



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC PETITION NO. 4 OF 2020

EMMANUEL NYONGESA

FRED JUMA

BENSON GETERU MUJOMBA

EPHANTUS MWANIKI

DAVID KEYA & 31 OTHERS.....PETITIONERS

VERSUS

COUNTY GOVERNMENT OF TRANS NZOIA.....RESPONDENT

JUDGMENT

1. The petitioners filed the petition dated **14/09/2020** on **17/09/2020** wherein they sought the following orders:

- a) An order requiring the respondent to implement the original physical plan as allotted to the petitioners.**
- b) A declaration that the any other physical plan apart from the original plan is null and void.**
- c) Costs of the petition.**

The Petition

2. According to the petitioners, they were allotted various plots at Kapkoi Trading Centre by the defunct County Council of Nzoia which was succeeded by the County Government of Trans Nzoia; the petitioners took possession of their allotted plots and have since developed them. It was further averred that the physical plan was drawn but it was never implemented and that the respondent has now drawn a new physical planning plans to displace the petitioners and introduce new plot numbers.

Replying Affidavit

3. In response to the petition, the respondent through its physical planner **Beatrice W. Wangila** filed a replying affidavit dated **21/01/2021** where she deposed that Kapkoi Trading Center is public land set aside for the purposes of a market; that it is held in trust for the public by the County Government of Trans Nzoia; that no plan has ever been approved and that the members of the public have been using it without any approved plan; that the respondent embarked on the preparation of a plan for the market and published a notice of intention to plan on **17/02/2014**; that the public was consulted through various stakeholder engagements and public notices; that the 1st petitioner attended the meeting on the planning of the market held on **19th August 2014**; that the planning was completed on **11/10/2018** and all stakeholders informed through among other media gazette notice No. **5865** dated **1/7/2020**; that the letters of allotment annexed to the petitioners petition are temporary occupation licenses issued by the defunct County Council of Nzoia and that the annexed draft plan is not conclusive and was not approved and that is why the planning was commenced afresh.

4. The petitioners filed a supplementary affidavit sworn by the 1st petitioner Emmanuel Nyongesa and admitted that Kapkoi Trading Center is public land held by the respondent in trust for the public. He deposed that in the year **2002**, the defunct Nzoia County Council through the Ministry Of Lands and prepared a physical plan for Kapkoi Trading Center dated **12/10/2002**; that using that physical plan, the defunct Nzoia County Council allocated the interested persons including the petitioners commercial and residential plots herein; that the said plan has never been approved; that instead of executing the already existing plan, the respondent sought to develop new plans; that there was no public participation; that he attended the meeting of **19/08/2014**, but the agenda was for the merging of Kapkoi Trading Centre and Kanyarkwat

trading center; that the new development plan would affect public utilities such as chiefs office, schools and churches among others; that the petitioners have been paying land rates since they were allotted the suit property; that the new physical planning plan will displace them; that after they were given allotment letters of offer they complied with the conditions of offer and their allotments were never cancelled.

Submissions

5. The petitioners filed their submissions dated **22/06/2021** and filed on the same date while the respondent filed its submissions dated **25/06/2021** and filed on **30/06/2021**.

Determination.

6. After considering the petition, the affidavits filed and the submissions of the parties, the issues for determination are whether this court has jurisdiction over this matter, whether the petitioners rights were violated and whether the court should grant the prayers sought.

7. I would wish to first address the issue of jurisdiction even though only the respondent raised it in their submissions. The court in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** held as follows:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

8. The Supreme court in the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR** stated as follows:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

9. The Physical and Land Use Planning Act empowers county governments to prepare county physical and land use development plans. **Section 45(1)** provides as follows:

"45. (1) A county government shall prepare a local physical and land use development plan in respect of a city, municipality, town or unclassified urban area as the case may be."

10. **Section 49** of the same Act goes on to provide as follows on the notice of objections and approvals to local physical and land use development plans:

"49. (1) Within thirty days of the preparation of a local physical and land use development plan, a county planning authority shall publish a notice in the Gazette, in at least two newspapers of national circulation and through electronic media informing the public that the plan is available at the places and times designated in the notice for inspection and that an interested person may comment on the content of the plan."

(2) The provisions of section 40 relating to the making of representations or objections to the county physical and land use planning liaison committee concerning county physical and land use development plans and to the consideration by the committee of such representations or objections and to the appeals shall apply mutatis mutandis to this section."

11. The petitioners allege that the County Council of Nzoia allotted to them various plots of land in Kapkoi Trading Centre which plots they have developed. They allege further that the said allocation was based on a physical planning plan dated **12/10/2002** which both parties admit was never approved. In **2014**, the respondent commenced the preparation of a physical plan for Kapkoi Market which was completed on **11/10/2018** and gazetted in **gazette Notice No. 5865** dated **1/07/2020**. The petitioners are challenging the gazetted **Kapkoi Local Physical and Land Use Development Plan** and are seeking for an order requiring the respondent to implement the unapproved physical plan.

12. **Section 40(4)** of the Physical and Land Use Planning Act provides for the procedure to be followed by any party who is dissatisfied by the enactment and/or passage of a county physical and land use development plan and provides as follows:

"4) A person aggrieved by a decision of the county planning authority concerning the county physical and land use development plan or matters connected therewith, may within sixty days of receipt by him of notice of such decision, appeal to the county physical and land use planning liaison committee in writing against the decision in such manner as may be prescribed."

13. The above section clearly provides that if a party is seeking to challenge a county physical and land use plan, then they ought to appeal to the county Physical and Land Use Planning Liaison Committee. The petitioners in this matter did not follow the required procedure but instead they filed the present petition alleging contravention of various articles of the Constitution.

14. The court in the case of **Revital Healthcare (Epz) Limited & another v Ministry of Health & 5 others [2015] eKLR** quoted with

approval the case of **John Harun Mwau Vs. Peter Gastrow & 3 Others [2014] eKLR** where it was stated:

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights.

... It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. ...”

15. Further, the Court of Appeal in the case of **Mutanga Tea & Coffee Company Ltd v Shikara Limited & another [2015] eKLR** cited with approval the case of **Speaker of The National Assembly V Karume [2008] 1 KLR 425** where it was held as follows:

“Where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

16. In light of the above decisions, parties are encouraged to pursue and exhaust the available remedies before invoking the court’s constitutional jurisdiction.

17. On the constitutional jurisdiction of this court, the court in the case of **Southlake Panorama Limited v Kenya Electricity Transmission Company Limited & 3 others [2021] eKLR** stated as follows:

29. The constitutional jurisdiction of the court is a very specific jurisdiction which is not open to general claims. It is invoked pursuant to Articles 22 (1) and 23 of the Constitution by filing a petition. The reliefs that a court exercising the constitutional jurisdiction can grant are clearly spelt out by Article 23 (3)...

30. So as to ensure that constitutional jurisdiction of the court is not misused, the doctrine of constitutional avoidance comes in handy. It frowns upon the practice of bringing ordinary disputes to the constitutional court.

18. The doctrine of constitutional avoidance was expounded on by the Supreme Court in the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** as follows:

[256] The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Krentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

[258] From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.

19. Having considered the petition and the response in depth, this court finds that as there is a remedy prescribed by the law regarding the petitioner’s complaint and therefore the doctrine of constitutional avoidance applies. Therefore there is no need to address the other issues for determination that had been set out for determination as above.

20. Before I conclude this judgment however, it would be necessary to point out at this point that it is in accordance with the principles of good governance as espoused by **Article 10** of the **Constitution of Kenya 2010** the duty of the respondent to consider from every possible angle the concerns of the petitioners during the planning and plan implementation periods. If that is done then there would be no serious apprehension on the part of the petitioners as exhibited herein.

21. The upshot of the foregoing is that the instant petition lacks merit and it is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 16TH DAY OF DECEMBER, 2021.

MWANGI NJOROGE

JUDGE, ELC, NAKURU.