



Muisyo & another v County Government of Nairobi & another (Environment & Land Petition E036 of 2021) [2024] KEELC 13749 (KLR) (11 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13749 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E036 OF 2021
MD MWANGI, J
DECEMBER 11, 2024**

BETWEEN

DAVID KYALO MUISYO 1ST PETITIONER

ROSE MUTIO MUISYO 2ND PETITIONER

AND

THE COUNTY GOVERNMENT OF NAIROBI 1ST RESPONDENT

DIRECTOR, LANDS, HOUSING & URBAN RENEW, URBAN PLANNING & DEVELOPMENT 2ND RESPONDENT

JUDGMENT

1. The 2nd Petitioner is an employee of the County Government of Nairobi residing as a rent paying tenant in house No. 4186 Block V- Jericho, belonging to the 1st Respondent and managed by the 2nd Respondent pursuant to a tenancy card number 34410. The 1st Petitioner is a brother and guardian of the 2nd Petitioner whom he takes care of from the said premises. Consequently, he resides in the suit property with his family.
2. It is the Petitioners' case that despite paying rent, undertaking repairs and maintenance of the houses, the Respondent served them a termination notice terminating the tenancy and requiring them to vacate the suit premises provoking this Petition. The notice alleged that the 1st Petitioner had assigned and or underlet the demised premises thereby parting with possession without the consent of the Respondents.
3. In the said Petition, the Petitioners alleged a number of Constitutional violations as set out on the face of the Petition; and in particular averred that the Respondents' notice to vacate dated the 10th September, 2021 was unprocedural, unfair, unreasonable, inefficient and unlawful. The Petitioners contend that they were not notified or engaged by the Respondents before informing them of their



intended eviction thus violating their rights and fundamental freedoms to the protection of property and to housing respectively under Article 40 and 43(1)(b) of *the Constitution*.

4. The Petitioners sought the following orders against the Respondents;
 - a. A declaration that the Petitioners are by virtue of Article 40(1)(a) entitled to be on the leased properties and whether the Respondents have violated the same?
 - b. A declaration that the Petitioners are by virtue of Article 27(2) entitled to the full and equal enjoyment of all rights including the ownership of a tenancy herein and whether the Respondents have violated the same?
 - c. A declaration that the Respondents are by virtue of Article 40(2) prohibited from arbitrarily depriving the Petitioners herein of their tenancy interest or right on the demised property and whether the same has been violated by the Respondents herein.
 - d. A declaration that the demised property which is now under eminent threat of being unprocedurally and unlawfully alienated from Petitioners and if yes whether the same will amount to violating their rights under Article 43(1)(b) of *the Constitution* as the Petitioners are entitled to accessible and adequate housing.
 - e. A declaration that the Petitioners are entitled to the rights enshrined under Article 28 which rights guarantees them an inherent dignity and the right to have that dignity respected and protected if yes whether the same will.
 - f. A declaration that the Respondents while arriving at the decision to issuing the termination notice failed, refused and neglected to grant the Petitioners herein an opportunity to be heard which failure violated their constitutional enshrined under Article 47 of *the Constitution* as read with Section 2, 4, 6, 7, 9, 10, 11 and 12 of the Fair Administration and Action Act.
 - g. A declaration that the Respondents while arriving at the decision to issuing the termination notice violated Article 25 and Article 50 of *the Constitution*.
 - h. A declaration that the Petitioners are entitled to an order of certiorari to remove this Honourable Court and quash the Respondents notice dated 10th September, 2021.
 - i. A declaration that the Petitioners herein are entitled to the prerogative order of prohibition to renounce to this Honourable Court and bar, restraint and prevent the Respondents herein evicting the Petitioners and their family from the demised premises.
5. The Petition is supported by the affidavit of the 1st Petitioner, David Kyalo Muisyo sworn on the 23rd February, 2023. The Deponent avers that the Petitioners are the 'registered tenants' of the suit property. That the 2nd Petitioner was registered as a Tenant pursuant to a tenancy card No. 34410 dated 9th December, 2011. He avers that they have always diligently paid their monthly rent without fail.
6. However, and in spite of them paying rent without fail, on 21st September, 2021 the Respondents served them the termination notice dated 10th September, 2021. The grounds for termination were that the 1st Petitioner had assigned the premises without prior consent of the Respondents. The Respondents thus accused the Petitioners of breach of tenancy conditions thereof by subletting the said house for Kshs. 7,000/=. Consequently, the Petitioners were granted 30 days to vacate the said premises failure to which the Respondents would forcefully evict them.
7. The Petitioners however assert that they have never parted with possession of the subject property as alleged. They produced their receipts confirming payment of rent as proof of their possession and their



diligence in paying the rent monthly. They alleged that evicting them from the subject property would render them homeless.

8. The Petitioners assert that the decision to terminate their tenancy was arrived at by the Respondents without following due process. The decision is therefore unprocedural, unfair, unreasonable, inefficient and unlawful.
9. The Petitioners allege that their constitutional right under Article 47 of *the Constitution* as read together with Section 2, 4, 6, 7, 9, 10, 11 and 12 of the Fair Administration Act have been violated by the Respondents. They further allege that their Constitutional right under Articles 25 and 50 of *the Constitution* have been violated by the Respondents by unprocedurally making a decision that substantially infringes on their right.
10. The Petitioners assert that they have the locus standi to institute these proceedings to safeguard their Constitutional rights under Articles 22 (2) and 258 (2) of *the Constitution*. They state that they have the capacity to institute these proceedings and that this court has the jurisdiction to determine it.

Respondents' Replying Affidavit

11. The Respondents opposed the Petition through the Replying Affidavit sworn by Marion Rono on the 3rd December, 2021. The deponent avers that the suit relates to termination of a tenancy agreement for House No. 4186 Block V situated in Jericho within Nairobi County.
12. She confirmed that a Termination Notice was issued to the Petitioners on the grounds that; the 1st Petitioner had assigned the demised premises to a third party; that the 1st Petitioner had underlet the subject property thus parting with possession of the property without prior written consent of the Respondents. She affirmed that the Petitioners sublet the subject property to one Collins Lumadede Ambani at Kshs. 7,000/= per month yet the rent charged for the house is Kshs. 2,000/=.
13. The Respondents further aver that the subletting was contrary to Clause 13 of the conditions of the Tenancy Agreement hence the issuance of the Termination Notice dated 10th September, 2021.
14. The Petitioners contend that the evictions were prompted by the need to have an inventory of the county houses and the tenants therein. A resolution was made by the defunct Nairobi Metropolitan Services that the tenancies of tenants of county houses who had sublet their houses be terminated. The Petitioners argue that the Petition is premised on falsehoods and is misleading. It should therefore be dismissed with costs.

Supplementary Affidavit by the Petitioners

15. The Petitioners filed a Supplementary Affidavit sworn by David Kyalo Muisyo on the 24th April, 2024. The deponent avers that although the 2nd Petitioner is the registered tenant of the subject premises, he has been in occupation of the said house with her as his brother, hence he has a right to file this Petition.
16. The deponent asserts that the 2nd Petitioner has never parted with possession of the said House. He argues that the then Nairobi Metropolitan Services was declared unconstitutional. Therefore, at the time of making a determination of terminating the tenancy, the NMS did not have the legal standing to act and make a decision on the termination of the tenancy.
17. In further response to the assertions contained in the Replying Affidavit, the deponent states that Collins Lumadede Ambani is a stranger to them and is being used to frustrate the tenancy held by the 2nd Petitioner on the suit premises. He reiterated that the 2nd Petitioner has never parted with



possession of the said house as evidenced by the Status Report dated 9th November, 2023 adduced thereof.

Court's Directions

18. The court with the concurrence of both parties, directed that the Petition be dispensed with by way of written submissions. Both sides complied. The Petitioners' submissions are dated 24th September, 2024 whereas the Respondents filed their submissions are dated the 9th October, 2024.

Petitioners' Submissions

19. In their submissions, the Petitioners identify two issues for determination, i.e. (i) whether the Petitioner's constitutional rights were violated and (ii) whether the Petitioner is entitled to the reliefs sought in the Petition.
20. On the first issue, the Petitioners submit that by virtue of Article 40(1)(a), the Petitioners are entitled to properties of any description including a tenancy of this nature and that by virtue of Article 27(2) they are entitled to the full and equal enjoyment of all rights including the ownership of a tenancy herein and that the same has been violated by the Respondents. Further, that Article 40(2) of *the Constitution* prohibits the Respondents from arbitrarily depriving the Petitioners herein of their tenancy interest or right on the demised premises. The Petitioners assert that they have resided on the subject property for over 11 years and the termination if allowed would violate their rights under Article 43 (1) (b) of *the Constitution*; accessible and adequate housing.
21. In addition, the Petitioners submit that the intended unfair and unprocedural termination infringes on their constitutionally enshrined right under Article 28. The said Article guarantees them an inherent right to dignity. Their dignity must be respected and protected. The impending eviction will render them homeless, destitute and without a place to call home.
22. The Petitioners further submit that the Respondents while arriving at the decision to issuing the termination notice failed to grant them an opportunity to be heard thus violating their Constitutional rights under Article 47 of *the Constitution* as read together with Sections 2, 4, 6, 7, 9, 10, 11 and 12 of the *Fair Administrative Action Act*.
23. The Petitioners rely on the case of Seluarajan –vs- Race Relations Board (1976) 1 ALL ER 12 where Lord Denning stated that an investigating body is under a duty to act fairly and is required to give the individual the case against him and also accord him an opportunity to answer it.
24. Regarding the Affidavit by one Collins Lumadede Ambani, the Petitioners submit that the same is defective and ought to be expunged as it offends the provisions of Order 19 Rule 3 (1) of the Civil Procedure Rules. The Petitioners therefore argue that their Petition is merited and the orders sought ought to be granted for justice to prevail.

Respondents' Submissions

25. On their part, the Respondents also identified two issues for determination being; (i) whether the Petitioners breached the tenancy Agreement and, (ii) Whether the Petition raises any Constitutional issues.
26. On the first issue, the Respondents submit that the 2nd Petitioner voluntarily entered into a tenancy agreement; which agreement spelt out the terms and conditions governing it. Clause 13 of the agreement expressly prohibited subletting of the subject premises without prior consent of the council. Contrary to the said Clause, the 2nd Petitioner sublet the premises to one Collins Lumadede Ambani



hence the resolution to terminate the tenancy and a termination notice duly issued. They argue that they cannot be faulted for proceeding to perform their obligation resulting from the Petitioners' own breach of the Tenancy Agreement.

27. On whether the Petition raises any Constitutional issues, the Respondents submit that what is before the Court is strictly an issue of interpretation and application of a Tenancy Agreement between the 2nd Petitioner and the Respondents. The Respondents submit that it is trite law that merely citing a Constitutional provision does not translate a legal dispute into a Constitutional Petition. They cite the Supreme Court decision in *Kimani & 2 Others –vs- Kenya Airports Authority & 3 Others* (2021) eKLR, where the court stated that a party has to show the applicability of the Constitutional provisions it cites.
28. The Respondents assert that the Petition herein does not raise any Constitutional issues and does not meet the test of a Constitutional Petition laid down in the often cited cases of *Anarita Karimi Njeru –vs- Republic* (1979) KLR 15 and *Mumo Matemo –vs- Trusted Society of Human Rights Alliance and 5 Others* (2013) eKLR. Other than citing Constitutional provisions, the Petition has not provided particulars of the alleged complaints or the manner in which they have been infringed as required in law.
29. The Respondents submit that this is a case of termination of a tenancy agreement and issuance of a termination notice between a Landlord and a Tenant which is purely a contractual issue between the two contracting parties. They therefore urge the court to dismiss the Petition with costs.

Issues for Determination

30. After considering the Petition, the replying affidavit, the supplementary affidavit and the submissions by both parties, the issues for determination in my view are;
 - a. Whether this Petition meets the threshold of a constitutional Petition; and
 - b. Whether the Petitioners are entitled to the reliefs sought.

Analysis and Determination

A. Whether this Petition meets the threshold of a constitutional Petition

31. The court in the case of *Anarita Karimi Njeru vs. Republic* (1979) eKLR, stated as follows:

“...if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
32. The court of Appeal in the case of *Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR reaffirmed the principle enunciated in the case of *Anarita Karimi Njeru* (supra) where at Paragraph 44 of its judgment the court stated as follows: -
 - (44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (supra). In view of this, we find that the Petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the Petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the Petition fell short of the very substantive test to which the High Court made a reference to in view of the substantive nature of these shortcomings, it was not enough for



the superior court below to lament that the Petition before it was not the “epitome of precise, comprehensive, or elegant drafting”, without requiring remedy by the 1st respondent”.

33. Lenaola, J (as he then was) in the case of Patrick Mbabu Karanja -vs- Kenyatta University (2012) eKLR, held that that the Bill of Rights and the constitutional interpretative mandate of the court ought not to be invoked where there are other remedies. In the case he stated thus: -

“I maintain in this position and it is important that simple matters between individuals which are of a purely Civil or Criminal nature should follow the route of Article 165 (3) (a) and be determined as such. To invoke the Bill of Rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of Rights”.

34. In the case of Godfrey Paul Olutoyi & Another -vs- Habil Olaka & Another (2018) eKLR Chacha, J stated as follows regarding instances where there are alternative remedies in lieu of constitutional remedies: -

“It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and therefore a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by the particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of statutory provision that should give rise to a Constitutional Petition. A party should only file a Constitutional Petition for redress of a breach of *the constitution* or denial, violation or infringement of, or threat to a right of fundamental freedom. Any other claim should be filed in the manner allowed by the applicable law and procedure”.

35. In the case of George Owino Odhiambo & 13 Others -vs- Kenya Railways Corporation & Another (2020) eKLR where the Petitioners claimed to have been singled out and discriminated against by Kenya Railways Corporation and served notices terminating their residential tenancies in houses belonging to the Kenya Railways, the court was of the view that the acts complained of could not constitute a breach of the Petitioners’ constitutional rights. The court held that the parties had private commercial contracts and the forum for any party who felt the contract had been breached, was before the ordinary civil court for the issue to be adjudicated. The court held that the Petitioners had not properly invoked the Constitutional jurisdiction of the court and dismissed the Petition for being an abuse of the court process.
36. In the instant Petition, it is not in dispute that the 2nd Petitioner is a tenant in the Respondents’ premises known as House No. 4186 Block V situated in Jericho within Nairobi County having entered into a Tenancy Agreement. The Agreement as asserted by the Respondents contains the terms and conditions that govern the relationship between the 2nd Petitioner and the Respondents.
37. I fully agree with the Respondents’ submissions in that regard that the relationship between the 2nd Petitioner and the Respondents is in essence contractual and is regulated by the tenancy agreement that they had entered into between themselves. In my view, where parties enter into an agreement, the terms of the agreement have to be construed and considered to determine whether there has been any breach by either party to warrant termination of the same by issuance of a Termination Notice.
38. All that the Petitioners are inviting this Court to determine is whether or not there has been breach of a contract on the part of the 2nd Petitioner that justified the issuance of the termination notice by the Respondents. That cannot be within the mandate of this court exercising its constitutional



interpretative jurisdiction to determine. It is an issue that falls within purview of the ordinary civil court.

39. From the forgoing, my finding is that the Petition herein offends the doctrine of constitutional avoidance.

40. The Supreme Court in the case of Communications Commission of Kenya and 5 Others vs Royal Media Services Limited & 5 Others (2014) eKLR, held that;

“the principle of avoidance entails that a court will not determine a constitutional issue when a matter may properly be decided on another basis. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional Petition. The Petition as drawn clearly does not plead which provisions of *the constitution* were breached and/or violated and how the same had been violated.”

41. In my view the Petitioners wrongly invoked this court’s constitutional jurisdiction. The Court’s finding is that the dispute ought to be filed, if at all, as an ordinary civil suit not a constitutional Petition.

42. The Petition is therefore struck-out. However, considering the relationship between the parties, I direct that each party will bear its own costs.

It is so ordered.

JUDGEMENT DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF DECEMBER, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Munyoki h/b for Mr. Mwangi Ndegwa for the Petitioners

Mr. Manyonge h/b for Mr. Juma for the Respondents

Court Assistant: Joan

