



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

PETITION NO. 60 OF 2011

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 43(1) (B) & 28 CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ARTICLES 2, 19, 20, 21, 22, 23, 24, 25, 35, 45, 48, 50, 53, 54 & 57, 62 OF
THE CONSTITUTION OF THE REPUBLIC OF KENYA & RULE 11 & 12 (PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) PRACTICE AND
PROCEDURE RULES AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE
LAW)**

AND

**IN THE MATTER OF ARTICLE 25 OF THE UNIVERSAL DECLARATION OF HUMAN
RIGHTS**

AND

**IN THE MATTER OF ARTICLE 11 OF INTERNATIONAL COVENANT ON ECONOMIC,
SOCIAL & CULTURAL RIGHTS**

AND

**IN THE MATTER OF ARTICLE 27 OF INTERNATIONAL CONVENTION OF THE RIGHTS
OF THE CHILD**

AND

IN THE MATTER OF ARTICLE 26 OF THE CONVENTION ON THE RIGHTS OF PERSONS

WITH DISABILITIES

BETWEEN

HON. GIDION MBUVI KIOKO.....	1ST
PETITIONER	
JAMES M. SINGI.....	2ND
PETITIONER	
PAUL O. OKELLO.....	3RD
PETITIONER	
SAMUEL IRERI THIONGO.....	4TH
PETITIONER	
LAWRENCE MUGO THIONGO.....	5TH
PETITIONER	
BENATTA MUMBUA KIMUYU.....	6TH
PETITIONER	
RAEL KEMEI.....	7TH
PETITIONER	
CHARLES K. MUTAI.....	8TH
PETITIONER	
PAUL RONO.....	9TH
PETITIONER	
PAUL MURIMI.....	10TH
PETITIONER	
WYCLIFFE AKOLA.....	11TH
PETITIONER	
FAITH KARUGA.....	12TH
PETITIONER	
SARAH ATIENOG. KIWANUKA.....	13TH
PETITIONER	
JOSEPH M. KAGIRI.....	14TH
PETITIONER	
ISSAC MUTISYA.....	15TH
PETITIONER	
LILIAN W. KURIA.....	16TH
PETITIONER	
GLADYS WANGARE MACHARIA.....	17TH
PETITIONER	
LAURA MACHARIA.....	18TH
PETITIONER	

(Suing on their own behalf and on behalf of ex-employees of Kenya

Railways Corporation)

AND

THE KENYA RAILWAYS CORPORATION.....	1ST
RESPONDENT	
THE ATTORNEY GENERAL.....	2ND
RESPONDENT	

RULING

The 1st Respondent is the owner of houses in South B in Nairobi in which the 2nd to 17th Applicants reside as tenants. The Petitioner is the Member of Parliament for Makadara Constituency where the houses are and therefore the Applicants are his constituents. He filed this Petition on their behalf and on behalf of the other tenants of the 1st Respondent at South B. The Petition followed a one month notice dated 16th March 2011 issued to the tenants by the 1st Respondent terminating the tenancies. The 1st Respondent indicated in the notice that it was in the process of finalizing the sale of these houses.

It is not in dispute that the 1st Respondent wanted to sell these houses and advertised the sale in the Daily Nation of Friday, February 18, 2011. This was sale by tender. The sale was subject to a reserve price. The closing date was 11th March 2011 at 10.30 a.m. According to the replying affidavit by David Njogu, the Legal Officer of the 1st Respondent, bids were received, evaluated and the successive bidders were requested to enter into agreements for the sale of the houses with the Respondent. The Applicants and tenants either did not bid for the houses, or were not successful bidders. It is not in dispute that they were eligible to bid just like all members of the public. It is following this sale that the 1st Respondent issued the notice to terminate the tenancies. It would appear not to be in dispute that under the

Tenancy Agreement signed between the 1st Respondent and each tenant it was agreed that:-

“Either party may terminate this Agreement at any time during the subsistence of the tenancy by giving one month’s notice in writing, but the landlord reserves its right under the provisions of sub-clause 1(e). In all other cases the tenancy shall automatically lapse upon expiry of the term created herein.”

Some history to the dispute between the 1st Respondent and these tenants would be useful. The tenants are ex-employees and/or retired employees of the 1st Respondent and have lived in these houses for a long time. Following the Concession Agreement entered into between the 1st Respondent and Rift Valley Railways, the Respondent made recommendations to the Government to be allowed to sell its non-strategic assets that had not formed part of the Concession for the purpose of raising money to pay its huge portfolio of liabilities. These house formed part of the non-strategic assets. The 1st Respondent recommended that some of the houses be sold to its employees at favourable consideration. Pages 55 to 60 of the supporting affidavit by James Singi are the annexed recommendation. Following that, the Permanent Secretary Ministry of Transport wrote to the Permanent Secretary Ministry of Finance on 19th February 2008 (Pages 62 and 63) over the matter. The Permanent Secretary Ministry of Transport acknowledged that the Treasury was the custodian of all Government assets. He sought the approval of the Treasury in accordance with section 13 (1) (c) of the State Corporations Act (Cap. 412). There is also the Report by the Inter Ministerial Committee on the Proposal by the Board of Directors of Kenya Railways Corporation to sell Corporation’s Non-Strategic Properties (pages 64 to 75) that made a similar recommendation to the Government.

These recommendations form the basis of the Petitioner’s case. He contends that the action of the 1st Respondent to sell the houses and to seek to evict the tenants therefrom infringes their constitutional rights and freedoms, specifically:-

- (a) the right to accessible and adequate housing and to reasonable standards of sanitation provided under Article 43 (1) (b) of the Constitution of Kenya 2010 and Article 11 of the International Covenant of Economic, Social and Cultural Rights;
- (b) the right of access to information held by the State and other person under Article 35 (1) of the Constitution and Article 9 of the African Charter on Human and People Rights;

- (c) the right not to be treated in a cruel, inhuman and degrading manner as protected by Article 29 (f) of the Constitution;
- (d) the right to fair administrative action under Article 47 of the Constitution;
- (e) the right of every child to be protected from inhuman treatment as guaranteed by Article 53 of the Constitution and Article 37 of the Convention on the Rights of the Child; and
- (f) the right of other members of society to live in dignity and respect under Article 57 (c) of the Constitution.

The Petition was filed to injunct the Respondents from demolishing the houses, evicting the tenants, terminating the leases or tenancies or transferring the houses or in any other way interfering with the houses. It was further sought that the Respondents be compelled to halt the tendering process. In the interim, and this is what the present application is about, there be granted conservancy orders in the nature of a temporary injunction. The Petitioner was represented by Mr. Mutinda who argued the Application for him.

The 1st Respondent was represented by Mr. Nyaanga and the 2nd Respondent by Mr. Onyiso. The 2nd Respondent did not formally respond to the application. The 1st Respondent opposed it and was relying on the replying affidavit above.

When the recommendations were passed to the Treasury, on 23rd April 2008 the Permanent Secretary Finance/Treasury wrote to say:-

- (a) the disposal of the houses was not covered by the Government Policy on the Civil Servants Housing Scheme 2004;
- (b) the staff being proposed had been retrenched and were therefore no longer staff of the 1st Respondent;
- (c) the houses available would not be enough to give each retired employee an opportunity to buy; and
- (d) if some retired employees got an opportunity to buy the houses and others did not get, their implied retirement package would be higher than for the majority of the retirees, and that would be inherently unfair and would lead to legal challenges.

It was advised that:-

“the assets be sold at market price through a competitive process. KRC may also enter into Public Private Partnerships with other institutions to maximize the value of its assets.”

It is on the basis of this instruction that the 1st Respondent sold the houses by tender. I agree with Mr. Nyaanga that, the fact that the tender was open to the tenants gave them an opportunity to bid and therefore purchase the houses. That was the only fair way to handle the transaction. Secondly, the 1st Respondent was holding Government assets, in the nature of the houses, on behalf of the Treasury who was the ultimate custodian on behalf of the Government and the public. The Respondent sought to favourably sell the houses to the tenants and persuaded the Board and the Ministry of Transport to agree with the proposal. This did not find the favour of the Treasury, and with good reasons. This Petition did not seek to challenge the Treasury's instruction.

The other reason why I agree with the 1st Respondent is that it had a landlord/ tenant relationship with the tenants. That was a contractual relationship with clear terms that had been mutually agreed. On the face, the termination letters accorded with the terms of the contract. It would be stretching things too far for the tenants to seek to rely on the provisions of the Constitution and International Coventions/Treaties in what was purely a contractual matter. At this stage of the dispute, I do not find that a case has been made to invoke provisions of the Constitution.

Further, it was pointed out that before the tenants came to court in the Petition they had filed a **Judicial Review Application No. 43 of 2011** against the 1st Respondent in which they sought orders of Prohibition and Certorari in relation to the tendering process over the houses. That matter is pending. Mr. Mutinda and his clients stated that the Application has been abandoned; that it was not even served. The Application is still on record. It has not been withdrawn. It would be an abuse of process to maintain both claims over the same subject matter between the same parties.

In conclusion, I find that no case has been made to enable the court to issue a temporary injunction or any other conservancy order. I dismiss the application with costs.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF APRIL 2011

A. O. MUCHELULE
J U D G E