during my visit that it was partially operational. I did not see any interference with the Petitioners' access to their property on the sea front occasioned by the 1st Respondent's activities.

60. The only complaint that is obviously visible is the impeded view of the creek on parts of blocks of development undertaken by the Petitioners. The Petitioners contends this violated its rights to property as espoused under article 40 of the Constitution which extend to the right of use and enjoyment. The right to property is also extended to be enjoyed by the 1st Respondent as the owner of the land L.R. no 6304. The question this court is called to consider is whether in enjoying his rights the 1st Respondent has infringed on the rights of the Petitioners as well as caused damage to the environment.

61. The Petitioners complaint is that the 2nd and 3rd Respondents failed to enforce the applicable principles of the law. For instance that the 2nd respondent issued development approvals to the 1st Respondent in open violation of the Physical Planning Act and Building Codes and without taking to account the Petitioners objections. The Petitioners however did not specify in their pleadings which sections of the Physical Planning Act or building Codes Regulations has been violated by the 2nd or 3rd Respondents. In their submissions, the Petitioners averred that section 41 (3) of the Physical Planning Act had been violated.

62. Section 41 (3) of Cap 286 provides that **“where in the opinion of a Local Authority an application in respect of development, change of user or subdivision has important impact on contiguous land or does not conform to any conditions registered against the title of the property, the Local Authority shall at the expense of the applicant publish the notice of the application in the gazette or in such other manner it deems expedient and shall serve copies of the application on every owner or occupier of the property adjacent to the land.**

41 (4) of the local authority receives objection to or representation in connection with an application made under 41 (1) it shall notify the applicant of such objections and shall before the application is determined afford the applicant opportunity to respond.”

63. There is no proviso made in regard to applications made under subsection 3 except that any person aggrieved by a decision of the Liaison Committee may appeal against that decision to the National Liaison committee in writing stating the grounds of his appeal. This subsection in my interpretation refers to an appeal by the party seeking the approvals.

64. The Petitioners submitted that the mother title of the 1st Respondent in **clause 5** provided that the land was to be used for the purposes of a medium class hotel. The 1st Respondent followed due process in obtaining change of user. **Clause 6** – demanded that the buildings shall not cover a greater area of land or such lesser area as may be laid down by the local authority by laws.

65. The Petitioner has not specified why in their opinion felt the 2nd Respondent failed to comply with the provisions of section 41 (3) of Cap 286. The 1st Respondent did apply for change of user. The notice of change of use was published in the standard newspaper. The Petitioners did not annex any documents they registered in regard to their objections with the 2nd Respondent's before the approval of change of user from medium class hotel to apartments was granted. Further as regards clause no 6, during the site visit, the court granted the Petitioners permission to carry out a survey to confirm the area covered by the 1st respondents' buildings.

66. The Petitioners did not file the findings of the survey carried out. Neither did the Petitioners say in their supplementary submissions that the report revealed the 1st Respondent had contravened this clause by covering more area than is allowed by the Building Codes. This court therefore draws an inference that the surveyors report may have been favorable to the 1st Respondent. Consequently I make a finding that no proof was made that the 1st Respondent contravened the provisions of the said clause 6 of the mother title. Further the Petitioners not having shown they had registered any objections to the change of user with the 2nd Respondent, I find no basis for the claim that section 41 (3) of Cap 286 was contravened and or that his right to fair administrative action has been violated.

67. The Petitioners also complained that their right to a clean and healthy environment has been infringed upon. The 1st Respondent submitted that the 3rd Respondent interviewed the closest neighbours who would be most affected by the building construction in the area. None of the neighbours objected except the Petitioners. In their objection, the petitioners requested for detailed architectural drawings before they could give their comments. Subsequently they wrote a letter dated 12th November 2012 to the 1st Respondent.

68. In the said letter, they referred to a meeting held on 5th November 2012 between their representative and that of the 1st Respondent. Their feedback was that they had no problems with the Rear Sea facing apartments as long as the windows are restricted on the elevation. In the Petition, no mention is made that there's been a breach of that request on this block. The Petitioners also averred on breach of right to privacy yet on the ground positions, the two plots do not share a common wall. Secondly there is a slipway that is to be used for launching the boats separating the two plots. The 1st Respondent has also not constructed balconies on the side facing the Petitioners' development.

69. On the creek front apartments, the Petitioners raised the issue that it is too close to the common boundary wall. Secondly that it blocks all views to the open sea particularly the view from their hotel lounge. Lastly that it overlaps their block D apartments. As pointed out in par 68 and the preceding paragraphs, both plots have an open sea front. On my site visit, what will be completely blocked is the view with regard to the side referred to as Block D apartments of the Petitioners.

70. Does the 1st Respondent owe a duty of care in terms of how he uses his plot to the Petitioners and is that right provided for under the Constitution? The Petitioners loss is estimated in terms of aesthetic value for loss of view to the creek. I do say so because as set out in paragraph 67 above, the two plots do not share a common boundary and are separated by a slip way.

71. The 1st Respondent's developments were duly approved by the 2nd Respondent. The approvals were made on various dates before the commencement of the construction works. The Petitioners deposed that the approvals were done illegally and unlawfully without inviting the Petitioners and others members of the public to present their views. The approvals were granted on 28th March 2012. The 2nd Respondent deposed on its part that it gave the approvals after other relevant institutions had also given their licenses. Amongst the Institutions that issued the license is the 3rd Respondent.

72. Since the Petitioners were invited to give their views on the proposed development by the 3rd Respondent and they confirmed being aware of the proposed developments vide their letter of 12th November 2012. In this letter, they did not complain that their right to a clean and healthy environment would be infringed. In the pleadings they have also not stated how this right has been infringed. A right to a clean and healthy environment is described in article 42 of the Constitution to include

a) To have the environment protected for the benefit of present and future generations through legislative and other measures.

73. The 1st Respondent's project was duly approved by the 2nd and 3rd Respondents before construction commenced. It is submitted by the 1st Respondent that it is in conformity with other developments in the neighborhood. In my view since the Petitioners and the 1st Respondent have equal access to the sea front and all amenities attached to the ocean waters, the 1st Respondent's building blocking their view of the creek or Fort Jesus on one side of Block D apartments particularly the view from their hotel lounge does not amount to a violation of a Constitutional right in a situation where their plot shares equal access as the 1st Respondent. The Petitioners guests are able to access the views of the sceneries from their front facilities. It would have been different if the Petitioners view were completely cut off

74. Furthermore, the 1st Respondent duly engaged the Petitioners to discuss the extent and nature of his development as can be seen from the emails exchanged between themselves (between 2011 & 2012). The Petitioners confirmed they understood the nature of the development to be undertaken hence their objection contained in paragraph 2 of their letter of 12th November 2012. It is therefore not true for them to say that what was approved by the 2nd Respondent is different from the architectural drawings they were shown during the E.I.A study exercise. In conclusion, I am not satisfied that the Petitioners have made out a case to show that their Constitutional rights as envisaged in the articles cited on the body of the petition have been violated. It is my finding that the Petition has no merit and hereby dismisses it with costs to the Respondents.

Whether the 1st Respondent is entitled to damages;

75. The 1st Respondent brought the cross-petition on account that the Petitioners obtained conservatory orders at the time of filing the petition which orders were subsequently lifted after inter-partes hearing of the application. In the cross- petition, the Petitioners (1st Respondent) pleaded that the contractor has pleaded that they are likely to incur losses in the sum of Kshs.74, 891.46 exclusive of VAT per day. Further that with the conservatory orders in place, there may be need to replace and or reinforce metal rods, pillars and slabs arising from rust and corrosion.

76. The Petitioners (1st Respondent) claim there was absolutely no justification by the Respondents (Petitioners) in bringing the petition. The Petitioners therefore prayed for an order for damages suffered by themselves as a consequence of the conservatory orders issued on 29th day of July 2015 arising from damages payable to the contractor, wastage in the building structures and lost business prospects and delays in servicing financial facilities accorded to the Petitioners including punitive damages for incompetent and ill-conceived court proceedings. They also prayed for costs of the cross-petition.

77. The cross-petition is supported by the affidavit sworn by Kenneth Stanley Haji on 9th November 2015. The affidavit deposed to facts contained in the cross-petition and annexed documents in support

thereof including the agreement of conditions of contact for building works between the Petitioners herein and their Contractor.

78. The cross-petition was further supported by the submissions filed by the petitioners (1st Respondent's submissions). They refer to a report dated 8th April 2016 and filed in court on 4. 5. 2016 which assessed the loss at Kshs.5, 450,598.04 and which they submit has not been challenged by the Respondents in the cross-petition. They quoted the case of **Joseph Wainaina Gaya T/A Queen Chic Inn vs. H.E. Daniel Arap Moi & Another (2007) eKLR** where Ibrahim J (as he then was) stated that should the suit be successful on the part of the defendant, that losses incurred as a result of the interim orders issued in favour of the plaintiff should be assessed and awarded.

79. For my determination are two issues in regard to this Cross-Petition. Firstly whether the Respondents were entitled to move this court to obtain the conservatory orders that has generated the filing of the cross-petition and therefore no award of damages should accrue. Secondly is if the damages are payable whether the same has been proved.

80. Under article 70 of the Constitution and Section 3 of EMCA it is provided that if a person alleges that a right to a clean & healthy environment has been or is likely to be denied, violated or infringed, the person may apply to court for redress in addition to any other legal remedies. On application, the court make any order or give any directions it considers appropriate as spelt out in paragraphs A – C Article 70 (3) provides that an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

81. The right to come approach court is thus given by both the Constitution and Statute. The proviso in article 70 (3) is that the applicant does not have to demonstrate that any person has incurred loss or suffered injury. All he needs to show the court that this right is being denied or is likely to be infringed/threatened. The mandate on whether to issue any orders or give such directions lies at the discretion of the court.

82. In this instance, the court upon being moved exparte, was satisfied there were sufficient reasons to issue the conservatory orders it gave at the time pending the determination of the application. Should be Respondents be punished by being made to pay damages because the application was subsequently dismissed? In my view the award of damages should only be given where the application is dismissed on grounds of being vexatious or a clear abuse of the court process.

83. The Respondents application was dismissed after it was heard on merits. In my determination, I did not make a finding that the said application was vexatious. In the final determination of the Respondents petition, I have also found that indeed the Respondents are *likely suffer loss* in terms of loss of aesthetic value of view of the creek by occupants of their block D apartments except that the court cannot enforce that right by virtue of the fact that the two plots have equal access to the sea front hence the petitioners herein cannot be compelled under the Constitution or by statute to provide that view. The Respondents had genuine fear on both the location of the Petitioners' jetty and loss of view of the oceanic features on part of their development and therefore had every right to move the court in the manner they did. I find no reason to condemn them by ordering them to pay damages for moving the court to protect/preserve those rights.

84. On the basis of my finding above, I will not determine whether the damages have been proved since I have found that they are not payable by the Respondents. Consequently I dismiss the cross petition with an order that each party to bear their respective costs of the cross-petition.

Dated and Signed at Mombasa this 11TH day of JANUARY 2017

A. OMOLLO

JUDGE

Delivered at Mombasa this 12th day of JANUARY 2017 by

M. THANDE

JUDGE