



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: OUKO (P), MUSINGA, & GATEMBU, J.J.A.)**

**CIVIL APPEAL NO. 52 OF 2019**

**BETWEEN**

**JIMMY ODARI & 6 OTHERS.....APPELLANTS**

**AND**

**MINISTER FOR LOCAL GOVERNMENT.....1ST RESPONDENT**

**MOMBASA COUNTY GOVERNMENT (FORMERLY**

**MUNICIPAL COUNCIL OF MOMBASA).....2ND RESPONDENT**

**LOCAL AUTHORITIES PENSION TRUST (LAPTRUST).....3RD RESPONDENT**

**(An appeal from the Judgment and Decree of the High Court of Kenya at Mombasa**

**(E. M. Muriithi, J.) delivered on 30th October 2017 *in H.C. Petition No. 24 of 2012.*)**

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**JUDGMENT OF THE COURT**

1. The appellants are committee members of Changamwe Estate Residents Group, which comprises of about 200 members, all being tenants of the new Changamwe Estate, (the Estate). They instituted a petition in the High Court of Kenya at Mombasa on their own behalf and on behalf of all the members of Changamwe Estate Residents Group to challenge the transfer of the said Estate by the Municipal Council of Mombasa, the 2<sup>nd</sup> respondent, to the Local Authorities Pension Trust (LAPTRUST), the 3<sup>rd</sup> respondent.
2. In their petition, the appellants stated that they had legitimate expectation that the houses would be sold to them, having expressed such interest; that instead the houses were transferred to the 3<sup>rd</sup> respondent; that the said transfer was contrary to the spirit of **Articles 43(1) and 47 (1) & (2) of the Constitution**; and the **Public Procurement and Disposal Act, 2005**; that following the transfer, the 3<sup>rd</sup> respondent had increased the rent by 150%, and that all the aforesaid actions were prejudicial to the appellants. They sought a declaration that the transfer was illegal and unconstitutional.
3. The 2<sup>nd</sup> respondent denied the appellants' contention. It stated that under **section 12 (3)** of the repealed **Local Government Act** it had power to acquire, hold and alienate land; that it had not disposed of the said Estate, rather it "*only swapped the property to the 3<sup>rd</sup> respondent as a reprieve to relieve the Council from the heavy penalties being imposed on the 2<sup>nd</sup> respondent for the late non-remittance of the pension contribution from the 2<sup>nd</sup> respondents' employees.*"
4. The 3<sup>rd</sup> respondent also opposed the petition. It stated that as at 28th May 2010 the 2<sup>nd</sup> respondent owed it **Kshs.392,029,309** being outstanding pension contribution inclusive of penalties; that the Government of Kenya through the Ministry of Local Government directed that all such debts be paid by 30th June 2010; that consequently the 2<sup>nd</sup> and 3<sup>rd</sup> respondents entered into a Debt Swap Agreement whereby the Estate would be transferred to it to offset the debt and an agreement to that effect was executed on 28th May 2010, before the advent of the Constitution of Kenya, 2010.
5. The High Court (**Muriithi, J.**), in dismissing the Petition held that the transfer of the Estate did not violate the appellants' rights under **Articles 43 (1) (b) and 47** of the **Constitution**, and that the appellants, as tenants of the 3<sup>rd</sup> respondent, if they believed that the 3<sup>rd</sup> respondent had wrongly hiked the rent payable, had a right to challenge it under the Rent Restriction Act.

6. The appellants were aggrieved by the said decision and preferred this appeal. In their memorandum of appeal, the appellants faulted the learned judge for: failing to make a determination on the applicability of the Public Procurement and Disposal Act to the transaction; finding the transfer was constitutional and legal; and finding that the rent increment was not illegal. They urged us to allow the appeal and set aside the impugned judgment.

7. **Mr. Owino**, learned counsel for the appellants, submitting on the first ground of appeal, argued that the transfer of the Estate contravened the provisions of the **Public Procurement and Disposal Act, 2005**, now repealed by the **Public Procurement and Disposal Act, 2015** (the Act). He said that under **section 3** of the Act, a public entity includes the Government or any department thereof as well as a local authority under the repealed Local Government Act; that **section 4(3)** of the Act has specific provisions that apply in respect of acquisition of property by a public entity.

8. In his view, the transfer of the Estate ought to have been done in accordance with the principles that are set out under **section 2** of the Act which are: -

***“(a) to maximise economy and efficiency;***

***(b) to promote competition and ensure that competitors are treated fairly;***

***(c) to promote the integrity and fairness of those procedures;***

***(d) to increase transparency and accountability in those procedures;***

***(e) to increase public confidence in those procedures; and***

***(f) to facilitate the promotion of local industry and economic development.”***

Counsel submitted that the 2nd and 3rd respondents ought to have considered the appellants’ proposal to purchase the Estate and faulted the learned judge for treating the transaction as disposal of a private property.

9. Secondly, Mr. Owino faulted the learned judge for holding that the transfer did not violate the appellants’ right to a fair administrative action; that since the decision was within the statutory competence of the 2nd respondent, it did not require to give the appellants reasons for not accepting their offer. He argued that **Article 47** of the **Constitution** applies to all State agencies whose actions, omissions or decisions affect the legal rights or interests of persons to whom such action, omission or decision applies and therefore it ought to have given reasons for its administrative action.

10. Regarding the rent increment imposed by the 3rd respondent, the appellants’ counsel submitted that the issue was raised as a tributary to the argument that the appellants’ right to accessible and adequate housing had been violated. Counsel further submitted that the appellants had enjoyed the amenities of the residential Estate, which, as public property under the control of the 2nd respondent, had favourable terms with regard to the rent payable; that the decision to transfer the Estate to the 3rd respondent without involving them deprived the appellants of their right to housing because the 3rd respondent being a private entity would not be inclined to retain the same terms.

11. For those reasons, we were urged to allow the appeal.

12. In their brief response to the appellants’ submissions, **Miss Muthoni**, learned counsel for the 2nd respondent and **Mr. Wafula**, learned counsel for the 3rd respondent, submitted that the Public Procurement and Disposal Act was not applicable to the said transactions; that the transaction was entered into before promulgation of the Constitution of Kenya, 2010 and therefore the provisions of the new Constitution were not applicable; and that the rent increment was not illegal and did not amount to any violation of the appellants’ constitutional rights.

13. We start by considering the applicability of the provisions of the Constitution of Kenya, 2010 in respect of this transaction. The Debt Swap Agreement was executed on 28th May 2010 before the advent of the current Constitution, but the sub-lease was registered in favour of the 3rd respondent on 15th May 2012.

14. The appellants’ contention was that the said transaction was contrary to the spirit of **Articles 43 (1)** and **47(1)** and **(2)** of the Constitution. The trial court held that the Constitution of Kenya, 2010 could not be applied retrospectively in the aforesaid circumstances.

15. In **Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others [2012] eKLR**, the Supreme Court rendered itself as follows: -

***“At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately accrued before the commencement of the Constitution.”***

16. **Article 43(1)** of the **Constitution of Kenya, 2010** provides for the right to accessible and adequate housing and reasonable standards of

sanitation, and **Article 47(1)** and **(2)** states as follows: -

**“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”**

The words in the above Articles are forward-looking and, in our view, cannot be applied retrospectively to the transaction between the 2nd and 3rd respondents. The learned judge cannot therefore be faulted for his holding that the said provisions of the Constitution were not applicable. We agree with the 2nd respondent that there was nothing in the repealed Constitution that prevented it from using its assets to settle outstanding debts, particularly statutory debts. We must therefore dismiss that ground of appeal.

17. Regarding the increment of rent, having found that the transfer of the Estate was not unconstitutional, it is axiomatic that the 3rd respondent, in increasing the rent payable by the appellants did not violate their constitutional right to accessible and adequate housing as alleged. Prior to the transfer, the appellants were paying to the 2nd respondent a monthly rent of Kshs.1,950 for a one-bedroom unit, but the 2nd respondent increased it to Kshs.4,500 per month. The 3rd respondent did not bear any constitutional obligation to the appellants under **Article 43(1(b))** of the **Constitution**, which we have found could not be applied retrospectively. If the appellants were genuinely aggrieved by the rental increment, there are lawful ways of challenging the same.

18. Lastly, we turn to consider the applicability of the repealed Public Procurement and Disposal Act, No. 3 of 2005 to the transaction between the 2nd and 3rd respondents. The Act was binding upon all public entities in their procurement and disposal of unserviceable, obsolete or surplus stores, assets and equipment. The definition of a public entity included a local authority under the repealed Local Government Act, and there was no dispute that the Municipal Council of Mombasa was a local authority. However, it was not demonstrated by the appellants that the Debt Repayment Agreement between the 2nd and 3rd respondents fell within the provisions of **section 4** of the **Act** which stipulated as follows: -

**“4. (1) This Act applies with respect to-**

**(a) Procurement by a public entity;**

**(b) Contract management;**

**(c) Supply chain management, including inventory and distribution; and**

**(d) Disposal by a public entity of stores and equipment that are unserviceable, obsolete or surplus.”**

19. The learned judge cannot be faulted for finding that **“the suggestion that the transfer was in breach of procurement law was not fully canvassed.”** Mr. Tubman Otieno, the then Town Clerk of the Municipal Council of Mombasa (the 2nd respondent), in his replying affidavit to the petition stated: -

**“the 2nd Respondent did not dispose off (sic) the property but rather, only swapped the property to the 3rd Respondent as a reprieve to relieve the Council from the heavy penalties being imposed on the 2nd Respondent for late or non-remittance of the Pension Contributions from the 2nd Respondent’s employees. As this has been demonstrated hereinabove, this was merely a transfer of an asset from one department under the Ministry of Local Government to another department within the same Ministry. And for this reason, the operations of the Public Procurement and Disposal Act did not apply.”**

20. We agree with that argument. The 2nd and 3rd respondents explained in great details and exhibited all the necessary paper work that preceded the execution of the Debt Repayment Agreement, including the approval of the transaction by the Deputy Prime Minister and Minister for Local Government. In the circumstances, the transaction was not subject to the provisions of the repealed Public Procurement and Disposal Act, 2005.

21. All in all, we find this appeal lacking in merit and dismiss it with costs to the 2nd and 3rd respondents.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MARCH, 2021**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb.**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**