



**Ngara Railways Southern Zone Residents Association v Kenya Railways Staff Retirement Benefits Scheme & another; Kenya Railways Corporation & another (Interested Parties) (Environment and Land Petition E031 of 2025) [2026] KEELC 769 (KLR) (5 February 2026) (Ruling)**

Neutral citation: [2026] KEELC 769 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT AND LAND PETITION E031 OF 2025**

**J OMANGE, J**

**FEBRUARY 5, 2026**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES  
27, 28, 40, 43, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF THEN ENVIRONMENT AND LAND COURT ACT (NO. 19 OF 2011)**

**AND**

**IN THE MATTER OF PRACTICE DIRECTIONS  
UNDER LEGAL GAZETTE NOTICE NO. 5178.**

**BETWEEN**

**NGARA RAILWAYS SOUTHERN ZONE RESIDENTS  
ASSOCIATION ..... PETITIONER**

**AND**

**KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME .... 1<sup>ST</sup>  
RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KENYA RAILWAYS CORPORATION ..... INTERESTED PARTY**

**RIFT VALLEY RAILWAYS WORKERS UNION ..... INTERESTED PARTY**



## RULING

1. The Petitioners, being residents of LR No. 209/19382 comprising retirees, their families, and persons occupying the suit property pursuant to leases and licences, filed this Petition alleging threatened eviction by the 1st Respondent without adherence to due process and constitutional safeguards.
2. Contemporaneously, two applications were filed; Notice of Motion dated 30th April 2025 seeking interlocutory injunctive orders restraining eviction, sale, or interference with the suit property.
3. The second application is Notice of Motion dated 16th May 2025 seeking to cite the Respondents for contempt for alleged issuance of eviction notices on the same day status quo orders were granted.
4. In addition to the two applications, The Respondents raised a Preliminary Objection citing the following grounds namely; that the Petition herein is Res Judicata Milimani Constitutional Petition No 468 of 2016 and Milimani ELC Case no 138 of 2018 and that issues touching on procurement and sale of LR No 209/19382 have been addressed and determined ; that the Petition is sub judice Milimani ELC 031 of 2025; Lastly that the Petitioners have failed to exhaust available remedies.
5. The court directed that the two applications and the Preliminary Objection be canvassed together. Arising therefrom are the following issues for determination; Whether the Preliminary Objection has merit Whether the Petitioners have satisfied the test for interlocutory injunction Whether contempt of court has been proved
6. I will address the Preliminary Objection first. The celebrated case of Mukisa Biscuits defines a preliminary objection as; -

“...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

7. This decision has been affirmed in Courts including the Supreme Court in Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others Civil Application No. 36 of 2014 [2015] eKLR that a preliminary objection should be founded upon a settled and crisp point of law.

The test to be applied in determining a proper preliminary objection can be inferred as follows; -

- (i) A preliminary Objection must be a pure point of law which if argued may dispose of the entire suit.
- ii) A Preliminary Objection should be based on the presumption that the pleadings and or facts as pleaded by the opposite side are correct or agreed facts.
- iii) A Preliminary Objection cannot be entertained where;
  - a. The facts are disputed/contested.
  - b. The facts are liable to be contested.



- c. Facts are to be proved through process of evidence.
  - d. What is sought is an exercise of judicial discretion
8. The preliminary objection is hinged on the doctrine of res judicata which is anchored on Section 7 of the Civil Procedure Act which reads ; -
- “No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”
9. The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation.
10. Courts have struggled with making determination on Res Judicata as Preliminary point of law as carrying out an inquiry as to whether the facts in a particular case meet the test laid out in section 7 require analyzing facts which are often disputed.
11. In *Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Another (2014) eKLR*, the court stated
- “That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1<sup>st</sup> Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1<sup>st</sup> Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”
12. Further, in the case of *George Kamau Kimani & 4 Others v County Government of Trans Nzoia & Another (2014) eKLR*, the Court held that:-
- “I have considered the points raised by the 1<sup>st</sup> Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection.”
13. In the instant case it was the Respondents responsibility to prove that the parties are identical or parties under whom they claim; that the issues directly and substantially in issue are the same or should have been the same and that there was a final determination by the court.
14. The Respondents did not provide pleadings, proceedings, or final judgment to establish these elements. Further, the present Petition raises constitutional questions of threatened eviction, housing



rights, and procedural fairness, issues not shown to have been conclusively determined elsewhere. In the absence of this evidence the plea of Res Judicata cannot stand.

15. The doctrine requires existence of another previously instituted suit pending before a competent court involving the same parties and issues. In the instant case the cited case in the Preliminary Objection is the same case as this Petition. This element is thus not proved.
16. Regarding the claim of failure to exhaust available remedies these remedies are available to scheme members, beneficiaries and dependents on issues relating to benefits computation, distribution of pension, recognition of dependents and trustees refusal to pay. The Tribunal cannot handle issues of eviction, injunctions and constitutional issues. I therefore find that the Preliminary Objection has no merit.
17. Regarding the second issue of injunction the law on grant of interlocutory injunctions is set out under Order 40 Rule 1 (a) and (b) of the Civil Procedure Rules as follows:

“Where in any suit it is proved by affidavit or otherwise –

  - a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
  - b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in execution of any decree that may be passed against the defendant in the suit;

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”
18. The principles for grant of injunction are well settled by the locus classicus of *Giella v Cassman Brown & Company Limited* [1973] E.A. 358., where the court stated thus:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”
19. This court is thus required to determine whether the applicant has satisfied the three conditions for grant of injunction. In *Nguruman Limited v Jan Bonde Nielsen & 2* the Court of Appeal had this to say on prima facie case ; “The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion”
20. It is not disputed that the Petitioners are in occupation of the suit property pursuant to arrangements recognized by the Respondent. Eviction has been threatened. The Respondents have not produced evidence to confirm compliance with due process for eviction.



21. Eviction would result in loss of shelter, displacement of families which would not be compensable by payment of damages. The threshold for irreparable harm is thus met. The balance of convenience is thus on preserving the status quo pending determination of the Petition.
22. On the application for contempt, The standard of proof in cases of contempt of court was explained in *Mutitika v Baharini Farm Limited* [1985] KLR 229, 234 where the Court of Appeal held that, “In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”
23. In the case of *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* [2021] eKLR the Court extensively discussed the issue of the burden and standard of proof for contempt thus,

“...there must be “willful and deliberate disobedience of court orders.” There cannot be deliberate and willful disobedience, unless the contemnor had knowledge of the existence of that order. And because contempt is of a criminal nature, it is always important that breach of the order be proved to the required standard; first, that the contemnor was aware of the order having been served or having personal knowledge of it, and second; that he deliberately and willfully disobeyed it.”
24. Although a status quo order existed, service and knowledge were contested and not conclusively demonstrated. Given the quasi-criminal nature of contempt, doubt must be resolved in favour of the alleged contemnors. I therefore find that contempt has not been proved to the required standard. However, the Court emphasizes that the orders remain binding and any future breach shall attract sanctions.
25. In the end the court makes the following orders;
  - a. The Preliminary Objection is dismissed.
  - b. A temporary injunction is issued restraining the Respondents from evicting the Petitioners or interfering with the Petitioners’ occupation pending hearing and determination of the Petition.
  - c. The Petitioners shall continue to pay dues to the Respondents in accordance with the respective leases
  - d. The contempt application dated 16th May 2025 is dismissed.
  - e. Costs to abide the outcome of the Petition.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 5<sup>TH</sup> DAY OF FEBRUARY 2026.**

**JUDY OMANGE**

**JUDGE.**

In The Presence Of:

Mr. Aguko for the Petitioner.

Mr. Githinji for the Interested Party.

Peter – Court Assistant.

