



Republic v Kenya Railways Corporation; Musa & another (For and on behalf of the affected residents of Shaurimoyo, Swahili Village and Bondeni Informal Settlements of Muhoroni Sub-County, Kisumu County) (Exparte Applicant) (Environment and Land Judicial Review Case E007 of 2023) [2024] KEELC 1574 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1574 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E007 OF 2023**

SO OKONG'O, J

MARCH 14, 2024

BETWEEN

REPUBLIC APPLICANT

AND

KENYA RAILWAYS CORPORATION RESPONDENT

AND

SOLOMON MUSA AND DANIEL OTIENO ARWA (FOR AND ON BEHALF OF THE AFFECTED RESIDENTS OF SHAURIMOYO, SWAHILI VILLAGE AND BONDENI INFORMAL SETTLEMENTS OF MUHORONI SUB-COUNTY, KISUMU COUNTY) EXPARTE APPLICANT

JUDGMENT

1. On 15th July 2022, this court (Ombwayo J.) entered judgment in Kisumu ELC Petition No. E020 of 2021(hereinafter referred to only as “the petition”) in favour of the ex-parte applicants herein, Solomon Musa and Daniel Otieno Arwa against the respondent herein, Kenya Railways Corporation, and the Principal Secretary State Department of Housing and Urban Development and Attorney General who are not parties to the present application (hereinafter referred to only as “the co-respondents in the petition”). The judgment which was entered against the respondent herein and the co-respondents in the petition jointly and severally was on the following terms;

- (a) That this court finds and so declares that the respondents have jointly and severally been responsible for the denial/violation/infringement of the petitioners’ rights and fundamental freedoms under Articles 10(2)(b), 25, 26, 28, 29(f), 39, 40, 43(1)(f), 47 and 56 of *the Constitution*.



- (b) That the 1st respondent to engage the petitioners and all the project-affected persons in Shaurimoyo, Bondeni and Swahili villages in Muhoroni Sub-County in crafting a relocation plan.
 - (c) That each of the 206 petitioners be entitled to Kshs. 100,000/- creating an aggregate of Kshs. 20,600,000/- as general damages for breaches of their fundamental rights.
 - (d) Costs of the petition be borne by the respondents.
2. On 26th October 2022, a decree was extracted and issued in terms of the said judgment. What is before me is a Notice of Motion application dated 31st May 2023 brought by the ex-parte applicants (hereinafter referred to only as “the applicants”) seeking an order of mandamus to compel the Managing Director of Kenya Railways Corporation (hereinafter referred to only as “the respondent”) to forthwith pay to the applicants a sum of Kshs. 23,786,271.72 being the principal sum that was awarded to the applicants as general damages in the said judgment in the petition together with interest and costs. The application was brought pursuant to the leave that was granted by Asati J. on 29th May 2023. The application was brought on the grounds set out on the face thereof and on the supporting affidavit of Solomon Musa sworn on 31st May 2023, and the statutory statement and verifying affidavit both dated 29th May 2023 that accompanied the application for leave.
3. In summary, the application was brought on the ground that the judgment of this court made in the petition had remained unsettled by the respondent. The applicants averred that the Managing Director of the respondent herein which is one of the judgment debtors in the petition had unreasonably refused to pay the decretal amount that was awarded to the applicants in the said petition that stood at Kshs. 23,786,271.72 as at 28th May 2023 despite a demand made to him under Section 88 of Kenya Railways Act to make the payment. The applicants averred that the Managing Director of the respondent had a statutory duty to settle the outstanding decretal amount due to the applicants without undue delay. The applicants averred that the refusal by the Managing Director of the respondent to settle the said amount was an act of impunity. The applicants annexed to their supporting affidavit among others; a copy of the judgment made in the petition, a copy of the decree and various letters to the respondent and its advocates demanding payment of the said decretal amount.
4. The respondent opposed the application through a replying affidavit sworn by Stanley Gitari on 25th October 2023. The respondent averred that Solomon Musa who swore the affidavit in support of the application did not place before the court proper or valid authority from his co-applicants to swear the affidavit and plead generally on their behalf. The respondent averred that in the absence of such authority, the said Solomon Musa could bring the application only on his behalf and not on behalf of anyone else. The respondent averred further that the judgment in the petition was made against the respondent and its co-respondents in the petition jointly and severally. The respondent averred that the applicants had left out its co-respondents in the petition from the present application although they were all jointly liable to settle the decretal amount. The respondent averred that although the applicants had written several letters to the respondent demanding payment of the decretal amount, no such letter had been addressed to the respondent’s co-respondents in the petition who were equally liable to settle the debt. The respondent averred that its position was and had always been that it was ready and willing to settle its portion of the debt which was half of the decretal amount and that the applicants should pursue the recovery of the other half from the co-respondents in the petition. The respondent urged the court to dismiss the application as it was not warranted since the respondent’s Managing Director had not refused to settle the respondent’s portion of the judgment amount.



5. The applicants filed a further affidavit sworn by Solomon Musa on 27th October 2023. In the affidavit, Solomon Musa stated that he had the authority of his co-applicants to file the application before the court and to swear the affidavits in support thereof on their behalf. He annexed to the affidavit the authority that was given to him by the other co-applicants to plead and sign documents in the petition on their behalf. He stated that the said authority remained valid until the execution of the judgment in the petition. He stated that the respondent was liable to pay the full decretal amount and could seek reimbursement from its co-respondents in the petition. He stated that although the respondent had claimed that it was ready and willing to pay half of the decretal amount, it had not deposited the same with the applicants' advocates or the court since the judgment was entered in the petition in July 2022. He stated that due to the delay in the settlement of the decretal amount, the same had risen to Kshs. 25,173,804.11 as at 27th October 2023.

6. The application was argued by way of written submissions. The applicants filed their submissions dated 4th November 2023 while the respondent filed submissions dated 17th November 2023. I have considered the applicants' application together with the statutory statement, verifying affidavit, supporting affidavit and further affidavit filed in support thereof. I have also considered the replying affidavit by the respondent. Finally, I have considered the written submissions by the parties and the various authorities cited in support thereof. Section 88 of *Kenya Railways Corporation Act*, Chapter 397 Laws of Kenya provides as follows:

“Notwithstanding anything to the contrary in any law—

- (a) where any judgment or order has been obtained against the Corporation, no execution or attachment, or process in the nature thereof, shall be issued against the Corporation or against any immovable property of the Corporation or any of its trains, vehicles, vessels or its other operating equipment, machinery, fixtures or fittings; but the Managing Director shall, without delay, cause to be paid out of the revenue of the Corporation such amounts as may, by the judgment or order, be awarded against the Corporation to the person entitled thereto;
- (b) no immovable property of the Corporation or any of its trains, vehicles, vessels or its other operating equipment, machinery, fixtures or fittings shall be seized or taken by any person having by law power to attach or distrain property without the previous written permission of the Managing Director.”

7. The applicants have contended that the Managing Director, of the respondent which is one of the judgment debtors in the petition has a statutory obligation under the said provisions of the Kenya Railways Act to settle the decretal amount due to the applicants and that he has refused and/or neglected to do so.

8. In Halsbury's Laws of England, 4th Edition Volume 1 at page 111 paragraphs 89 and 90, the authors have explained the nature and mandate of an order of mandamus as follows:

“The order of mandamus is of most extensive remedial nature and is in the form a command issuing from the High Court of justice, directed to any person, cooperation or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy defect of justice (and accordingly it will issue, to the end that justice may be done, in all cases where there is specific legal right and there no specific legal remedy for enforcing that right)



and it may issue in cases where although there is an alternative remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute which imposes a duty leave discretion as to the mode of performing the duty in the hand of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

9. In *Kenya National Examination Council v. Republic ex parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR, the court explained the principle pronounced in the foregoing passage from Halsbury’s Laws of England as follows:

“They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of person by a statute and where that person or body of persons has failed to perform the duties to the detriment of a party who has a legal right to expect the duty to be performed.”

10. It is not in dispute that the applicants obtained a judgment against the respondent and its co-respondents in the petition for a total sum of Kshs. 20,600,000/- plus costs. It is not in dispute that the applicants’ costs have been taxed at Kshs. 1,226,825/- and certified by the Deputy Registrar of this court. I agree with the applicants that the Managing Director of the Respondent has a statutory obligation and duty to settle the decretal amount that was awarded to the applicants in the petition.
11. I have found no merit in the objections taken by the respondent against the application. The two applicants who have brought the present application were the same applicants who represented the other applicants in the petition. Their authority to represent the other applicants was not challenged in the petition. I wonder why the respondent should think that they had the authority only to prosecute the suit and obtain judgment but not to seek the enforcement of the judgment. I am satisfied from the material before me that the applicants had the authority to bring the present application and that Solomon Musa had the authority from the other applicants to swear the affidavits in support of the application on their behalf. On the liability of the respondent, I agree with the law as stated by the applicants. The respondent is liable for the entire decretal amount. Once it settles the full amount, it will be at liberty to seek reimbursement from its co-respondents in the petition with which they were jointly and severally liable to settle the decretal amount. The applicants had no obligation to pursue all the respondents in the petition for the settlement of the decretal amount.

Conclusion

18. Due to the foregoing, I find merit in the applicants’ Notice of Motion application dated 31st May 2023. I, therefore, issue an order of mandamus compelling the Managing Director of Kenya Railways Corporation to pay the applicants forthwith a sum of Kshs. 20,600,000/- together with taxed costs that were awarded to the applicants by the court in *Kisumu ELC Petition No. E020 of 2021, Solomon Musa & Another v. Kenya Railways Corporation & 2 others* on 15th July 2022. The applicants shall have the costs of the application.

DELIVERED AND DATED AT KISUMU ON THIS 14TH DAY OF MARCH 2024

S. OKONG’O

JUDGE



Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Nyambeki for the Applicants

Ms. Kavagi for the Respondent

Ms. J. Omondi-Court Assistant

