



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. PETITION NO. 5 OF 2017**

**IN THE MATTER OF ARTICLES 10(A) (B), 22(1) (2) (D), 23(1) (3), 35(1) (A) (B), 42, 47(1) (2), 69(1) (2), 70(1), 73(1) (A) (2) (B) (D) AND 196 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION**

**OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**UNDER ARTICLES 35(1) (A) (B), 42, 47(1) (2), 69(1) (2), 73(2) (B) (D) AND 196 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT CHAPTER 265 OF 2012**

**AND**

**IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT**

**AND CO-ORDINATION ACT CHAPTER 387 OF 1999**

**AND**

**IN THE MATTER OF THE PHYSICAL PLANNING ACT NO. 6 OF 1996**

**BETWEEN**

**SYOKIMAU RESIDENTS ASSOCIATION LTD.....PETITIONER**

**AND**

**COUNTY GOVERNMENT OF MACHAKOS.....1<sup>ST</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MGT. AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Application by the Petitioner that is before me is the one dated 15<sup>th</sup> February, 2017.

2. In the Application, the Petitioner is seeking for the following orders:

*a. That the 1<sup>st</sup> Respondent is restrained from issuing building approvals for any construction that is not a single residential building, issuing change of user licenses and any other building license due the Respondent's failure to have an approved and legal development plan for the whole area and/or structured guidelines for such approvals within Syokimau Estate which is L.R. no. 12715 as per the requirements of the Physical Planning Act pending the hearing of this application and petition.*

*b. That the Respondents are compelled to allow the participation and/or approval of the Petitioner prior to the granting of building approvals and/or licenses within Syokimau Estate, which is L.R. No. 12715 pending the hearing of this Application and Petition.*

*c. That this Application be advertised in the Daily Nation to allow for participation by any interested parties to the Petition.*

*d. The hearing of the Petition be expedited.*

*e. The costs be provided for.*

3. The Petitioner's Secretary swore an Affidavit in support of the Application in which he stated that the Petitioner is made up of the residents of Syokimau Estate whose land is known as L.R. No. 12715; that the Estate began after the sub-division of Syokimau Farm into smaller units and which were all classified as single user plots and that the Petitioner's members have put up houses within the Estate.

4. It is the Petitioner's case that they have since witnessed the unplanned and inconsistent developments in the once organized Estate which have been as a result of the Respondents' approval and licensing without due regard to policy or guidelines and that the degradation of the Estate is due to change of user being granted by the 1<sup>st</sup> Respondent from single user to multiple user without due regard to the amenities and without a proper designed development plan.

5. According to the Petitioner, its members are never involved during the issuance of the Environmental Impact Assessment tests; that most EIA reports are fictitious and that most of the Petitions by the Petitioner have always been ignored by the Respondents.

6. Despite the numerous objections by the Petitioner, the Petitioner has averred that the 1<sup>st</sup> Respondent has gone ahead to issue approvals for change of user for several parcels of land within Syokimau Estate without giving the Petitioner an opportunity to be heard on the merits or demerits thereof; that the Respondents have never given the Petitioner an opportunity to canvass their objections contrary to the clear provisions of the Constitution and that although the Petitioner has communicated its desire to partner with the 1<sup>st</sup> Respondent in formulating a development plan for the Syokimau Estate by forwarding a proposed development plan, the 1<sup>st</sup> Respondent has not responded to the same.

7. In response, the 1<sup>st</sup> Respondent's Chief Officer in the Department of Lands and Urban Development deponed that the 1<sup>st</sup> Respondent has elaborate guidelines and procedures for approval of physical developments throughout the County; that those procedures and guidelines are compliant with the relevant laws and allow public participation and that the physical development approvals within Machakos County are undertaken by the Sub-County physical development approval committees.

8. According to the 1<sup>st</sup> Respondent, any party dissatisfied with the decision of the Committee can always appeal to the Appeals Committee; that L.R. No. 12715 was originally designated as agricultural land and was sub-divided into several portions under an approved scheme and that the said portions were designated for residential use and was subject to change of user by the individual owners.

9. It is the 1<sup>st</sup> Respondent's case that the 1<sup>st</sup> Respondent always complies with the Physical Planning Act in determining whether or not to approve applications for change of user or not.

10. The Chief Officer of the 1<sup>st</sup> Respondent deponed that the 1<sup>st</sup> Respondent always gives due regard to any objection as presented by the public and other stakeholders including the Petitioner herein relating to land use and environmental matters; that on 15<sup>th</sup> Augusts, 2015, the Petitioner wrote to the County in support of an application from single dwelling to commercial of L.R No. 12715/119 and that the Petitioner has always been heard.

11. The 1<sup>st</sup> Respondent's Chief Officer finally deponed that before granting development approvals, the County always considers the Environmental Impact Assessment Reports and is bound by the decision of the 2<sup>nd</sup> Respondent; that all the approved plans in the Mavoko Sub-County are available for inspection and that the Petitioner has always been involved in those approvals.

12. In the Further Affidavit, the Petitioner's Secretary deponed that the 1<sup>st</sup> Respondent has only exhibited guidelines and procedures which have not been gazetted; that the Petitioner has never been informed of the outcome of its objections and that the 1<sup>st</sup> Respondent has never convened a forum to discuss the Petitioner's objections.

13. The Petitioner's advocate submitted that without an approved zoning map for the whole area of Syokimau Estate, there shall be haphazard and irregular development of the area; that the unstructured developments continue to breach the Petitioner's members' rights to a clean and safe structured environment and that the 1<sup>st</sup> Respondent has never responded to any of the objections that have been raised by the Petitioner for the change of user.

14. Counsel relied on the cases of *Commissioner of Lands vs. Kunste Hotel Limited (1997) eKLR and John Kabukuru & others vs. County Government of Nakuru & others, Petition No. 13 f 2016 (Nakuru)* which I have considered.

15. The 1<sup>st</sup> Respondent's counsel submitted that the 1<sup>st</sup> Respondent has demonstrated that it has constantly engaged the Petitioner in the process of development approvals; that public participation does not entail usurping the decision making powers of public agencies and that public participation does not always mean that the outcome thereof must result in what the Petitioner wants.

16. Counsel submitted that prima facie, the 1<sup>st</sup> Respondent is within its mandate to grant development approvals; that every project must be independently assessed on its merits and that the Petitioner's complaint has not been pleaded with reasonable precision.

17. Counsel finally submitted that the Petitioner has not shown the irreparable loss that its members shall suffer; that there are many other stakeholders at risk of losing their right to use land and that if the injunctive orders are granted, it would be against public interest.

18. The 1<sup>st</sup> Respondent's advocate relied on the cases of *Makupa Transit Shade Limited & Another vs. Kenya Ports Authority & Another (2015) eKLR; Nairobi Metropolitan PSV Sacco Limited & 25 others vs. County Government of Nairobi, Petition No. 486 of 2013; Matemo Mumo Vs. Trusted Society of Human Right Alliance & 5 others (2013) eKLR and City Riders Sacco & 11 others vs. County Council of Nairobi and 3 others (2016) eKLR* which I have considered.

#### **Analysis and findings:**

19. The Petitioner is a registered Association representing the interests and welfare of the residents owning land within Syokimau Estate which was initially L.R. No. 12715. The said land has since been sub-divided into various portions.

20. As conceded by the Petitioner in the Petition, the 1<sup>st</sup> Respondent is a constitutionally created body tasked with the duty of approving building developments within its geographical area.
21. The Petitioner's complaint is that the Respondents have been issuing building approvals and EIA licences within the Estate without providing an opportunity to the residents to air their objections thus denying them public participation as envisaged in the Constitution.
22. According to the Petitioner, their objections to various developments in the Estate have been neglected by the Respondents and that the building approvals and licenses issued by the Respondents have contributed to the rise of unplanned and unstructured development in the area.
23. The Petitioner is seeking for a declaration that its constitutional rights have been violated by the Respondents; an order cancelling any building approvals given by the Respondents to which the Petitioner has objected to until it is given a hearing and an order restraining the 1<sup>st</sup> Respondent from issuing any new change of user licenses and building approvals for multi residential or commercial developments in the area until a development plan for the Estate has been gazetted.
24. In the meantime, the Petitioner wants those orders be given pending the hearing and determination of the Petition.
25. The Petitioner has annexed on its Supporting Affidavit a list of the Objections it has raised in respect to applications for approvals for developments within the Estate which, according to the Petitioner, have been ignored by the Respondents.
26. The 1<sup>st</sup> Respondent has countered the Petitioner's complaint by stating that it has always engaged the Petitioner before granting approvals for the change of user within the Estate.
27. To support the assertion that it has always involved the Petitioner in its decision, the 1<sup>st</sup> Respondent annexed on its Affidavit the Minutes of 7<sup>th</sup> October, 2015, 26<sup>th</sup> May, 2016 and 9<sup>th</sup> June, 2016.
28. I have perused those Minutes.
29. According to the Minutes of the Mavoko Sub-County Development Plans Approval Committee of 9<sup>th</sup> June, 2016, the objection by the Petitioner for change of user of L.R. No. 12715/8860 and 8861 was considered by the Committee and the objection was rejected.
30. Although the Committee stated the reasons for rejecting the objection in the Minutes, there is no evidence that the decision was ever communicated to the Petitioner. That is the same thing that happened when the Committee met on 26<sup>th</sup> May, 2016 to consider the application for change of user of L.R. .No. 12715/1662-1668.
31. Indeed, there is no evidence before me to show that the 1<sup>st</sup> Respondent ever responded to the Petitioner in respect to the objections that they had raised viz-a-viz the applications for the change of user of the suit land.
32. Having not responded to the Petitioner's Objections, it follows that the 1<sup>st</sup> Respondent locked out the Petitioner from the right to appeal against their decisions as provided for in the Physical Planning Act.
33. The failure to inform the Petitioner, and other objectors of their decision to approve the numerous applications for change of user, prima facie, is illegal and against the constitutional principle of the right to be heard and the right of public participation.
34. Although it is true that it is the 1<sup>st</sup> Respondent's mandate to grant development and change of user approvals, the process which should be followed before those approvals are granted ought to be fair,

inclusive and participatory.

35. The decision of the Respondents has to be communicated to all the interested parties within a reasonable period so as to enable them lodge an appeal to the relevant bodies within the requisite period. That seems not to have been done by the 1<sup>st</sup> Respondent at all.

36. The Petitioner has further alleged that the 1<sup>st</sup> Respondent has been issuing building approvals and issuing change of user licences without an approved and a gazetted development plan for the whole area.

37. However, the Petitioner has not cited to me the law that requires that the whole area must have a gazetted development plan before the 1<sup>st</sup> Respondent can approve developments and change of user in the area. In the circumstances, I am unable, at this stage, to injunct the Respondents from approving the developments and change of user in the Estate, save for the requirement that the Petitioner should be involved in the process.

38. Indeed, the prayers in the current application cannot be granted considering that each approval by the Respondents has to be considered on its own merits.

39. I say so because the change of user of the land within the Estate involves several bodies and land owners, whose interests have to be considered before any adverse order can be made.

40. It is now accepted that a Constitutional Petition has to be pleaded with reasonable precision in order to provide adequate particulars of the claims relating to alleged violations of the Constitution (*See Mumo Matemu vs. Trustees of the National Land Commission & 5 others (2013) eKLR*).

41. The Petitioner should have stated in the body of the Application and the Petition the specific parcels for land whose approvals for the change of user it is opposed to enable the Respondents and the registered proprietors of the affected parcels of land respond.

42. The way the Application has been drafted is ambiguous and too general in nature for a proper judicial inquiry to be made at this stage, and for appropriate orders to issue.

43. For those reasons, I dismiss the Application dated 15<sup>th</sup> February, 2017 with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2017.**

**O.A. ANGOTE**

**JUDGE**