



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC PETITION NO 5 OF 2019

GEORGE OWINO ODHIAMBO.....1ST PETITIONER

DAVID KIPNGENO KATITI.....2ND PETITIONER

ESTONE LUGAIRI.....3RD PETITIONER

FRIDAH WELLIMO.....4TH PETITIONER

CAROLINE CHESSUM.....5TH PETITIONER

HUSSEIN MOHAMMED OSMAN.....6TH PETITIONER

JOSHUA KARIOKI MOSE.....7TH PETITIONER

LUCY WANJIKU MWANGLI.....8TH PETITIONER

MARGARET MWARIRI NJOKI.....9TH PETITIONER

MOHAMED ADAN IBRAHIM.....10TH PETITIONER

PASCALIA OWINO.....11TH PETITIONER

RODAH JELAGAT RONO.....12TH PETITIONER

STEVE GICHABA BIRUNDU.....13TH PETITIONER

SULEIMAN KHALIF IBRAHIM.....14TH PETITIONER

VERSUS

KENYA RAILWAYS CORPORATION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

J U D G M E N T

1.The Petitioners are all tenants of the 1st Respondent at Section 58 Nakuru Railways Estate where the 1st Respondent has some old single dwelling units numbering 26 sitting on the 1st Respondent's land measuring 7.5 acres or there about. The petitioners had all been issued Tenancy Agreements by the 1st Respondent for a term of 2 years, which with the exception of the Tenancies for the 10th and 14th Petitioners ran from 1st January 2017 to 31st December 2018. When the tenancies expired, the 1st Respondent gave notices to the Petitioners that they required that the petitioners vacate the premises that they occupied after the expiry of one month. The 1st Respondent stated they wanted to redevelop the single unit dwelling houses into modern multidwelling high rise residences in conformity with the governments agenda to offer affordable low cost houses.

2. The petitioners were opposed to the notice and contended the 1st Respondent's objective was merely to evict them from the residences they were occupying and the reason proffered was unreasonable and arbitrary. They averred the 1st Respondent's threatened action to have them evicted from their homes without compensation was an affront to their fundamental rights enshrined under the constitution. The petitioners claimed that the fact that not all the tenants of the 1st Respondent residing in Section 58 area, Nakuru were served termination letters indicated that the petitioners were selectively targeted and thus they were discriminated against in violation of Article 27 (1) & (2) of the constitution. They contended the 1st Respondent's acts were in abuse of power, were arbitrary and were not exercised fairly and therefore were in violation of Articles 28, 40 and 47, of the constitution. The petitioners further contended the 1st Respondent failed to avail any information on the intended affordable Housing Agenda and that constituted denial of access to information contrary to Article 35 of the constitution.

3. The petitioners with leave of the Court amended their petition initially dated and filed on 29th January 2019 on 19th February 2020. The petitioners prayed for the following orders:-

(a) A declaration be made that the Petitioners' fundamental rights and freedoms under Articles 27 (1) & (2), 28,35 (1),40, and 47 (1) of the Constitution have been contravened and or likely to be contravened and violated by the respondents herein.

(b) A declaration that the termination notice dated 9th January 2019 by the 1st Respondent is illegal, arbitrary, irregular, un-procedural and contrary to Articles 27 (1) & (2), 28,35 (1), 40, and 47 (1) of the Constitution of the Republic of Kenya and is therefore null and void.

(c) A declaration be made that the Petitioners' have a right to peaceful and quiet enjoyment of the properties subject hereto.

(d) A declaration that any forceful eviction is illegal, oppressive and violates rights of the rights of the petitioners.

(e) Compensation for the improvements made on the suit properties.

(f) Costs of this petition.

(g) Any other orders, writs and directions the Honourable Court considers appropriate and just to grant for purposes of the Petitioner's constitutional rights.

4. The 1st Respondent filed a replying affidavit through Kenedy Mbulo their Senior Real Estate Officer on 25th April 2019. The 1st Respondent denied any fundamental rights and/or freedoms of the petitioners had been violated. The 1st Respondent asserted that the petitioners were all tenants of the 1st Respondent in the 1st Respondent's 26 single dwelling units where they each held 2 years tenancy agreements that expired on 31st December 2018. The 1st Respondent asserted that pursuant to the expiry of the tenancies, the petitioners were issued notices to vacate the premises as the 1st Respondent intended to redevelop modern multidwelling units on the site in place of the single dwelling units. The 1st Respondent in the premises contended its relationship with the petitioners was that of Landlord and Tenant and could not give rise to Constitutional Rights. The relationship was contractual and any dispute arising therefrom could not be deemed as a constitutional issue. The 1st Respondent thus contended the matter did not constitute a Constitutional matter that fell to be considered under the Constitutional Bill of Rights. The 1st Respondent thus contended the jurisdiction of the Court under the Bill of Rights, was improperly invoked.

5. The petition was canvassed by way of written submissions. The petitioners filed their submission on 14th November 2019 while the 1st Respondent filed its submissions on 18th November 2019. The petitioners in their submissions have contended that the replying affidavit sworn by Kenedy Mbulo was defective as it was not demonstrated that the said Kenedy Mbulo had authority to swear the affidavit on behalf of the 1st Respondent. The petitioners argued, the deponent did not annex any authority to show that he was authorized to depone the affidavit and consequently that rendered the affidavit defective and liable to be struck out. The petitioners placed reliance on the cases of **Microsoft Corporation -vs- Mitsumi Computer Garage Ltd & Another (2001) eKLR** and **Pamela Jebichii Koskei -vs- Horizon Coach Co Ltd & 2 others (2018) eKLR**. In the Microsoft Corporation case (*supra*) Ringera J (as he was then) stated thus:-

".. An affidavit by a corporation can only be made by an officers thereof who is duly authorized by the Corporation to do so. I accept the submission by counsel for the first defendant that this is a matter of substance not form and that it is incompetent of any other person however conversant with the averments in the plaint he may be to make an affidavit on behalf of the Corporation".

6. In the Pamela Jebichii Koskei case (*supra*) Kariuki, J struck out an affidavit sworn on behalf of the applicant without authority. The petitioners in the instant matter argue that the 1st Respondent's replying affidavit was sworn by a person who was not authorized and it therefore should be disregarded/struck out.

7. The 1st Respondent in its submissions did not specifically respond to the challenge in regard to the replying affidavit sworn by Kenedy Mbulo but rather challenged the competency of the petition arguing that it did not satisfy the threshold as to what constitutes a Constitutional Petition in as far as a violation of fundamental rights under the Bill of Rights was alleged.

8. On the issue of the 1st Respondent's replying affidavit having been sworn by someone who was not authorized by the 1st Respondent to do so, I have perused the record and I have not come across any authority given by the first respondent although under paragraph 2 of the replying affidavit Kenedy Mbulo depones thus:-

2. That I am the senior Real Estates officer of the Respondent and I have its authority to make this oath.

9. However, notwithstanding the absence or demonstrated authority on the part of Kenedy Mbulo to swear the affidavit on behalf of the 1st Respondent, I would not, this being a Constitutional Petition, have been persuaded to strike out the replying affidavit as long as it disclosed some relevancy to the matter in controversy. My view is that the strict Rules of the Civil Procedure cannot apply to Constitutional Petitions which under Article 22(3) of the Constitution and the Constitution of Kenya Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013 permit flexibility and informality in the institution of Constitutional Petitions. Under Article 22 (3) of the Constitution the Chief Justice was mandated to make rules providing for the Court proceedings in regard to the Enforcement of the Bill of Rights. Inter alia such rules were to satisfy the criteria set out under Article 22 (3) (b) & (d): -

(3) (a) (b) formalities relating to the proceedings, including commencement of the proceedings are kept to the minimum, and in particular that the court shall, if necessary entertain proceedings on the basis of informal documentations;

(c) -----

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and

(e) -----

10. The Rules made by the Chief Justice under Article 22 (3) of the Constitution had the singular objective of facilitating access to justice for all persons and ensuring just determination of the proceedings in an expeditious manner. In regard to proceedings for enforcement of the Bill of Rights the rules of procedure were relaxed such that the courts were enjoined to seek to render substantive justice and were not to be held captive by the technical rules of procedure.

11. The deponent of the replying affidavit for the 1st Respondent was its employee and was conversant with the matter giving rise to the complaint by the petitioners as he was the 1st Respondent's Estate Manager. The petitioners were all tenants of the 1st Respondent and all the deponent did was to verify that fact by annexing copies of the tenancy agreements entered into by the petitioners. The petitioners were not disputing the tenancy agreements and/or that they had been served with notices to vacate the premises. They were merely contesting the manner their tenancies were terminated contending the termination was arbitrary and discriminative and was thus in contravention of their constitutional rights.

12. The replying affidavit by Kenedy Mbulo in my view and in the light of Article 22 (3) of the Constitution and the 2013 Practice Rules was a relevant and admissible document in the form it was and it not in any way prejudiced the petitioners case. The objective of Article 22 of the Constitution was to enable proceedings touching on the enforcement of the Bill of Rights to be undertaken without any undue regard to technicalities of procedure to facilitate unfettered access to justice and to ensure substantive justice was meted out to parties in such proceedings. I may mention that the two authorities cited by the petitioners and referred to herein above referred to Civil proceedings to which the Civil Procedure Act and the Rules made thereunder have full application.

13. The other issue in regard to which both the Petitioners and the 1st Respondent have submitted on is the competence of the Petition. The 1st Respondent has submitted the petitioners case does not satisfy the threshold or test of what constitutes a constitutional petition as established in the case of **Anarita Karimi Njeru -vs- The Republic (1979) eKLR**. This case established the principle that a Constitutional Petition should set out with a reasonable degree of precision the petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed. The 1st Respondent submitted that the principle enunciated in the Anarita Karimi Njeru case (*supra*) was restated by the Court of Appeal in the case of **Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** where the Court stated at paragraph 44 as follows:-

(44) *We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case at. At the very least, the 1st should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these short comings, it was not enough for the superior court below to lament that the petition before it was not the " epitome of precise, comprehensive or elegant drafting ", without remedy by the 1st respondent.*

14. Further the Court of Appeal in the same Mumo Matemu case (*supra*) at paragraph 87 (3) on its findings stated as follows:-

" It is our finding that the petition before the high Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit, we have concluded that they did not provide adequate particulars of the claims relating to the alleged violations of the Constitution of Kenya and the Ethics and Anti- corruption Commission Act, 2011. Accordingly the petition did not meet the standard emaciated in the Anarita Karimi Njeru case

(*supra*).

15. The petitioners responding to the assertion that the petition lacked competency on the ground of imprecise pleading, submitted the principle in the Anarita Karimi case had since been somewhat relaxed and cited in support of their submission the case of **Musili Mwendwa -vs- Attorney General & 3 others (2016) eKLR** where the High Court stated :-

" The rule in Anarita Karimi Njeru -vs- Republic (supra) ought not be applied hook line and sinker . It is not about absolute precision. If a party and, a priori, the court is able to painlessly identify the complainants case, then the matter ought to be

determined substantively and on its merits”

16. The petitioners further referred the Court to the case of **Samuel Tunoi -vs- Speaker Nakuru County Assembly & 2 others (2019) eKLR** where the high Court reviewed the competency test of Constitutional Petitions as laid in the Anarita Karimi Njeru case (*supra*) and Mumo Matemu case (*supra*) and held that the Court sitting as a Constitutional Court has a duty to protect the rights of every individual as preserved in the Constitution and as such the Court should not be quick to dismiss a petition on the ground that it has not been drafted with elegance. To that extent the Court was of the view that the strict approach established in the Anarita Karimi case ought to be relaxed to some degree with a view of sustaining constitutional petitions so that they are heard and determined on merits.

17. While the principle enunciated in the Anarita Karimi Njeru case (*supra*) and further restated in the Mumo Matemu case (*supra*) remains good law and the guiding principle in regard to particularity and specificity in Constitutional Petitions, as it enables the respondents to know the particulars of the case they are required to respond to, I am also of view that as long as the petition discloses the alleged transgressions and the particulars of the provisions alleged to have been breached, the petition ought to be allowed to proceed to full hearing to enable a determination to be made on merits. I am fortified in this view by Article 22 (3) (b) & (d) of the Constitution which I set out earlier in this judgment. These provisions in my view envisage a situation where the pleadings commencing the Constitutional proceedings may not have been “elegantly drawn” yet they relate to enforcement of the Bill of Rights. To strike out such pleadings would run counter to these provisions.

18. The present petition has set out the provisions of the Constitution the petitioners allege to have been violated and have under paragraph 46 of the petition endeavored to give particulars of how the violations occurred. The affidavit sworn in support of the petition sets out the facts that culminated in the alleged violations. The petition therefore in form satisfies the principle of precision in the Anarita Karimi Njeru case.

19. Having found that the Court is properly seized of the petition, I now turn to consider whether the petition has any merit. The petitioners have submitted that their right to property under Article 40 (2) & (3) of the Constitution have been threatened and/or infringed and it is their argument that there has been no fair administrative action accorded to them by the 1st Respondent. It is the petitioners contention that the Notice by the 1st Respondent to terminate their tenancies was unreasonable and arbitrary. It is on that account they aver there was no fair administrative action before the impugned action was taken.

20. The 1st respondent has contended that the petitioners and the 1st Respondent were in a contractual relationship of a Landlord and Tenant and that the termination notices were pursuant to the provisions of the tenancy agreements and could not amount to a violation of a Constitutional provision as alleged by the Petitioners. The 1st Respondent has submitted that the petitioners cause of action, if any, was in the law of contract and the law relating to leases and tenancies under the Land Act, 2012. The 1st Respondent argued that by the petitioners couching their complaint as a case for violation of the Bill of Rights under the Constitution, the Petitioners were abusing the court process. The 1st Respondent contended that after the termination notices of their tenancies expired they became trespassers on the 1st Respondent’s premises. The 1st Respondent argued that the petitioners remedy did not lie in the Constitutional Court but in the Civil court. The petitioners had an alternative remedy and therefore ought not to have invoked the jurisdiction of the Constitutional court. See the case of **Abraham Kaisha Kanziku -vs- Governor of Central Bank & others (2006) eKLR**.

21. In the case of **Godfrey Paul Okutoyi & others -vs- Habil Olaka & Another (2018) eKLR** Chacha, J on the issue of there being an alternative remedy in lieu of constitutional remedies at paragraph 65 stated:-

65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.

22. In the case of **Bernard Murage -vs- Fine Serve Africa Ltd & others (2015) eKLR** the Court stated:-

“ Not each and every violation of the Law must be raised before the High Court as a constitutional issue. Where there exist an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first”.

23. In the case of **Patrick Mbau Karanja -vs- Kenyatta University (2012) eKLR Lenaola**, J (as he then was) expressed himself as follows in regard to when the Constitutional interpretative mandate of the Court may be invoked:-

“ I should only say this as I conclude; in Francis Waitthaka -vs- Kenyatta University Petition No. 633 of 2011, this Court was categorical that it is imperative that the Bill of Rights and the Constitutional interpretative mandate of this Court should not be invoked where other remedies lie. Further the Court also cited with approval, the decision in Teitinnang -vs- Ariong (1987) LRC (const.) 517 where it was held as follows:-

“Dealing now with the questions, can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the Laws? The rights and duties of individuals, and between individual, are regulated by private laws. The Constitution, on the other hand, is an instrument of government. It contains rules about the government of the Country. It is my view, therefore that duties imposed by the Constitution under the fundamental rights provisions are owned by the government of the day, to the governed . I am of the opinion that an individual or group of individuals, as in this case, cannot owe a duty under the fundamental rights provisions to another individual also as to give rise to an action against the individual or group of individuals . Since no duty can be owed by an

individual or group of individuals to another individual under the fundamental rights provisions of the Constitution no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me, and I so hold”.

24. Lenaola, J went on to observe as follows after citing the above case:-

“ I maintain this position and it is important that simple matters between individuals which are of a purely Civil or Criminal nature should follow the route of Article 165 (3) (a) and be determined as such. To invoke the Bill of Rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of Rights”.

25. I fully associate myself with the sentiments expressed by Chacha, J and Lenaola, J in the above referenced cases and I agree that matters that do not call for the Court’s Constitutional interpretative mandate under the Bill of Rights provisions of the Constitution should not be disguised as Constitutional Petitions seeking enforcement of the Bill of Rights. There ought to be a clear delineation of constitutional matters and the ordinary Civil suits. In the present matter each of the Petitioners had a personalized tenancy agreement for a term of two (2) years with the option to renew upon negotiations on the expiry of the terms of the tenancy. The contracts also carried a clause under clause 3(c) of the tenancy agreements allowing either party to terminate the tenancy . It provided thus:-

3(c) Either party may terminate this Agreement at any time during the subsistence of the tenancy by giving one months’ notice in writing but the Landlord reserves its right under the provisions of sub clause 1(a) . In all other cases the tenancy shall automatically lapse upon expiry of the term created herein.

26. Without exception all the petitioners were served with one Month’s Notice in writing of the termination of the tenancy . The 1st Respondent in my view was within its rights to serve termination notices of the tenancies on the petitioners, and if for any reason, the Petitioners considered that the terminations were not justified, that did not constitute the matter a constitutional matter. The parties had private commercial contracts and the forum for any party who felt the contract had been breached, was before the ordinary Civil Court for the issue to be adjudicated. I am satisfied there was no threatened violation and/or infringement of any Constitutional provisions under the Bill of Rights to justify the petitioners to invoke the Constitutional jurisdiction of this Court. The petition is devoid of any merit and was brought in abuse of the court process

27. Accordingly, I order the petition dismissed with costs to the 1st Respondent.

28. Orders accordingly.

Judgment dated, signed and delivered virtually at Nakuru this 30th day of July 2020.

J M MUTUNGI

JUDGE