



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 6 OF 2017

IN THE MATTER OF: ARTICLES 1, 2 (5), 35, 37, 118

(1), 3, 174 (c) & 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.....PETITIONERS

VERSUS

1. THE COUNTY GOVERNMENT OF MOMBASA

2. COUNTY SECRETARY, COUNTY GOVERNMENT OF

MOMBASA.....RESPONDENTS

1. HON. ALI HASSAN JOHO, GOVERNOR MOMBASA COUNTY

2. MR. EVANS ACHOKI, COUNTY COMMISSIONER

MOMBASA COUNTY.....AFFECTED PARTIES

RULING ON PRELIMINARY OBJECTION DATED 24/09/2018

1. The Preliminary Objection dated 24/9/2018 aims to terminate the petition herein on the main point of law that this instant petition is res

judicata on account of Mombasa Civil Appeal No. 46 of 2017 – Legal Advice Centre & 2 others vs. County Government of Mombasa & 2 others.

2. Parties filed submissions to the Preliminary Objection. Petitioners submissions were filed on 29/1/2020 while the Respondents submissions were filed on 5/6/2020.

The Background

3. The petition herein was dated and filed on 02/02/2017 praying for the following orders:

- (a) A declaration that the Petitioners' rights under all the aforementioned provisions of the law have been violated.
- (b) A declaration that the Petitioners are entitled to quiet and peaceful occupation of the suit property; further, a declaration to the effect that the Respondents have no right to evict the Petitioners therefrom without a proper understanding and resolving the issues raised by the Petitioners with respect to the aforesated project.
- (c) A conservatory order restraining the Respondents from interfering, entering upon, demolishing, alienating, disposing, evicting the Petitioners or otherwise dealing in any way whatsoever with the suit property until an amicable solution is reached on resettlement of the Petitioners as well.
- (d) A compelling order directing the Respondents to recall all the forcefully and unlawfully evicted Petitioners.
- (e) A compelling order directing the Respondents to accept rent payments for the suit property and the same to be paid vide a court account.
- (f) Damages for (a) above.
- (g) Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
- (h) Costs of this suit.

4. On the face of it, it would appear that the petition is all about alleged wrongful eviction of the Petitioners on issues covering rents. However, on a deeper look - and this is probably what has caused the current Preliminary Objection – the petition appears hinged on Petition No. 39 of 2016 involving different Petitioners but the same Respondent. This petition became the Mombasa Civil Appeal No. 46 of 2017 on which the Preliminary Objection is based (hereinafter called the Civil Appeal).

5. To understand the issue better it is important to go briefly into the said Civil Appeal, which started in the High Court as Petition No. 39 of 2016. By their petition dated 5/8/2016 and later amended on the 11/10/2016, the Petitioners sought a total of 11 orders against the Respondent basically faulting a project proposed by the Respondent and dubbed “*MOMBASA URBAN RENEWAL & REDEVELOPMENT OF OLD ESTATES*” as being in violation of the Right to housing, in violation of the Environmental Management and Coordination Act, the public private partnerships Act, the County Governments Act, the privatization Act and the Planning Act, and therefore null and void for being in contravention of Articles 10, 174, (a), (c) (d) one 175(a) of the constitution for which reasons several declarations were sought together with permanent injunction to restrain the implementation of the project. The Petitioners equally prayed for costs of the petition and a prayer that the court grants to them “*any further relief or orders deemed just and fit*”. In the words of the petitioners this court is asked to grant to them orders crafted as: -

- a) A declaration that the County Government of Mombasa Urban Renewal & Redevelopment of Old Estates within Mombasa County through joint venture partnership is a violation to the Right to Public Housing.**
- b) A Declaration that the County Government of Mombasa Urban Renewal & Redevelopment of Old Estates within Mombasa county through joint venture partnership violates the Environmental Management & Coordination Act.**
- c) A declaration that the County government of Mombasa Urban Renewal & Redevelopment of Old Estates within Mombasa County through joint venture partnership violates the Public Private Partnerships Act No.15 of 2013**
- d) A declaration that the County government of Mombasa Urban Renewal & Redevelopment of Old Estates within Mombasa County through joint venture partnership the Privatization Act No. 2 of 2005**
- e) A declaration that the County Government of Mombasa Urban Renewal & Redevelopment of Old Estates within Mombasa County through joint venture partnership violates the County Government Act 2012**
- f) A declaration that the County Government of Mombasa urban Renewal through joint venture partnership violates the Public Procurement & Disposal Act.**
- g) A declaration that he County government of Mombasa Urban Renewal through joint venture partnership violates the Physical Planning Act**
- h) A declaration that the County Government of Mombasa Urban Renewal and Redevelopment of Old Estates Programme is**

contrary to Articles 10, 174(a), (c), (d) and 175(a) of the Constitution of Kenya, 2010 for lack of public participation and therefore null and void

i) An order of permanent injunction restraining the Respondents from implementing the Mombasa urban Renewal & Redevelopment of Old Estates within Mombasa County through joint venture partnership.

j) Costs of this Petition

k) Any further Relief or Orders that this Honourable court shall deem just and fit to grant.

6. The matter was heard and determined. Among the issues raised and determined, were the following:

· Was the “Mombasa County Urban Renewal and Redevelopment of Old Estates Programme” conceptualized and formulated with public participation?

· Was the Petitioners’ right to access information under Article 36 infringed?

· Does the “Mombasa County Urban Renewal and Redevelopment of Old Estates Programme” threaten the Petitioners’ rights to adequate housing under Article 43 (1) (b) of the constitution?

· Whether the Mombasa County Urban Renewal and Redevelopment of Old Estates is in breach of the various statutes in the petition.

7. In its Judgment the High Court dismissed the petition as follows:

“72. Save for the orders I have made that the documents be availed and that the law be complied with at every stage of implementing the project, all the prayers are declined and dismissed.”

8. In effect the court confirmed that the Mombasa County Urban Renewal and Redevelopment of Old Estates Programme was good and should proceed with observance of the law. This position was confirmed by the Court of Appeal in the aforesaid Civil Appeal No. 46 of 2017 as follows:

“47. We believe that the 1st respondent facilitated the public participation of the relevant stakeholders being the tenants in the suit estates through their representative, the 1st interested party. Besides, the 1st respondent also facilitated reasonable opportunity to other residents of Mombasa County, the general public at large and civil society to participate by holding press conferences, briefing members of public and establishing a department to exclusively deal with concerns regarding the project. In the end, we find that the appellants’ allegation that the respondents did not facilitate adequate public participation goes against the weight of the evidence summed up hereinabove. Confronted with this state of affairs and the submission by Mr. Amoko that indeed public participation was still ongoing and that the 1st respondent was continuously appraising the tenants and other interested parties on the progression of the project, Mr. Oluga conceded that their disenchantment was not with the current position but with the fact that his clients were not involved when the idea to come up with the project was actually conceptualised.

49. Moving on to the perceived violation of the right to housing, we again concur with the learned Judge that the appellants had failed to demonstrate how this right had been or was threatened with violation. There is no evidence to support the appellants’ averments that the 1st respondent would only retain 20% of the proposed new units and leave the remaining 80% in the hands of private individuals. We have perused the affidavit sworn on behalf of the 3rd respondent and cannot find any such arrangement. As for the reasonableness of the proposed purchase price of the units, we take note that the appellants have not demonstrated that the alleged price is exorbitant, unreasonable or unrealistic in light of the prevailing market forces. It is trite that it is not enough for a party to mention perceived violations of the Constitution but such a party must go a step further and show how the alleged offending party had violated the same.

51. Last but not least, we cannot help but note that it was deposed on behalf of the 3rd respondent that none of the private partners who would be brought on board would be exempted from complying with the existing regulatory regime. We also note that the project would be undertaken in stages and at respective stages relevant permission/authority or compliance would be required under the statutory regimes mentioned by the appellants. As at the time, the appellants filed the petition in the High Court some if not all the stages requiring the consent/authority and/or compliance under the said legislations were yet to commence. Consequently, to that extent we agree with the respondents that this complaint was premature. In any event, where a violation of any of the provisions of the legislations in question occurs, there are elaborate mechanisms under the respective legislations to deal with such violations. Hence, those mechanisms ought to be exhausted first before approaching the High Court. We draw guidance from this Court’s decision in Bethwell Allan Omondi Okal vs. Telkom (K) Ltd (Founder) & 9 others [2017] eKLR:

“The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See International Centre for Policy and Conflict & 4 others vs The Hon. Uhuru Kenyatta and others, Petition No. 552 of 2012, and Speaker of National Assembly vs Njenga Karume [2008] 1KLR 425.” [Emphasis added]

52. The upshot of the foregoing is that we find no merit in the appeal which is hereby dismissed. Being a public interest matter we make no orders as to costs.”

9. Justice Ann Omollo in ELC Suit No. 86 of 2017 Mary Karimi Muraghi vs. The County government of Mombasa, which is similar with this petition, observed as follows:

“In her submissions, the defendant at page 5 stated that the Court of Appeal in Civil Application No. 46 of 2017 exhaustively dealt with the issues raised in the present claim by giving the respondent liberty to proceed with implementation of the housing project. That the consequence of that decision divested this court of jurisdiction to handle the present claim. The applicant must have been aware of the matter in dispute in Civil Appeal No. 46 of 2017 and probably the effect of that finding. Since it is submitted that the finding affects other people which includes the applicant herein this court cannot try an issue that is already determined by a court of competent jurisdiction and which court is higher than this court.”

10. The learned Judge then dismissed the application but not on *res judicata*, but upon provisions of Sections 6 and 7 of the Civil Procedure Act.

The Petition herein

11. In the light of the foregoing, what is the Petitioners’ case in this matter.

12. The Petitioners state in their petition that they are all adult persons residing and working for gain within Mombasa County and are residents of Khadija Estate within Mombasa County. They further state that the petition relates to the proposed “**Mombasa Urban Renewal and Redevelopment of Old Estates**” project which is now at its initial stages. The aforesaid project is set to interfere with the peaceful and quiet occupation right of the residents of Khadija estate hereinafter referred to as the suit property. Further, there has been recent issuance of eviction notices issued to the Petitioners followed by forceful and unlawful eviction of some of the tenants of Khadija Estate in contravention of the provisions of the constitution of Kenya 2010 as well as other statutes concerning such projects. The said project is being implemented contrary to the provisions of the Judgment delivered on Constitutional Petition No. 39 of 2016.

13. The Petitioners aver that for a long time they have enjoyed quiet and peaceful occupation of the suit property, some even for decades. However, this has since changed over the past year with the alleged renewal and development of old estates. The Respondents through their Agents invited the Petitioners for a meeting where they tabled a proposal for the said renewal of development of old estates; Khadija estate being among them. However, upon deliberation the Petitioners requested that the County Government first addresses their concerns of welfare as well as involvement in the project dubbed Mombasa urban renewal and redevelopment of old estates. The Respondents failed to address the Petitioners requests and concerns. Instead, the 1st and 2nd Respondents have since been verbally threatening the Petitioners and have even issued eviction notices to Petitioners citing extraneous circumstances, in violation of the Petitioners’ constitutional rights. The Petitioners then filed a Constitutional Petition No. 39 of 2016 aforesaid in the High Court at Mombasa where according to the Petitioners the court via Judgment rendered on 23/12/2016 categorically stated that the eviction of tenants from the suit property should not be done without full compliance of the law and guidelines regarding such projects. The Petitioners aver that the Respondents have since ignored the aforesaid Judgment and have continued to forcefully evict tenants from the suit property. The Petitioners state that the implementation of the purported upgrade project dubbed “**Mombasa Urban Renewal and Redevelopment of Old Estates**” project is being done in contravention of constitutional principles of public participation. Moreover, the Respondents have refused to receive rent payment from the Petitioners for a lengthy period of time. Further, that the Respondents have threatened violence against Petitioners, and even branded the Petitioners as criminals without cause whatsoever. The Petitioners state that the said forceful evictions are as a result of grave acts of illegalities perpetrated by the Respondents’ and amount to a violation of the Petitioners’ fundamental Rights enshrined in the Constitution of Kenya 2010, as set out below:

- (a) Purporting to commence a project that in all manner and character directly affects the Petitioners’ rights without having regard of the actual existence of the Petitioners who have at all material times been in occupation of the suit property.
- (b) Commencing and implementing the project dubbed “**Mombasa Urban Renewal and Re-development of Old Estates**” project without incorporating the principles of Public participation and inclusivity. The Respondents have out-rightly refused to furnish the Petitioners with documents relating to the project and have failed to give solutions to the Petitioners’ grievances with respect to the aforesaid violations.
- (c) Refusing to receive any rent payments from the Petitioners for an inordinate time frame.
- (d) Issuing eviction notices based on unfounded claims and without any accord of a fair hearing.
- (e) Allocating houses of some of the evicted Petitioners without any consideration whatsoever and in blatant attempt of court orders.
- (f) Interfering with the Petitioners’ rights to enjoy peaceful and quiet possession of the suit property.
- (g) Failing to adhere to the principle of Fair Administrative action in that the county government has since evicted some of the Petitioners forcefully and without any consideration of facts whatsoever.

Particulars of Breach of Fundamental Rights

14. The Petitioners cited Articles 40, 35, 37, 174, 1, 10, 27, 28, 43 and 53 and virtually all the Articles which were cited in Petition No. 39 of 2016 to have been breached.

The Preliminary Objection

15. The doctrine of *res judicata* is founded on section 7 of the Civil Procedure Act, Chapter 21 Laws of Kenya, which provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially 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.”

16. The purpose of the doctrine is to bring an end to litigation and ensure that litigants do not abuse the Court process by bringing suits which evoke issues that have already been determined by the Court in other suits. (See **John Florence Maritime Services Limited & another vs. Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**).

17. In **Republic vs. Public Procurement Administrative Review Board & 3 others Ex parte Tecno Relief Services Limited [2019] eKLR at Page 65** the High Court stated:

“When a plea of *res judicata* is raised, the doctrine of estoppel becomes applicable, as was also noted by the 1st Respondent in its decision. This effect is explained in Halsbury’s Laws of England, Fourth Edition (2001 Reissue) Volume 16(2) at paragraph 976:

“A prior judgment may give rise to cause of action estoppel or issue estoppel. In order to prove cause of action estoppel it is necessary to show that the subject matter in dispute is the same, namely that everything that is in controversy in the second suit as the foundation of the claim for relief was also in controversy or open to controversy in the first suit; while in order to prove issue estoppel it is necessary to show that an issue which arose in the previous proceedings has been raised in the current proceedings.

The cause of action or the issue must have come in question before a court of competent jurisdiction; the result must have been conclusive (or final) so as to bind every other court; and the parties to the judicial decision or their privies must have been the same persons as the parties to the proceedings in which the estoppel is raised or their privies.”

18. The rationale of this doctrine has further been espoused in the case of **Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 Others (2017) eKLR** where the Court of Appeal remarked as follows:

“The rule or 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 common-sensical 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 fora, to obtain at last, outcomes favorable 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 and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

19. The Respondent avers that the instant Petition No. 6 of 2017 is akin to **Mombasa High Court Petition No. 39 of 2016 Legal Advice Centre & 3 others vs. County Government of Mombasa & 4 others [2016] eKLR** a Petition which was lodged on the 5/8/2016 wherein the Petitioners herein through a Non-Governmental Organisation (NGO), *Kituo Cha Sheria*, sought to halt a project being undertaken by the Respondents - County Government of Mombasa being the 1st Respondent – from undertaking the project dubbed ‘*Mombasa Urban Renewal & Redevelopment of Old Estates*’ on the grounds that the same was in violation of right to housing, in violation of the Environmental Management and Coordination Act, the Public Private Partnership Act, the County Governments Act, the Privatization Act and the Physical Planning Act and sought that the same be declared null and void for the reasons that the project was in contravention of Articles 10, 174 (a) (c) (d) and 175 9 (a) of the Constitution of Kenya, 2010 wherein the Petitioners particularly sought a permanent injunction against the implementation of the said project.

20. Notably, the Court delivered its Judgment on 23/12/2016 wherein all the Petitioners’ prayers were dismissed since no proof of violation of the aforementioned statutes was adduced. Shortly thereafter, the Petitioners lodged an Appeal in the Court of Appeal vide **Civil Appeal No. 46 of 2017 Legal Advice Centre & 3 others vs. County Government of Mombasa & 4 others** against the aforesaid Judgment of the High Court. The Court of Appeal vide a Judgment delivered on 5/7/2018 found no merit in the Appeal thereby dismissing it. Additionally, it was the Court’s finding under paragraph 49 of the said Judgment that the Appellants had failed to demonstrate how their right to housing had been violated. The Court gave a go ahead for the said project to be actualized on condition the existing regulatory regime was complied with. See paragraph 8 of this Ruling on the Court of Appeal’s decision.

21. The elements of *res judicata* which have been held to be conjunctive rather than disjunctive, are as follows:

- 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.

22. The primary issue in the instant Petition is the intended eviction of the Petitioners from Kisauni/Khadija Estate. The Petitioners have alleged that such eviction violates National Values and Principles of Governance, right to equal protection and benefit from the law, right human dignity, right to property, right to accessible and adequate housing, right to fair administrative action and the right to fair hearing. Particularly, paragraph 4 of the instant Petition, Petition No. 6 of 2017, expressly states that the Petition relates to the proposed *Mombasa Urban Renewal & Redevelopment of Old Estates project*. Similarly, in the Petition No. 39 of 2016, the Petitioners alleged contravention of the national values and principles, violation of their right to human dignity and right to accessible and adequate housing. It is notable that the rights alleged as violated and the prayers sought therein are identical or similar to the ones sought in the instant Petition. In Petition No. 39 of 2016, the Petitioners prayed that this Court do make declarations that the said project contravenes the Environmental Management and Coordination Act, the Public Private Partnership Act, the County Governments Act, the Privatization Act, Public Procurement and Disposal Act and the Physical Planning Act. In addressing the foregoing, the Court directed the Petitioners to pursue relief under the specialized institutions created under those statutes which have clear mandates and are best equipped to ensure that the provisions of the Acts are followed and not breached or violated. It is therefore clear that the issue was substantially addressed by the Court.

23. Further, the parties have been litigating under a similar title. In Petition No. 39 of 2016, the same Petitioners had sued through *Kituo cha Sheria* which organization handles public interest litigation cases and acts as a watchdog over demonstrated administrative action excesses. The same parties litigated at the Court of Appeal. The only difference in this case is that the Petitioners now retained an Advocate but they seek the same redress. In *Lal Chand vs. Radha Kishan, AIR 1977 SC 789*, it was stated:

“The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.”

24. It is clear that the Petitioners have couched their pleadings in the different forums but seeking similar remedies. In *Edwin Thuo vs. Attorney General & Another Nairobi Petition No.212 of 2012 (Unreported)*, the court stated:

“The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff is in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi vs National Bank of Kenya Limited and Others [2001] EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu vs Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated; ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata”

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.

Dated, Signed and Delivered at Mombasa this 4th day of August, 2020.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the absence of parties.

No appearance for Petitioners

No appearance for Respondents

Mr. Kaunda Court Assistant