



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 304 OF 2015

IN THE MATTER OF: ARTICLE 21(1), 22 AND ARTICLE 23(3)(F) OF THE CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 25,43 AND 50 of the CONSTITUTION OF KENYA, 2010.

BETWEEN

DAVID NGIGE THARAU (Suing on his own behalf and on behalf of

128 residents Kibera Soweto East Zone ‘A’ Housing project).....PETITIONERS

VERSUS

PRINCIPAL SECRETARY MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....ND RESPONDENT

AND

SOWETO EAST ‘A’ HOUSING CO-OPERATIVE.....INTERESTED PARTY

JUDGEMENT

Petitioners’ Case

- 1. In this Petition, the petitioners according to themselves are residents of Soweto East Zone “A” in Kibera within Nairobi in the Republic of Kenya, who according to them, were selected as participants for the Kibera Slum Upgrading Project (hereinafter referred to as “the Project”)

undertaken by the 1st Respondent under the auspices of the Kenya Slum Upgrading Project (KENSUP) and jointly funded by the Government of Kenya and the UN Habitat Mission which project encompassed the provision of housing and improved conditions of residency to the residents thereof.

2. It was contended that to achieve the same, the Government conducted various sensitisation courses for residents and enumeration exercises to identify genuine residents. To the petitioners, pursuant to an unsigned minutes of a meeting held on 25th August, 2006, it was allegedly agreed between the residents of Soweto Village vide an amorphous body known as "Soweto Community Forum", the Settlement Executive Committee (SEC), a representative of the University of Nairobi and a representative from KENSUP that the Soweto Community would be divided into four clusters, A, B, C and D for ease of management during the mapping; that the residents would form themselves into cooperatives through which the geographical neighbourhood of the residents of the Village would be retained; that the structures to be constructed would be affordable to the residents who would hold communal tenure thereof through the cooperatives; that the residents would be provided with security of tenure under the **Sectional Properties Act**; that a decanting site would be set aside as a temporary relocation place for residents during the period of development; that a Community strategy would be developed for the purposes of dissemination of information that compensation would be afforded to both residents and landlords concerned; and that the tenure and term of SEC would be defined and the same would be periodic with elections at the end of each term.
3. According to the Petitioners, they were never privy to the aforesaid meeting and did not participate therein. It was their case that the composition of the membership of two key institutions set up to drive the programme was fraught with illegalities and inconsistencies with the members being selected on tribal basis with no provision for periodic elections.
4. However based on the Memorandum of Understanding between the individual residents of the Village and the Government, copies of which were retained by the Respondents, the residents were relocated to a decanting site in Langata Area in Nairobi. However upon relocation, the Respondent abdicated its responsibility of running and managing the site as agreed and instead surrendered its duty to SEC, the Cooperative, a group called the Estate Elders and Block representatives whose elections were unknown. It was averred that following the said relocation, three blocks of flats which remained unoccupied were filled by unknown persons who were non-residents of the Village and no compensation was offered to the residents as agreed without opportunity for them to engage in income generating activities. It was therefore the Petitioners' case that the wrongful and fraudulent actions by the Respondents have caused the Petitioners pain and anguish of unlawful deprivation thereof.
5. However, it was averred, the Respondents were on the verge of relocating the said residents back to the refurbished and completed units through SEC and the Cooperatives but upon setting unit prices way above the financial standing of the respondents of the Village contrary to the promise of constructing affordable housing for the residents hence creating an environment where the petitioners have been priced out of ownership of the individual units after being relocated from the decanting site without alternative places to go. It was therefore contended that the Respondents failed to ensure equity and fairness in the balloting exercise for the individual units and have instead turned blind eye to the corrupt activities of the SEC, the Co-operative and other *ad hoc* Committees for purposes of assisting the residents.
6. Apart from failing to recover the Blocks allocated to strangers and imposition of illegal terms, the Respondents were accused of failing to prevent and/or acquiescing in the illegal alterations of the membership of the Cooperatives which has been infiltrated by strangers who are not members of the village but who are hell bent on occupying the units and double allocations of the units to individuals thus creating landlords.
7. It was therefore contended that the aforesaid acts amounted to a violating of Article 43 of the

Constitution thus the Petitioners' rights were contravened by being denied the due process and protection under the law of Kenya.

8. In the premises the Petitioners sought the following orders:

- a. **This Honourable Court be pleased to issue a declaration under Article 165 (3) (b) and Article 23 (3) (a) that the rights of the Petitioner to a fair hearing and fair administrative action and consequently right to education as contained in the Bill of Rights were denied, violated and infringed by the 1st and 2nd Respondents.**
- b. **Consequent to the grant of prayer (a) above the Honourable Court do issue an order of Injunction restraining the Respondents from conducting any balloting in relation to the Units for residents of Soweto Zone "A" scheduled for the 21st day of July 2015 and in the event that the same has been conducted an order of certiorari to quash the decision of the Respondents in conducting balloting for the completed Units for residents of Soweto Zone "A" scheduled for the 21st day of July 2015.**
- c. **An order of Permanent Injunction restraining the Respondents from conducting any balloting in relation to the Units for residents of Soweto Zone "A".**
- d. **An order of Permanent Injunction restraining the Respondents from forceful evicting the residents of Soweto Zone "A" from the decanting site**
- e. **Further consequent to the grant of prayer (a) above the Honourable Court do issue an order of Mandamus to compel the Respondents to conduct a vetting exercise to confirm the genuine residents of Soweto Zone "A" eligible for allocation of completed units in the slum upgrading program.**
- f. **An order of Mandamus to compel the Respondents to conduct a proper sensitization program with the Residents of Soweto Zone "A" for the purposes of determining and placing a fair valuation for the price of pricing the Completed Unit for the benefit of the Residents.**

- g. **Such other and/or further orders and/or directions as this Honourable Court may deem just and equitable to grant.**
- h. **The costs of and occasioned by this Petition be provided for.**

9. In support of their case the Petitioners filed a supporting affidavit and a Supplementary affidavit sworn by **David Ngige Tharau** on 17th July, 2015 and 16th November, 2015 respectively.

Respondents' Case

10. In opposition to the Petition, it was contended on behalf of the Respondents that whilst the petitioners claim to be residents of Soweto zone A, a critical analysis of our records indicate that some of the petitioners are the strangers in the project as their details were not traced in the master register of the residents of Soweto Zone A. Further, various inconsistencies arose from the details provided by the petitioners which puts the authenticity of their claims to doubt.
11. It was denied that the bona fide residents of Soweto zone A were not selected as alleged by the petitioners but were enumerated and issued with a unique enumeration card and their details captured in the master register. It was disclosed that the planning and enumeration process started in 2004 where various sensitization forums and community engagements were undertaken and that the respondents played no role in the selection of officials or members of the Soweto Executive Committee (SEC) as the same is done by the residents. It was therefore suspect that the petitioners were raising issues of ethnicity at this point yet they have all along

- been aware of the membership of SEC and even participated in the selection process. It was further contended that the respondents have no authority over the activities of the interested party because the Government only offers assistance in the formation of the said cooperatives.
12. The Respondents denied that they had abdicated their responsibility of managing the decanting site and averred that they had an operational office in the estate and addressed issues arising in the course of the residence at the decanting site. To them, the petitioners did not disclose who the alleged strangers in the decanting site were or the strangers to benefit from the completed units hence the said allegations should be dismissed. They asserted that all the genuine residents of Soweto zone A who were at the decanting site and who had no rent arrears and had complied with the agreed criteria qualify to get a unit in the newly constructed houses at Soweto Zone A and towards this end, a steering committee was formed in April 2014 and three working teams were formed namely vetting, allocation and grievances sub committees and the allocation criteria was adopted in a meeting held in August 2014 and notifications to interested applicants for ownership of houses was open to all residents at the decanting site including the petitioners.
 13. It was averred that the petitioners have never complained to the respondents of the tenure of SEC and neither complained when the elections were held in 2004 and 2006 respectively. In any event, the petitioners ought to have presented their claims to the grievances committee before seeking redress in court. It was the Respondents' position that the prices of the housing units was negotiated by the representatives of SEC, the respondents, the interested party and the local leaders and is way below the actual cost of the said units hence the petitioners claims are untenable. Further, the agreed allocation criteria was communicated to the petitioners through various forums including public *barazas* and the petitioners should be stopped from misleading the court with frivolous allegations.
 14. The Respondents contended that they were not liable for the unsubstantiated allegations contained in the petition as no evidence has been provided to assert the petitioners' claims. To the contrary, all the residents at the decanting site were notified to clear their outstanding rent arrears as that was a determinant in the allocation of the new units but some of the petitioners who had rent arrears scaling to hundreds of thousands of shillings failed to clear the same and should thus not be given priority at the expense of those who have no arrears. It was however disclosed that the relocation from the decanting site to the new units will be done in phases and all the residents cannot be taken to the new units at once. However, physical verification was done between 15th and 19th of June 2015 and the petitioners were invited to participate hence the calls for a repeat of the verification exercise is untenable.
 15. The Respondents affirmed that they developed various policy guidelines to achieve their purpose including the Kenya slum upgrading programme-implementation strategy covering the period between years 2005-2010 as well as the Slum Upgrading and Prevention Policy which is awaiting approval by cabinet. To them, the slum upgrading process at Soweto Kibera was participatory, fair and within the confines of the Law and the Memorandum of Understanding between the Government of Kenya and the residents of Kibera Soweto east zone A hence the reliefs sought by the petitioners are devoid of merit, unjustified and are only aimed at delaying the process of relocation.
 16. It was submitted on behalf of the Respondents that the process was participatory, consultative and transparent as was expected of any public process. It thus beats logic why the petitioners would allege that there was no public participation yet there's evidence in terms of minutes over what transpired from inception of the project till the end. In any case, public participation does not mean that everyone affected by the project must be consulted. Public participation, it was submitted, means that the stakeholders were actually involved in the project. On the concept of public participation reliance was placed on the case of **Moses Munyendo & 908 Others vs. AG Nairobi HC Petition No. 16 of 2013**.
 17. Based on the foregoing the Court was urged to find that there was sufficient public participation in

light of the fact that SEC was involved at all stages.

18. To the Respondents, the Petitioners have not proved that their non-derogable rights under Article 25 have been violated. With respect to the rights under Article 43, it was submitted that the project is evidence that the respondents have met their obligations under article 43 of the constitution and such cannot be said to be a violation of the petitioners' rights. Slum upgrading is one of the key pointers at provision of decent and affordable housing as demonstrated above. With respect to Article 50, it was submitted that the petitioners did not lodge their complaints before the grievances committee as expected of them. In any event, the petition at hand does not demonstrate genuine claims. Whereas the law places the burden of proof on the person who alleges, the petitioners have not given any proof of who the strangers are at the decanting site neither have they presented proof of the alleged strangers intended to benefit at their expense. It is not enough to just state violations, there should be precision on the violations and proof of the said violations. In this respect reliance was placed on the case of **Annarita Karimi Njeru vs. Attorney General [1979] KLR 154; [1976-80] 1 KLR 1272.**
19. To the Respondents, the purported rights of the petitioners are not absolute. They are subject to the rights of the larger public and the various limitations under the constitution as envisaged under article 24 of the constitution. The test is that which is reasonable in an open and democratic society. In this case, the petitioners' alleged rights have been limited by the laid down allocation criteria which applies evenly to all the residents of Kibera Soweto zone A. The criterion was implemented to ensure fairness and objectivity in the allocation of the newly constructed units.
20. With respect to the prayers sought, it was submitted that the prayer to permanently bar the respondent from conducting the balloting for the units is mischievous as it seeks to stop a lawful process. The units have been completed and the only thing that is remaining is occupation of the said units. It would be a waste of public resources to construct houses then leave them lying unoccupied yet many people do not have decent housing. The object of constructing the said houses would be defeated if the court gave in to the petitioner's baseless claims. Further, if indeed their motive was straight, they would advocate for a sooner balloting date as opposed to seeking orders to defer the balloting indefinitely.
21. It was submitted that though the petitioners purported to have brought this suit in the interest of the public, the evidence on record only proves that the petition is self serving and has no nexus to the interest of the Kibera community. As demonstrated by the interested party's replying affidavit, the petitioners consist largely of the people who are in arrears therefore do not qualify for the said units. The petitioners only want to derail the process by bringing side shows in the relocation exercise. It is evident that their claims hold no water since everything was done in a transparent manner without any discrimination as the laid down criteria cuts across uniformly. The petitioners should not seek preferential treatment if they haven't met the laid down criteria. Were it not for the injunction issued by the court, the people of Kibera East Zone A would already be occupying the units.
22. With respect to the prayer for mandamus, it was submitted the petitioners are seeking to compel the respondents to conduct fresh vetting and to conduct sensitization forums to determine the pricing of the completed units. However, this prayer cannot be granted as it is without basis and in any event the court cannot supervise or micromanage any institution. The courts duty is to determine whether the respondents' actions are lawful and not to run the particular institution. *Mandamus* is an order directed at a public body to perform a public duty and reliance was placed on **Kenya National Examinations Council vs. Republic ex parte Geoffrey Gathenji Njoroge and 9 Others Civil Appeal No. 266 of 1996 [1997] eKLR.**
23. It was therefore the Respondents' position that there was nothing illegal or unconstitutional in the respondent's actions and as such the court cannot issue the orders sought. The petition seeks to use the constitutional court to derail the relocation exercise while undermining the efforts made

by the same government that the petitioners expect to provide decent and habitable housing. They urged the Court to dismiss the petition with costs.

Interested Parties' Case

24. According to the interested parties, apart from two people, all the residents of Kibera Soweto East Zone "A" Housing Project were satisfied with the manner in which the project was handled and were ready to participate in the balloting. It was averred that all the stakeholders and intended beneficiaries of the Project including the petitioners participated in all activities and meetings in furtherance of the Project. It was disclosed that though it was a pre-condition for the beneficiaries of the project to belong to cooperatives, the petitioners are not members of the interested party has cannot question the authority of the interested party.
25. It was deposed that the pricing of the units was negotiated between the residents and the Government and that the units are affordable, accessible and of good quality and that there were no corrupt activities as alleged by the Petitioners. It was contended that the motive for opposing the project was informed by the fact that the Petitioners do not qualify for allocation of the units. The interested party therefore urged that it ought to be allowed to do its work and allocate the houses to qualified members through balloting as unanimously resolved by the residents.

Determinations

26. I have considered the issues raised in this petition. In this petition the petitioners do not seriously contend that the project ought not to have been undertaken. From what I can gauge from the petitioners' case, it is the process of relocation to the units which were intended to benefit them that they are aggrieved with. It is their position that the manner in which the relocation process is being undertaken will result in them being locked out from being beneficiaries therein yet as a result of their relocation to decanting sites they have no alternative areas in which they will be able to eke a living. They contend that the manner in which the relocation process is being undertaken is not only opaque but also steeped in corruption and lack of transparency and their denial to participate in the same process.
27. However although the Petitioners contend that following their relocation to the decanting sites, some strangers who were not entitled to the benefit of the said project have since acquired the same, no particulars were furnished by the petitioners on the basis of which the Court can gauge the veracity of such allegations. As was held in **Annarita Karimi Njeru vs. Attorney General [1979] KLR 154; [1976-80] 1 KLR 1272:**

"If a person is seeking redress from the High Court in 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 have been infringed."

28. I must however give a word of caution in adopting the decision in ***Karimi Case*** line, hook and sinker. Section 7(1) of the Transitional and Consequential Provisions of the Constitution of Kenya provides:

All laws in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

29. This Court in Nairobi High Court Miscellaneous Application No. 596 of 2008 - **Kenya Union of Savings and Credit Cooperatives (KUSCCO) Limited vs. Nairobi City Council (Now Nairobi City County)** expressed itself on a not too dissimilar issue in the following terms:

“...all the pre-Constitution of Kenya, 2010 decisions must now, pursuant to section 7(1) of the Transitional and Consequential Provisions of the Constitution, be looked at in the light of the current constitutional dispensation. This does not mean that all such decisions ought to be ignored but must be interpreted and construed in a manner that gives effect to the Constitution. Since the imposition of the Single Business Permit is pursuant to the said County Legislation which as of now has not been nullified, I hold that the decision given herein must be looked at in the light of the current devolution system of governance and since County Governments are empowered to enact legislation, where the Legislation enacted is inconsistent with the pre-2010 decisions and the said Legislation is not inconsistent with the Constitution, the pre-2010 decision cannot stand if its effect would be to contradict the legislation, it is no longer good law...Accordingly, the order the subject of these proceedings must be construed in accordance with the current Constitutional dispensation and the prevailing legal regime and I find that in so far as the *Nairobi City County Finance Act, 2013* entitles the County to impose and recover single business permits against *inter alia*, SACCOs and Co-operative Societies including the Applicant herein, the Respondents are not in contempt of Court by collecting the said Single Business Permits from the applicant since their action is permitted by the law.”

30. Whereas the ***Annarita Case*** is, in my view, still good with respect to the need for precision in matters seeking application and interpretation of the Constitution, the said decision must be read in a manner that resonates with the provisions of the current Constitution. Under Article 22(3) of the Constitution, the Chief Justice is enjoined to make rules providing for the court proceedings relating to the Bill of Rights which Rules are required to satisfy *inter alia* the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation. In my view, where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the later ought to prevail over the former. However, parties ought not to simply throw at the Court the provisions of the Constitution without expounding on the facts on which they are based and expect the Court to look for the facts itself. It is upon the parties to bring themselves within the ambit of the relevant constitutional provisions by relating the facts of their case to the said provisions and explain how in their view those provisions are relevant to their case. This threshold, with due respect, the Petitioners have failed to meet.

31. It was contended that the Respondents have since imposed conditions which make it impossible for the Petitioners to acquire the units meant for them. Whereas the petitioners contend that they never participated in the selection or election of the interested party, the fact that they did not contest the interested party's locus until later when the units in question were due for allocation does not augur well for their bona fides. One cannot thereof help the feeling that the petitioners' grievances may well be informed by the intention to delay the occupation of the premises by those who may well be deserving of the same.

32. On public participation I would associate myself with the position adopted by **Sachs J.**, in **Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)** at para. 63 that:

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

33. It was upon the Petitioners to satisfactorily prove that the actions taken by the Respondents were not consultative and lacked the ingredients of public participation. Apart from bare allegations there was no concrete evidence on the basis of which favourable findings could be made in their favour. The Respondents on the other hand enumerated instances showing that in fact the process was consultative. As was appreciated by **Lenaola, J in Moses Munyendo & 908 Others vs. AG Nairobi HC Petition No. 16 of 2013:**

“Whether or not there was public participation in this case is a question of fact and it is for the petitioners to prove that in fact the Constitution was violated to an extent that the resulting law is null and void...As concerns the pre-parliamentary or consultative stage, the Permanent Secretary has given evidence on how different stakeholders were consulted. Some of the organisations consulted include the following; Kenya National Federation of Cooperatives, National Cotton Growers Association, Meru Central Dairy Co-operative Union Limited, Cereal Growers Association and the Horticultural Farmers and Exporters Association. The organisations consulted are, in my view, broadly representative of agricultural interests in the country. This evidence is not controverted by the petitioners. Furthermore, I do not think it is necessary that every person or professional be invited to every forum in order to satisfy the terms of Article 10...Thus the contention that by the first petitioner, “I am aware that majority of Kenyans producers, processors, professionals or policy makers have not been invited to any stakeholders meetings to enrich any of the law” is not necessarily decisive of the lack of public participation.”

34. It not a requirement that all the stakeholders must be heard. What is important is that an opportunity ought to be availed at which the stakeholders can reasonably put across their views for consideration by the authorities.
35. With respect to the right to accessible and adequate housing, I can do no better than my learned brother **Majanja, J in Richard Were & 11 Others vs. Permanent Secretary, Ministry of Health & 3 Others [2013] KLR** in which he expressed himself inter alia as hereunder:

“...the State’s obligation under Article 43(1)(b) is not to give houses to specific applicants but to provide a framework under which citizens may have access to housing...The right to housing under Article 43(1)(b) is framed in terms of ‘access’...It is also fair to add that fundamental rights and freedoms are not absolute they must take into account the rights of others...”

36. To deny all deserving residents of Soweto their right to housing simply because the petitioners have for one reason or another not been accommodated in the said project in my view cannot be warranted. What the Court ought to do is to ensure that those of the petitioners’ who deserve have their interests are catered for within the parameters which are reasonable. I therefore agree with the Respondents that to permanently restrain the Respondents from conducting any balloting in relation to the Units for the residents of Soweto Zone A is not only selfish but would defeat the very purpose for which the Project was conceived and would run counter to the

Constitutional provisions under Article 43.

37. I agree with the decision in **Kemrajh Harrikissoon vs. Attorney General of Trinidad and Tobago [1979] 3 WLR 63** that:

“The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedoms, but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicants to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

38. The Petitioners however contend that the project has been marred by corruption and fraudulent activities. The project is meant to benefit those who genuinely deserve to reap the benefits of the project. Accordingly care must be taken to ensure that those who deserve to benefit from the project are the ones who actually benefit therefrom. The petitioners' position seems to have support from an unlikely quarter - that of the Respondents - who seem to be of the view that though the deponent of the affidavit in support of the petition is not entitled to the benefit of the project, he will nonetheless be entitled to the benefit thereof. It cannot therefore be ruled out that there is a possibility of some people who are not justifiably entitled to the units finding their way into the said units. That scenario must be avoided at all costs.

Order

39. Consequently, whereas I decline to grant the orders sought herein, in order to ensure transparency of the project, I direct that the process of the allocation of the units, the subject of these proceedings, be overseen by the representatives of the Kenya National Commission on Human Rights in order to ensure that only those who are genuinely entitled to the benefit of the project reap therefrom.

40. There will be no order as to costs.

41. Order Accordingly.

Dated at Nairobi this 5th Day of January, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ogado for Mr Amuga for the Interested Party

1st Petitioner in person

Cc Kazungu



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