



**Wakoyo & 87 others v County Government of Mombasa & another (Environment & Land Petition 21'A' of 2022) [2023] KEELC 17030 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17030 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ENVIRONMENT & LAND PETITION 21'A' OF 2022**

**SM KIBUNJA, J**

**APRIL 26, 2023**

**[FORMERLY MOMBASA H. C. PETITION NO. 6 OF 2017]**

**IN THE MATTER OF ARTICLES 1, 2(5), 2(6), 35, 37, 118(1) & (3),  
174©, 22 AND 23 OF THE CONSTITUTION OF KENYA, 2010.**

**AND**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER ARTICLE 10, 27, 28, 40, 43(1)  
(B), 47, 50, AND 53 OF THE CONSTITUTION OF KENYA, 2010.**

**AND**

**IN THE MATTER OF THE INTENDED EVICTION OF  
RESIDENTS OF KHADIJA ESTATE IN MOMBASA COUNTY.**

**AND**

**IN THE MATTER OF SECTION 3(A), 6, 87, AND 115 OF  
THE COUNTY GOVERNMENT ACT NO. 17 OF 2012.**

**BETWEEN**

**PETER OBUNGHA WAKOYO & 87 OTHERS ..... PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF MOMBASA ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY, COUNTY GOVERNMENT OF MOMBASA .... 2<sup>ND</sup>  
RESPONDENT**

***([NOTICE OF MOTION DATED THE 27TH AUGUST 2020])***



## RULING

1. The petitioners moved the court through the notice of motion dated the August 27, 2020 seeking for an order of injunction restraining the respondents from interfering, entering upon, demolishing, alienating, disposing, evicting the petitioners or otherwise dealing in any way whatsoever with the suit properties pending the hearing and determination of the intended appeal. The application is premised on the six (6) grounds on its face and supported by the affidavit of Peter Obungha Wakoyo, sworn on the August 27, 2020. It is the petitioners case that as they have lodged a Notice of Appeal dated the August 10, 2020 showing their dissatisfaction with the court's ruling of August 4, 2020, this court is obligated under Article 10 of the Constitution to uphold the principles of natural justice and the rule of law so that the judicial process, particularly the right of appeal is not wasted or defeated by the respondents' evicting them. That the petitioners have applied for certified copies of the proceedings and ruling to enable them file the record of appeal in the Court of Appeal, and this court has a duty to preserve the substratum of the intended appeal by granting the order sought.
2. The application is opposed by the respondents through the eight (8) grounds of opposition dated the September 7, 2023 and the replying affidavit of Jimmy Waliaula, Director of Legal Services of the 1<sup>st</sup> respondent, sworn on the September 16, 2020. It is their case that the application is frivolous, misconceived, and abuse of the process of court; improperly lodged as the court is functus officio; offends Rule 5(2)(b) of the court of Appeal Rules, 2010; has not met the threshold for issuing of injunctive orders and the intended appeal has no arguable issues in view of the Court of Appeal decision in the case of Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] eKLR.
3. The learned counsel for the petitioners and respondents filed their submissions dated the October 1, 2020 and October 19, 2020 respectively, which the court has considered.
4. The record shows that this matter was filed before the High Court Mombasa, and it was only on the May 10, 2022 that an order was made transferring it to this court. The file was then forwarded to the ELC registry vide a letter of the same date and received on the May 11, 2022. Then on the December 13, 2022, the counsel for the petitioners fixed it for mention before this court on the February 28, 2023, when the application was set down for ruling today.
5. The following are the issues for the determinations by the court;
  - a. Whether the petitioners have made a reasonable case for the injunction order to issue pending the hearing and determination of the intended appeal.
  - b. Who pays the costs.
6. The court has carefully considered the grounds on the application, grounds of opposition, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon and come to the following findings;
  - a. The record confirms, and the parties have not disputed that the petition herein was struck out vide the court's ruling delivered on the August 4, 2020 on a preliminary objection raised by the respondents dated the September 24, 2018, on the ground that the matter was res judicata on



account of Mombasa Civil Appeal No 46 of 2017, Legal Advice Centre & 2 others v County Government of Mombasa & 2 others. The court at paragraph 25 held that;

- “25. The upshot is that the preliminary objection herein succeeds and the petition before the court is struck out on account of being *res judicata*. Costs for the respondent.”
- b. That the petitioners have taken the position that though the petition has been struck out, this court should consider ordering a stay of execution so as not to place the Court of Appeal in an awkward position in case their appeal was to be successful after the petitioners have been evicted. The learned counsel cited in their submission the decisions in the cases of *D. J. Lowe & Company Ltd v Banque Indosuez* [2018] eKLR, *Butt v Rent Restriction Tribunal* [1982] KLR 417, in which *Erinford Properties Ltd v Chehire County Council* [1974] 2 ALL ER 448 at 454 was cited.
- c. On their part, the respondents have opined that the application is not based on any provision of the law, is an abuse of the court process and the court having determined the petition on the August 4, 2020 is functus officio, unless if moved for review and or setting aside of the striking out order. The learned counsel relied on the decisions in the cases of *Chembe Katana Changi v Ministry for Lands & Settlement & 4 others* [2014] eKLR, and *Tabir Sheikh Said Investments Ltd v Administrator, TSS Grain Millers Ltd & 2 others* [2019] eKLR, on the proposition that upon the petition being struck out, there is nothing remaining on which to ground or base the injunction order sought. The counsel further submitted that the application offends Rule 5(2)(b) of the *Court of Appeal Rules*, and further that it has not met the threshold required. The other cases cited by counsel are *Patricia Njeri & 3 others v National Museum of Kenya* [2004] eKLR, *Mrao v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125, *Giella v Casman Brown* [1973] EA 358, *Vic Preston Ruchabi v Mary Wangari & 3 others* [2018] eKLR, *Nguruman v Jan Bonde Nilesen & 2 others* CA Civil Appeal No 77 of 2012 and *Kenya Commercial Finance Co Ltd v Afraba Education Society* [2001] Vol 1 EA 86.
- d. That having given due considerations to the two contesting positions, the superior courts decisions cited, and being aware that the petition was struck out on the August 4, 2020 upon the court being satisfied that the issues it raised for determinations are res judicata in view of the Court of Appeal decision in the Legal Advice Centre case [supra], then the court is in agreement with the Respondent’s Counsel’s submissions that there is nothing remaining upon which to ground the application on. The striking out order of August 4, 2020 was not a positive order and did not confer upon any party or parties any benefit(s) that is capable of execution, except costs to the respondents. The order had effectively returned the parties to their position prior to the filing of the petition. In case the petitioners feel that they deserve the order that they seek before the intended appeal is filed, heard and determined, probably the forum to approach is the court where their appeal will lie.
- e. That having come to the decision that the petitioners’ application is without merit, then it follows that they should pay the respondents costs in terms of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya.
7. Flowing from the foregoing, the court finds and orders as follows;
- a. That the petitioners’ notice of motion dated the August 27, 2020 is without merit and is hereby dismissed.
- b. The petitioners to pay the respondents costs.



It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 26<sup>th</sup> DAY OF APRIL 2023.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

IN THE PRESENCE OF:

PETITIONERS : Absent

RESPONDENTS: Absent

COUNSEL : Absent

WLISON – COURT ASSISTANT.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

