



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.65 OF 2010

Between

- SATROSE AYUMA.....1ST PETITIONER
- JOSEPH SHIKANGA.....2ND PETITIONER
- JOSEPH GITONGA.....3RD PETITIONER
- BETH WAITHIRA.....4TH PETITIONER
- LYDIA MUTHONI.....5TH PETITIONER
- LAMECK MWAMBE.....6TH PETITIONER
- JOSEPH OTIENO.....7TH PETITIONER
- WILSON GITHINJI.....8TH PETITIONER
- JOHN OCHIENG.....9TH PETITIONER
- EUNICE OPIYO.....10TH PETITIONER
- YASH PAL GHAI.....11TH PETITIONER
- PRISCILLA NYOKABI.....12TH PETITIONER

(SUING ON THEIR OWN BEHALF AND ON BEHALF OF MUTHURWA RESIDENTS)

AND

THE REGISTERED TRUSTEES OF THE KENYA RAILWAYS

STAFF RETIREMENT BENEFITS SCHEME.....1ST RESPONDENT

THE KENYA RAILWAY CORPORATION.....2ND RESPONDENT

AND

MILOON KOTHARI.....INTERESTED PARTY

RULING

Introduction

1. The disputes herein concerns the fate of 359 people who are lessees, occupiers and tenants of a property known as LR. No.209/6502 commonly referred to as “**Muthurwa Estate**” within Nairobi City County. The said property comprises old and dilapidated residential houses and other social amenities previously for use by staff of Kenya Railways Corporation. Currently, the suit premises is vested in the Kenya Railways Retirement Benefit Scheme (the 1st Respondent). The Scheme’s purpose is the provision of pension and other benefits to Kenya Railways Corporation staff.
2. In the Petition dated 28th October, 2010 the Petitioners had challenged the decision of the 1st Respondent to evict them from the suit premises claiming that their eviction had violated their fundamental rights and freedoms including the right to accessible and adequate housing.
3. On 26th August, 2013, this Court delivered its judgment in the following terms;
 - a. *It is hereby declared that the 1st Respondent violated the Petitioners’ rights to accessible and adequate housing contrary to Article 43 of the Constitution but limited to the manner in which the forced evictions from Muthurwa Estate was conducted on or about 12th July 2010.*
 - b. *The 3rd Respondent is directed to consider amendments to the Water Services Act of 2002 to bring it in line with expectations of Article 43(1)(d) of the Constitution 2010.*
 - c. *The 3rd Respondent shall within 90 days of this judgment file an affidavit in this Court detailing out existing or planned State policies and legal framework of Forced Evictions and Demolition in Kenya generally and whether they are in line with acceptable international standards.*
 - d. *The 3rd Respondent shall within 90 days of this judgment file an affidavit in this Court detailing out the measures the Government has put in place towards the realization of the right to accessible and adequate housing and to reasonable sanitation in Kenya as is the expectation of Article (1)(b) of the Constitution.*
 - e. *Within 21 days of this judgment, a meeting shall be convened by the Managing Trustee of the 1st Respondent together with the Petitioners, where a programme of eviction of the Petitioners shall be designed taking into account all factors clearly outlined at paragraph 83 of this judgment.*
 - f. *That at the time of eviction neutral observers should be allowed access to the suit premises to ensure compliance with international human rights principles.*
 - g. *That there must be a mandatory presence of governmental officials or representatives including Nairobi County officials and security officers.*
 - h. *That there must be compliance with the right to human dignity, life and security of the evictees.*
1. *That the evictions must not take place 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.

10. That on one is subjected to indiscriminate attacks.

4. Following the Judgment and as ordered by the Court, the Petitioners and the 1st Respondent held several mediation meetings on developing a programme of eviction. Unfortunately, they have failed to agree upon a programme in terms of the aforesaid judgment.
5. It is in the above context that the 1st Respondent has filed the Notice of Motion Application dated 14th May, 2014 seeking *inter alia* an order for settlement of the terms of judgment delivered on 26th August 2013. The Application is premised on grounds that the Parties have failed to agree on an eviction programme due to divergent views held by either the Petitioners or the 1st Respondent's Managing Trustee. Further, that the 1st Respondent is finding it difficult to fulfill its statutory obligations of paying pensions to its members as the Petitioners are still occupying the subject property and have failed to pay rent to its detriment.
6. Mrs. Makasila, learned Counsel for the 1st Respondent submitted that as long as the Petitioners continue to occupy the subject property. The 1st Respondents continues to be denied income from the lease of the same. It claims therefore that its wish is to have the judgment implemented as soon as possible because it has planned that the income generated from the sale or lease of the suit premises would be used to pay the beneficiaries of the 1st Respondent's pension scheme.
7. It was her further submission that having acquired the property and being the registered owner, it is entitled to have its property rights protected. That security of land tenure is critical to economic development and relied on the decision of **Occupiers of 51 Olivia Road, Berea township and 197 Main Street Johannesburg vs City of Johannesburg & Others (24/07) ZACC 1** where it was held that it was an offence for anyone to continue occupying the premises after notice to vacate had been issued.
8. In persuading the Court to set a date for eviction of the Petitioners from the suit premises, Mrs. Makasila relied on the provision of **Section 12 of the South Africa Extension of Security of Tenure Act** that provides for guidelines to be followed during forced evictions. The said Section grants the Court ordering an eviction to determine a just and equitable date on which the occupier shall vacate the land and also determine the date on which the eviction may be carried out in the event the occupier fails to vacate voluntarily. He further referred the Court to the decision in **Residents of Joe Slovo Community vs Thubelisha Homes (2010) (3) SA 454 ZACC** and **Groengras Elendomme (PTY) Ltd vs Elansfontein Unlawful Occupants (2002) (1) SA 125 (T)** where the Court held that it was the duty of the State to provide housing to the homeless and that duty does not extend to an ordinary owner of property in the County.
9. Mrs. Makalia therefore urged the Court to set a just and equitable date for the eviction, order the process to be witnessed by Kenya Police officers who will provide security, maintain peace and order; Government officials, Nairobi County officials, neutral observers from the Retirement Benefits Authority and the Law Society of Kenya and 2nd Respondents representatives and that transport would be provided by the 1st Respondent to the Railway Station at Nairobi for the tenants who require assistance within areas in Nairobi.

The 2nd Respondent's case

10. The 2nd Respondent did not file any response or submission to the Application but Mr. Agwara learned Counsel appearing for it submitted that the Judgment subject of these proceedings should be operationalized so as to bring an end to the litigation.

The 3rd Respondent's case

11. The Attorney General did not respond to the Application but Mr. Moimbo, learned State counsel, representing him stated in his oral submission that the Attorney General had been unable to file an affidavit as ordered by the Court on the eviction policy and also on the measures the State had taken to realize the obligation of the right to housing and reasonable sanitation as provided for under **Article 423(1)** of the **Constitution**. No clear reason for that failure was offered.

The 1st to 10th Petitioners' submissions

12. Mr. Ogozo, learned Counsel for the 1st to 10th Petitioners submitted that the Court has a duty to ensure that any programme for eviction must be just and fair. In that regard, the Court was referred to the Judgment in the **Social Economic Rights Centre & Centre for Economic and Social Rights vs Nigeria Com No,155/96 (2001)** where it was held that evictions should be as a matter of last resort and with judicial oversight.

13. It was his further submission that before the 1st – 10th Petitioners' as well as other tenants' eviction from Muthurwa Estate could be effected, the Pensioners should be paid their pension which is owing from the 1st Respondent. That failure to pay them their pension before they are evicted would lead to a violation of their right under **Article 43(1)** of the **Constitution**. He thus contended that the Petitioners would only vacate the premises prior to receiving their pension if they are given alternative accommodation.

14. As regards the other tenants in the suit premises who were not Petitioners he contended that they too require adequate and reasonable eviction notice and that the minimum condition presence of Government officials and neutral observers and that the evictions should be carried out in a manner that promotes human dignity and right to life and security of those affected. Further, that the evictions should also not take place during band weather, during festivals, holidays or during exams and in the middle of a school term.

15. In addition that the proposed eviction programme by the 1st Respondent is unreasonable and inadequate and only a notice period of at least six months would be reasonable and fair. On that submission, he relied on the decision in **Port Elizabeth Municipality vs Various Occupiers (2005) (1) SA 217 (CC)** where the Court held that there was need to protect the Petitioners from eviction. In that regard, he proposed that a start up stipend of Kshs.10,000.00 per household should be paid in order to cushion the residents of the suit premises for the first three years after they are evicted given the social challenges they anticipate.

The 11th Petitioner's Submission's

16. Mr. Waikwa, learned Counsel for the 11th Petitioner's submitted that by failing to comply with this Court's orders, the Attorney General had violated his mandate under **Article 156(6)** of the **Constitution** and the Act governing his mandate. It was his position therefore that like in previous cases that as **Kenya Bus services Ltd & Another vs Minister of Transport and 2 Others (2012) e KLR** and **Joseph Ihugo Mwaura & 82 Others vs Attorney General (2012) e KLR** the High court has admonished the office of the Attorney General for failing to take seriously his mandate under **Article 156(6)** of the **Constitution** and this Court ought to do the same. It was also his contention that the Attorney General has the responsibility of ensuring that the right to housing of the Petitioners in the suit premises is not violated and that the Attorney General had failed to comply with the Court orders in the judgment at hand by failing to provide the information he was ordered to and in such circumstances the Court should order the Attorney General to attend court in person to explain why he had not complied with the orders of the Court.

17. It was Mr. Waikwa's further submission that the State has a duty to provide alternative housing to the Petitioners upon their eviction from the suit premises and claimed that the State has a further duty to provide alternative housing to the Petitioners upon their eviction from the suit premises and claimed that the State has a further duty under **Article 21(2)** of the **Constitution** to take

legislative and policy measures to ensure the progressive realization of the right to housing. He submitted therefore that the Attorney General must file an affidavit demonstrating whether there exist state policies and legal framework on forced evictions and demolition in Kenya and also an affidavit on measures the State has put in place towards the realization of the right to accessible and adequate housing as well as reasonable standards of sanitation.

18. It was also his position that the Court ought to balance the interests of the Petitioners and the rights to property of the 1st Respondent and that even if the 1st Respondent was entitled to an eviction order, it was only possible for the Petitioners to be evicted if there would be available alternative housing for them. He relied on the decision in **City of Johannesburg Metropolitan Municipality vs Blue Moonlight Properties 39 (PTY) Ltd & Another (2011) ZACC 33** where the Constitutional court of South Africa found that the owners' right to enjoy his property could be limited in the interests of justice and equity. He also relied on the case of **Ibrahim Sangor Osman & Others vs Attorney General & Others Petition No.2 of 2011** where the High Court found that the Petitioners' rights to accessible and adequate housing under Article 43 had been violated and ordered the Respondents to reconstruct reasonable residences and/or provide alternative accommodation or housing for the Petitioners.

19. In conclusion, it was therefore Mr. Waikwa's other submission that it would be unjust and inequitable to order an eviction of the Petitioners if it would result in homelessness. He proposed in that regard that before a date is set for the Petitioners' to vacate the suit premises, alternative accommodation be identified and made available by the 3rd Respondent.

The Interested Party's case

20. The Interested Party did not file any response to the Application did he make any oral submissions in respect thereof.

Determination

21. The practical question to be answered in this ruling is whether the Petitioners must be evicted to grant the 1st Respondent the right to fully exercise its rights regarding the suit premises and if so whether their eviction must be linked to an order that the 3rd Respondent ought to provide them with alternative accommodation. In that regard, the 1st and 2nd Respondents' position is that they are neither obliged nor able to provide the Petitioners alternative housing. That they wish to exercise their right to sell the suit premises in order to raise revenue to pay pensions. On their part, the Petitioners are apprehensive that save for the 11th Petitioner, they may end up homeless unless their pension are paid to them prior to the eviction or they are provided with alternative accommodation.

22. In that context and of relevance to the present Application, the dispute herein was instigated by the Eviction Notice dated 1st July 2010 in which the 1st Respondent gave the Petitioners 90 days to vacate the suit premises. However, before the 90 days had lapsed on the morning of 12th July, 2010, the 1st Respondent threatened to demolish all the houses within Muthurwa Estate hence the Petition. In the judgment aforesaid this Court found that the intended eviction was not carried out in accordance with the United Nations Basic Principles and Guidelines on Development based Eviction and Displacement of 2007 (The UN Guidelines) and therefore violated the 1st – 10th Petitioner's rights to adequate housing because their eviction was to be carried out without a plan and in the end the said Petitioners were to be left homeless. It was on the basis of that finding that the Court ordered the Parties to hold mediation talks and develop a plan on how the eviction of the said Petitioners from the suit property was to be carried out. Sadly, the parties failed to agree on such a plan.

23. Mrs. Makasila submitted that delay on the eviction of the Petitioners amounts to deprivation of the

- 1st Respondent's right to property and that it had no obligation to provide housing to the 1st – 10th Petitioners. It has therefore sought the implementation of this Court's Judgment on the issue at hand. In particular, Mrs. Makalisa urged the Court to set out a clear date on which the eviction would take place.
24. In that regard, it is common ground that the 1st Respondent is the lawful owner of the suit premises and that the 1st – 10th Petitioners have lawfully been occupying the suit premises as tenants and each had been paying or was expected to pay rent for the houses they occupy until they received the eviction notice aforesaid. However, the issue of rent had been very contentious though out these proceedings and has never been properly settled because it was not part of the Petition's substratum.
25. Be that as it may, as the lawful owner of the property the 1st Respondent is entitled to eviction of all occupiers thereof and the crucial question before this Court now is whether it is just and equitable to evict the Petitioners considering all the circumstances manifesting themselves in this case.
26. This Court must therefore consider a number of factors in determining what is just and equitable in the circumstances. Those factors include the fact that the Petitioners have been in occupation of the premises for a long time and the said occupation was once lawful. Further, the 1st Respondent is the lawful owner of the property and is entitled to it but the eviction of some of the Petitioners may render them homeless. How should the Court then manage the existing quagmire?
27. Firstly, as regards the issue of the legality of occupation of the Petitioners on the suit premises, it is uncontested that they have been tenants of the 1st Respondent and that they were issued with the eviction notice so as to pave way for demolition of their respective houses. Secondly, the 1st Respondent and that they were issued with the eviction notice so as to pave way for demolition of their respective houses. Secondly, the 1st Respondent being the lawful owner of the suit premises has the right to use its property for the purpose it deems proper. See **City of Johannesburg Metropolitan Municipality vs Blue Moonlight Properties (supra)**. Thirdly, the 1st Respondent cannot be expected to provide the Petitioners with free housing on its private property and the judgment of this Court was clear in that regard.
28. Having said so therefore, I am in agreement with Mrs. Makalasi that the Petitioners must be evicted from the suit premises as was the order of this Court. The only question that remains is how and when such eviction must be undertaken and specifically on the issue of the actual date on which the evictions must be taken. With respect, the issue of accommodation is not a matter arising to be determined.
29. In that regard and in my understanding of the international law on forced evictions, thus for I am satisfied that the 1st – 10 Petitioners have been given adequate information about the need to develop Muthurwa Estate and their need to vacate the suit premises on condition that they were paid their full pensions.
30. Sadly, the issue of pension is not before this Court nor do I have any material facts or evidence to enable the Court to determine that issue even if I was minded to consider the issue at all. Even if I had, that is an issue reserved for the exclusive jurisdiction of the Courts established under **Article 162(2)(a)** as it is an issue related to employment and labour relations. That is all there is to say on that aspect of this application.
31. When then should the 1st – 10th Petitioners and those they represent vacate the property in issue and under what conditions. I heard Mr. Ogosso to be saying that a notice period of six months would be adequate and sufficient to enable the Petitioners vacate the suit premises given their long occupation of the same.

32. In my judgment, and I reiterate the point, I referred to the UN Guidelines that have articulated conditions that must be undertaken during evictions and *inter alia* there must be presence of Government officials, neutral observers and that the evictions must not take place 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. I shall therefore make the appropriate order shortly.

33. Before that I pause here to determine the submission made by the 11th Petitioner that the 3rd Respondent has the duty to provide the Petitioners with alternative accommodation. The Constitution at **Article 43(1)** has provided for the right to adequate and accessible housing and reasonable standards of sanitation. The State under **Article 22(1)** is required to take legislative, policy and other measures to achieve the progressive realization of the right to housing and reasonable standards of sanitation. The State under **Article 22(1)** is required to take legislative, policy and other measures to achieve the progressive realization of the right to housing and adequate sanitation. However, that right is subject to availability of resources. In order for these rights to be realized, there is need for the State to take steps to ensure their realization.

34. Of issue to the enforcement of the aforesaid judgment, the issue is whether the State has put in place measures to ensure that evictions are carried out in accordance with the law and that the measures the State has undertaken to fulfil its obligation to ensure the realization of the right to housing. In that regard, this Court had directed the Attorney General to file an affidavit in Court detailing out the State policies and legal framework on forced evictions and demolition as and measures the State has taken to ensure the realization of the right to accessible and adequate housing and to reasonable sanitation in Kenya. Sadly, the Attorney General has failed to do so and no explanation has been given for that failure.

35. Having so said, it seems to me that goodwill does not exist on the part of any party to this litigation. It is close to two years since my judgment and the opportunity to amicably address the date and conditions of eviction has been lost. Litigation must come to an end hence the final orders to be made in this Ruling.

36. In concluding, the issues to be determined in this Ruling were very narrow but Parties submitted as many more extraneous issues which I have deliberately ignored.

37. Having therefore considered the matter and in the totality of the facts before me, I now make the following orders;

- a. **The Petitioners are hereby ordered to vacate the suit premises on or before 30th April, 2016 in the terms set out in the judgment of 26th August 2013.**
- b. **The 3rd Respondent shall provide information on the legislative and policy measures the State has undertaken on forced evictions and demolitions and realization of the right to accessible adequate housing and reasonable sanitation within 60 days failure to which the Petitioners are at liberty to take such action as they deem fit.**
- c. **There shall be no order as to costs.**

38. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Ogono for 1st -10th Petitioner and holding brief for Mr. Waikwa for 11th Petitioner

Miss Nduta for 1st Respondent

No appearance for 2nd Respondent

No appearance for 3rd Respondent

No appearance for Interested Party

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE