



Legal Alert | March 24, 2022

**THE RIGHT TO PLAY AND TO SAFE DRINKING WATER:
ERICK OTIENO & OTHERS v CHIGWELL HOLDINGS
LIMITED**

Introduction

In a judgment delivered on March 03, 2022, the Kenyan High Court directed a developer to provide clean and safe water in adequate quantities by installing water filtration systems to its residential development and to provide designated play areas for children.

Brief Facts

The suit was instituted by the Development's residents through a constitutional petition. The residents claimed that the developer had violated their rights by not providing clean and safe water and their children's rights by not having designated play areas. This they claimed was contrary to marketing brochures provided to them when making the decision to buy.

While the developer committed to providing clean filtered water, it contested the residents' prayer for designated play areas arguing that (i) the estate was constructed in strict adherence to approved drawings and plans which were made available to the residents for inspection before they executed their respective sale agreements; and (ii) the brochures were for marketing purposes only and therefore not binding as they were not incorporated in the sale agreements. Their argument was essentially that the residents demand for playing areas was equivalent to rewriting the agreement between the parties.

The Court's Decision

The Court held that the developer had violated the residents' rights on human dignity and the duty to act in the child's best interest as set out in articles 28 and 53 of the Constitution respectively as well as the right to reasonable standards of sanitation and to clean and safe water as enshrined in article 43(1).

The Court relied on a site visit it conducted and the admission by the developer that they were in the process of installing filtration systems for the two initial phases.

Legal Implications

The judgement has various implications particularly with regard to the "Disclaimer" and "Entire Agreement" clauses designed to protect the developer from any claims made from representations made during pre-contract typically during marketing. The Disclaimer Clause confirms that the Purchaser has inspected the Building Plans and therefore protects the developer from liability, except to the extent the buildings, as built, do not conform to approved drawings. Primary responsibility is therefore placed on the buyer to ascertain what they are buying by referring to the plans and drawings. The Entire Agreement Clause, on the other hand, excludes any representations or matters that are not expressly set out in the contract. The judgement's import is that even with these clauses, where the development lacks certain facilities and amenities whose absence amounts to a violation of any aspect of the Bill of Rights, then on the strength of the Constitution, the courts will not hesitate to order performance regardless of whether it is provided for in contract or not. This speaks to the supremacy of the Constitution, the fundamental nature of these rights and that these rights belong to each individual.

In our view, while the decision was directed at a private developer, it is a reminder of:

- The State's role in ensuring that these basic requirements are met taking into account that the State and every State organ has a constitutional duty to protect, promote, and fulfil the rights and fundamental freedoms in the Bill of Rights. For instance, what measures can the State put in place so that water supply is sufficient and residents do not have to rely on boreholes, which if done in excess have an adverse impact on the environment or in providing clean and safe public parks for children;
- The role of the county governments in physical planning. For instance, as per the Nairobi Integrated Urban Development Master Plan (NIUPLAN) issued in 2013 there were only 18 registered playgrounds in Nairobi against a



primary school going population of at least 400,000. This number must have since increased without a corresponding increase in playgrounds. Is there a place to ensure, at a minimum, that schools have adequate play areas and where approvals are given for multi storey developments that seek to maximise ground coverage, there is ease of access to a public playground?

This decision for us clearly exemplifies the fact that while private developers have sought to plug in the gap left by the State and its organs by developing master planned developments, we can only ensure these rights are observed, protected and fulfilled if the State and its organs play their rightful role to ensure public wellbeing.

As well, the Court's decision on this matter may also advise developers to, as far as possible, develop their properties in line with the marketing collateral that they issue to potential homeowners, who may treat such selling points as legitimate expectations in making their purchase decisions.

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