



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC CASE NO.138 OF 2018

LUCAS ODONYA & 72 OTHERS (*Suing as Retirees and Tenants in Kenya Railways Ngara*

Estate).....**PLAINTIFFS**

KENYA RAILWAYS RETIREMENT BENEFITS SCHEME.....**1ST DEFENDANT**

CORPORATE & PENSION TRUST SERVICES LIMITED.....**2ND DEFENDANT**

KENYA RAILWAYS CORPORATION**3RD DEFENDANT**

RULING.

1. The Plaintiffs/Applicants are former employees of Kenya Railways Corporation which is the third respondent. The applicants are members of Kenya Railway Retirement Benefits Scheme which is the first respondent. The Retirement Benefits Scheme is held in trust for the first respondent by Corporate & Pension Trust Services Limited which is the second respondent. The applicants are tenants in Ngara Railway Estate which is run by the first respondent.

2. On 23rd March 2018, the applicants filed a suit against the respondents in which they sought the following reliefs:

- a. A permanent injunction restraining the defendants or their agents, servants or officers from evicting the plaintiffs from the premises being L.R NO.209/19382 Kenya Railways Ngara Estate.**
- b. Damages for harassments and unfair treatment, violation of constitutional rights and unlawful trespass to their premises.**
- c. Costs of the suit.**
- d. Interest on (a) and (b) above.**

They contemporaneously filed a notice of motion in which they sought injunctive orders restraining the respondents or their agents, servants or officers from evicting or interfering with their tenancies on the premises erected on LR No.209/19382 Kenya Railways Ngara Estate pending hearing and determination of the suit.

3. The applicants contend that they have tenancies which were last renewed for one year with effect from 1st November 2017 but that the respondents have constantly harassed them by sending goons to their houses who are threatening them with eviction. They state that they have been tenants for a cumulative period of over 10 years and that the respondents have not given them any notice of breach or termination of tenancy. They have school going children and if they were to be evicted, this will inconvenience them and would amount to unfair treatment and breach of human dignity. They further contend that the respondents intend to fraudulently transfer the suit property to a third party.

4. The first respondent has raised a preliminary objection against the application and the entire suit on the ground that the suit is res-judicata in view of the judgement delivered on 28th February 2018 in Petition No.468 of 2016 between **Lucas Odonya & 4 Others Vs Kenya Railways Staff Retirement Benefits Scheme & 2 Others**; that the suit is frivolous vexatious and an abuse of the process of the court; that this court does not have jurisdiction to determine the dispute and that the suit is subjudice as there is an appeal to the court of appeal against the judgement delivered in Petition No.468 of 2016 (Supra).

5. The first respondent has also filed a replying affidavit filed on 2nd May 2018 in which the first respondent states that its principal purpose

is the provision of pension and other retirement benefits for employees of the third respondent upon their retirement from the employment of the third respondent. The third respondents vested immovable properties upon it so that it could convert some of them into cash to pay its members.

6. As the Legal Instruments applicable to Pension Scheme requires that a pension scheme should not have more than 30% of immovable assets, the first respondent which had 100% immovable assets decided to dispose of some 15 acres at Ngara Railways Estate so that it could raise money to pay its members. The first respondent invited for bids which attracted 9 bidders. The bids were opened but the process could not proceed as the first respondent was served with orders from Petition No.468 of 2016. The Petition has since been determined and the suit herein is therefore res-judicata. The first respondent contends that the applicants were involved at every stage of what the first respondent was doing with regard to sale of part of the Ngara Railways Estate property. The first respondent further states that if it were to be stopped from proceeding with the sale, the scheme will be exposed and might even be declared insolvent.

7. I have considered the applicants' application as well as the opposition to the same by the first respondent. I will first deal with the issue of the preliminary objection raised because if it is upheld, there will be no need to deal with the application as the preliminary objection would have disposed of not only the application but also the entire suit. On the issue of this suit being res-judicata, the first and second respondents have annexed a judgement delivered by Justice Mwita on 28th February 2018. A reading through the judgement in Petition No.468 of 2016 shows that the main issue in contention was the proposed sale of LR No.209/19382 on which the houses leased by the applicants stand. This is the same issue which the applicants are raising in this suit. In both the Constitutional Petition referred to hereinabove and the current suit, the applicants led by the first applicant herein who was also leading the other four Petitioners in the Petition were seeking injunctive reliefs stopping the sale of LR No.209/19382.

8. The issues which affected the Petitioners and about other 900 members of the first respondent were exhaustively dealt with and the court found that the first respondent was at liberty to sell the suit property. The judge proceeded to dismiss the Petition. The applicants moved to this court and filed this suit that they have been threatened with eviction. The alleged eviction is not there. What is there is that the applicants had been asked to look for alternative accommodation as the first respondent had embarked on the process of selling the suit property. The applicants are terming the intended sale fraudulent but the materials put before the court prima facie reveal otherwise.

9. The principle of res-judicata is predicated on Section 7 of the Civil Procedure Act which states as follows:-

“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”.

10. In Constitutional Petition No.468 of 2016, the first applicant herein together with four others were litigating on behalf of the larger members of the first respondent. The respondents in the petition as in this suit are the same. In the present suit, there are 74 plaintiffs. All these plaintiffs are members of the first respondent and they are litigating on the same property as was the case in the constitutional petition. In Nairobi High Court Petition No.59 of 2015 Okiya Omtata Vs Communications Authority of Kenya Justice Lenaola as he then was stated as follows:-

“ I agree with the learned judge and as I stated above, it matters not that the petitioner has framed different questions for determination or has sought slightly different orders from those in petition No.14 of 2014 . To my mind, the core and crux-forming the subject matter of the petitioners case is largely the use of digital migration save the additional issues as regards the board of CAK. I am clear that the petitioner is therefore trying to bring to this court, in another way and in the form of a new cause of action, a suit that has already been placed before a competent court in an earlier proceeding and which was adjudicated upon and judgement delivered”.

11. What the applicants have done by filing this suit is exactly what justice Lenaola was discussing in the Okiya Omtata case (supra). The applicants having lost the petition in which they wanted to stop the sale of the suit property have now come to this court and fashioned the same claim as a landlord-tenant dispute but the ultimate aim is to stop the intended sale of the suit property by the first respondent. The present suit is clearly res-judicata and an abuse of the process of the court.

12. In Bullen ,Leak and Jacob's precedents of pleadings 12th Edition at page 148, the authors wrote as follows:-

“ The term “abuse of the process of court “ is a term of great significance . It connotes that the process of the court must be carried out properly honestly and in good faith; and it means that the court will not allow its functions as a court of law to be misused but will in a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation”.

13. The applicants herein are using litigation to suppress the operations of the first respondent. This litigation is being used to oppress the first respondent. The applicant's actions in filing this suit is clearly an abuse of the court process. I find that this suit is not only res judicata but is also an abuse of the process of the court. I proceed to strike out the applicants' application as well as the entire suit with costs to the respondents.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 18th day of October, 2018.

E.O.OBAGA

JUDGE

In the presence of:

M/s Maina for Plaintiff

Mr Ochieng for Mr Saenyi for defendants

Court Assistant: Hilda

E.O.OBAGA

JUDGE