



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MILIMANI

ELC CASE NO. 596 OF 2017

ROSELINE ALIVITSA ASENSA.....1ST PLAINTIFF

JAMES WAWERU.....2ND PLAINTIFF

JOSEPH KITHEKA MUNUVE.....3RD PLAINTIFF

KEROTI AUGUSTINE.....4TH PLAINTIFF

CHARLES KIHATO.....5TH PLAINTIFF

CATHRINE MWIKALI & OTHERS.....6TH PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION.....1ST DEFENDANT

KENYA PIPELINE COMPANY LIMITED.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

RULING

Background

1. The Kenya Railways Corporation which is the 1st Respondent herein is in charge of all railways in the Republic of Kenya. The railway lines are supposed to maintain a reserve of at least 30 metres on either side of the railway line except in stations which maintain a bigger reserve. Over a period of time, the railway reserves have been encroached on by individuals and institutions. The encroachment is particularly worse in urban areas where individuals and institutions have established informal settlements and other institutions like schools and churches.

2. The problem of encroachment particularly in informal settlements of Kibera and Mukuru raised serious safety concerns for railway operations as people put up structures too close to the rail lines thus interfering with train movement and maintenance of the rail due to items being thrown on to the rail lines. The Kenya Railway Corporation thought of a way of securing the railway line by preserving the reserve particularly at Kibera and Mukuru areas within Nairobi. To do this, it became necessary that those who had encroached on to the railway reserve had to be moved out.

3. It was also found necessary to build a wall to keep off encroachers on either side of the railway line at Kibera and Mukuru areas. The Kenya Railways Corporation with funding from the World Bank embarked on a project to relocate those persons to be affected who were called Project Affected Persons (PAPS). A study was done and those who were affected were identified and a re-location plan was put in place. At every stage, those affected were involved and compensation given. To allow movements across the railway and within Mukuru Kwa Njenga and Mukuru Kwa Reuben villages, construction of footbridges was identified. This was the same case with Kibera.

4. The re-location plan was organized in such a way that even there was a setup of dispute resolution mechanisms which included Segment committee, Multi-segment committee and Appeals Board within the villages. There was even liberty for those aggrieved to move to the High Court. The final re-location report was prepared in 2010 and there was a cut-off date such that those not on the reserve at the date were not eligible to be considered under the re-location plan.

5. In the case of Mukuru Kwa Njenga and Mukuru Kwa Reuben, construction of a wall began. This is what prompted the Plaintiffs in this case to come to Court seeking to stop the construction of the wall on the ground that there was no proper identification of the persons who were affected and that appropriate compensation had not been given and that the wall was being constructed not in accordance with the re-location plan which had been agreed upon.

6. During the time of filing the suit, the Plaintiffs contemporaneously filed an application dated 21st September, 2017 in which they sought injunctive orders restraining the Respondents from constructing the wall and for a declaration that the forceful evictions without option of re-location was illegal and violated their rights.

The 1st Respondent filed a Preliminary Objection on 16th October, 2017 in opposition to the application by the Applicants on the ground that the application as well as the suit were *resjudicata*.

7. Later the Applicants filed an application dated 19th March, 2018 in which they sought similar orders as in the one of 21st September, 2017 but this time they sought orders of Court directing the OCPD Makadara Division to oversee the implementation of Court orders. They also sought orders directing the Respondents to restore the Applicant's structures which had been demolished.

8. The Court directed the parties to file Written Submissions in respect of the applications and the Preliminary Objection raised by the 1st Defendant/Respondent. The Plaintiffs/Applicants filed their submissions on 13th December, 2018. The 1st Respondent filed submissions on 12th March, 2019. The 2nd Respondent filed submissions on 21st February, 2019. The 3rd Respondent opted to rely on the submissions by the 1st Respondent

The Applications

9. The Applicants contend that the construction of the wall is being undertaken contrary to what was agreed on in the re-location plan; that the re-location plan had provision for construction of three footbridges which have not been constructed and that they have been forced to use the underground tunnel to connect to the other villages; that the tunnel is where Ngong river which is filthy passes through and that there is a lot of insecurity because criminals hide in the tunnel and attack vulnerable people like the pregnant women, children and disabled.

10. The Applicants also contend that the wall was supposed to be constructed 27 metres from the centre of the railway line on either side so as to leave 3 metres of the railway reserve on either side as a footpath but that instead the Respondents have in some cases constructed the wall beyond the agreed metres and that in some instances the Respondents have constructed the wall 43 metres thus affecting persons who should not have been affected had the Respondents followed the agreed range as per the re-location plan report.

11. The Applicants also contend that the wall has led to flooding in the area and has inhibited children from accessing school and that the wall has been a den for criminals who are attacking the residents. The Applicants also argue that the wall which was recommended is a concrete wall but the Respondents are using stones to put up a weak wall which may collapse and cause deaths. The Applicants also contend that because of corruption, some of the affected persons were not compensated.

Response by the Respondents

12. The Respondents opposed the Applicants applications arguing that the same are *resjudicata* and that in any case the Applicants have not met the threshold set out in the case of *Giella – Vs- Cassman Brown [1973] EA 358*. The Respondents contend that the Applicants are desirous of being compensated as can be seen from the supporting affidavit and as such no injunction can issue. The Respondents further argue that the wall being constructed is for the safety of the Applicants and that the filing of multiple applications is an abuse of the process of Court.

13. The Respondents particularly the 2nd Respondent contend that the Applicants have encroached on to where the oil pipelines have been laid in and are cooking on top of the same which is a disaster in waiting should an oil leak occur. The perimeter wall should therefore be let to go on to completion.

The Preliminary Objection

14. The 1st Defendant raised a Preliminary Objection on the ground that the applications as well as the entire suit are *res judicata*. The 1st Defendant contends that all the issues which are being raised in the applications and the suit have been dealt with particularly in a judgment delivered in Nairobi High Court Petition No. 239 of 2014 *Kepha Omondi Onjuro & Others – Vs- Attorney General & 5 Others [2015]eKLR*. The same issues were also addressed in two other cases that is Nairobi High Court Petition No. 615 of 2015 *Paul Omondi Otiende & 100 Others – Vs- Attorney General & 4 Others* and Nairobi High Court Petition No. 321 of 2016 *Joseph Kabukuru Ngatia & 3 Others – Vs- Attorney General & 2 Others*.

Plaintiffs' response to the Preliminary Objection

15. In response to the Preliminary Objection raised by the 1st Defendant, the Plaintiffs contend that this present suit raises a different cause of action and that they were not parties to the case which was decided by Justice Odunga. They further contend that Justice Odunga in his judgment gave liberty to the parties in the former suit to apply and therefore this suit cannot be said to be *res judicata*.

16. The Plaintiffs further argue that the facts which have necessitated this case could not have been raised in the former case and that the two suits are not based on same factual transaction and that *res judicata* does not apply in a case where a claim is based on violation of bill of rights.

Analysis

17. I have, considered the Applicants two applications as well as the opposition to the same. I have also considered the submissions filed by the Respondents. In view of the fact that there is a Preliminary Objection raised on grounds of *res judicata*, I will first deal with it because if the same is sustained it will be superfluous to deal with the applications.

18. I have read the judgment of Justice Odunga in **Kepha Omondi Onjuro & Others – Vs- Attorney General & 5 Others [2015]eKLR**. In this petition, the Petitioners had filed a petition against the Respondents in which they were contending that the manner in which the re-location plan was being carried out at Kibera and Mukuru was unconstitutional. They wanted the implementation stopped. The 1st Defendant herein which was a Respondent in that petition filed a cross-petition seeking the Court to dismiss the petition by the Petitioners and allow the cross-petition which sought to have the persons who had encroached on to the reserve removed and it be allowed to proceed with the implementation of the re-location plan. The Petitioners petition was dismissed and the cross-petition was allowed.

19. Building of a wall on either side of the railway line was in issue in the former suit. The petition was brought on behalf of the residents of Kibera and Mukuru areas. It is the construction of a similar wall which is in contention in the present case. The Plaintiffs in this case are contending that the process of identifying affected persons was not proper. In the case dealt by Justice Odunga, the Judge found that the process of identifying the affected persons was very elaborate and had been completed as at the cut –off date which was in 2010. This cut-off applied for both the Kibera people and the people of Mukuru.

20. There are no new issues which have emerged. All the issues were dealt in the former suit and the new encroachers were given time to move out. Even in the present suit, the deponent of the supporting affidavits concedes that she was involved at every stage and that at some stage she was met with illness in her family which made her unable to pay rent. She had to move to the railway reserve where she put up her business cum residence. This is exactly the problem which was solved through the former case. The deponent and her other co-plaintiffs are now in the same problem. They cannot now turn round and claim that they should not be removed from the area or that their predicament amounts to a new cause of action which is not *res judicata*.

21. There are a number of decisions which have dealt with the doctrine of *res judicata* whose objective is to avoid cases after same issues have been finally dealt with in previous cases. Many Kenyan cases have borrowed from the case of **Henderson – Vs- Henderson (1843-60)** All ER 378 where it was stated as follows:-

“...where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

22. The Plaintiffs argued that where Constitutional issues are raised, the doctrine of *res judicata* does not apply. To answer the Plaintiffs I wish to rely on the following findings of the Court of Appeal in **John Florence Maritime Limited & Another –Vs- Cabinet Secretary for Transport and Infrastructure & 3 Others[2015]eLKR** where the Court of Appeal stated as follows:-

“ i) The doctrine of res judicata is applicable to Constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider, however, that it should be invoked in Constitutional litigation in rarest and in the clearest of cases.

ii) There is no legal requirement or factual basis for the submissions that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of Preliminary Objection.

iii) The ingredients of res judicata must be given a wider interpretation; the issue in dispute in the two cases must be the same or substantially the same as in the previous case, parties to the two suits should be the same or parties under whom they or any of them is claiming or litigating under the same title and lastly, the earlier claim must have been determined by a competent Court.”

23. The Plaintiffs herein are trying to prevent the construction of a wall. As I said hereinabove, this is the same issue which was in the former suit. What the Plaintiff have done herein is trying to couch their claim in such a way as to appear that the wall is not being done as per the re-location plan. This does not constitute a new cause of action as to bring this suit out of the ambit of *res judicata*.

24. In Nairobi High Court Petition No. 321 of 2016 **Joseph Kabukuru Ngatia & 33 Others – Vs- The Principal Secretary Ministry of Infrastructure, Housing and Development & Others**, Justice Mureithi declined to allow the residents of Mukuru an injunction to stop construction of the same wall being litigated now.

Conclusion

It is now clear that the Plaintiffs claim is not only *res judicata* but is also an abuse of the process of the Court. I proceed to strike out the two applications together with the entire suit with no order as to costs. I only wish to add that even if this suit was not found to be *res judicata*, the Plaintiffs would not have been granted an injunction as they have said that their only issue is that they were left out on compensation.

Dated, Signed and delivered at Nairobi on this 28th day of August, 2019.

E.O.OBAGA

JUDGE

In the presence of Mr Ondieki for Plaintiff

Mr Kamau for 3rd defendant and Mr Odhiambo for Mr Agwara for 1st defendant

Court Clerk : Phyllis

E.O.OBAGA

JUDGE