



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.575 OF 2013**

**BETWEEN**

HON. M.C.A. PETER IMWATOK.....1<sup>ST</sup> PETITIONER  
ELIZABETH ODHIAMBO OMONDI.....2<sup>ND</sup> PETITIONER  
FRANCIS NJOROGE GATUKU.....3<sup>RD</sup> PETITIONER  
SARAH NTHENYA NJERU.....4<sup>TH</sup> PETITIONER  
JOSEPH KAHINDI NZUKI.....5<sup>TH</sup> PETITIONER  
FRANCES OLOO OKENDO.....6<sup>TH</sup> PETITIONER  
ENOS OMONDI.....7<sup>TH</sup> PETITIONER  
JUDITH ANYANGO.....8<sup>TH</sup> PETITIONER  
ALEX OLOO.....9<sup>TH</sup> PETITIONER  
CAROLINE AUMA.....10<sup>TH</sup> PETITIONER  
BRIAN KADENGE.....11<sup>TH</sup> PETITIONER  
HABIL INOIMULI.....12<sup>TH</sup> PETITIONER  
WYCLIFF ODUOR.....13<sup>TH</sup> PETITIONER  
FLORENCE ANYANGO.....14<sup>TH</sup> PETITIONER  
PATRICK ODUOR.....15<sup>TH</sup> PETITIONER  
STELLA AKINYI.....16<sup>TH</sup> PETITIONER

**AND**

THE ATTORNEY GENERAL.....	1 <sup>ST</sup> RESPONDENT
PRINCIPAL SECRETARY MINISTRY OF LANDS & URBAN DEVELOPMENT.....	2 <sup>ND</sup> RESPONDENT
COMMISSIONER OF LANDS.....	3 <sup>RD</sup> RESPONDENT
KENYA RAILWAYS CORPORATION.....	4 <sup>TH</sup> RESPONDENT
NATIONAL LAND COMMISSION.....	5 <sup>TH</sup> RESPONDENT

### RULING

1. On 6<sup>th</sup> December 2013, Korir J. issued orders to the effect that **“any eviction or planned eviction of the Applicants/Petitioners is stayed”**. The said orders were extended severally but on 19<sup>th</sup> June 2015, Ms. Arati for the Petitioners approached this Court under a Certificate of Urgency and applied for grant of the following orders;

*“(a) That this Application is certified extremely urgent and be heard extremely urgent and heard ex-parte.*

*(b) That this Honourable Court be pleased to grant orders; temporary and conservatory orders restraining the 4<sup>th</sup> Respondent by themselves, their servants and whatsoever from unlawfully issuing leases and allocating strangers to the PAPs houses located along Mbotela Agare Slums in Nairobi until full hearing and determination of this suit.*

*(c) That the Court do issue orders restraining the Makadara DCIO, OCPD and County Commissioner from harassing and intimidating and physically assaulting and unlawfully without any Court orders arresting the residents of Makongeni, Kaloleni Mbotela Ward residents whose houses were demolished to pave way to construction of the PAPs project.*

*(d) That the OCPD and DCIOA be restrained from arresting the area leadership (i.e. the area Member of Parliament (MP) Hon. Benson Mutura and the Makongeni Ward MCA Hon. Peter Imwatok).*

*(e) That this Honourable Court be pleased to make a site visit to the PAPs Project at Makongeni Area and ascertain the facts on who are the lawful beneficiaries of this project contrary to the 4<sup>th</sup> Respondent’s assertions.*

2. For avoidance of doubt, the orders earlier sought by the Application dated 5<sup>th</sup> December 2013 were as follows;

*“(1) That this Application be certified as extremely urgent and be heard ex-parte at the earliest opportunity.*

*(2) That the Honourable Court be pleased to grant temporary conservatory orders restraining the Respondents by themselves, their Agents, servants or whosoever from continuing to construct houses, eviting, removing, destroying, demolishing, and/or doing anything prejudicial to all persons living, working and/or doing business in Agare/Mbotela slums in Makongeni Ward in Nairobi City County until this application is heard inter-partes.*

*(3) That the Honourable Court be pleased to grant temporary conservatory orders restraining the Respondents by themselves, their Agents, servants or whosoever from continuing to construct*

**houses, evicting, removing, destroying, demolishing, and/or doing anything prejudicial to all persons living, working and/or doing business in Agare/Mbotela Slums in Makongeni Ward in Nairobi City County until this Petition is heard and determined.**

**(4) That the Honourable Court be pleased to give any further orders it may deem fit and convenient in the circumstances of this case.**

**(5) Costs.”**

3. To put matters into perspective, the Applicants, by their Petition dated 5<sup>th</sup> December 2013, alleged that they are **“inhabitants of Agare/Mbotela slums in Makongeni Ward”** and have been threatened with evictions by the 4<sup>th</sup> Respondent, the Kenya Railways Corporation. Their claims in that Petition include declarations as to their alleged rights to adequate housing, a clean and healthy environment, right to have access to goods and services and equal treatment before the law and have therefore invoked **Articles 27, 42, 43 and 47 of the Constitution.**

4. This Ruling is limited to the issues raised in the Application dated 18<sup>th</sup> June 2015 and the Applicants’ case is that they are retirees from the employment of the Kenya Railways Corporation and reside at the Agare/Mbotela Slums. That on 12<sup>th</sup> June 2015, agents of the 4<sup>th</sup> Respondent together with armed police officers descended upon the area and attempted to forcefully relocate the residents. The said action caused tension and skirmishes erupted.

5. In his Affidavit in support of the Application, Hon. Benson Mutura, MP deponed that his attempts at intervening in the matter led to his arrest and yet he was only defending the rights of the residents of the area who were lawfully entitled to occupation of the land as agreed with the World Bank and the 4<sup>th</sup> Respondent’s representatives.

6. He further deponed that some residents have in fact been evicted and are living in squalid conditions in total violation of the United Nations’ Guidelines and Basic Principles on Evictions. That the Applicants are therefore entitled to the orders elsewhere sought above.

7. In response, the 4<sup>th</sup> Respondent filed Grounds of Opposition on 30<sup>th</sup> June 2015 and they are as follows;

**“(1) As demonstrated in the 4<sup>th</sup> Respondent’s, Replying Affidavit sworn by Mr. A. K. Maina on 28<sup>th</sup> February 2014 and filed herein on 3<sup>rd</sup> March 2014, the Petitioners are not affected by the subject project and have never been evicted by the Corporation.**

**(2) The Petitioners obtained orders herein on 6<sup>th</sup> December 2013 restraining their alleged threatened evictions by the Respondents which orders have remained in force to date and the Respondent has fully complied with the same as the Petitioners are not affected by the Project herein and have continued to occupy their respective premises.**

**(3) The matters raised in the Application are in whole a departure from the pleadings and the reliefs sought in the Petition as filed herein. The same are res-judicata having been heard and determined by this Honourable Court in *Kepha Onjuro & Others vs the Attorney General & 5 Others in Nairobi High Court Constitutional Petition No.239 of 2014*. A copy of the judgment delivered by this Court in the matter is attached hereto for ease of reference.**

**(4) As demonstrated in the said judgment;-**

**(i) The Corporation being a law abiding entity embarked on reallocating the illegal squatters together with other establishments from along the rail tracks to the 10 metre out edge of the railway reserve leaving 20 metres on either side of the track for railway operations, safety and expansion resulting in the Reallocation Action Plan (hereinafter “the RAP”)**

(ii) *The Reallocation Action Plan is exclusively meant to resettle the squatters living within the railway reserve so as to guarantee the safety of all rail users and adjacent establishments, to secure the future of railway expansion and to provide a buffer zone against injury and loss of life to members of the public in case of railway accidents.*

(iii) *The subject houses are constructed within the Corporation's land.*

(5) *The Reallocation Action Plan does not affect the Applicants herein and that neither are they Project Affected Persons as the Mbotela Agare area within which they reside does not lie within the railway reserve nor are they affected by the project in any way.*

(6) *The Reallocation Action Plan is specifically meant to resettle only the illegal squatters living within the railway reserve so as to minimize the likelihood and risk of loss of life posed by accidental derailments of the train and collisions with the adjacent structures and not all slum dwellers within the Country.*

(7) *The foregoing notwithstanding, the 4<sup>th</sup> Respondent on the 5<sup>th</sup> June, 2014 sought and obtained leave of this Honourable Court in the said Nairobi High Court Constitutional Petition No.239 of 2014; Keph Onjuro & Others vs The AG & 5 Others to advertise the Petition in Daily Newspaper with wide coverage within 7 days to allow any person who could be affected by the said project to join the case with a view of protecting their interests. A copy of the said order together with the Advertisement are attached hereto for ease of reference.*

(8) *The Petitioners and the Applicants being persons not affected with the project herein, did not take any steps to join the said case and the matter proceeded for a full hearing on its merit thus leading to the judgment of this Honourable Court as delivered on 4<sup>th</sup> February, 2015 determining the issues relating to the World Bank Funded Project to resettle the PAPs.*

(9) *The said judgment has neither been appealed nor has its implementation stayed by any Court of competent jurisdiction and the 4<sup>th</sup> Respondent continues to implement the Project in compliance with the Court's judgment.*

(10) *Reasons wherefore the 4<sup>th</sup> Respondent prays that Honourable Court should strike out and or dismiss the Notice of Motion application dated the 18<sup>th</sup> June, 2015 for being an afterthought and lacking on any merit.*

(11) *The 4<sup>th</sup> Respondent has neither evicted nor intends to evict any of the Applicants as alleged and/or at all."*

8. I have in addition to the above, taken into account the oral submissions by both Ms. Arati and Mr. Agwara for the 4<sup>th</sup> Respondent.

9. I have also noted the contents of the Affidavit sworn on 18<sup>th</sup> June 2015 by John Otieno Oloso and Philip Ochenga Madiwa whose value to the Application I am unable to tell because they have a bearing to the Petition itself and not to the present Application.

10. In any event, what is the substance of the Application before me? It principally refers to the issuance of leases and alleged allocation of the contested housing project to strangers. The other prayers in it are directed at the police and the one order sought for this Court to visit the PAPs project **"and ascertain the facts on who are lawful beneficiaries of this project."**

11. I should begin by addressing the last prayer. For obvious reasons, such a prayer cannot be granted at all. I say so, with respect, because the question whether the Applicants are lawful beneficiary of the PAPs Project is at the heart of the determination of the Petition. I cannot also determine such a weighty matter by physically visiting the housing project for how can this Court by that act alone determine who are the

lawful beneficiaries of the project are the prayer is obviously misguided, misconceived and lacking in reflection and thought. I say so with tremendous respect to the Applicant and their Counsel.

12. On the Prayer that the OCPD and DCIO should be restrained from arresting **“the area leadership (i.e. area Member of Parliament (MP) Hon. Benson Mutura and the Makongeni Ward MCA Hon. Peter Imwatok)** how can this Court be expected to issue such a blanket order? The power of arrest is vested on the National Police Service by virtue of **Section 24(g) and (h)** of the **National Police Service Act, Cap.84**. The Director of public Prosecutions is then empowered by dint of **Article 157(6) “institute and undertake criminal proceedings against any person ... in respect of any offence alleged to have been committed”** Where is the evidence that the Police by arresting or attempting to arrest the two persons named above have acted outside their statutory mandate? No such evidence exists and it is not enough that the two are leaders at the forefront of the claim for houses in the disputed project. They are bound to act within the confines of the law and if they act contrary to it, this Court cannot shield them.

13. Similarly, I do not see how this Court can be expected to stop arrests of **“the residents of Makongeni, Kaloleni Ward”** if there is lawful reason for such arrests to be made.

14. On both issues above, in any event the Constitution has provided sufficient safeguards in appropriate cases for enforcement of rights where the police overstep their mandate. I see no such action by the Police in the present Application and in the future, the Applicants can rightfully seek such safeguards should the necessity to do so arise.

15. Turning back to the more fundamental prayer in the Application, the Applicants are already beneficiaries of wide powers issued by Korir, J. to stay any eviction from the premises that they presently occupy. Those orders are in force and as correctly submitted by Mr. Agwara, if they are breached, there is the option to seek contempt of Court orders. None have been sought.

16. Secondly, it is alleged that leases have been issued and strangers have been allocated the disputed houses. I have seen no evidence of those matters at all but the larger issue as to whether the Applicants are entitled to those houses is a matter to be determined in the Judgment and on merits. In any event, since the Applicants have orders to stay their eviction, of what purpose would any other orders be? Suppose it is indeed true that the houses are being allocated and/or leases issued, (and I have said no such evidence is before me) of what use will they be?

17. Thirdly, the grant of conservatory orders under the Constitution was addressed by the Supreme Court in *Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others (2014) e KLR*, and it rendered itself thus;

***“Conservatory Orders” bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions linked to such private-party issues on the “prospects of irreparable harm occurring during the pendency of a case; or “high probability of success” in the applicants case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case bearing in mind the public interest, the Constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes”***

18. Applying the above principles to the present Application and noting what I have stated above, I am not inclined to find that the Applicants are deserving of the orders in the Application. I should add that the substratum of the Petition does not include claims against unnamed person who are also called **“strangers”** and others who have allegedly been issued with leases to the disputed houses.

19. In conclusion, the Application dated 18<sup>th</sup> June 2015 is misconceived and misguided. It is hereby dismissed and costs shall await the outcome of the Petition.

20. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> DAY OF SEPTEMBER, 2015**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Miron – Court clerk

Mr. Agwara for 2<sup>nd</sup> Respondent

Mr. Sekwe holding brief for Mr. Kuria for 1<sup>st</sup> Respondent

No appearance for Applicant

**Order**

Ruling duly delivered.

**ISAAC LENAOLA**

**JUDGE**

**17/9/2015**

**Further Order**

Further mention on 4/12/2015. Notice to issue.

**ISAAC LENAOLA**

**JUDGE**

**17/9/2015**