



**Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff
Retirement Benefit Scheme & 2 others; Kothari (Interested Party); Rift Valley
Railways Workers Union (K) (Intended Petitioner) (Petition 65 of 2010)
[2023] KEHC 22311 (KLR) (Constitutional and Human Rights) (15 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22311 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 65 OF 2010

M THANDE, J

SEPTEMBER 15, 2023

BETWEEN

**SATROSE AYUMA 1ST PETITIONER
JOSEPH SHIKANDA 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**

AND

**THE REGISTERED TRUSTEES OF THE KENYA RAILWAYS STAFF
RETIREMENT BENEFIT SCHEME 1ST RESPONDENT
THE KENYA RAILWAYS CORPORATION 2ND RESPONDENT
HON. ATTORNEY GENERAL 3RD RESPONDENT**



AND

MILOON KOTHARI INTERESTED PARTY

AND

RIFT VALLEY RAILWAYS WORKERS UNION (K) ... INTENDED PETITIONER

RULING

1. The proceedings herein as can be seen from the record were initiated by the 1st -10th Petitioners on their own behalf and on behalf of other interested beneficiaries of the Kenya Railways Staff Retirement Benefit Scheme, and also on behalf of 359 lessees, occupiers, tenants and persons who reside on the suit premises, namely, L.R. No.209/6502, Muthurwa. In their Petition, dated Petition, they sought the following reliefs:
 - a. A Declaration that the 1st to 10th Petitioners, the persons they represent and their families are entitled to the rights set out at paragraph 12 of this Petition.
 - b. A Declaration that the actions and omissions of the Respondents violate the fundamental rights and freedoms of the 1st to 10th Petitioners, the persons they represent and their families set out in paragraph 12.
 - c. An Injunction restraining the Respondents, their servants, agents or others acting on their behalf or instructions from demolishing houses, terminating leases or tenancies, transferring or alienating the suit premises or in any other manner evicting the Petitioners and the persons they represent from the suit premises.
 - d. An Order compelling the Respondents jointly and severally to reconnect sewage systems, water supply and toilet facilities to the suit premises.
 - e. An Order compelling the Respondents to avail all information relating to the suit premises including but not limited to the following; resolutions of all the organs of the 1st Respondent that authorised the demolition, alienation of the suit premises, sale and eviction of the Petitioners.
 - f. Without Prejudice to the foregoing, and in the alternative, a declaration that in the event of an eviction and prior to such eviction the Respondent shall ensure and provide that:
 - i) One (1) year notice in writing to the Petitioners and all affected persons and the parties herein to hold public hearings on the proposed plans and alternatives and those Petitioners may act in person and or through their advocates and or representatives.
 - ii) During such hearings, the Petitioners be given opportunity to challenge the eviction decision and to present alternatives proposals and issues, priority rights and interests, which shall be incorporated in the final decision.



- iii) Prior to such meetings and hearings, the Respondents shall furnish the Petitioners in advance with all relevant information in advance and including land records and a comprehensive proposal on the resettlement plan specifically addressing the Petitioners' rights in the Petition herein and all rights of vulnerable persons.
- iv) The proposal in (b) above shall incorporate reasonable time for public review of, comment on, and/or objection to the proposed plan.
- v) The Petitioners be accorded reasonable opportunity to obtain legal, technical or other professional advice on the Petitioners' rights and interest and other options.
- vi) Compensation for breach of fundamental freedoms.
- vii) Costs of the suit herein.
- viii) Any further relief or order that the Court shall deem just and fit to grant.

2. The matter proceeded to full hearing and in his judgment delivered on 30.8.13, Lenaola, J. (as he then was) gave the following orders:

- 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 the 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 on Forced Evictions and Demolitions 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 realisation of the right to accessible and adequate housing and to reasonable sanitation in Kenya as is the expectation of Article 43(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 the factors clearly outlined at paragraph 83 of this judgment;
 - i. that at the time of eviction, neutral observers should be allowed access to the suit premises to ensure compliance with international human rights principles.



- ii) that there must be a mandatory presence of Governmental officials or representatives including Nairobi County 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.

The agreed programme shall be filed in this court, in any event within 60 days of this judgment.

- f. As to costs, clearly the issues raised in the Petition and the orders made above would show that there shall be no orders as to costs.
 - g. All other prayers in the Petition are not granted and are consequently dismissed.
 - h. Each party at liberty to apply.
3. Thereafter, the Petitioners and the 1st Respondent held several mediation meetings on developing a programme of eviction which however bore no fruit. This prompted the 1st Respondent to move to Court by way of an application dated 15.5.14, seeking inter alia an order for settlement of the terms of judgment. In a ruling on 18.12.15, Lenoala, J. (as he then was) ordered the Petitioners to vacate the suit premises on or before 30.4.16, in the terms set out in the judgment.
4. The subject of this ruling is an Application dated 24.11.21 in which the proposed 13th Petitioner (the Applicant) seeks the following orders:
- 1. That the applicant be enjoined (sic) in the matter as the 13th Petitioner.
 - 2. That parties in the matter be directed to serve the applicant with the pleading and the documents with respect to the petition herein.
 - 3. That on receipt of the said pleadings the intended 13th Petitioner to put in a formal application.
 - 4. That costs be in the suit.
5. The grounds upon which the Application is premised as set out in the affidavit of Munayi Opondo Isaac, the Applicant's Secretary General sworn on even date, are that the subject property is one among other properties that were vested to the 1st Respondent vide a Vesting Order in Legal Notice No. 169 of 2006. By the vesting order, the ownership of the said property among others therein listed, was transferred from the 2nd Respondent to be run and managed for the benefit of the members of the 1st Respondent who include members of the Applicant; that for the past over 14 years, the subject property has never benefitted members of the 1st Respondent and of the Applicant despite the said property belonging to them; that it would be extremely prejudicial for the owners of the said property in the unlikely event that orders were issued without the contribution and presence of the Applicant;



that members of the 1st Respondent and the Applicant are residents of the said property and they have and share the very interests of the Petitioners herein; that certain cartels have over the years hived off the property and have been collecting monies and depositing the same in private accounts rather than the lawful account that would benefit the pensioners; that the indolence and disinterest of the 2nd Respondent with regard to the said property has aided and abetted the pensioners' woes; that the Petitioners herein have no locus over the said property and the interest of the owners of the property is in grave danger of being prejudiced; that Article 50(1) of *the Constitution* affirms the right to have a dispute litigated in open court in a just manner. In view of the foregoing, the joinder of the Applicant will go a long way in assisting the Court to dispense justice herein to the true owners of the said property.

6. The Application is opposed by the Petitioners vide grounds of opposition dated 10.5.22. The grounds are that the Application is intended to derail the Court from trying the substantive issues and that the Applicant is unnecessary in the proceedings herein; that the Application makes unreasonable, irrational and untrue averments both of law and fact and imputes that this Court made an erroneous finding; that the Applicant seeks to rely on illegally obtained documents whose source and relevance is unknown to the Petitioners; that the Applicant cannot claim to advance the interest of a group that has no basis or whose input in the case is unknown or otiose and no brief detailing the interest has been presented or why it was not presented during the hearing of the case; that the case was determined on 30.8.13 and the Applicant cannot seek joinder 9 years later; that the Petitioners have no connection with the Applicant to necessitate its input. The Petitioners thus seek that the Application be dismissed with costs.
7. In a response to the grounds of opposition dated 29.9.23 and signed by Munayi Opondo Isaac, the Applicant denied the allegations in the Petitioners' grounds of opposition and reiterated the averments in his earlier affidavit. It was averred that the matter was a mistrial in the sense that the true owners of the subject property never participated in the proceedings. The Applicant contends that the Court has not finally pronounced itself in the matter as such, it is within the Applicant's right to be joined in these proceedings in terms of the right to a fair trial under Article 50 of *the Constitution*. Further that the subject property was vested in the 1st Respondent for the benefit of its members which include members of the Applicant. The Applicant's representative is a signatory to what he refers to as the Schemes Trust Deed and Rules, *the Constitution* of the 1st Respondent. As such, the Applicant is eligible to represent its members herein and therefore the Petitioners cannot allege that the Applicant has no role in the affairs of the subject property yet the same belongs to the Applicant among others. The Applicant further refers to the Petitioners are strangers to the property and have no right in respect of the ownership of the same. The Petitioners may possess the property but are not the owners thereof. The Applicant as owners of the property should be allowed to ventilate their concerns over the property.
8. Rule 5 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) provides for the addition, joinder, substitution and striking out of parties. On joinder of parties, the Rule 5(d)(ii) provides as follows:

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 just—

- (ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.



9. The Court has the power to add to proceedings before it, any person who ought to have been joined as a party and was not, or whose presence is necessary to enable the Court adjudicate upon and make a just determination of the issues in controversy before it. This may be done at any stage in the proceedings by the Court acting suo moto or upon application. For the Court to grant such orders, it must be persuaded that such person is a necessary party.

10. In the case of *Pizza Harvest Limited v Felix Midigo* 2013 eKLR Havelock, J. considered who a necessary party was and stated:

I have also taken cognizance of the case of *Amon v Raphael Tuck & Sons Ltd* [1956] 1 All ER 273, in which Devlin, J held at p. 286-287:

“What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.”

11. And in the case of *EG v Attorney General; David Kuria Mbote & 10 Others (Interested Parties)* [2021] eKLR the Court of Appeal held as follows:

(1) The core of the court’s power to join a party to any proceedings including at the appellate stage, as aptly discussed in *Hamisi Yawa & 36,000 others v Tsangwa Ngala Chome & 19 others* [2018] eKLR, is to bring on board a necessary party for purposes of determining the real issue(s) in dispute. Also, a joinder of a party is not an automatic right, but one which is granted upon exercise of the discretion of the court concerned. Nonetheless, the court exercises such discretion under defined parameters, that is, it must be satisfied that: -

- a) The intended party has a personal interest or stake in the matter in question; and that interest is clearly identifiable and proximate enough and not merely peripheral.
- b) The intended party’s presence would enable court to resolve all the matters in the dispute.
- c) The intended party would suffer prejudice in case of non-joinder.
- d) The joinder of the intended party will not vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings.

The Court went on to state:

(15) While it is not lost to us that the appellant is a member of the LGBTIQ community, we are persuaded that the inclusion of the applicant in the appeal will not in any way prejudice



the proceedings or the parties. In our view, the applicant's inclusion will afford the Court an opportunity to hear the various perspectives of the concerned parties which will in turn enable it to conclusively determine the matter.

12. The power of the Court under this provision is discretionary and a party seeking to be added in proceedings must lay a sound basis before the Court, that such party is a necessary party for purposes of determining the real issues in dispute. To this end, the Court must be satisfied that such a party has a clearly identifiable proximate stake in the matter and that the party's presence will assist the Court in resolving all matters in dispute. Additionally, it must be demonstrated that non-joinder will occasion prejudice to such intended party and will not convolute the matter before court with unnecessary new matters not envisaged in the pleadings.
13. The position of the Applicant as I understand it is that for the past over 14 years since the vesting order, the subject property has never benefitted members of the 1st Respondent and of the Applicant despite the said property belonging to them. They claim that certain cartels have over the years hived off the subject property and have been collecting monies and depositing the same in private accounts rather than the lawful account that would benefit the pensioners. Further that the indolence and disinterest of the 2nd Respondent with regard to the said property has aided and abetted the pensioners woes. According to the Applicant, the Petitioners are strangers and not owners of the subject property and have no locus over the same. As such, they have no basis to oppose the Applicant's application for joinder. It is the Applicant case that its members being members of the 1st Respondent upon which the subject property was vested for the benefit of its members, should be joined in these proceedings to give their voice and input in the matter.
14. A careful look at petition herein centres around the eviction of the 1st -10th Petitioners by the Respondents from the subject property. The ownership of the same is not in issue at all. Orders were given by this Court in its judgement of 30.8.13 on how eviction will take place. Further orders were issued on 18.12.15 by which the Petitioners were ordered to vacate the suit premises on or before 30.4.16 in the terms set out in the judgment.
15. As stated by the Court of Appeal, a joinder of a party in proceedings, is not an automatic right, but one which is granted upon exercise of the discretion of the court concerned. It is noted that the Petition herein was filed in 2010 and judgment delivered in 2013. The Applicant has not explained where it has been for over 10 years. Further, the Applicant claims ownership of the subject property on the ground that its members are members of the 1st Respondent. This being the case, its input ought to have been made through the 1st Respondent in whom the subject property was vested. The circumstances herein are that orders were in 2014 given in favour of the 1st Respondent for vacation of the suit property by the Petitioners and timelines duly given. It is therefore difficult to understand what input the Applicant will have in the matter at this late stage. Joinder of the Applicant at this post-judgment stage will in my view convolute the matter and not add any value to proceedings in which the matters in dispute were resolved in the judgment and subsequent ruling.
16. Additionally, there is no demonstration by the Applicant that it has an identifiable and proximate stake in the matter in issue or that its presence will assist the Court in resolving all matters in dispute, which in any event have already been resolved. It has also not been shown that non-joinder will occasion prejudice to the Applicant. Further, the Court is of the view that what the Applicant intends to bring on board will no doubt convolute the matter by introducing new and unnecessary matters, not envisaged in the pleadings.



17. The Applicant urged the Court to allow the Application and cited its right to a fair trial under Article 50(1) of *the Constitution* which provides:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

18. The Court appreciates that the right of the Applicant and indeed every person to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, is guaranteed under *the Constitution*. However, the circumstances herein are that the matter concerns eviction of the Petitioners, which has been resolved. The Applicant's issue seems to be that no benefit has accrued to its members and members of the 1st Respondent from the subject property since the same was vested in the 1st Respondent in 2006. The Applicant further alleges that the indolence and disinterest of the 2nd Respondent with regard to the subject property has contributed to the woes of the pensioners. With respect, these are not the issues in dispute in the Petition herein. The Applicant's recourse lies not in this Petition but in filing a separate suit against the Respondents.

19. In the case of *Florence Mwhiki Kamande v Maisha Flour Limited & TDF Group Limited* [2021] eKLR cited by the Petitioners, Makau, J. considered an application for joinder and stated:

18. I find that the 2nd Respondent has not demonstrated that the third party is a necessity part to be enjoined in these proceedings as a party. The applicant has not disclosed any tangible reasons for joinder of the third party in the instant Petition.

20. Likewise, I find that the Applicant herein has not demonstrated any tangible reasons for joinder in this matter where the issue is eviction of the Petitioners and not the lack of accrual of benefit to pensioners, from subject property.

21. In the result, I find that the Application dated 24.11.21 is without merit and the same is hereby dismissed with costs to the Petitioners.

DATED and DELIVERED in NAIROBI this 15th day of September 2023.

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M. THANDE

JUDGE

