



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 46 OF 2017

BETWEEN

LEGAL ADVICE CENTRE.....1ST APPELLANT

HAKI YETU ST. PATRICK'S.....2ND APPELLANT

TRANSPARENCY INTERNATIONAL KENYA.....3RD APPELLANT

AND

THE COUNTY GOVERNMENT OF MOMBASA.....1ST RESPONDENT

COUNTY SECRETARY

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

COUNTY EXECUTIVE COMMITTEE MEMBER-

LAND PLANNING AND HOUSING DEPARTMENT..3RD RESPONDENT

AND

MOMBASA COUNTY PUBLIC

RENTAL ETATES COUNCIL.....1ST INTERESTED PARTY

KENYA HUMAN RIGHTS COMMISSION.....2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya

at Mombasa (Otieno, J.) dated 23rd December, 2016

in

Petition No. 39 of 2016.)

JUDGMENT OF THE COURT

1. One of the key themes running through the current constitutional regime is public participation in governance and the conduct of public affairs. This Court in *British American Tobacco Ltd vs. Cabinet Secretary for the Ministry of Health & 5 others [2017] eKLR* succinctly underscored the centrality of public participation as follows:

“It is clear that since the promulgation of the Constitution of Kenya 2010, the concept of public participation and consultation has been entrenched. Indeed, the concept is consistent with the principle of sovereignty of the people that permeates the Constitution and in accordance with Article 1(4) of the Constitution is exercised at both national and county levels.”

2. Cognizant of the key role of public participation, the Senate has made attempts to put in place legal framework regulating the same. The first attempt was the **Public Participation Bill 2016 (Kenya Gazette Supplement No. 175; Senate Bill No. 15)** and the current attempt is the **Public Participation Bill, 2018; Kenya Gazette Supplement No. 17; Senate Bill No.4.**

3. Be that as it may, the appeal before us principally turns on the issue of public participation in the formulation of Urban Renewal & Regeneration Programme. A summation of the relevant facts will help place the appeal in context. The County of Mombasa being the second largest city in Kenya as well as one of the fast growing cities in Africa, the 1st respondent estimates that by 2035 the population would have grown from 1.5 million to 3.5 million. Given the County’s finite land mass area of 222.82 square kilometres coupled with the rapidly growing population, the 1st respondent deems the need for optimal and equitable land use for the benefit of all its residents as integral. More so, with regard to housing within the County.

4. Highlighting the problems related to housing within the County, the 1st respondent claims that there is scarcity of housing, that is, the annual supply of new housing units is 4,000 against an annual demand of 25,000 housing units. The quality of some if not most of the existing County housing units are either barely or non-habitable. There is poor or non-existing infrastructure. Further, upcoming housing units by private individuals tend to be unaffordable to most residents. The net effect of which is that persons at the lower end of the social strata have been forced to live in unplanned informal settlements.

5. That state of affairs is what informed the 1st respondent’s Urban Renewal & Regeneration Programme (project) targeting the upgrading of 10 of the County’s estates (suit estates) which had been erected in the 1970’s and were in deplorable condition. These estates include: Khadija Estate, Miritini Greenfield, Changamwe Estate, Tudor Estate, Mzizima Estate, Buxton Estate, Likoni Estates, Nyerere Estate, Tom Mboya Estate and Kaa Chonjo Estate. The project would entail demolition of old and run-down buildings, construction of up to date housing and putting in place proper infrastructure which would raise the living standards of the residents therein as well as open up new economic opportunities.

6. Due to the magnitude and cost implication of the said project, the 1st respondent decided to bring on board private partners pursuant to **Section 33** of the **Urban Areas and Cities Act** to carry out the project as a joint venture. Towards that end, the 1st respondent has since called for submission of tenders by interested parties on 3rd February, 2016 and 23rd February, 2016.

7. Nonetheless, while the appellants applauded the project, they were convinced that the respondents had not complied with the law. In that, first, contrary to the **Constitution** and the **County Governments Act (GCA)**, the respondents failed to facilitate public participation from the conception and formulation of the project. As we understand, the appellants’ argument is that what the 1st respondent termed as public participation was not what is envisaged under **Articles 10(2) & 174(c)** of the **Constitution**. In particular, that the alleged public participation had not met the requisite constitutional threshold.

8. Second, the project as purported to be implemented would infringe on the current tenants right to housing. Third, the respondents had denied the appellants access to vital information regarding the project in violation of **Article 35** of the **Constitution**. Fourth, the respondents had breached several statutory provisions, to wit, **CGA, Environment and Management and Coordination Act (EMCA), Privatization Act, Public Procurement and Asset Disposal Act (PPADA), Physical Planning Act, Public and Private Partnership Act**. Consequently, the appellants filed a constitutional petition in the High Court seeking *inter alia*:

a) A declaration that the County Government of Mombasa Urban Renewal & Redevelopment of Old Estates within Mombasa County through joint venture partnership is a violation to the Right to Public Housing.

b) A declaration that the County Government of Mombasa Urban Renewal & Redevelopment of Old Estates within Mombasa county through joint venture partnership violates the Environmental Management & Coordination Act.

c) A declaration that the County government of Mombasa Urban Renewal & Redevelopment of Old Estates within Mombasa County through joint venture partnership violates the Public Private Partnerships Act No.15 of 2013.

d) A declaration that the County government of Mombasa Urban Renewal & Redevelopment of Old Estates within Mombasa County through joint venture partnership violates the Privatization Act No. 2 of 2005.

e) A declaration that the County Government of Mombasa Urban Renewal & Redevelopment of Old Estates within Mombasa County through joint venture partnership violates the County Government Act 2012.

f) A declaration that the County Government of Mombasa Urban Renewal through joint venture partnership violates the Public Procurement & Disposal Act.

g) A declaration that the County government of Mombasa Urban Renewal through joint venture partnership violates the Physical Planning Act.

h) A declaration that the County Government of Mombasa Urban Renewal and Redevelopment of Old Estates Programme is contrary to Articles 10, 174(a), (c), (d) and 175(a) of the Constitution of Kenya, 2010 for lack of public participation and therefore null and void.

j) An order of permanent injunction restraining the Respondents from implementing the Mombasa urban Renewal & Redevelopment of Old Estates within Mombasa County.

9. In response to the petition, Anthony Njaramba, the then holder of the office of the 3rd respondent, swore an affidavit on behalf of the other respondents. He deposed that from the onset the 1st respondent had recognized the importance of public participation and endeavoured to engage the public especially the existing tenants of the suit estates. A number of meetings had been held between the 1st respondent, the affected tenants and the civil society who included the appellants. Press conferences were held as a means of communicating to the public at large. The County's Governor even briefed Members of Parliament on the project. Structured questionnaires were also administered to existing tenants to solicit their views, which were all taken into consideration. The 1st respondent had gone a step further by establishing a department to deal and/or receive all inquiries, reservations or complaints regarding the project. He added that the process of public participation would be ongoing throughout the duration of the project.

10. The 3rd respondent was at a loss as to how the project would infringe on the tenants right to housing. This is because as it stood the suit estates comprised 3,039 housing units and the project proposed to provide 31,135 housing units. In addition, the project would provide social amenities and improve infrastructure within the suit estates. All things considered, the project was geared towards the 1st respondent's obligation of ensuring progressive realisation of the right to housing under **Article 43** of the **Constitution**. What is more, the 1st respondent had made arrangements to provide alternative accommodation for the existing tenants when the suit estates are demolished until the project is completed. The 1st respondent had also established a tenant purchase scheme exclusively available to those existing tenants who wish to purchase the new units. The purchase price had been set to be between 25%-35% lower than the market rate.

11. According to the respondents, the appellants had been supplied with all the necessary information. As for breach of statutory provisions, the 3rd respondent deposed that none of the developments was exempted from the existing regulatory regime(s). Each development partner was required to comply with the applicable law. The overall position taken by the respondents was that the appellants' allegations were without merit.

12. The 1st interested party, who was joined in the proceedings by consent, described itself as an umbrella body representing the interests of 388 households in the suit estates. The chairman, Charles Okello Loka, in his affidavit, re-echoed that the suit estates were in a deplorable state. In point of fact the suit estates as they are infringe on the tenants right to adequate housing, clean and health environment and clean and safe water. He deposed that the 1st respondent not only facilitated public participation but also heard the tenants' concerns and addressed the same. The general feel amongst the tenants is that they welcomed the project.

13. On the other hand, the 2nd interested party who was also joined by consent supported the appellants' petition on more or less similar grounds as the appellants.

14. Upon weighing the arguments by the parties and the law, the learned Judge (**Otieno, J.**) based his determination on the followings issues as agreed by the parties:

1) Whether the "Mombasa County Urban Renewal and Redevelopment of Old Estates Programme" was conceptualised and formulated with public participation under Articles 10 & 174 of the constitution as well as Sections 87 and 11(1) of the County Government Act.

2) Whether the Respondents breached the Petitioners' constitutional rights to access information under Article 35 of the constitution.

3) Whether the "Mombasa County Urban Renewal and Redevelopment of Old Estates Programme" threatens the rights to adequate housing under Article 43(1) b of the constitution.

4) Whether the programme, (Mombasa County Urban Renewal and Redevelopment of Old Estates Programme) is in breach of various statutory provisions listed in the petition.

15. In a judgment dated 23rd December, 2016, the learned Judge dismissed the appellants' claim save for the allegation that their right of access to information had been denied. In doing so, he found that the 1st respondent had met the requisite threshold of public participation and that the process would be on going throughout the project. The respondents had breached the appellants' right of access to information by failing to reply to the appellant's letter dated 24th May, 2016 requesting certain documents and/or availing the documents sought. There was no demonstration of how the project threatened to infringe on the residents right to housing. Lastly, that the breach of the statutory provisions, if any, would be better dealt with through the mechanisms set out in the relevant statutes.

16. It is this decision that provoked the appeal before us wherein the appellants complain that the learned Judge erred in law and fact by finding that the project, was conceptualized and formulated with public participation; does not violate the right to adequate housing; and was not in breach of the **PPDA, EMCA, Physical Planning Act, Privatization Act and Public Partnership Acts**.

17. Mr. Oluga, learned counsel for the appellants, took issue with the manner in which the respondents purported to have facilitated public participation. In his view, such participation, if any, did not amount to adequate public participation as envisaged under the law.

18. Counsel went on to state that the legal underpinning for public participation is found in **Articles 10(2) & 174** of the **Constitution** as well as **Sections 87 & 115** of the **CGA**. Expounding on the abovementioned provisions, reliance was placed on the sentiments of Odunga, J. in **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR**: where the learned Judge expressed as follows:-

“From the foregoing provisions it is clear that public participation plays a central role in both legislative and policy functions of the Government whether at the National or County level. It applies to the processes of legislative enactment, financial management and planning and performance management.”

19. Reference was also made to the persuasive decision of the High Court in *Erick Okeyo vs. County Government of Kisumu & 2 Others* [2014] eKLR wherein **Muchelule, J.** held:

“Lastly, the Constitution and the County Governments Act (No. 17 of 2012) provide for citizen participation in elections and appointments; legislation; policy formulation, planning and development; effective resources mobilization and use of sustainable development; project identification, prioritisation, planning and implementation; and alignment of county financial and institutional resources to agreed policy objectives and programmes.”

20. Mr. Oluga contended that for the respondents to have met the requisite constitutional threshold of public participation, they were under an obligation to ensure that such participation was attained both quantitatively and qualitatively. They ought to have done whatever was reasonable in the circumstances to ensure that as many residents of the County of Mombasa and Kenyans in general were aware of the project. The respondents were also required to exhort and facilitate the participation of not just the tenants of the suit estates but all residents of Mombasa in formulation of the project.

21. As far as counsel was concerned, the respondents did not meet the said threshold. Firstly, there was no public notice or advertisement in newspapers, public announcements on radio, television or in public places. Secondly, despite alleging that a total of 29 meetings and briefings had been held in connection to the project there was no evidence to support that contention. Thirdly, the purported consultation of the existing tenants of the suit premises was done in August, 2016 long after the project had been conceptualized and formulated. Fourthly, the civil society never participated in formulation of the project as alluded to by the respondents. Fifthly, as admitted by the 3rd respondent, the 1st respondent did not have full and accurate documentation of existing tenants and their legal status. The starting point should have been the identification of these tenants not just for purposes of relocation but also for their participation in the project.

22. The learned Judge was also faulted for what the appellants termed as selective interpretation of the letter dated 12th April, 2016 under the hand of the 2nd appellant, to mean that there was public participation. To counsel, the said letter was clear that the purpose of the extensive inquiries, consultations, public and private meetings between themselves and the respondents was to seek information on the project so as to understand its implication. Thus, the learned Judge erred in holding that there was public participation having found in another breath, that the appellants had been denied access to information relating to the project by the respondents. It was not possible for the appellants to have engaged in meaningful public participation without information.

23. Counsel held steadfast to the position that the respondents had not complied with a number of legislations key amongst them, the ***Privatisation Act, the Public Private Partnership Act and the Public Procurement and Asset Disposal Act.***

24. He added that in the long run, the project as formulated would automatically lead to breach of the fundamental right to adequate housing of the residents of Mombasa. This was because the 3rd respondent had deposed that the 1st respondent would only retain 20% of the new housing units leaving 80% in the hands of the private partners. In his opinion, the 1st respondent should retain majority of the units for the benefit of the residents. Furthermore, the proposed purchase price of the said units was beyond the financial capability of the tenants. It was preposterous to expect a tenant who pays on average monthly rent of Kshs.500 to purchase the cheapest unit earmarked at Kshs.1, 000,000.

25. In his concluding remarks, Mr. Oluga also holding brief for Mr. Mwakireti, learned counsel for the 2nd interested party, indicated that 2nd interested party supported the appeal. He urged us to allow the appeal based on the foregoing grounds.

26. On his part, Mr. Amoko, learned counsel for the respondents, argued that the onus lay with the appellants to establish that there was lack of public participation with regard to the project and that the same was in violation of the tenants' right to housing. To the contrary, the respondents enumerated in detail all the instances of public participation and also made it clear that the exercise would continue throughout the duration of the project.

27. Addressing us on what public participation entails, counsel also cited the High Court decision in *Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others* (*supra*) wherein the South African case of *Doctors for Life International vs. Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC)* was quoted with approval. More specifically, he relied on the following sentiments of the South African Constitutional court:

“According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process.”

28. According to the respondents, the 1st respondent has a significant measure of discretion in determining the most effective way to facilitate public participation subject to minimum constitutional thresholds. In the instant case, it could not be plausibly denied that the 1st respondent offered and is still offering a reasonable opportunity for the public and all interested parties to know about the project and have their say.

29. Besides, public participation does not mean that everyone must be consulted; rather a reasonable opportunity ought to be availed to which stakeholders can put across their views. In that regard, reference was made to the High Court's decision in *Ngige Tharau & 128 Others vs. Principal Secretary of Lands, Housing and Urban Development & 2 Others* [2016] eKLR. Laying emphasis on that proposition, counsel also relied on the High Court case of *In the matter of the Mui Coal Basin Local Community* [2015] eKLR wherein the three-Judge bench

expressed:

“It is not possible to come up with an arithmetic formula or litmus test for categorically determining when a Court can conclude that there was adequate public participation. However, as we have alluded above, the Courts look at the bona fides of the public actor, the nature of the subject matter, the length and quality of engagement and the number of mechanisms used to reach as many people as possible.”

In the end, what constitutes adequate public participation varies on a case by case basis.

30. It was argued on behalf of the respondents that the appellants had not given details or specifics of how the project contravened the tenants’ right to housing. Conversely, the project contributes to the progressive realization of that right.

31. Mr. Amoko’s response to the allegation of violation of various legislations was that the violation of statute does not necessarily give rise to a constitutional complaint. This rung true in this case, since the statutes alleged to have been violated provide specific elaborate mechanisms for resolving complaints or disputes arising thereunder. In any event, some of the processes complained of were yet to commence, like the Environment Impact Assessment process and the requisite approvals under the PPA thus, the appellants’ challenge was premature and speculative.

32. Rising to his feet, Mr. Ratemo, learned counsel for the 1st interested party, reiterated that his client was an umbrella body representing the interests of the tenants in the suit estates. In order to have structured consultation, residents of the suit estates with the assistance of the 1st respondent set up the 1st interested party as an umbrella body to represent 388 households within the suit estates. Each estate has a representative therein. Accordingly, he was at a loss as to whose interests the appellants represented.

33. Counsel argued that the 1st interested party never indicated that there was unanimity amongst the tenants but of significance was that everyone who wished to participate was given an opportunity to state their position and/or grievances. He stated that the 1st interested party had been engaged by the 1st respondent from the time the project was conceptualized. All in all, the 1st interested party supports the project given the dilapidated state of housing in the suit estates. Further, the 1st interested party did not believe that the project would infringe on the tenants’ rights to housing.

34. Associating himself with the submissions made on behalf of the respondents, Mr. Ratemo urged that the learned Judge considered the issues before him, correctly applied the law to the facts thereto and arrived at the right conclusion. Therefore, there was no reason for this Court to interfere with the learned Judge’s decision.

35. In a brief rejoinder, Mr. Oluga stated that the appellants represented not only the tenants but all the people of the County of Mombasa. He argued that the 1st interested party was an amorphous body and did not represent all the tenants. In point of fact, the appellants have a list of tenants supporting their petition.

36. We have considered the record, submissions by the parties’ respective counsel and the law. We will begin by addressing the contention with regard to whose interest the appellants and the 1st interested party represent. It is not in dispute that the appellants instituted the suit on the basis that they were representing the interests of the tenants as well as other residents of the County of Mombasa while the 1st interested party represents 388 households in the suit estates. In our view, the said parties were well within their mandate to represent the interests of the tenants within the suit estates regardless of holding divergent positions on the project. It cannot be said that since one claims to represent the interest of the tenants the other cannot. This because of the looming reality that there is a possibility of the said tenants having diverse opinions on the project and whose interests are equally entitled to be represented. The 1st interested party could also not be precluded from representing the tenants’ interests simply because the appellants referred to it as an amorphous body.

37. Our position is guided by **Article 22 (1)** of the **Constitution** which guarantees a right to every person to institute proceedings to protect Fundamental Rights or Freedoms. **Article 258 (2)** goes further and mandates a person acting on behalf of another person who cannot act in their own name, a person acting as a member of, or in the interests of a group or class of persons, a person acting in the public interests, or an association acting in the interests of one or more of its members to institute court proceedings. **Article 260** of the **Constitution** defines “person” as including a company, association or other body of persons whether incorporated or unincorporated.

38. The Supreme Court in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR** while discussing the aforementioned provisions observed:

“It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of locus standi, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or the Constitution in general. In John Wekesa Khaoya V. Attorney General, Petition No. 60 of 2012 [2013] eKLR the High Court thus expressed the principle:

‘Articles 22 and 258 of the Constitution provide that every person has the right to institute proceedings claiming that the Constitution has been contravened; and “person” in this regard, includes one who acts in the public interests.’ [Emphasis added]

39. It is common ground that public participation plays a central role in both legislative and policy functions of the government whether at the National or County level. It is one of the modes that citizens who are vested with sovereign power participate in decisions affecting them or in the conduct of public affairs notwithstanding that they have delegated the exercise of sovereign power to elected representatives. **Ngcobo, J.** in **Doctors for Life International vs. Speaker of the National Assembly & Others (supra)** appreciated, and rightly so, that this

right of public participation also places a duty on the concerned public body/authority to facilitate public participation in the conduct of public affairs by ensuring the citizens have the necessary information and effective opportunity to exercise the right to political participation.

40. In the case at hand, we, like the learned Judge, find that from the evidence on record there were some consultations with regard to the project ranging from meetings, press conferences and structured questionnaires. We also concur with the learned Judge that the letter dated 12th April, 2016 authored by the 2nd appellant evidenced that consultations had taken place. The letter in question read in part as follows:

“...we have taken time to study its design, shape ad scale. We have consequently made extensive inquiries and consultations with your offices, attended several public and private meetings with various officials to seek more information and insight into the project with a view to understand full implication of this project on the people of Mombasa particularly the Urban Poor...

We also note that the so called Public Participation that have been undertaken by the County Government have only targeted current tenants of the Old Housing Estates but it is not lost to us that these are for the most part facilities of current and former politicians or their cronies, employees of the county and their colleagues who do not represent the true urban poor who badly need housing.” [Emphasis added]

41. As we can decipher from the record and submissions before us, of concern to the appellants was that the foregoing consultation/ public participation did not meet the requisite constitutional threshold. Putting it another way, that there wasn't adequate public participation. This because firstly, the respondents only engaged tenants of the suit estates and not all the residents of the County of Mombasa. Secondly, the existence and implication of the project was not disseminated to the general public.

42. Public participation should always be real and not treated as a mere formality for the purposes of fulfilling the constitutional requirement. It is not a public relations exercise. See **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 others (supra)**. Whether the mode or degree of public participation is adequate can only be determined on a case by case basis. See this Court's decision in **Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others [2017] eKLR**. This position was aptly set out by a three Judge bench of the High Court in **Institute of Social Accountability & Another vs. National Assembly & 4 others [2015] eKLR** in the following manner:

“The issue as to whether there was public participation is not merely a matter of form but one of substance. The court must look at the process to determine whether it meets constitutional muster.”

43. It is now settled, that what matters in determining whether the constitutional threshold of public participation has been met is that at the end of the day a reasonable opportunity is offered to the members of the public and/or all interested parties to know about the issue/project and to have an adequate say on the same. See this Court's decision in **Nairobi Metropolitan Psv Saccos Union Limited & 25 others vs. County of Nairobi Government & 3 others [2014] eKLR**.

44. In our view, the mechanism used by the 1st respondent to facilitate public participation namely, through meetings, press conferences, briefing of Members of Public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances. We find so taking into account that the 1st respondent has the discretion to choose the medium it deems fit as long as it ensures the widest reach to the members of public and/or interested party. See this Court's decision in **Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others (supra)** and the South African case of **Merafong Demarcation Forum and Others vs. The Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10**.

45. On whether the 1st respondent should have engaged and/or facilitated the public participation of not just the tenants but also all the other residents of the County of Mombasa, we agree and adopt the now often quoted South African decision in **Doctors for Life International vs Speaker of the National Assembly & Others (supra)** wherein the constitutional court in its own words stated:

“The measure and degree of public participation that is reasonable in a given case will depend on a number of factors. These include, the nature and the importance of the legislation and the intensity of its impact on the public. The more discreet and identifiable the potentially affected section of the population, and the more intense the possible effect on their interest, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.”[Emphasis added]

46. Applying the above principles, we concur with the following observations made by the learned Judge:

“To this court, to expect that every resident of Mombasa County was to be consulted and expected to give opinion on the project would be make public participation a single and all grounding bottleneck to any execution of any mandate by the County government. In my understanding what the constitution demands is that a reasonable and real opportunity be availed to the stakeholders to be heard on the project.

The views availed would then be considered, at the discretion of the Respondent, and a decision made which to absorb and which not to absorb, regard being had to the practical realities of every situation including professional advice. Once again G.V Odunga in David Ngige Tharu and 128 Others Vs. Principal Secretary, Ministry of Lands, Housing and Urban Development & 2 others (2016) eKLR when addressing his mind to almost similar facts but on allocation of developed housing units had this to say:-

‘It is not a requirement that all stakeholders must be heard.’

...

In effect the Petitioners are saying that all residents of Mombasa had to be served with the questionnaire. That is the kind of demand and expectation that this court would consider an absolute impediment to the obligation of the Respondents to execute their constitutional mandate in ensuring adequate housing for its residents. And I need to add that there would be a sizeable number of residents of Mombasa who may not be interested on what kind of housing the respondent provide or don't provide purely because they have their own arrangements for housing or it just does not concern them. To such people it is not reasonable to expect that they must give an input. All that is expected is that the process is done transparently in that a chance and an opportunity is availed for all views to be made known. ”

47. We believe that the 1st respondent facilitated the public participation of the relevant stakeholders being the tenants in the suit estates through their representative, the 1st interested party. Besides, the 1st respondent also facilitated reasonable opportunity to other residents of Mombasa County, the general public at large and civil society to participate by holding press conferences, briefing members of public and establishing a department to exclusively deal with concerns regarding the project. In the end, we find that the appellants' allegation that the respondents did not facilitate adequate public participation goes against the weight of the evidence summed up hereinabove. Confronted with this state of affairs and the submission by Mr Amoko that indeed public participation was still ongoing and that the 1st respondent was continuously appraising the tenants and other interested parties on the progression of the project, Mr Oluga conceded that their disenchantment was not with the current position but with the fact that his clients were not involved when the idea to come up with the project was actually conceptualised.

48. In our view however, this argument is tantamount to requiring public participation in the County government's thought process. One cannot be expected to invite members of public to participate in an intangible thought or an innate concept before the same has crystallised into an implementable concept particularly when the concept in question is a novel one that is being conceptualised for the first time as in this case. That in our view would be surreal, unrealistic and unworkable. We are satisfied that there was extensive public participation in this matter and the learned Judge did not err in so finding.

49. Moving on to the perceived violation of the right to housing, we again concur with the learned Judge that the appellants had failed to demonstrate how this right had been or was threatened with violation. There is no evidence to support the appellants' averments that the 1st respondent would only retain 20% of the proposed new units and leave the remaining 80% in the hands of private individuals. We have perused the affidavit sworn on behalf of the 3rd respondent and cannot find any such arrangement. As for the reasonableness of the proposed purchase price of the units, we take note that the appellants have not demonstrated that the alleged price is exorbitant, unreasonable or unrealistic in light of the prevailing market forces. It is trite that it is not enough for a party to mention perceived violations of the **Constitution** but such a party must go a step further and show how the alleged offending party had violated the same.

50. We may point out however that the project is between the 1st respondent and some private partners. We are not told the private partners are altruistic philanthropists whose sole interest in the matter is provision of housing for the poor. They are entitled to some reasonable returns on their investment and have no constitutional obligation to provide free housing for the poor. Learned counsel told us that out of the anticipated 32,000 housing units, 6,200 will be available for social housing. There is no evidence that the said number is inadequate to address the plight of all the current tenants of the estates in question. Although Mr Oluga purported to represent 'the entire Mombasa poor' that is a nebulous group whose number is unknown and which group is not before us for purposes of this appeal.

51. Last but not least, we cannot help but note that it was deposed on behalf of the 3rd respondent that none of the private partners who would be brought on board would be exempted from complying with the existing regulatory regime. We also note that the project would be undertaken in stages and at respective stages relevant permission/authority or compliance would be required under the statutory regimes mentioned by the appellants. As at the time, the appellants filed the petition in the High Court some if not all the stages requiring the consent/authority and/or compliance under the said legislations were yet to commence. Consequently, to that extent we agree with the respondents that this complaint was premature. In any event, where a violation of any of the provisions of the legislations in question occurs, there are elaborate mechanisms under the respective legislations to deal with such violations. Hence, those mechanisms ought to be exhausted first before approaching the High Court. We draw guidance from this Court's decision in **Bethwell Allan Omondi Okal vs. Telkom (K) Ltd (Founder) & 9 others [2017] eKLR**:

“The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See International Centre for Policy and Conflict & 4 others vs The Hon. Uhuru Kenyatta and others, Petition No. 552 of 2012, and Speaker of National Assembly vs Njenga Karume [2008] 1KLR 425.” [Emphasis added]

52. The upshot of the foregoing is that we find no merit in the appeal which is hereby dismissed. Being a public interest matter we make no orders as to costs.

Dated and delivered at Mombasa this 5th day of July, 2018.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR