



**Cabinet Secretary, Ministry of Lands, Housing and Urban Development (Formerly Known as the Hon Minister For Lands) & 2 others v Osman On His Own Behalf and on Behalf of 1,122 Evictees of Medina Location, Municipal Council of Garissa) & another; Global Initiative for Economic Rights Socio-Economic Rights Institute Community Law Centre Centre For Economic and Social Rights Centre for Equality Rights in Accomodation Social Rights Advocacy Centre Malcolm Langford (Amicus Curiae) (Civil Appeal 89 of 2017) [2024] KECA 1715 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1715 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 89 OF 2017  
W KARANJA, J MOHAMMED & LK KIMARU, JJA  
NOVEMBER 28, 2024**

**BETWEEN**

**CABINET SECRETARY, MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT (FORMERLY KNOWN AS THE HON MINISTER FOR LANDS) ..... 1<sup>ST</sup> APPELLANT  
CABINET SECRETARY, MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT (FORMERLY KNOWN AS THE HON MINISTER FOR STATE FOR PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY) ..... 2<sup>ND</sup> APPELLANT  
THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> APPELLANT**

**AND**

**IBRAHIM SANGOR OSMAN ON HIS OWN BEHALF AND ON BEHALF OF 1,122 EVICTEES OF MEDINA LOCATION, MUNICIPAL COUNCIL OF GARISSA) ..... 1<sup>ST</sup> RESPONDENT  
COUNTY GOVERNMENT OF GARISSA (FORMERLY KNOWN AS MUNICIPAL COUNCIL OF GARLSSA) ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**GLOBAL INITIATIVE FOR ECONOMIC RIGHTS SOCIO-ECONOMIC RIGHTS INSTITUTE COMMUNITY LAW CENTRE CENTRE FOR ECONOMIC AND SOCIAL RIGHTS CENTRE FOR EQUALITY RIGHTS**



*(eing an appeal from the Judgment and Decree of the Judgment of the High Court  
at Embu (A.O. Muchelule, J.) dated 16th November 2011 in Petition No. 2 OF 2011)*

## JUDGMENT

1. The 1<sup>st</sup> respondent, on his own behalf and on behalf of 1,122 other persons (hereafter referred to as “the evictees”) presented a petition before the High Court claiming several reliefs against the appellants. The evictees’ case as pleaded, and supported by the affidavit sworn by Ibrahim Sangor Osman was that they were evicted from Bularika, Bulamedina, Sagarui, Naima, Bulanagali and Gesto (commonly known as “Medina location”) on 24<sup>th</sup>, 30<sup>th</sup> and 31<sup>st</sup> December 2010 by the officers of the 2<sup>nd</sup> appellant and the 2<sup>nd</sup> respondent. Those evicted included children, women and the elderly. Some of the children were school-going. The 1<sup>st</sup> respondents were evicted from unalienated public land in respect of which title deeds have not been issued. The land is within the jurisdiction of the 2<sup>nd</sup> respondent. It had been occupied by the 1<sup>st</sup> respondents since 1940s, initially as grazing land but in the 1980s they put up permanent and semi-permanent dwellings in which they were living prior to eviction.
2. It was deponed that sometimes in December 2010 word started going round that the local provincial administration and the 2<sup>nd</sup> respondent were planning to evict the 1<sup>st</sup> respondents. On 3<sup>rd</sup> December, 2010 the District Commissioner Garissa, by the name Samson Macharia went to the location in a GK Land-rover followed by a bulldozer and four saloon cars. In the vehicles were administration police officers and a group of unidentified youths. The District Commissioner informed the 1<sup>st</sup> respondents that he had come to prepare the ground for the construction of a ring-road and warned that any homestead that fell along the road would be deemed to be on Government land and would be demolished. The team proceeded to mark the area where the purported road would pass, and left thereafter. There was no further communication. The 1<sup>st</sup> respondents made numerous attempts to have audience with the District Commissioner and the officers of the 2<sup>nd</sup> respondent but were not successful.
3. On 24<sup>th</sup> December, 2010 a group of armed administration police officers in riot gear and unidentified youths arrived under the command of the District Officer, Garissa Central and, without warning, begun to demolish the houses and structures of the 1<sup>st</sup> respondents which they claimed to be on Government land leaving the 1<sup>st</sup> respondents homeless. The exercise continued on 30<sup>th</sup> and 31<sup>st</sup> December 2010. There was some resistance from the evictees and the police officers resulted to using tear gas and physical violence to evict and eject them.
4. The evictees claimed that the demolition and eviction was carried out without notice and that the appellants and the 2<sup>nd</sup> respondent had no court order, and they did not engage the 1<sup>st</sup> respondent in any consultation or explanation. In all, 149 houses and structures were demolished. The evictees were forced to live and sleep in the open or in make-shift temporary structures and were exposed to the elements and vagaries of nature, health risks, insecurity and lack of the basic human necessities such as food, water and sanitation. Several children had to drop out of school as their parents had to seek alternative accommodation elsewhere. Others had to move from the nearby Tumaini Primary School and go to other schools that included Yathrib Primary School. The elderly had to endure unbearable conditions in the open without basic human facilities.



5. The 1<sup>st</sup> respondent wrote to the 1<sup>st</sup> appellant about the evictions and the conditions under which they were living. He promised to investigate but nothing was done to alleviate the suffering but instead, the 1<sup>st</sup> appellant threatened to demolish the temporary structures that the evictees had put up.
6. These are the circumstances that prompted the 1<sup>st</sup> respondent to file the petition under Articles 22(1), (2) and (3), 23 (1) and (3), 165 (1) and (3) and others, of *the Constitution* of Kenya 2010 and rules 20 and 21 of *the Constitution* of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006. They obtained an interim order of injunction to restrain the appellants and the 2<sup>nd</sup> respondents, and all those acting under them, from evicting them or demolishing their houses and structures without a court order and provision of suitable alternative accommodation. They further obtained an interim mandatory injunction compelling the appellants and the 2<sup>nd</sup> respondents to provide them with alternative housing, shelter/accommodation, food, clean and safe drinking water, sanitary facilities and health care.
7. Based on those facts, the evictees sought judgment against the appellants and the 2<sup>nd</sup> respondents respectively for, inter alia:
  - “ a) Declarations that the forcible, violent and brutal eviction through demolition of homes of the petitioners without according them alternative shelter and/or accommodation leaving them to live in the open exposed to the elements and vagaries of nature was a violation of their fundamental right to life guaranteed by Article 26 (1) and (3) of *the constitution* of Kenya, 2010 and Article 11 of the ICESCR;
  - b. That the forcible, violent and brutal eviction was a violation of their fundamental rights to inherent human dignity and the security of the person guaranteed by articles 28 and 29(c), (d) and (f) of *the Constitution* of Kenya, 2010;
  - c. That the forcible, violent and brutal eviction was a violation of their fundamental right of access to information guaranteed by Article 35(1) of *the Constitution* of Kenya, 2010;
  - d. That the forcible, violent and brutal eviction without according them an opportunity to salvage any of their belongings was a violation of their fundamental right to protection of property guaranteed by article 40 (1), (3) and (4) as read with article 21 (3) of *the Constitution* of Kenya and several other declarations that their rights as guaranteed by *the Constitution* and other universal covenants and protocols had been violated.”
8. They also sought orders of permanent injunction restraining the respondents, their officers, agents and/or servants from evicting them from their homes in the areas called Bularik, Bula Medina, Sagarai, Naima, Bulla Nasal and Gesto within the Municipal Council of Garissa (the suit premises) without provision of alternative shelter/accommodation and/or housing mutually agreed upon with the petitioners); an order of mandatory injunction compelling the respondents to provide the petitioner and the 1,122 co-evictees appearing on annexures with suitable and permanent alternative land, shelter and/or accommodation; and general, aggravated, exemplary and punitive damages against the respondents jointly and/or severally; and costs of this petition.
9. The petition was served on the appellants and 2<sup>nd</sup> respondents who did not file any response.



10. Having considered the matter, the learned Judge of the High Court (A.O. Muchelule, J.) (as he then was) held in his judgment rendered on 3<sup>rd</sup> November 2011 that the appellants and the 2<sup>nd</sup> respondent had violated the evictees' constitutional rights and granted reliefs, inter alia, declaration that the forced evictions violated the petitioners' fundamental right to housing dignity, and respect as enshrined in the Kenyan Constitution; the eviction left the petitioners vulnerable, unable to provide for themselves and in a crisis that threatened their existence.
11. The respondents were ordered to return the petitioners to the land and reconstruct reasonable residences or provide alternative accommodations with similar amenities. The court also issued a permanent injunction to prevent future evictions or demolitions unless the law was strictly followed.
12. The court, though noting that there was paucity of evidence on the value of the damaged properties, and the amount used to reconstruct their temporary abodes, and while observing that the Government (through the appellants) did not have limitless pockets, ordered the respondents jointly and severally to pay each petitioner Ksh.200,000 in damages.
13. Aggrieved, the appellants lodged the present appeal. In the memorandum of appeal, the appellants raised the grounds that the learned trial Judge erred in law; in accepting the 1<sup>st</sup> respondent's averments as conclusive proof of the alleged constitutional violations; in proceeding to hear the petition without ascertaining whether service of the hearing notice was proper; in assuming the existence of the 1,122 alleged evictees without any identification or proof of their existence; by condemning all the appellants jointly without ascertaining which role each party played in the alleged demolitions; in apportioning liability to the 3<sup>rd</sup> appellant without appreciating the nature and mandate of the 3<sup>rd</sup> appellant under Article 156 of the Constitution of Kenya; in failing to formulate issues for determination in the judgment therefore making an erroneous analysis of the case; in failing to balance the private interests of the 1<sup>st</sup> respondent and the countervailing larger public interest of the appellants and by awarding the 1<sup>st</sup> respondent a global compensation for the general, aggravated, exemplary and punitive damages in a constitutional petition without having a basis for awarding the said damages.
14. During the hearing of this appeal, the parties were represented by learned counsel. Thande Kuria, Principal State Counsel for the Attorney General appeared for the appellants while Mr. Mbugua Mureithi appeared for the evictees.
15. With regard to the question whether there was proper service of hearing notices and whether the appellants were accorded adequate time to be heard during the entire trial, it was submitted that from the proceedings it is evident that the matter came up in court for the first time on 28<sup>th</sup> February 2011 and that Warsame J. (as he then was) directed that the application be served on all the parties and that only the advocate for the 1<sup>st</sup> respondent was present for the said fixing of the hearing where the mention was fixed ex-parte for 28<sup>th</sup> March 2011. Further, that on the said date it is noteworthy that only the advocate for the 1<sup>st</sup> respondent was in court. It was submitted that the court recorded the non-appearance for the respondents but no indication is given as to whether the court ascertained whether service of either the pleadings or the mention notice was made.
16. According to learned counsel, the High Court did not interrogate whether the appellants had been served with the mention date for 3<sup>rd</sup> March 2011 where an appropriate and convenient date for all parties would have been fixed. Counsel submitted that on the material date the counsel for the 1<sup>st</sup> respondent herein argued the application ex parte and was granted conservatory orders.
17. It was submitted that although the court directed that the appellants be served, with the mention notice to appear before the learned Judge, on 9<sup>th</sup> May, 2011, the mention notice was never served.



18. Essentially, the main complaint by learned counsel for the appellants was that there was no proof of service of the petition itself or the hearing dates before the court decided to proceed with the hearing in the absence of the appellants. Reliance was made to Union Insurance Co. of Kenya Ltd -vs- Ramzan Abdul Dhanji Civil Application No. Nai.179 of 1998 on the right to be heard. On the importance of service to parties counsel relied on this Court's decision in James Kanyiiita Nderitu & another -vs- Marios Philotas Ghikas & Another Civil Appeal No. 6 of 2015 (2016) eKLR.
19. As to whether there was sufficient evidence to sustain the Constitutional Petition (grounds of appeal No. 1, 3 & 7), it was submitted that the material placed before the trial court was not sufficient to prove the 1<sup>st</sup> respondent's case even in absence of any response from the appellants. It was stated that the 1<sup>st</sup> respondent were required to show the rights alleged to be infringed, as well as the basis of each of their grievances.
20. Further, it was submitted that the matter subject of this appeal was decided based on the sworn affidavit of the 1<sup>st</sup> respondent who contended that he had the consent to bring the petition on behalf of the 80 persons who gave him authority to represent all the residents of Medina comprising of 1,222 residents. It was stated that there is a handwritten document purportedly signed by the alleged 80 persons to that effect and that curiously there is another document that is typed and that purports to justify the 1,122 residents of Medina. That the document has 149 persons that are used to justify the households or persons affected by the alleged illegal evictions.
21. In the appellants' view and analysis, the two lists are fundamentally different and the High Court in determining the matter ought to have interrogated both lists and ascertained whether the persons therein really existed. It was submitted that there were glaring contradiction in terms of the two documents that go to the core of the threshold of evidence that the court ought to have addressed to justify the outcome of the matter in terms of the damages awarded in the final judgement and that in the view of the appellants, and on a balance of probabilities, the petition ought to have failed. We are urged to intervene and overturn the said judgement.
22. On the burden of proof in a constitutional petition, the cases of Communications Commission of Kenya & 5 Others -vs- Royal Media Services Limited & 5 Others [20 I 4] eKLR and Independent Electoral and Boundaries Commission (IEBC) - vs- National Super Alliance(NASA) Kenya & 6 others [2017] eKLR, were relied on for the proposition that even in absence of any responses from the appellants the High Court did not have enough evidential material to rely on to prove that the alleged eviction took place and as a consequence the violation of the 1<sup>st</sup> respondent's rights.
23. It was further submitted that although the 1<sup>st</sup> respondent sued 4 parties in the matter, the High Court did not interrogate fully the role of each party in the alleged eviction of the 1<sup>st</sup> respondents from Medina village. Further that it was wrong and unjust to apportion liability jointly and severally and that if at all the said evictions were proved, liability would solely and legally attach to the 8<sup>th</sup> respondent under whose jurisdiction the land in question is located.
24. As to whether the damages and award of costs is grossly exaggerated especially this being a public law litigation (ground of appeal No. 8) it was submitted that courts have held, rightly so, that an award of compensation against the State is an appropriate and effective remedy for redress of infringement of a fundamental right under *the Constitution*. Reliance was placed on Kisilu *Mutua -vs- Republic Petition No. 91 of 2015* and Edward Akong'o Oyugi & 2 others -vs- Attorney General [2019]eKLR.
25. On costs it was submitted that the discretion of the taxing master was grossly abused as the minimum allowed fees was increased with a factor of more than 2,700 without explanation. It was stated that



- this was against all known principles of taxation which calls for this Court's intervention set aside the said award.
26. We are urged to set aside the said judgment and orders of the High Court sitting in Embu in terms of damages and costs awarded or in the alternative and in the interest of justice, due to the public interest from this matter, we are urged to remit the matter preferably to the Garissa High Court and order for a retrial preferably on a priority basis.
  27. Opposing the appeal, Mr. Muriithi, learned counsel for the evictees relied on his written submissions, which he highlighted. As to whether the appellants were denied the right to fair hearing, counsel submitted that the appellants were all along served with the pleadings and requisite hearing notices which was admitted in the appellants' submissions. It was submitted that despite the appellants being served with the petition they did not file any response and that the disinterest of the appellants to participate in the matter was noted by the trial Judge in the impugned judgment.
  28. Mr. Muriithi brought to the Court's attention the appellants' concealment and failure to disclose to this Court the fact that the appellants had post judgment filed an application dated 18<sup>th</sup> July, 2014 for review and setting aside of the judgment and that after substantive hearing of the application on 12<sup>th</sup> February, 2015 the trial court dismissed it. Counsel submitted that based on that ruling the appellants are estopped from urging the issue of having been denied a fair trial and that having pursued the option of review and setting aside the judgment they are deemed to have abandoned the notice of appeal and that they cannot pursue an appeal of the same decree after review. Counsel maintained that the appellants ought to have appealed against the ruling of 12<sup>th</sup> February, 2015 refusing to review and setting aside of the judgment. Reliance was placed on Chairman Board of Governors Highway Secondary School -vs- William Mmosi Moi [2007] eKLR.
  29. Turning to the question whether the appellant should have obtained a court order prior to carrying out the eviction, counsel argued that it is a requirement of the law in Kenya for a party to obtain a court order authorizing a forced eviction whether of a resisting tenant, a licensee or a squatter.
  30. As to whether there was sufficient proof of violation of the evictees' rights and whether the High Court was correct in granting the orders that it did and in awarding compensation to the evictees including those who were not in court to prove their cases, Mr. Mureithi submitted that the violation of the fundamental rights in the event of a forced eviction and demolition of homes is self evident; that the appellant admitted that it carried out the demolitions and evictions with the result that violations of the pleaded rights attached; that the evictees were thereby rendered homeless with the inevitable result that children of the evictees were dislocated and the plight of the elderly persons aggravated.
  31. With that, Mr. Mureithi urged us to uphold the judgment of the High Court and to dismiss the appeal with costs.
  32. We have considered the record of appeal in its entirety and the submissions by learned counsel. We are mandated by rule 31(1) a of the Court of Appeal Rules to re-evaluate all the evidence that was adduced before the High Court and to draw our own conclusions one way or the other. See *Selle -vs- Associated Motor Boat Co Ltd* [1968] EA 123.
  33. We have carefully perused the record, rival submissions by counsel, authorities cited and the law. Having done so, we distil the following three pertinent issues for our determination.
    - i. The first and most important issue is whether the appellant could pursue the appeal when it was clear that they had opted to pursue review to conclusion.



- ii. Depending in the answer to the first issue, was there evidence of service of the petition and also the mention/ hearing dates?
  - iii. Were the awarded damages manifestly excessive?
34. It is well settled that where a party is aggrieved by the judgment, ruling or order of the trial court, such a party can either file an appeal or apply for review. In the instant case, the appellant filed a Notice of Appeal on 25<sup>th</sup> November 2011, signifying its decision to appeal. The appellant then subsequently filed an application for review of the judgment on 18<sup>th</sup> July 2014 which application was heard on 18<sup>th</sup> December 2014 by F. Muchemi, J. who dismissed the same on 12<sup>th</sup> February 2015. After the dismissal of the application for review the appellants decided to pursue the instant appeal filed on 25<sup>th</sup> November 2011 which we heard on 25<sup>th</sup> July, 2023.
35. The 1<sup>st</sup> respondent contended that since the appellants had filed a notice of appeal, they did not have the option of pursuing an application for review which they did and the same was dismissed by the High Court on 12<sup>th</sup> February 2015, which fact they failed to disclose to this Court. Our perusal of the record confirms that there was indeed such an application filed by the appellants. We think the law in this area is settled and there is no ambiguity in its translation at all. The position is articulated in *The Chairman Board of Governors Highway Secondary School -vs- William Mmosi Moi*, Civil Application No. 277 of 2005 (*supra*) as follows:-
- “The Board took an active part in giving instructions to the advocate on the various matters the advocate was pursuing before the superior court. In particular, the Board gave instructions that an application be filed for review of the ruling and it is the same ruling against which instructions had already been given for filing an appeal to the Court of Appeal. In those circumstances the options available to the Board were exhausted when the application for review was determined by the superior court and it is doubtful whether the intended appeal would be valid even if it was filed. An aggrieved party under Order 44 of the Civil Procedure Rules can apply for the review of a decree or order either where “no appeal has been preferred” or where “no appeal is allowed”. An appeal is allowed on orders made under Order 9A rule 2 Civil procedure Rules, as in this case, and indeed the Board filed a notice of appeal under rule 74 of the rules to challenge the orders. A notice of appeal however is only a formal notification of an intention to appeal and it cannot be said that the aggrieved party has “preferred” an appeal at that stage and was thus precluded from exercising the option of review. The issue as to whether a respondent having filed a notice of appeal, which had not been withdrawn, was answered in the affirmative by the Court of Appeal in *Yani Haryanto Vs. E.D. & F. Man (Sugar) Ltd* Civil Appeal No. 122 Of 1992 (UR)... The Board was at liberty to pursue the option of review of the orders despite the filing of a notice of appeal to challenge the same orders. However, upon the exercise of that option and pursuit therefrom until its conclusion, there would be no further jurisdiction exercisable by an appellate court over the same orders of the court. That was the end of the matter and the notice of appeal was rendered purposeless. Both options cannot be pursued concurrently or one after the other.”
- (Emphasis ours).
36. The above findings need no embellishing. It suffices to state that once the appellants file an application for review and prosecuted it to conclusion, there was no option open for the appellants to proceed with the appeal to conclusion. Infact, we were taken by surprise when Mr. Muriithi informed us that there was an application to review the same judgment that had already been heard and dismissed as



this appeal was still pending. Upon perusal of the record, we observed that whereas the application for review was dismissed in 2015, the record of appeal was filed in 2017, almost 6 years later. The appellants filed and served the notice of appeal in accordance with the Court of Appeal Rules, but they decided to go to slumber and when they woke up 3 years later, they filed the application for review of the judgment. As stated earlier, the application was dismissed on 12<sup>th</sup> February, 2015. The appellants then collected the proceedings from the trial court 2 years later and filed the record of appeal. The appellants cannot have their cake and eat it. We agree with Mr. Muriithi that the only recourse the appellants had was to appeal the ruling that dismissed the application for review.

37. In the case of Otieno, Ragot & Company Advocates -vs- National Bank of Kenya Limited [2020]eKLR, this Court expressed itself thus;

“Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing a notice of appeal. (See: Kamalakshi Amma vs A. Karthayani [2001] AIHC 2264)”.

38. Accordingly, we associate ourselves with the decision in The Chairman Board of Governors Highway Secondary School - vs- William Mmosi Moi (supra) that both options cannot be pursued concurrently or one after the other. To find otherwise would amount to giving the Court’s seal of approval to persons who wish to play lottery with judicial process.

39. Having so found, we need not venture into the other two issues for determination as this appeal falls on account of the first issue having been answered in the negative. Had this point been raised in limine, we would have struck out the appeal as the appeal did not lie in the circumstances we have outlined above. Having heard the appeal to its end, we can only make a finding that the same is devoid of merit and dismiss it, which we hereby do, with costs to the respondents.

**DATED AND DELIVERED AT NYERI THIS 28<sup>TH</sup> DAY OF NOVEMBER 2024**

**W. KARANJA**

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**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

I certify that this is a the true copy of the original.

Signed

**DEPUTY REGISTRAR**

