



Kiptoo & 23 others v CECM for Lands Physical Planning, Housing and Urban Development County Government of Baringo & another (Environment and Land Petition E003 of 2023) [2024] KEELC 4193 (KLR) (22 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4193 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KABARNET
ENVIRONMENT AND LAND PETITION E003 OF 2023**

**L WAITHAKA, J
MAY 22, 2024**

BETWEEN

MIRAJI KIPTOO & 23 OTHERS PETITIONER

AND

**CECM FOR LANDS PHYSICAL PLANNING, HOUSING AND URBAN
DEVELOPMENT COUNTY GOVERNMENT OF BARINGO . 1ST RESPONDENT
COUNTY GOVERNMENT OF BARINGO 2ND RESPONDENT**

JUDGMENT

1. On or about 29th November 2022, the 1st respondent issued an enforcement notice requiring the petitioners to demolish buildings/structures they had erected without approval of the 2nd respondent, County Government of Baringo.
2. Aggrieved by the enforcement notice, the petitioners filed the instant suit/petition seeking among other orders, an order of *Certiorari* to remove to this court for purpose of being quashed the impugned enforcement notice and an order of prohibition to restrain the respondents from depriving them the enjoyment of their properties.
3. As can be discerned from the pleadings filed by the petitioners, the petition and the affidavit sworn in support thereof, the petition is premised on alleged violation of the petitioners' rights in issuance of the impugned enforcement notice. For instance, the petitioners contend that the portion of land on which they have erected the impugned structures belongs to them; that the portion is different from the public utility reserved as livestock sale/auction yard and that in issuing the impugned enforcement notice, the respondents acted without legal justification and in excess of their constitutional and legal mandate.



4. Terming the issuance of the impugned enforcement notice arbitrary and prejudicial to them, the petitioners accuse the respondents of having neglected, refused or failed to constitute the county physical and land use planning committee thereby hindering their right to lodge an appeal against the notice to the Committee as by law required.
5. The petitioners further contend that ordering stoppage of construction and demolition of structures on their private land amounts to arbitrary search, seizure and deprivation of property.
6. It is the petitioners' case that under Section 72 of the *physical and land use planning Act* No.13 of 2019, the 1st respondent can only issue an enforcement notice on them if they have breached a condition in the development permit.
7. Maintaining that the impugned enforcement notice is a violation of their fundamental rights and freedoms and a violation of Articles 10, 27, 28, 31, 35, 40(2), 47, 48 and 50 of the *Constitution* of Kenya, the petitioners contend that the impugned enforcement notice is incorrect, illegal, irregular and improper.
8. The petitioner's urge the court to set aside the enforcement notice ex debito justiciacie.
9. The respondents filed a reply to the petition to wit the replying affidavit of the chief physical planner of the 2nd respondent, Frankline Kiche, filed on 25th May, 2023. In their response, the respondents admit that they issued the impugned notice but contend that the petitioners used an un-approved plan to claim a public utility (land reserved for council auction/holding ground and weigh bridge); that the petitioners without any colour of right or express authority or permission of the respondent carried out and continued to construct illegal temporary structures on the suit parcel and that the petitioners were informed of their legal rights. Further that under Section 57(1) of the *Physical and Land Use Planning Act* 2019,(hereinafter referred to as the *Act*) the petitioners were required to seek the permission of the county executive committee member for land before commencing any developments, which approval they never sought.
10. Concerning establishment of liaison committees as required by Section 76 and 77 of the *Act*, the respondent acknowledge that they had not established the committees but explain that they were prevented from establishing the committees by lack of approved regulations. The respondents' have averred that the regulations have since been approved and that they have initiated the process of establishing the committees.
11. It is the respondent's case that the petition does not meet the threshold of a constitutional petition as the petitioners have not specified and demonstrated with reasonable particularity how their constitutional rights have been violated.
12. Terming the petition frivolous, incompetent, and incurably defective and an abuse of the process of the court, the respondents urge the court to dismiss it with costs to them.
13. In a rejoinder, the petitioners filed a supplementary affidavit, sworn on 16th January 2024 in which they acknowledge that they did not obtain approval of the respondents before erecting/putting up the impugned structures but contend that they did not require the permission or approval of the respondents to erect the impugned structures on their own parcels of land and because the developments are temporary in nature.
14. With regard to the contention that the petition does not meet the legal threshold of pleading violation of constitutional rights and that the petition is frivolous, incurably defective and abuse of the process



of the court, the petitioner contend that the petition is proper and urge the court to grant them the orders sought.

15. Pursuant to directions given on 17th January 2024, the petition was disposed off by way of written submissions.

Submissions

Petitioners Submissions

16. The petitioners filed submissions dated 12th May 2024, in which they assert that they did not construct the impugned structures on a public utility as contended by the respondents; that the issuance of the enforcement notice dated 29th November 2022 ordering them to stop further constructions and to demolish development on their properties is in violation of Articles 10 and 47 of the Constitution in that there was no transparency and accountability in issuance of the impugned notice and that due process was not observed in issuance of the impugned enforcement notice.
17. The petitioners submit that they have made up a case for being granted conservatory orders yet the issue before court is whether or not they have made a case for being granted the orders/reliefs sought in the petition; quashing of the impugned enforcement notice and being granted an order of prohibition to prohibit the respondents from enforcing the notice, among other orders/reliefs sought in the petition.

Respondents submissions

18. On their part, the respondents through their submissions filed on 27th February 2024, reiterate their contention that the petition does not meet the legal threshold of pleading violation of constitutional rights. In that regard reference is made to the case Mumo Matemu v. Trusted Society of Human Rights Alliance (2014)e KLR.
19. In the instant suit, the petitioners are said to have failed to allude to how any article, clause, paragraph or provision of the Constitution or legislation has been violated.
20. According to the respondents, the impugned enforcement notice was issued pursuant to the respondent's constitutional and/or legal mandate under the 4th Schedule of the Constitution of Kenya 2010 and Section 72 of the Physical and Land Use Planning Act, 2019 hence legal.

Analysis and determination

21. I have read and considered the circumstances leading to filing of this suit to wit, issuance of enforcement notice by the respondents to stop or prohibit further constructing of structures on land falling within the jurisdiction of the respondent without approval from the 2nd respondent. The notice also required the petitioners to, within two weeks, demolish the buildings they had erected.
22. Section 57(1) of Physical and Land Use Planning Act 2019, puts an obligations on developers to obtain development permits from the county executive committee member for Lands before carrying any development in the County's area of jurisdiction.



23. Subsection 2 of section 57 of the Act makes it a criminal offence to carry out development within a County without a development permission granted by the respective county. In that regard, see the said provisions of the law which provide as follows:-
- “57. A person shall not carry out development within a county without a
- (1) development permission granted by the respective county executive committee member.
 - (2) A person who commences any development without obtaining development permission commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two months or to both.”
24. Subsection (3) of section 57, gives power to the county executive committee member to enforce compliance with development planning. The sub-section provides as follows:-
- “3. A county executive committee member shall require a person who has commenced a development without obtaining development permission to restore the land on which the development is taking place to its original condition or as near to its original condition as is possible and that such restoration shall take place within ninety days.”
25. Section 58 of the Act, puts an obligation on a developer to apply and obtain development permit from the chief executive committee member in charge of lands.
26. Section 72 of the Act, on the other hand, provides as follows:-
- “1. A county executive committee member shall serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to the notice of that county executive committee member that-
- a. a developer commences development on any land after the commencement of this Act without required development permission having been obtain; or
 - b.”
27. It is not in dispute that the development in respect of which the enforcement notice hereto was issued was being carried out in the 2nd respondent’s area of jurisdiction without approval or permission of the 1st respondent.
28. The petitioners’ acknowledge that they did not obtain permission or approval from the 1st respondent to carry out the development in respect of which the impugned enforcement notice was issued. They claim that since they were carrying out the development on their own parcel of land and because the development is temporary, they did not require to obtain development approval/permit from the 1st respondent.
29. The petitioners did not cite any provision of law exempting them from the provisions of Section 57(1) as read with Section 58 of the Act, which put an obligation on them to seek the permission and approval of the 1st respondent to carry out any development in the 2nd respondent’s area of jurisdiction.



30. Whereas it's true that the petitioners' could not exercise one of their rights provided in law namely appeal against the impugned notice to the liaison committees contemplated in the Act because the committees had not been formed, it is the considered view of this court that lack of that forum does not render the notice illegal or unconstitutional as it was issued pursuant to the constitutional/legal mandate of the respondents. The petitioners have not demonstrated that the failure by the respondents to establish the committees is deliberate or calculated at violating their right. To the contrary, the respondents have offered a reasonable explanation why the committees were not established. The regulations required to guide the establishment of the committees was yet to be published/enacted.
31. It has not been demonstrated that the impugned enforcement notice was arbitrary or issued without any legal basis to warrant granting the orders sought. Consequently, I dismiss the petition with costs to the respondents.
32. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KABARNET THIS 22ND DAY OF MAY, 2024.

L. N. WAITHAKA

JUDGE

Judgment delivered electronically in the presence of:-

Mr. Boiwo for the petitioners

N/A for the respondents

Court Asst.: Ian

