



**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**

**The Application**

1. The Notice of Motion before the Court is dated 17<sup>th</sup> April, 2019. It prays for the following orders:

(i) That this matter be certified urgent.

(ii) That pending the hearing and determination of this application inter partes, the Respondents, the County Government of Mombasa, its servants, employees or assigns be restrained through a conservatory order from interfering in any way with the Applicant's quiet and peaceful occupation of House No. 84/1 in Kisauni-Khadija Estate occupied by Mary Karimi Muraghi as there already exists a conservatory order issued herein as regards to the 88 other Petitioners who occupy similar houses in the said Estate.

(iii) That Mary Karimi Muraghi be joined in this petition as Petitioner No. 89.

(iv) That the cost of this application be provided for.

2. The application is premised on the grounds set out therein and is supported by affidavit of Mary Karimi Muraghi sworn on 17<sup>th</sup> April, 2019.

3. The Applicant's case is that she filed Mombasa Environment and Land Court Case No. 86 of 2017 – Mary Karimi Muraghi vs. The County Government of Mombasa over the House No. 84/1 in Kisauni-Khadija Estate owned by the Respondent which house the Applicant states she has occupied as a tenant for over 35 years, and has paid rent upto May, 2019. The said ELC suit was dismissed on 15<sup>th</sup> March, 2019 and that on 9<sup>th</sup> April, 2019 some officers from the Respondent visited her house and demand that she vacates on account of losing the ELC suit, else she would be evicted. Considering that she had paid rent upto May, 2019, the Applicant found the Defendant's demand unreasonable; that the said eviction would render her family and herself completely homeless which would translate to irreparable loss as she has nowhere to house her family. That in the circumstances she prays for an order to be enjoined in this petition as Petitioner No. 89 together with the other 88 Petitioners as she has the right to defend her tenancy over House No. 84/1 in Kisauni-Khadija Estate for which she had already paid rent up to the end of May, 2019. In the petition herein there exists conservatory orders restraining the Respondent from interfering with the Petitioners' quiet and peaceful occupation of their houses covered in this petition and the Applicant states that she should be accorded the protection of this suit by being granted an appropriate conservatory order restraining the Respondent from interfering with the quiet and peaceful occupation of House No. 84/1 in Kisauni-Khadija Estate. The Applicant states that it would be an affront to elementary justice if the Respondent is allowed to evict her now while the Respondent is still holding her money.

### **The Response**

4. The application is opposed by the Respondent through a Replying Affidavit sworn by Jimmy Waliaula filed on 20<sup>th</sup> May, 2019. The Respondent's case is that the Applicant's application is hinged on the allegation that there is a conservatory order that restrains the Respondent from evicting the Applicant from House No. 84/1 Kisauni – Khadija Estate alongside 88 other house owners to construct modern housing units, which cause now the Applicant seeks to be enjoined.

5. The Respondent states that the Applicant filed Mombasa ELC Case No. 36 of 2017 – Mary Karimi Muraghi vs. County Government of Mombasa seeking *inter-a-lia* injunctive orders restraining the Respondent from interfering, entering upon, demolishing, alienating, evicting, selling and/or otherwise disposing off the suit property pending the hearing and determination of that application and compelling the Respondent to accept rent from the Applicant. The said application was struck out by the Court. An order to that effect was attached as exhibit "JW-2a".

6. The Respondent states that the issues raised in this cause were conclusively canvassed in Mombasa Civil Appeal No. 46 of 2017 Legal Advice Centre & 2 others vs. County Government of Mombasa & 2 others which Judgment gave the Respondent green light to proceed with implementation of the housing project which involves demolishing the Applicant's house to pave way for re-development of modern housing units. As a result, the Court noted that it was divested of jurisdiction to make any determination regarding the Plaintiff's claim and it is at this instance that the Applicant jumped ship to the instant application in Petition No. 6 of 2017 seeking the same remedies in a different cause and Court altogether. The Respondent avers that a careful examination of the same would show that this is a forum hopping which is an abuse of the Court process since the Court has already pronounced itself on the issues raised and seeking to be enjoined to this petition will only delay the inevitable; that is to pave way for the new housing project. The Respondent avers that it is a well-established principle of law that litigation must come to an end and the prayer to be enjoined in this petition defeats and subverts that principle.

7. Further the Respondent states that the Applicant has not demonstrated sufficiently that she faces imminent danger of being evicted noting that she is an illegal occupant who is using the law as a scape goat. The Applicant is guilty of material non-disclosure since she has failed to inform the Court the sole reason for eviction being the upgrading of the county estates which are in a deplorable condition and to raise the living standards of the residents and occupants.

### **Submissions and Determination**

8. Parties filed submissions which I have considered. This Court is not called upon to determine the issue of tenancy between the Applicant and the Respondent. That is an issue for the determination by the ELC.

9. From the Replying Affidavit of Mr. Jimmy Waliaula it is apparent that the Applicant had filed the ELC Case No. 86 of 2017 seeking orders which were dismissed by the said Court on 15<sup>th</sup> March, 2019. Subsequently the Applicant decided to join this petition because the Petitioners herein appear to have the same grievances the Applicant has with the Respondent. The Petitioners herein had secured injunction against the Respondent stopping the Respondent from in any way interfering with the Petitioners' quiet possession of the suit premises until the petition is heard and determined. The Applicant herein, having failed in his pursuit of the said ELC, has decided to join this petition in which she will be seeking the same orders which she was denied in the aforesaid ELC. That, in my view, is being dishonest. Although the Applicant lives in the same location as the Petitioners herein, the tenancy agreement between her and the Respondent is purely individual and separate and must be construed on its own terms. If the Applicant had not filed a suit in the ELC, then she would persuade this Court to grant her the leave to join this petition. In this case, a competent Court has already dismissed her suit which had *inter-a-lia* the following prayers:

(c) That the Honourable Court do grant the Plaintiff a temporary injunction restraining the defendant from interfering, entering upon, demolishing, alienating, evicting, selling and/or otherwise disposing off the suit property pending the hearing and determination of the application;

(d) That the defendant be compelled to accept payment of rent from the Plaintiff herein;

(e) That in the alternative to prayer (d) above the Plaintiff be allowed to pay the rents into Court.

10. That suit having been dismissed by Court of competent jurisdiction, cannot now be reinstated through the back door in this petition. It is trite that litigation must come to an end. If the Applicant was aggrieved with the decision in the aforesaid ELC matter, there was the option of appeal. It is the finding hereof that the current application by the Applicant is a blatant abuse of the process of this Court. Her application must fail for that reason and is hereby dismissed with costs to the Respondent.

**Dated, Signed and Delivered at Mombasa this 23<sup>rd</sup> day of October,**

**2019.**

**E. K. OGOLA**

**JUDGE**

In the presence of:

Ms. Kiptum holding brief Gikandi for Petitioners

No Appearance for Respondents

Mr. Kaunda Court Assistant