



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO. 615 OF 2014**

**BETWEEN**

1. PAUL OMONDI OTIENDE
2. ERICK ROGENDU
3. YUNES NYABOKE
4. EDWARD RORI
5. OTAO NYAKUNDI
6. JOSEPH MENYA
7. RUTH MUENI
8. PETER GECHIKO
9. GEORGE ODHIAMBO
10. STELA KEMUNTO
11. GEORGE MORARA OBARE.....PETITIONERS

AND

- THE HONOURABLE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT
- THE KENYA RAILWAYS CORPORATION.....2<sup>ND</sup> RESPONDENT
- CABINET SECRETARY, MINISTRY OF LANDS,  
HOUSING AND URBAN DEVELOPMENT.....3<sup>RD</sup> RESPONDENT
- H-YOUNG & CO (EA) LIMITED.....4<sup>TH</sup> RESPONDENT

**JUDGMENT**

## INTRODUCTION

1. Does the State, including any organ of the State, and any other person have a duty to ensure the dignity of both its citizens and that of the Court is upheld when taking steps to ensure compliance with court orders? That is the tight legal question raised by the instant petition. Behind the legal issue is however the human question of residential security.

2. The Petitioners, by their Petition, seek declaratory orders that their right to dignity as well as freedom and security of the person, right to housing and right to fair administrative action have been violated by the evictions undertaken by the 2<sup>nd</sup> and 4<sup>th</sup> Respondents on 8<sup>th</sup> and 9<sup>th</sup> September 2014.

## MATERIAL BACKGROUND

3. The background to the Petition is relatively clear.

4. The Petitioners are all residents of Kibera, an informal settlement on the suburbs of Nairobi City. Together with many others, the Petitioners have lived in Kibera together with others for decades.

5. In the year 2004, the World Bank embarked on an ambitious project of upgrading the informal settlement. Many needed to be re-settled, the Petitioners included. The inhabitants to be resettled were identified. The project did not however take off until more than ten years later in 2013. It meant that the inhabitants to be resettled had changed. Some had moved in and others had moved out. When the Respondents sought to evict the inhabitants to help make way for the World Bank funded housing project, the Petitioners together with others moved to court and on 30 July 2014 obtained, at an interlocutory stage, an order for the maintenance of the status quo. The order was made in **Kepha Omondi Onjuro & Others vs. Kenya Railways Corporation & Others HCCP No. 239 of 2014**.

6. It is a common cause that the final judgment by the High Court in **Kepha Omondi Onjuro & Others vs. Kenya Railways Corporation & Others (supra)**, was delivered on 4 February 2015. The Petition herein had by then been filed on 15 December 2015.

## THE PETITIONERS' CASE

7. The Petitioners' case is simple and straight forward.

8. The Petitioners contend that there was a long term project funded by the World Bank to upgrade the housing units in the informal settlement known as Kibera where the Petitioners resided and earned a living. The project was to be implemented by the 2<sup>nd</sup> Respondent. That the commencement of the project delayed. That the Petitioners were some of the identified project affected persons (PAPs). The Petitioners were threatened with eviction from their settlements on or about 5 May 2014 and some two weeks later the petitioners alongside others filed a petition in this court challenging their eviction. On 22 May 2014 the court then issued an order for maintenance of status quo. The petitioners contend that the Respondents disobeyed the order directing the maintenance of status quo and in the process also violated the Constitution. The disobedience is stated to have taken place on 8-9 September 2014, when the Petitioners were evicted without any opportunity to salvage their goods and items and the 4<sup>th</sup> Respondent proceeded to take possession of the site while the order for status quo was actually still pending.

9. The Petitioners contend that their eviction was contrary to established law as the evictions were not structured besides being in violation and breach of a court order. The Petitioners additionally contend that the evictions effectively violated the Petitioners' right to dignity, security and right to accessible and adequate housing. The Petitioners also contend that in so far as the evictions were carried out without any notice, then the Petitioners' right to fair administrative action was violated.

10. For the violations the Petitioners seek declaratory as well as compensatory relief.

## THE RESPONDENTS' CASE

### ***1<sup>st</sup> & 3<sup>rd</sup> Respondents***

11. The 1<sup>st</sup> and 3<sup>rd</sup> Respondent whilst factually relying on the Replying affidavit filed on behalf of the 2<sup>nd</sup> Respondent contended that the Petition had not met the competency threshold. In this respect, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents contend that the Petition has not been drawn with the requisite precision and particularity and ought to be struck out.

12. Additionally, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents also contend that the government has ensured that adequate measures are taken to ensure that evictions are carried out in a dignified manner and in compliance with all constitutional and international requirements. It was pointed out that the government has not only provided funds to facilitate such evictions but has also submitted appropriate legislation in parliament to regulate evictions and displacements.

13. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents also add that the Petitioners have not demonstrated that their rights under Article 43 have been violated and further that in any event the dangers posed to the Petitioners who were residing near rail lines justified the quick action of the Respondents to evict and re-settle the Petitioners

### ***2<sup>nd</sup> and 4<sup>th</sup> Respondents***

14. The 2<sup>nd</sup> and 4<sup>th</sup> Respondents' case is contained largely in the Replying Affidavits sworn and filed on 25<sup>th</sup> March 2015 and 8 May 2015. The 4<sup>th</sup> Respondent additionally filed a Supplementary Affidavit on 15 July 2015.

15. The 2<sup>nd</sup> Respondent, a statutory corporation which manages and maintains Kenya's railway line, contended that the petitioners alongside other persons had encroached the rail-lines and rail-line reserves thus endangering the lives of the commuters.

16. The 2<sup>nd</sup> Respondent's case was that to eliminate risk of life to both the passengers as well as those who had encroached onto the rail-line reserves, the 2<sup>nd</sup> Respondent embarked on a relocation project which entailed the relocation and resettlement of the Petitioners and many others. The 2<sup>nd</sup> Respondent states that it identified all those who were to be relocated and resettled, held various consultations with them, set up teams to organize the relocation and resettlement and provided for their compensation without any discrimination. All these were undertaken through a Relocation Action Plan which also identified and placed values on all the property, structures and assets of those who were to be relocated.

17. Accordingly, the 2<sup>nd</sup> Respondent states that the alleged evictions were structured and organized and no fault can be laid on the 2<sup>nd</sup> Respondent as in any event the petitioners were illegally on the rail-line reserves.

18. The 2<sup>nd</sup> Respondent further states that the instant petition is bad in law as all the issues raised by the Petitioners have been ventilated in **Kepha Omondi Onjuro & Others vs. Kenya Railways Corporation & Others HCCP No. 239 of 2014** where the court approved of the relocation process and also approved of the project itself besides directing all persons who were not PAPs and who had just recently occupied the rail-line reserves to vacate the premises.

19. The 2<sup>nd</sup> Respondent contends that the Petitioners were aware of the pendency of the suit but none the less deliberately declined to attempt to be enjoined and instead decided to file a fresh suit whilst relying on an interim order, which later lapsed when the final judgment was delivered by Odunga J in **Kepha Omondi Onjuro & Others vs. Kenya Railways Corporation & Others HCCP No. 239 of 2014** on 4 February 2015. By reason of the principle of res judicata the 2<sup>nd</sup> Respondent states that the Petition herein should not be allowed to stand.

20. The 2<sup>nd</sup> Respondent further denies having taken part in any eviction of the Petitioners or having

violated any of the Petitioners' rights and fundamental freedoms enshrined in the Constitution.

21. On its part, the 4<sup>th</sup> Respondent stated that it was never involved in any demolitions while acknowledging that it had been contracted to construct dwelling units for those who were being relocated by the 2<sup>nd</sup> Respondent.

22. The 4<sup>th</sup> Respondent also denies that it violated any of the Petitioners' rights enshrined under Articles 28, 29, 43 and 47 of the Constitution.

## **ARGUMENTS IN COURT**

### ***Petitioners' Submissions***

23. Mr. Otenyo urged the Petitioners' case.

24. Having laid the background, with extensive reference to the affidavits to establish that the petitioners had been residents on the portions of land from where they were evicted, Mr Otenyo stated that the Petitioners were not given any notice to vacate or even an opportunity to salvage their property.

25. The Petitioners' counsel also stated that the evictions were undertaken at a time when there was in existence a court order prohibiting any evictions. The order in question, counsel pointed out, was the one issued by Hon Justice Odunga in **Kepha Omondi Onjuro & Others vs. Kenya Railways Corporation & Others HCCP No. 239 of 2014** on 30 July 2014 and was subsisting even as the eviction took place on 8-9 September 2014. According to counsel, the Respondents destroyed the status quo which had been ordered and directed to be maintained by the court.

26. The Petitioners' counsel submitted that the evictions were untimely and inhuman and contrary to all known law as the Petitioners were not given any notice vacate or opportunity to salvage anything at all or even to take an inventory of their assets. In this regard, counsel made a copious reference to the judgment in **Kepha Omondi Onjuro & Others vs. Kenya Railways Corporation & Others HCCP No. 239 of 2014** which laid out the processes and procedure in forced evictions.

27. Counsel also referred to the cases of **Susan Waithera Kariuki & 4 Others vs. Town Clerk Nairobi City Council & 2 Others HCCP No. 66 of 2011** and **Mitu-Bell Welfare Society vs. The Kenya Airports Authority & 2 Others HCCP 164 of 2011** both for the proposition that evictions should not result in individuals being rendered homeless and should be undertaken upon reasonable and appropriate notice and further in a structured manner whilst ensuring that alternative housing, resettlement or access to land as the case may be is provided.

28. The Petitioners further submitted that they had proven their case that their right to both housing as well as fair administrative action had been violated and that in being rendered homeless their right to dignity had been violated. The Petitioners' counsel, on the authority of **Ibrahim Sanghor Osman vs. Minister of State for Provincial Administration and Internal Security & 3 others HCCP No 2 of 2011 (Embu)**, submitted that the Petitioners were entitled to damages for the illegal evictions and urged the court to award a global amount of Kshs 20,000,000/=. This was adequate compensation for the illegal eviction, loss of property and trauma suffered during the evictions.

### ***1<sup>st</sup> and 3<sup>rd</sup> Respondent submissions***

29. The 1<sup>st</sup> and 3<sup>rd</sup> Respondent's case was argued by Mr. Kuria Thande.

30. Mr Kuria reiterated that there had been no need to implead the 3<sup>rd</sup> Respondent who was not involved in the process at all.

31. Counsel also submitted that the Petition had not been drafted with the requisite particularity and was

not therefore competent. Counsel relied on the cases of **Mathew Okwanda vs. Minister of health and Medical Services & 3 Others [2013]eKLR** and **Mumo matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013]eKLR** for the proposition that pleadings which did not wholly and clearly reveal a party's case could not be sustained by the court.

32. Mr. Kuria then submitted that socio-economics rights were to be realized progressively by the government as had been held by the court in previous decisions. Counsel stated that in the instant case there was adequate evidence that the government had put in motion various measure to ensure that the rights were realized and these included legislative measures. Additionally, various resources were being made available to ensure the realization of such rights as housing through resettlements and thus the 1<sup>st</sup> and 3<sup>rd</sup> Respondents could not be faulted.

### ***2<sup>nd</sup> Respondent's submissions***

33. Mr. Agwara presented the 2<sup>nd</sup> Respondent's case.

34. Mr Agwara's first port of call was the competency of the Petition.

35. Counsel pointed out that the Petition sought to challenge the legality or otherwise of the Respondents' action in evicting the Petitioners whilst there was still pending a court case and there was a court order subsisting and prohibiting such evictions. The claim and order were in **Kepha Omondi Onjuro & Others vs. Kenya Railways Corporation & Others HCCP No. 239 of 2014**. Counsel state that at the time of filing the matter was sub-judice and that the time of hearing the case was already settled and thus res judicata. Mr. Agwara then submitted that the court could not find that the submissions were irregular yet the court in **Kepha Omondi Onjuro & Others vs. Kenya Railways Corporation & Others HCCP No. 239 of 2014** had found the evictions to be regular and proper. In counsel's view, as the substantial issue had been settled there was no need for this court to revisit the same. Counsel referred the court to the cases of **Okiya Omtatah Okoiti vs. Communications Authority of Kenya & 14 Others [2015]eKLR**, **Aggrey Chiteri vs. Republic [2016]eKLR** and **Japhet Muroko vs. Attorney General & 4 Others [2016]eKLR** for the proposition that the doctrine of res judicata applied with equal measure to constitutional litigation.

36. Mr Agwara, for completeness, added that the Petitioners stood to suffer no prejudice as the court in **Kepha Omondi Onjuro & Others vs. Kenya Railways Corporation & Others HCCP No. 239 of 2014** had granted the petitioners liberty to apply making it clear that there was a window of opportunity for any dissatisfied litigant which was the case with the Petitioners.

37. On the merits, the 2<sup>nd</sup> Respondent submitted that there was no connection between the evictions visited on the Petitioners and the 2<sup>nd</sup> Respondent at all as the Petitioners had themselves stated under oath as well as in various witness statements that the evictions were undertaken by certain criminal gangs. Referring to Section 107 of the Evidence Act (Cap 80), Mr Agwara submitted that the Petitioners had failed to prove that the Respondents were in any way involved in the evictions.

38. Finally, the 2<sup>nd</sup> Respondent submitted that the Petitioners' rights and freedoms guaranteed by the Constitution had not been violated in any way as the petitioners had been notified of the evictions and all parties who were bound to be affected invited to participate in the relocation plans.

### ***4<sup>th</sup> Respondent's submissions***

39. The 4<sup>th</sup> Respondent's case was presented by Mr. Adede.

40. Mr. Adede largely associated himself with the submissions of Mr Agwara and added that the 4<sup>th</sup> Respondent was never engaged in the clearing of the site but only in construction. Counsel stated that there was no evidence to link the 4<sup>th</sup> Respondent to the evictions. Additionally, counsel submitted that

there was no proof of the special damages sought by the Petitioners.

### ***Petitioner's rejoinder***

41. Mr. Otenyo reiterated by way of a rejoinder that the substance of the instant petition was not similar to the claim in **Kepha Omondi Onjuro & Others vs. Kenya Railways Corporation & Others HCCP No. 239 of 2014**. Additionally, Mr. Otenyo added that the fact that in **Kepha Omondi Onjuro & Others vs. Kenya Railways Corporation & Others HCCP No. 239 of 2014** the court had given liberty to apply meant that the case had not been finalized with finality.

42. To Mr. Otenyo, the respondents had failed to undertake the evictions in a constitutional manner.

### **DISCUSSION AND DETERMINATION**

43. I have considered the Petition in its entirety as well as the various supporting and replying affidavits. I have also considered the submissions advanced by the parties. Four issues, in my view, emerge and can be isolated for determination.

#### ***Issues and burden***

44. Firstly, is the issue whether the petition meets the competency threshold? Secondly, is whether the Petitioners' claim is res judicata? Thirdly, is whether the manner in which the evictions were undertaken and carried out violated the petitioners' rights and freedoms under the Constitutions? Fourthly, would be who was responsible for the evictions and finally, what reliefs are available to the Petitioners, if any. A determination of the first two issues may however dispose of the Petition.

45. It must be noted as well that the burden of proof even in constitutional litigation is upon he who alleges. An approach which has been adopted in our courts following the Canadian case of **R vs. Oakes [1987]1 LRC (Const) 477** is that a party seeking to establish the existence of a right bore the onus of proof in the first instance. Thereafter the party who sought limitation of that right bore the onus of justifying the limitation under Article 24: see also **Catholic Commission for Justice & Peace in Zimbabwe -v- Attorney General [1993]2LRC (Const) 279** and **State vs. Makwanyane & Anor [1995]1 LRC 269** as well as the local decisions of **Matiba -V- Attorney General (1990) KLR 666** and **Githunguri Dairy Farmers Co-operative Society Ltd v Attorney General & 2 others [2016] eKLR**

#### ***Facts not contested***

46. It is common cause that the Petitioners were residents of part of the informal settlement known as Kibera within Nairobi County. It is also common ground that the 2<sup>nd</sup> Respondent in association with the World Bank sought to relocate the Petitioners and several others to other areas and that there would be construction of decent and proper housing unit for the all the project affected persons. It is additionally a common factor that the all residents and those affected whether squatters or otherwise were notified by the 2<sup>nd</sup> Respondent of the impending relocation and or eviction.

47. The parties are also in agreement that there was a previous litigation which was finally determined in February 2015, some two months after the instant suit had been commenced. In detail, I will refer to the said suit , in subsequent paragraphs.

48. Finally , the it is also a common fact that the petitioners were evicted on the 8 and 9 days of September 2014.

#### ***Competency Issue***

49. Both the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents contended that the Petition is not competent. Their argument was pegged on the widely accepted and settled principle of the law that complainants in constitutional petitions must plead their cases with reasonable precision to enable the court as well as the Respondent(s)

to understand clearly and appreciate the complainant's constitutional issue(s). The petitioner must with reasonable precision state the specific provisions of the Constitution and the rights allegedly violated. The Petitioner must also state the manner of infringement: see the case of **Anarita Karimi Njeru –v- The Republic (No. 1) [1978] KLR 154** as well as **Mumo Matemu -v- Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**.

50. I did not hear the Petitioners to state anything in response save to simply quip that the Petition was competent.

51. The principle brought to the fore is one of procedural drafting. As this court has previously stated, there is no requirement for absolute or simulated precision: see **Kevin Turunga Ithagi –v- Hon. Justice Fred Ochieng & 5 Others (No.1) HCCP No.442 of 2015 [2015]eKLR**. What is expected is reasonable specificity. The court as well as the respondent ought only be in a position where the rights or freedoms alleged to have been violated or threatened with violation may be identified with relative ease and painlessly so. The course of justice need not be impeded through a summary disposal of litigation and more so constitutional litigation. The court ought to be reluctant when asked to dismiss a claim unless in very clear cases. That is the approach that has been adopted locally :see **Nation Media Group Ltd –v- Attorney General [2007] 1 EA 261** as well as the Court of Appeal decision in **Peter M. Kariuki –v- Attorney General [2014]eKLR** . Comparatively as well, reluctance has been exhibited when it comes to striking out litigation in constitutional claims: see **Donovan Earl Hamilton –v- Ian Hayles (Claim No. 2009 HCV 04623)** by the Supreme Court of Judicature in Jamaica. The same approach was also taken by the Privy Council in **Ingram & Others v Clinton & Another [2007]2 LRC 142** where the court opined that even though constitutional claims were not impervious to the strike-out jurisdiction, the court was duty bound to look at constitutional claims with particular care as such claims emanated from a higher order law.

52. The approach is for the court to gather the petitioner's claim and detect if the case is painlessly clear to demand an answer from the respondent.

53. In the instant case, the Petitioners identified various Articles in the Bill of Rights as having been violated. They pointed to Articles 27, 28, 43 and 47.They then alleged that the Respondents either severally or jointly had violated their rights. They said they were now denied decent shelter and housing. They said they were never given any notifications prior to the forceful evictions. They said their dignity was then and has since been shattered. They then claim a compensatory relief besides the declaratory ones.

54. In response, all the Respondents filed detailed replies. It was clear they understood the claim by the Petitioner.

55. I do not view it that the Petition as drawn is fatally deficient. It is easy to understand the Petitioners grievances and concerns. They are genuine and raise constitutional questions, the merits aside. It would be very inappropriate to strike the Petition out on the basis of the principle locally enunciated in **Anarita Karimi Njeru vs. Republic (supra)**.

#### *A question of res judicata*

56. The Respondents also contended that the Petitioners in filing the instant claim had abused the process of the court as there was already in existence another claim raising similar issues and which at the time of filing of the instant claim was still subsisting but was closed and determined prior to the commencement of the hearing herein. The Petitioners contended otherwise; the claim herein was distinct as the petitioners had since been evicted and the evictions were also carried out in total flagrant disobedience of a court order.

57. The parties made extensive submissions on this point , replete with case law.

58. The Respondents' contention and arguments were premised on the decision by Odunga J in **Kepha**

**Omondi Onjuro & Others vs. Kenya Railways Corporation & Others HCCP No. 239 of 2014** rendered on 4 February 2015. While the Respondents sought to show that it was not open to any party to that suit to bring fresh claims touching and concerning the same subject matter and additionally that the final judgment rendered by Odunga J 's decision brought to a halt any claims by the Petitioners as well as the parties involved in that case, the Petitioners on the other hand sought to illustrate that the case was in support of their claim as an order issued in the case had been disobeyed and further the case had laid down the applicable barometer and procedure when it came to forceful eviction prompted by developmental needs and projects.

59. I would deem it more appropriate to have a pithy review of the judicial history as well as the judgment in that case.

*Kepha Omondi Onjuro & Others vs. Kenya Railways Corporation & Others HCCP No. 239 of 2014*

60. The parties herein are in agreement that the Petitioners with others who are not involved in the current litigation moved the court in **Kepha Omondi Onjuro & Others vs. Kenya Railways Corporation & Others HCCP No. 239 of 2014**. That fact can be gleaned from paragraph 12 of the affidavit in support of the Petition sworn by the 1<sup>st</sup> Petitioner. The claim had been filed in May 2014. In June 2014 one of the Respondents, Kenya Railways Corporation, filed a cross-petition in the main petition. In the meanwhile the court had issued an order for the maintenance of status quo. That was in May 2014. The status quo then obtaining was that the petitioners and many other were still on the land which was to be re-possessed by the 2<sup>nd</sup> Respondent herein. The parties then prepared for trial and ultimately after a trail a prolific judgment was delivered on 4 February 2015.

61. The judgment in *Kepha Omondi Onjuro & Others*' case was detailed. The learned judge reflected on the claim as well as the law.

62. The claim was rather straight-forward. The Petitioners then contended that the notice was not sufficient and that their eviction would lead to loss of adequate housing and that the intended evictions were also not structured and that the intended relocations would not meet the needs of the persons to be resettled as it was apparent that sufficient data had not been collected. The Petitioners then asked the court to declare the evictions and demolitions illegal oppressive and in violation of the Petitioners' rights. The Petitioners also sought an order to restrain the evictions and the demolitions.

63. In its cross petition, the respondent Kenya Railways Corporation asked the court to allow the project to go on whilst contending that the petitioners were squatters and further that in any even the intention behind the evictions was also to secure the petitioners lives as it was perilous for the petitioners to continue residing on the rail line reserves. The respondent also contended that there had been adequate consultation and that the respondent had put in place sufficient resettlement plans. The respondent urged the court to allow the evictions as they were development based evictions by State organs.

64. After a review of the obtaining local and comparative decided case law including **Satrose Ayuma & 11 others vs. Registered Trustees of Kenya Railways Staff Retirement Benefits Scheme & 3 Others HCCP No 65 of 2010**, **Ibrahim Sangor Osman vs. Minister of State for Provincial administration and Internal Security[2011]eKLR**, **Susan Waithera Kariuki & 4 Others vs. Town Clerk Nairobi City Council & 3 Others [2013]eKLR** and **Government of the Republic of South Africa and Others vs. Grootboom and others[2000]ZACC 19**, the court whilst making reference to international conventions settled for the position that in development related evictions there was need for planned evictions and the planning generally included eight aspects. The court identified the eight aspects based on the UN Habitat Fact Sheet No 21/Rev 1 and the UN Basic Principles and Guidelines on Development Based Evictions and Displacement (2007). The eight aspects included : opportunity for genuine consultations, adequate and reasonable notice, availability of information on the proposed eviction in reasonable time, presence of government officials or their representatives during evictions, proper identification of persons carrying out the evictions, prohibition of carrying out the evictions ant night or in bad weather, availability of legal remedies and availability of legal aid for those in need to seek judicial redress.

65. The court then specifically answered the questions in relation to the Petition. The court found as a fact that the residents that were living and trading by the railway reserves had all been given an opportunity for genuine consultation. The court also found as a fact that all the project affected persons had been given adequate notice and further that through a door to door vetting exercise the residents there was available information on the development project.

66. By way of final disposal, the court concluded that the respondents had taken adequate steps towards compliance with the UN Guidelines on evictions. The petition was then dismissed whilst the cross-petition was conditionally allowed. The court ordered for a structured eviction to be undertaken in the presence of neutral observers and government as well as security officials and additionally that the evictions were not to be undertaken in bad weather, during festivals or holidays and prior to any election with reports directed to be filed every quarter. There was also liberty to apply granted to either party.

67. It is the above case and decision that prompted the Respondents to plead res judicata.

68. I may quickly point out that the jurisdiction to invoke the doctrine of res judicata is not foreign to constitutional claims.

69. In **Aggrey Chiteri vs. Republic HCCP 260 of 2015 [2016]eKLR**, this court stated as follows:

***“[1]The principle of res judicata applies in law to bar subsequent proceedings when there has been adjudication by a court of competent and concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in dispute: see Mandavia -v- Rattan Singh [1965] EA 118. It is intended to ensure the protection and propagation of the public policy that “ parties to a judicial decision should not afterwards be allowed to re-litigate the same question”: see Miller J in Crown Estate Commissioners -v- Dorset County Council [1990]1 All E R 19,23.***

***[2]The court consequently has an inherent jurisdiction even where it is not expressly conferred to invoke this principle in appropriate circumstances and ensure too that the process of court is not abused.”***

70. The court further stated as follows:

***“[7] It would be important to note that in matters involving the enforcement of the Bill of Rights , where the Petitioner claims that his rights have been violated or are about to be violated a plea of res judicata must be considered with abundant caution. Rights may be violated multiple times and repeatedly or even after court decisions have been rendered and it would not mean that the claim is being re-litigated. The evidence may show otherwise.***

***[8] The court no doubt, however, has the inherent jurisdiction to stall any abuse of its process: see Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules, 2013. The filing of a Petition when a similar one has already been adjudicated upon with finality would amount to abuse of the process of this court. Likewise, the filing of a Petition when a similar one is pending, would also amount to abuse of the process of this court. The claimant in both instances would be estopped from so proceeding.”***

71. The court was clear that constitutional claims are not impervious to claims of res judicata and sub judice, save that adequate caution ought to be exercised as appropriate.

72. For starters, in the instant case the Petitioners were also party to the *Kepha Omondi Onjuro & Others'* case. So too were the Respondents save the 4<sup>th</sup> Respondent. The substratum of the claim in the *Kepha Omondi Onjuro & Others'* case was the intended eviction of the petitioners. The substratum of the case herein is the eviction of the petitioners, which both parties agree has already taken place. In both cases, the evictions are stated to have been illegal, arbitrary, irregular, unfair unplanned and unstructured. In the instant case however, the petitioners add that they have been evicted and that the eviction was undertaken

in the face of a court order to maintain the status quo hence an illegality, it was.

73. The court in *Kepha Omondi Onjuro & Others*' case found that the evictions were planned and only added that they needed to be structured. The court also held that notices had been issued. The court allowed the evictions to go on. They were to be undertaken by the Respondents in a structured and supervised manner to ensure that the dignity of the person was upheld.

74. I see very little difference between the Petitioners' instant claim and their claims made earlier in the *Kepha Omondi Onjuro & Others*' case. The slight difference is only in the fact that in the current scenario the Petitioners have been evicted. No doubt, they were evicted when there subsisted a court order for the maintenance of a status quo and that fact is not resisted by the Respondents. What is resisted is that the Respondents were not involved in the eviction. The Petitioners claim they were.

75. My view is that the instant Petition ought not to have been filed. It was silhouetted as a constitutional claim, yet it actually raised issues which were already pending before another court. The mechanism for enforcement of court orders lies in an action for contempt of court which is itself replete with various forms of relief. The Petitioners were perfectly entitled to complain that there had been disobedience of a court order but not in or through parallel proceedings which demanded parallel inquiries the moment the respondents denied participation in the evictions. Any parallel inquiry conducted by this court in a matter which was sub judice was bound to interfere with the ordinary course of justice. It could have prejudged the merits of the *Kepha Omondi Onjuro & Others*' case and usurped the function of that court, even though the alleged disobedience may be said to have affected the administration of justice.

76. I am satisfied that notwithstanding the fact that the *Kepha Omondi Onjuro & Others*' case has since been finalized, the claim herein ought to have been subsumed in the said case and not brought through an independent cause. The court could have been better placed to deal with the issues and made appropriate inquiry.

## **Conclusion**

77. I come to the conclusion that this suit was an abuse of the process in so far as it was commenced when the petitioners were still involved in similar proceedings. There was no need for such peregrination. The Petitioners should have moved through the same suit.

78. I am also satisfied that having found that the claim was an abuse of the process of the court which ought not to stand, there is no need to interrogate whether the Petitioners' rights were or have been abused. The court in *Kepha Omondi Onjuro & Others*' case gave the parties the permission generally to apply and I see no reason why the Petitioners would be barred from going to the same court.

## **Disposal**

79. By way of disposal, the Petition fails and it is dismissed.

80. Each party shall bear its own costs of the Petition.

**Dated, signed and delivered at Nairobi this 19<sup>th</sup> day August, 2016**

**J.L.ONGUTO**

**JUDGE**