



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 296 OF 2019

IN THE MATTER OF: AN APPLICATION FOR CONSERVATORY ORDERS BY ADAM KATANA SHAHENZA AND 300 OTHERS

IN THE MATTER OF: THE INTENDED EVICTIONS OF THE STAREHE AND SHAURI MOYO RESIDENTS

IN THE MATTER OF: THE STAREHE SHAURI MOYO ESTATES STAKEHOLDERS RESOLUTIONS ON RELOCATIONS AND OCCUPATIONS

BETWEEN

ADAM KATANA SHAHENZA (Suing on behalf

of 300 Residents of Starehe and

Shauri Moyo Estates Nairobi).....PETITIONER

VERSUS

THE CABINET SECRETARY, NATIONAL TREASURY....1ST RESPONDENT

THE CABINET SECRETARY,

MINISTRY OF TRANSPORT, INFRASTRUCTURE,

HOUSING AND URBAN DEVELOPMENT.....2ND RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. The Petitioner ADAM KATANA SHAHENZA, (Suing on behalf of 360 Starehe and Shauri Moyo Estates Nairobi, residents, through a petition dated 25th July 2019 seek the following reliefs:-

(a) A declaration that the Petitioners have a constitutional right to be given humble opportunity to defend themselves before matters of evictions and/or relocation from their houses at **Starehe and Shauri Moyo estates**.

(b) A declaration that the 2nd and 3rd Respondents are bound by the stakeholders Resolution and the **Kenya Affordable Housing Programme Development Framework Guidelines of October 2018**.

(c) A declaration that the Respondents' intend evictions will be unlawful and will violate the Constitution of the Republic of Kenya on the rights freedoms of the Petitioners, the stakeholders Resolutions and **Kenya Affordable Housing Programme Development Framework Guidelines of October 2018**.

(d) An order directing the Respondents not to evict the Petitioners and/or demolish their respective houses at **Starehe and Shauri Moyo estates, Nairobi**.

(e) A declaration that the alleged representation of the NGOs Coordination Board by the firm of OTIENO YOGO OJURO AND COMPANY ADVOCATES in the above listed matters is illegal, invalid, null and void in the absence of documentary proof of the existence of legally binding procurement procedures.

(f) An ORDER directing the Respondents cannot and have no jurisdiction to demolish the Petitioners', or evict from their respective houses at **Starehe estate, Nairobi**, as the said houses are on private lands, more specifically **LR NO. 209/12624, LR NO. 209/12625 and LR NO. 209/12626**.

(g) Costs of the petition to be met by the Respondents.

(h) Any such order as the court deems fit and expedient to grant for the end of justice to be met.

2. The 3rd Respondent through a Notice of Preliminary Objection dated 30th July 2019 and filed on the even date raised a preliminary objection to the Petitioner's petition on the following grounds:-

(a) The Petition is ostensibly in the name of 300 unnamed individuals by reason of which the Court cannot adjudicate on the matter lodged by non entities.

(b) No Authority to act has been executed or exhibited by the Petitioners to signify their grant of authority to one ADAM KATANA SHAHENZA to represent them in these proceedings.

(c) The Petition does not specify which Constitutional provisions have been breached, are likely to be breached or threatened with breach, thereby depriving this Honourable Court the jurisdiction to intervene.

(d) The Petition and Motion does not meet the threshold for the grant of Conservatory Orders as prayed.

(e) The deposition sworn by ADAM KATANA SHAHENZA (apart from 6 paragraphs thereof) is not sworn in the first person, in violation of Order 19, Rule 3 and 5 of the Civil Procedure Rules, 2010.

(f) The Petition seeks nebulous pleas neither specific to the unnamed Petitioners nor specific to any respective houses, thereby inviting the Honourable Court to act and/or issue orders in vain.

(g) There is no actionable cause of action as pleaded in paragraph 14 of the Grounds in support of the Notice of Motion dated 25th July 2019.

3. The 1st, 2nd and 4th Respondents filed a Notice of Preliminary Objection dated 2nd August 2019 opposing the Petitioner's petition dated 25th July 2019 on the following grounds:-

(a) Non-adherence to requirements of the National Slum Upgrading and Prevention Policy.

(b) Provision of alternative housing by the Respondents to the Petitioners before vacating the suit estates.

(c) Public participation in the redevelopment of the suit estates.

(d) Constitutionality of the issues raised by the Petitioners.

4. The Petitioners have filed Replying Affidavit to Preliminary Objection by the Petitioner Adam Katana Shahenza, sworn 4th November 2019.

5. The 1st, 2nd and 4th Respondents filed Submissions in support of their Preliminary Objection on 3rd March 2020 and Supplementary Submissions dated 21st May 2020. The 3rd Respondent did not file any submissions.

6. The Petitioner filed submission, in response to Respondents Submission, through submissions dated 11th June 2020. The Petitioner is opposed to the Respondents Preliminary Objections and prays the same be dismissed and that the petition be allowed to proceed to full hearing and determination.

Analysis and determination

7. I have very carefully considered the Preliminary Objections by the Respondents, the Petitioner's reply to the Preliminary Objections; both the written and oral submissions advanced in support and opposition of the Preliminary Objections and from the same, only one following issue arise for determination:-

(a) Whether the petition herein is Res Judicata.

8. In the instant, petition the Petitioners state that they are Civil Servants of the Government of Kenya who reside at Starehe and Shauri Moyo Civil Servants Estate. They aver that they pay rent to the Government of Kenya as the same is deducted from their monthly salaries.

9. It is contended that the 2nd Respondent bears the mandate and responsibility of providing affordable housing in Kenya. That as a result whereof; In 2019, the 2nd Respondent re-embarked on housing re-development project of such premises inclusive of others, to increase the housing capacity and create more modern housing structures in well-planned and neighbourhoods.

10. The 2nd Respondent to be able to commence implementation of the housing project, proceeded to issue a one month's vacation notice dated 26th June 2019, requiring the Petitioners to vacate such premises by latest 30th July 2019. The Petitioners sought more time and a further vacation notice dated 19th July, 2019 was issued requiring the Petitioners to vacate the said premises by 31st August 2019 to pave way for redevelopment.

11. It is stated that the project in question had been initiated in 2014 but was stayed pending hearing and determination of **petition No. 584 of 2014 Justus Mathumbi and 9 Others (Suing on their behalf and on behalf of 327 occupiers/tenants of Starehe and Shauri Moyo Government estates, Nairobi and their 200 school going children) versus the Cabinet Secretary, Ministry of Lands, Housing and Urban Development and 2 Others.**

12. It is averred that the Petitioners herein being aggrieved by the 2nd Respondent's decision herein, they proceeded to file the present petition seeking among others, a declaration that the Respondents intended eviction are unlawful and in violation of their rights and freedoms. They further sought an order directing the Respondents not to evict them and/or demolish the suit premises which they are in occupation of. This was in spite of 2nd Respondent having engaged the Petitioners in an extensive consultation process on the planned re-development of the suit premises since the year 2014.

13. The Respondents in response to both the Application and petition herein, filed a Preliminary Objection dated 2nd August 2019 and a Replying Affidavit sworn on 18th September 2019 and filed on 2nd October 2019.

14. The Preliminary Objection opposes the Application and petition as filed by the Petitioners as being **Res Judicata.**

15. **Section 7 of the Civil Procedure Act** specifically provides:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issues in a former suit between the same parties or between parties under whom they or any of them claim; litigating under the same title; in a court competent to try such subsequent suit or the suit in which such issue has been subsequently been raised, and has been heard and finally decided by such court.”

16. The 1st, 2nd and 4th Respondents case is, that the issues of law and fact pleaded in the petition herein, were heard and determined by this Honourable Court, in the **HC Petition No. 584 of 2014 Justus Mathumbi and 9 Others (Suing on their own behalf and on behalf of 327 occupiers/tenants of Starehe and Shauri Moyo Government estates, Nairobi and their 200 school going children) versus the Cabinet Secretary, Ministry of Lands, Housing and Urban Development and 2 Others (Hereinafter “the Mathumbi petition”).**

17. The 2nd Respondent has annexed copy of the Judgment, subsequent Ruling on an application for stay of execution of Judgment pending appeal in the **Mathumbi's petition** marked “SCHM2” and “CHM3” to the Replying Affidavit of the 2nd Respondent.

18. In the **Mathumbi petition** it was clearly stated that the Petitioners were as follows:

- a) **Civil servants in the employ of the National Government in various ministries;**
- b) **Suing on behalf of themselves, 327 tenants of Starehe and Shauri Moyo Civil Servants Estates, Nairobi and their school going children;**
- c) **Residing at Starehe and Shauri Moyo Civil Servants' Estate, the suit premises;**
- d) **Paying rent to the National Government through their relevant ministries and the same is deducted from their monthly salaries;**
- e) **Were issued with a one month's vacation notice which was extended for three times;**
- f) **Were not engaged in the process of arriving at the decision to have them vacate the suit premises to pave way for redevelopment;**
- g) **Sought to have an order of certiorari issue against the Respondents so as to quash the Notices to vacate and stop the intended vacation from the suit premises on grounds that it violated their rights under the Bill of Rights;**
- h) **Sought an order of permanent injunction restraining the Respondents jointly and severally from demolishing, evicting, relocating or transferring the Petitioners or in any other way interfering with the suit premises.**

19. That after hearing of the **Mathumbi's petition**, **Judgment was entered in favour of the Respondents against the Petitioners on 28th May 2018**. The Petitioners proceeded to file an application to stay execution of Judgment pending appeal, and **on 8th November 2018 the application for stay of execution was dismissed in favour of the Respondents**.

That no appeal has been filed by the Petitioner in that matter.

20. That upon considering all the issues, I have found the only issue for consideration in these Preliminary Objections is whether this petition is **Res Judicata**. The issue is agreed upon by both the Petitioners and the Respondents.

21. The principle of Res Judicata is found in **Section 7 of Civil Procedure Act**. The doctrine of **Res Judicata** has been explained in Plethora of decided cases. In the case of the **Independent Electoral and Boundaries Commission v Maina Kiai and 5 Others Nairobi Court of Appeal No. 105 of (2017) eKLR** - the Court of Appeal held that;

“Thus, for the bar of Res Judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.**
- b) That former suit was between the same parties or parties under whom they or any of them claim.**
- c) Those parties were litigating under the same title.**
- d) The issue was heard and finally determined in the former suit.**
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”**

The court explained the role of the doctrine as follows;

“The rule of doctrine of Res Judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the specter of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and for a, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of Res Judicata thus rest in the public interest for swift, sure and certain justice.”

22. Further in **Court of Appeal Civil Appeal No. 42 of 2014 John Florence Maritima Services Limited and Another V Cabinet Secretary for Transport and Infrastructure and 3 Others (2015)**, the Court of Appeal held as follows in relation to the doctrine of Res Judicata:-

“The doctrine of Res Judicata has two main dimensions cause of action Res Judicata and issue Res Judicata. Res Judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action Res Judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue Res Judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.”

23. In the Respondents petition it is clearly pleaded as follows:-

- a. Are civil servants in the employ of the National Government in various ministries;**
- b. Reside at Starehe and Shauri Moyo Civil Servants' Estate Nairobi, the suit premises;**
- c. The Petitioner is suing on behalf of himself and 300 residents of Starehe and Shauri Moyo Civil Servants' Estate, Nairobi and their school going children;**
- d. Pay rent to the National Government through their relevant ministries and the same is deducted from their monthly salaries;**
- e. Were issued with a one month's vacation notice which was extended for another month;**
- f. Were not engaged in the process of arriving at the decision to have them vacate the suit premises to pay way for redevelopment;**

g. Seek to stop the intended vacation from the suit premises thereby once again halting the redevelopment project on the suit premises.

24. A proper perusal of the above issues turns out that the issues are exact same issues, that were raised, canvassed, or argued and determined in the **Mathumbi petition**. That after Judgment was entered in favour of the Respondents, the Petitioners continued to occupy the suit premises. The Respondents choose not to forcefully evict the Petitioners but engage them in a humane manner by extending the time within which to vacate the suit premise. That upon the Respondents re-embarking on the project of redeveloping the suit premises; the Petitioners have, come back to this court seeking same reliefs, that the Honourable court denied them.

25. It is clear from the pleadings in the instant petition and the **Mathumbi petition**, the Petitioners herein are litigating over the same subject matter, involving the same issues. I find that the suit or issues were directly and substantially in issue in the former suit; the **Mathumbi petition**. The former suit was between same parties or parties under whom they or any of them claim; litigating under the same title. The issues therein were heard and finally determined in the former suit; by a competent court in which the issue raised was heard and determined.

26. The present petition was filed contrary to **section 7 of the Civil Procedure Act**, which expressly bars courts to try any suit or issue in which the matter directly or substantially in issue have been directly and substantially been in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

27. In the instant petition it is noted that the 1st and 3rd Respondents were not parties in the **Mathumbi petition**. However, this is not a bar to application of the **doctrine of Res Judicata**; where it is clear that the former suit was between the same parties or between parties under whom they or any of them claim, litigate under the same title.

28. In the **Judicial Review Application No. 433 of 2012 Republic v City Council of Nairobi and 2 Others (2014) eKLR**, the court expressed itself as follows:-

“However, I must say here that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of Res Judicata inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else. Under explanation 6 to section 7 of the Civil Procedure Act, where persons litigate bona fide in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.”

29. I find that it is proper for any party in a suit to raise a preliminary point of Law at any time. The doctrine of Res Judicata being a fundamental principle of law that relates to the jurisdiction of the court, can be raised as a valid defence under **Rule 3 (8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) practice and Public Rules 2013** to a Constitutional claim even on the basis of the court’s inherent power to prevent abuse of court process. I am certain that there is no principle of law that bars the application of the principle of the doctrine of Res Judicata in Constitutional petitions; as the principle of Res Judicata specifically is meant to meet the ends of justice. In the words of the **Court of Appeal in the case of Civil Appeal No. 243 of 2001 Ukay Estate Limited and another V Shah Hirji Manek Ltd and 2 Others (2006) eKLR** Waki JA, (as he then was) stated as follows:

“The doctrine is not merely a technical one applicable only on records. It has a solid base from considerations of high public policy in order to achieve the twin goals of finality to litigation and to prevent harassment of individuals twice over with the same account of litigation. Put another way, there must be an end to litigation and no man shall be vexed twice over the same cause.”

30. It is further noted that in a more recent decision in the case of **The Independent Electoral and Boundaries Commission v Maina Kiai and 5 Others, Nairobi Court of Appeal Civil Appeal No. 105 of 2017** (supra) a three judge bench explained that roles of the Res Judicata principle as follows;

“The Rule of doctrine of Res Judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and for a, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of Res Judicata thus rest in the public interest for swift, sure and certain justice.”

31. From **Mathumbi petition**, it is clear that the orders sought therein, were not only denied but the court went on and held that the issues raised were not constitutional and did not fall anywhere under the violation of rights since by their own admission in the pleadings; the relationship between the Petitioners and the Respondents was an employee – employer relationship giving rise to a service tenancy.

32. It is further noted that the Petitioners herein raised the following issues which had also been raised in the **Mathumbi petition** and which were determined in the former suit thus:-

(a) Non-adherence to the requirements of the National Slum Upgrading and Prevention Policy.

(b) Provision of alternative housing by the Respondents to the Petitioners before vacating the suit estates.

(c) Public participation in the redevelopment of the suit estates.

(d) Constitutionality of the issues raised by the Petitioners.

33. The **Mathumbi petition High Court petition 584 of 2014** annexed copy of the Judgment under paragraphs 53, 55, 57 and 59 of the Judgment highlights pleas and prayers sought in the said petition. Looking at the same and comparing the same with the instant petition, the pleas and prayers are all the same. The prayers are no different even where the language has been twisted, the end result of the prayers are the same. The Judgment by Hon. Justice John Mativo in **Mathumbi petition** dealt with all issues raised in the present petition on 8.11.2018.

34. Having considered the 1st, 2nd, 3rd and 4th Respondents' Preliminary Objections on a point of doctrine of **Res Judicata**, I am satisfied that all factors to justify a finding of **Res Judicata**, have all been met. I find that it was not open for the Petitioners herein to have filed the present petition on the very same grounds.

35. I do not agree with the Petitioners that their case is properly before this court and should proceed as pleaded; nor do I agree the issues raised herein for determination have not been before any court even in the **Mathumbi petition**. I find all issues raised in this instant petition were all raised in the **Mathumbi petition**, heard and determined in the **Mathumbi petition**.

36. I conclude by stating that the Preliminary Objections succeed. The petition is Res Judicata. The petition is struck out and dismissed. I have considered the nature of the petition and on the issue of the costs, I find that it would not be in the interest of justice to award costs in view of the facts of this petition as it is a public interest matter but direct each party do bear its own costs.

Dated, Signed and Delivered on 30th day of July 2020

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J. A. MAKAU

JUDGE