



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. APPLICATION NO. 165 OF 2013

REPUBLIC.....APPLICANT

AND

THE PRINCIPAL SECRETARY, MINISTRY OF LANDS, HOUSING

AND URBAN DEVELOPMENT.....RESPONDENT

***EX PARTE*..... KENYATTA PETER & 3 OTHERS**

RULING

1. These proceedings according to the ex parte applicants **Kenyatta Peter, John Keen Demesi, Ochwacho Ojango** and **Evans Emastt**, were instituted on their behalf and on behalf of more than 600 families of Kibera Soweto East Zone “A” Slums, in Kibera Nairobi who alleged that they were affected by the directive of the Respondent to evict them.
2. Upon hearing the application this Court on 27th November, 2014, granted the following orders:
 1. **Certiorari removing into this Honourable court the Respondent’s directive dated 14th November, 2012 and 29th April, 2013 to evict the ex parte applicants and any other consequential orders emanating therefrom and the same are hereby quashed.**
 2. **Prohibition against the Permanent Secretary Ministry of Housing his Officers, servants, agents or assignees from implementing or executing the order of demolishing, evicting, damaging or interference with the applicants’ business, homes, structures and properties located within Kibera Soweto East Zone slums or act in any other way that will prejudice their safe, quiet enjoyment of the same pending further orders of this Court.**
 3. Pursuant to Article 23 of the Constitution which does not limit the remedies this Court is empowered to grant in such cases, I direct that within 30 days of this Judgment, a meeting shall be convened by the Respondent with the Applicants, where a programme of eviction of the Applicants shall be designed taking into account the following factors:
 - i. **that at the time of eviction, neutral observers should be allowed access to the suit properties to ensure compliance with international human rights principles.**
 - ii. **that there must be a mandatory presence of Governmental officials and security officers.**
 - iii. **that there must be compliance with the right to human dignity, life and security of the evictees.**
 - iv. **That the evictions must not take at night, in bad weather, during festivals or holidays, prior to any election, during or just prior to school exams and in fact preferably at the end of the school term or during school holidays.**
 - v. **that no one is subjected to indiscriminate attacks.**

4. **The Report of the progress shall be filed in this Court within 60 days from the date of this Judgement.**
 5. **Liberty to apply granted.**
 6. **As this was substantially a representative Cause, there will be no order as to costs.**
3. On 4th June, 2015, the present applicants, **Tom Ndeche** and **Peter Shisia Mayeende** filed a Motion dated 3rd June, 2015 seeking that leave be granted for the firm of **Dr. Alutalala Muhwana & Co. Advocates** to come on record for them and for them to be joined to these proceedings.
 4. It was contended by the applicants that they were part of the 600 families on whose behalf this cause was brought by the *ex parte* applicants. According to the applicants, although the Respondents had not complied with the orders and directions given by this Court, they had instead clandestinely embarked on the systematic process of removing more than 600 families affected from their habitat under the risk of forceful evictions.
 5. It was disclosed that vide a letter dated 29th May, 2015 the advocates on record for the *ex parte* applicants wrote to the respondents contending that there were no orders barring the construction and confirming that the construction should proceed.
 6. On the part of the *ex parte* applicants, it was contended by withdrawing an earlier similar application the applicants' advocates were engaging in subterfuge, chicanery, trickery and went on to mislead and ticked and falsely misrepresented the facts to the Court to evade costs. It was contended that the applicants are not residents of the affected property and have no families therein as alleged and are simply collecting rents from their rented premises. Since the orders granted by the Court were only in favour of the *ex parte* applicants, it was contended that the applicants herein cannot take advantage of the same. In support of the submissions the *ex parte* applicants relied on **Fredrick Ngari Muchira & Others vs. Pyrethrum Board of Kenya [2013] eKLR**, **Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others [2014] eKLR** and **Macademia Nuts Dealers vs. Horticultural Crops Development Authority & Others [2014] eKLR**.
 7. I have considered the application, the affidavits on record and the submissions made.
 8. That the Court has the power to join parties to proceedings was placed beyond peradventure in **Meme vs. Republic [2004] 1 EA 124; [2004] 1 KLR 637** where it was held that at a very basic level the Court is empowered to draw from the *Civil Procedure Rules* in its exercise of powers under the *Constitution of Kenya (Protection of Fundamental Right and Freedoms of the Individual) Practise and Procedure Rules* and by virtue of Order 1 Rule 10(2), the Court is empowered to direct joinder of parties in such a way as to "enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit". In **Duncan M Michira & Others vs. Fidelity Commercial Bank Ltd Nairobi (Milimani) HCCS NO. 654 of 2007** the Court appreciated that Order 1 rule 10(2) of the *Civil Procedure Rules* grants the court jurisdiction to join any party to a suit at any stage of the proceedings provided that such joinder would assist the court to effectually and completely adjudicate upon and settle all the questions in dispute in the suit. The same provision was given effect to by the Court in **Ian Gwonda vs. James Nyangai Osoro & 2 Others Kisii Hccs No. 25 of 2008** when it held that under Order 1 rule 10(2) of the *Civil Procedure Rules*, it is clear that addition of any party to a suit requires leave of the court, unless the court directs so on its own motion. The same provides that the court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any person improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.
 9. It was therefore held in **Departed Asians Property Custodian Board vs. Jaffer Brothers Ltd [1999] 1 EA 55** that:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit...A

party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter."

10. As stated hereinabove, this Court in its judgement granted the parties liberty to apply. The parties in this application clearly were not restricted to the three *ex parte* applicants as this was, as was clearly held, a representative suit. By granting "liberty to apply" the Court clearly appreciated that as opposed to granting reliefs in the nature of the variation of the decision, its decision required working out which might involve matters on which it would be necessary to obtain the decision of the Court. If such working out was to be impeded by the acts or omissions of the persons named in the proceedings, it is my view that this Court would be perfectly entitled to join any of the persons in whose interest the suit was brought to enable the court effectually and completely adjudicate the issues in dispute otherwise the Court would have acted in vain.

11. I associate myself with the decision in **Macademia Nuts Dealers vs. Horticultural Crops Development Authority & Others** (supra) that:

"an interested party is a party who has a stake/interest directly in the matter before the Court, though he or she is not a party to the case. He must be a party who is likely or who will be affected by the decision of the court and he or she is of the view that unless he or she is enjoined (sic) in the matter his/her interest will not be well articulated or protected unless she or he is made a party to ventilate his or her cause."

12. The applicants herein aver that they were part of the people whose interests were being protected by the *ex parte* applicants and that the *ex parte* applicants are no longer keen in doing so. The only way in which they can ventilate their cause is clearly by being joined to these proceedings. To do otherwise would lead to an injustice and this Court has no jurisdiction to do injustice.

13. The circumstances of this case are clearly distinct from situations where a case has been determined and the matter closed since this case left an open window for further proceedings to be undertaken. This Court cannot therefore be said to be *functus officio*.

14. With respect to *res judicata*, since the earlier application by the applicants herein was withdrawn, it cannot be said that this application is *res judicata*. The law is clear that one of the ingredients of *res judicata* is that the matter in issue must have been heard and finally decided in the former suit. See **Lotta vs. Tanaki [2003] 2 EA 556**.

15. Where however the earlier suit was withdrawn without a determination being made on its merits, it cannot be said that the *res* therein had become *judicata*. See **Francis Kabaa vs. Nancy Wambui & Another Civil Appeal No. 138 of 1996**.

16. Before I conclude this ruling, I wish to remind parties and their legal representatives that affidavits ought to contain facts and facts alone. There is therefore no place in affidavits for derogatory remarks and innuendoes. In fact the law prohibits the inclusion in affidavits of matters which are deemed to be scandalous, irrelevant or oppressive. I must say some of the depositions in the replying affidavit filed herein were not meant to bring facts to the attention of the Court but to scandalise the applicants and their counsel. Such affidavits ought not to be admitted in evidence and the Court will not hesitate in future to strike out the same.

17. It must now be apparent that the Notice of Motion dated 3rd June, 2015 is merited.

18. Accordingly, the same is allowed. The costs thereof will be in the cause.

Dated at Nairobi this day 29th day of June, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Okemwa for the ex parte applicants

Dr Alutalala for the applicants

Cc Patricia