



REPUBLIC OF KENYA
IN THE ENVIROMENT AND LANDS COURT

AT MALINDI

PETITION NO. 25 OF 2016

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS UNDER ARTICLES 19, 20, 23, 40 AND 47 OF

THE CONSTITUTION OF KENYA, 2010

BETWEEN

1. GIANA ELISA RECCOSTA 1ST PETITIONER
2. GIANCARLO FAENZA..... 2ND PETITIONER
3. CARMELA SAULLO.....3RD PETITIONER
4. ARTURO LESANDRINI.....4TH PETITIONER
5. ITALO GRIMANI.....5TH PETITIONER
6. ARCARI LUIGI.....6TH PETITIONER
7. MAURO BORRACCETTI.....7TH PETITIONER
8. GIORGIO STABILINI.....8TH PETITIONER
9. MARGARET WAMBUI KINGORO.....9TH PETITIONER
10. DIANA GIOVANNI.....10TH PETITIONER
11. MARGIT SCHULTMAYER.....11TH PETITIONER
12. ABDULMAJID ABOO.....12TH PETITIONER
13. MARGAT OKECH.....13TH PETITIONER

14. RUBEN DARIO COSTA CARRETERO.....14TH PETITIONER

15. SUSAN ATIENO ABUDHA.....15TH PETITIONER

VERSUS

COUNTY GOVERNMENT OF KILIFI.....RESPONDENT

AND

CORAL PROPERTIES CONSULTANTS

LIMITED.....1ST INTERESTED PARTY

POLCINO OASIS LIMITED.....2ND INTERESTED PARTY

RULING

1. Before me is a Notice of Motion Application dated 30th November 2016 and brought pursuant to Article 159(1) (2) (d) and (e) of the Constitution of Kenya 2010 and Rules 13, 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules, 2013. By virtue of the said application, the 15 Petitioners herein seek the following reliefs from this court.

1. Spent

2. Spent

3. THAT pending the hearing of this Petition, a conservatory order does issue to restrain the Respondent, from in any manner whatsoever whether by itself, its servants, agents or advocates or any of them or otherwise from enforcing the notice addressed to the 1st Interested Party dated 10th November 2016 and referenced CG/KFI/HSG/OASIS VILLAGE/VOL. 1/24

4. THAT pending the hearing of this Petition an order of mandamus does issue compelling the Respondent to carry out a physical and structural analysis of the Oasis Building and give the Petitioners the structural review report to enable them carry out the necessary repairs.

5. THAT the court be pleased to make any other order fit in the circumstances of this case.

6. THAT costs be provided for.

2. The Application is supported by an Affidavit sworn by the 1st Petitioner Gianna Elisa Reccosta on 30th November 2016 as well as a number of grounds enumerated in the Notice of Motion. Despite service of the application upon the Respondents and the Interested Parties, on or about 13th February 2017, none of them entered appearance and as a result the application proceeded undefended.

3. I have considered the application and the submissions placed before me by Mr. Binyenya, Learned Counsel for the Petitioners. The Applicants are respectively owners of certain Apartments named Polcino Oasis Village which is erected on L.R No. 1862, Malindi belonging to Polcino Oasis Limited, the 2nd Interested Party herein. On or about 26th June 2015, the Applicants and Others who own apartments at the said Polcino Oasis Village appointed Messrs Coral Properties Consultant Ltd, the 1st Interested party herein as the Manager, to manage, protect and preserve the assets of the said Polcino Oasis Village.

4. By a notice dated 10th November 2016 addressed to the 1st Interested Party, the Respondent County Government of Kilifi through its Chief Officer Land, Energy, Housing and Physical Planning informed the occupants of the said Polcino Oasis Village of the revocation of an earlier notice issued to them vide a letter dated 3rd May 2016. The new notice under reference No CG/KFI/HSG/OASIS/VILLAGE/VOL. 1/24 reads in part as follows: -

“RE: OASIS VILLAGE MALINDI

The above refers to structures on Plot No. 1862 Malindi

As you are aware of the issues about this building, I wish to address you as

follows: -

(1) The building has not been strengthened to the satisfaction of the County Government.

(2) You have taken more than 12 months to take necessary steps towards repairs as advised.

(3) That, maybe you do not (sic) have the will or capacity or authority to take necessary steps to repair as you requested.

(4) That apart from the situation deteriorating further, you have allowed works to be carried out in some apartments, whose nature and effects on the fragile structures are not ascertained.

(5) That the building has been altered without specific approvals and inspection as required.

In view of the above, I am left without (an) option but to revoke the extension of the notice(issued) vid letter ref. No. CG/KLF/HSG/OASIS VILLAGE/VOL. 1/15 dated 3rd May 2016.

Therefore, take note that our earlier notice vide letter ref no. CG/KLF/HSG/OASIS VILLAGE/VOL. 1/12 dated 31st March 2016 takes effect immediately.

5. While the Applicant has not annexed the other two notices referred to in this letter, it would appear that the net effect of the new notice was to close the premises known as Polcino Oasis Village. As a result, the Applicants protest at Paragraph 6 of the Supporting Affidavit as follows: -

6. THAT the notice is unlawful and in breach of the law as the procedure adopted by the Respondent offends Article 47 of the Constitution of Kenya 2010. Specifically, the Respondent being aware of the proprietary interests of the Petitioners and other Apartment Owners, and well aware that the said notice shall adversely affect the rights and fundamental freedoms of the Petitioners and other apartment owners to own property as guaranteed by Article 40 of the Constitution of Kenya, 2010, the Respondent has not issued prior and adequate notice of the nature and reasons for the closure of Polcino Oasis Village and neither has the Respondent given the Petitioners an opportunity to be heard and make representations in that regard.

6. It is accordingly the Applicants contention that the notice by the Respondent amounted to the exercise of an administrative action and as such the Respondent was under a duty to invite the Applicants and other apartment owners as provided under Section 4 of the Fair Administrative Actions Act, 2015 to explain their case and ensure its action complied with the rules of natural justice.

7. It would appear from the correspondence availed to me that the Applicants through the 1st Interested party had been engaged in some discussions with the Respondent in regard to the structural soundness of Polcino Oasis Village. However, in light of the fact that the Respondent did not file any pleadings herein, this court can only speculate as to the nature of the said discussions.

8. In Light of the uncontroverted facts placed before me by the Applicants, I find and hold that the notice issued by the Respondent was contrary to the rules of natural justice and therefore fell a foul of the provisions of Article 47 of the Constitution of Kenya. The immediate nature of the notice closing the premises was contrary to the Applicant's legitimate expectation that before any adverse action was taken the Applicants would be afforded an opportunity of presenting their case and challenging the Respondent's position.

9. In the circumstances and in view of the need to ensure the structural soundness of the premises, I hereby order as follows: -

(i) That pending the hearing of this Petition, a conservatory order does issue to restrain the Respondents from in any manner whatsoever whether by itself, its servants, agents or any of them or otherwise from enforcing the notice addressed to the Interested Party dated 10th November 2016 and referenced CG/KFI/HSG/OASIS VILLAGE/VOL. 1/24.

(ii) That an order of mandamus does issue compelling the Respondent within 90 days of the date hereof to carry out a physical and structural analysis of the Oasis Building and to give appropriate recommendations to the Applicants.

(iii) That the costs of the physical and structural analysis be borne by the Applicants.

(iv) That the costs of this application shall be in the cause.

Dated, signed and delivered at Malindi this 13th day of July, 2017.

J.O. OLOLA

JUDGE