Mambo & 50 others v Registrar Trustees of Kenya Railways Staff Retirement Benefits Scheme & 2 others (Environment & Land Petition 57 of 2019) [2023] KEELC 15883 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15883 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT & LAND PETITION 57 OF 2019

AA OMOLLO, J

FEBRUARY 16, 2023

BETWEEN

CHARLES KAMUNYA MAMBO & 50 OTHERS ..... PETITIONER

AND

THE REGISTRAR TRUSTEES OF KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME ..... 1ST RESPONDENT

KENYA RAILWAYS CORPORATION ..... 2ND RESPONDENT

MINISTRY OF TRANSPORT, INFRASTRUCTURE HOUSING & URBAN DEVELOPMENT ..... 3RD RESPONDENT

JUDGMENT

1. The Petitioner's brought the petition dated October 18, 2019 and filed in court on October 22, 2019 seeking to be granted the following reliefs:

    a. A declaration that the act of the respondents jointly and severally is irregular, arbitrary, unfair, null and void, ab initio.

    b. A declaration that the Notice mounted on the gate/notice board within the area of occupation/residence of the petitioners violate the fundamental rights and freedoms of the Petitioners, the persons they represent and their families and the same is null and void ab initio.

    c. That conservatory orders of injunction and prohibition do issue restraining the Respondents jointly and severally, their agents, servants, functionaries, their members of staff, inspectors and or officers by whatever name called from terminating their leases or tenancies, transferring or in any other manner alienating the suit premises or in any other manner evicting the petitioners and the persons they represent from the suit premises.

d. An order Certiorarito quash the decision of the Respondents to give the propriety rights to other allotees.

e. Compensation for breach of fundamental freedoms.

f. Costs of this Petition to the Petitioners.

2. Alongside the petition was filed statement of witnesses and documentary evidence in support thereof.

3. All the three Respondents opposed the petition by filing their respective replying affidavits. The 2nd Respondents filed a replying affidavit sworn by Stanley Gitari who is the GM – Legal Services on November 22, 2021. The 2nd Respondent also filed a notice of Preliminary Objection dated October 30, 2019, which raised the following grounds:

i. This Honourable Court lacks the requisite jurisdiction to take cognizance of, hear and determine the purported Petition and the Application thereunder by dint of the express provisions of section 13(1) and section 13(2) (b) of the *Environment and Land Court Act* as read with article 162(2)(b) and article 165(5)(b) of the *Constitution of Kenya 2010*.

ii. The purported Petition and the Application thereunder as filed herein is grossly incompetent and bad in law for want of compliance with the express and mandatory provisions of rule 10(2) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*.

iii. The purported Petition and the Application thereunder is grossly incompetent and bac in law for want of compliance with the express and mandatory provisions of section 3(3) of the *Law of Contract Act* Cap 23 of the Laws of Kenya and Section 38(1) of the *Land Act* No 6 of 2012.

iv. This Honourable Court lacks the requisite jurisdiction to take cognizance of, hear and determine the purported Petition and the Application thereunder as filed herein.

4. The 3rd Respondent also filed a notice of Preliminary Objection dated the October 25, 2019 stating the following grounds:

a. That the Constitutional Petition and the application for Conservatory Orders should be dismissed in limine as the High Court lacks jurisdiction to determine the matter in light of the provisions of Article 165(5), Article 162(2) of the *Constitution* and Section 13 of the *Environment and Land Court Act*.

b. That the Constitutional Petition should be dismissed as the issues raised therein are res judicata having been previously dealt with in Nairobi Constitution Petition No 575 of 2013; *Honourable Peter Imwatok v & others* and Nairobi Constitution Petition No 239 of 2014 *Kepha Omondi Onjuro & others v Kenya Railways Corporation & 5 others*.

5. Directions were taken on January 31, 2022 that the Preliminary Objection and the Petition were to be heard together. Therefore, before delving into the merit of the petition, I will first determine whether the preliminary objection are merited which Preliminary Objections have the ability to dispose of the entire petition. Hence, I proceed to consider the submissions rendered for and against the preliminary objection.

6. In the 1st and 2nd Respondent's submissions dated November 15, 2022, the two Respondents gave a background of who the 2nd Respondent is in regard to this suit. Inter alia that the 2nd Respondent key mandate involves the planning and development of rail transport systems, promotion and facilitation of National railway network development. The 1st and 2nd Respondents submitted that to ensure that

there was no arbitrary eviction of the squatters contrary to law, the Corporation put in place a number of measures which were challenged by some of the petitioners herein and the other residents of the informal illegal establishments encroaching on the railway reserve as inadequate in Nairobi High Court Petition 239 of 2014 between *Kepha Omondi Onjuro & others v The Attorney General & 5 others* (2015) eKLR. At para 125 of the judgment of Justice Odunga (as he then was) delivered on the February 4, 2015, the judge confirmed that the Relocation Action Plan had been carried out within the required legal framework stating as follows in that regard:-

> " 125. Having analysed the above, it is my considered view that the Relocation Action Plan and the run up to the notice in the daily nation to vacate the railway reserve had been carried out within the required legal framework where parties have held continuous consultations on the project and have engaged at diverse levels."

7. At paragraph 22, 23 and 24 of their submissions, the 1st and 2nd Respondents stated that the 1st Respondent sought and obtained *inter alia*;

   a. An order of the court granting it leave to advertise *Kepha Omondi Onjuro & others v the Attorney General & 5 others* (*supra*) case in Daily Newspaper with wide coverage within 7 days to allow all persons with an interest or affected by the project to take steps to have their interests in the matter protected.

   b. On the June 13, 2014, following the court orders of June 5, 2014, the 1st Respondent put up a notice of substituted service by Advertisement in the Standard Newspaper at page 32 and page 20 of the Daily Nation notifying any person affected by the project and/or planned evictions or demolitions to take steps within 10 days to join the proceedings so as to have their interest in the matter determined.

8. The 1st and 2nd Respondents submitted further that despite being aware of the *Kepha Omondi Onjuro & others v the Attorney General & 5 others* and the court's decision in related matters, the Petitioners deliberately failed to bring to the court's attention the issues raised therein and proceeded to the file subject this petition in the hope that the honourable court would not get wind of the previous decisions in the subject matter. The Respondents proceeded by highlighting the decision reached in the *Kepha Omondi Onjuro and Others v the Attorney General & 5 others*.

9. In highlighting the Principles of res judicata, the 1st & 2nd Respondents referred this court to the case of *Aggrey Chiteri v Republic* (2016) eKLR where the court held thus;

   1. The Principle of res judicata applies in law to bar subsequent proceeding when there has been adjudication to court of competent and concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in dispute: See Mandavia v Rattan Singh (1965) EA 118. It is intended to ensure the protection and propagation of the public policy that

      > "parties to a judicial decision should not afterwards be allowed to re-litigate the same question",

      See Miller, J in Crown Estate Commissioners v Dorset County Council (1990) 1 All ER 19, 23.

   2. The court consequently has an inherent jurisdiction even where it is not expressly conferred to invoke this principle in appropriate circumstances and ensure too that the process of court is not abused.

10. The 1st and 2nd Respondents contend that the issues of whether or not the Relocation Action Plan, the construction and the resultant evictions and occupation of the premises are constitutional and lawful as raised by the Petitioners in paragraph 1 – 25 of the Petition and on whether the 2nd Respondent adhered to the World Bank eviction guideline to prevent arbitrary evictions of the Petitioners were the subject of the hearing and determination by the Honourable Justice Odunga in the *Kepha Omondi Onjuro* case where in determining those issues the court found *inter alia* that:

> "124. Was there availability of information on the proposed eviction in reasonable time? Under the door to door vetting exercise the cluster leaders were given a list with the names and house numbers of PAPs in their cluster which had been derived from the enumeration register and the leaders visited each structure to inform the occupants that the project was now being implemented. The Cluster leaders checked the name given and the number painted on the structure against the enumeration list and if the same tallied with that on the list the section leader requested the PAP to authenticate the information by signing the register. The report also provides that the section leader to find our whether the PAP household had any cases such as a person living with disability, a bed ridden member of the household or an aged person requiring consideration and any other special grievances which were keyed into the complaints register."

11. The 1st and 2nd Respondents also referred this court to the decision of Lenaola, J (as he then was) in the case of *Okiya Omtata Okoita v CAK & 14 others* (2015) eKLR where he quoted *ET v Attorney General* thus;

> "The court must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the Court in another way and in the form of a new causes of action which has been resolved by a court of competent jurisdiction."

12. The 1st and 2nd Respondents argued that by the order made on 5/6/2014 for service by substituted service, it made the advertisement public and all petitioners were consequently made aware of the existence and pendency of *Kepha Omondi Onjuro* case. In support of this argument, this court was referred to the decision in *Japhet Muroko v Attorney General & 4 others* (2016) eKLR where Mumbi Ngugi, J stated as follows;

> "The petitioner may well argue that he was not a party to the Richard Dickson Ogendo case, and the principle of res judicata does not therefore apply to him. However, it must be observed that it cannot be open to every member of the public, who deems himself to be public spirited, to re-open every issue on the basis that he has added a twist to a claim brought previously as a private individual claim and raise it as a matter of public interest."

13. The 1st and 2nd Respondents urged this court to dismiss the Petition for being ill – concerned and res judicata as all the issues raised have been fully considered and lawfully determined.

14. The 3rd Respondents filed his submissions dated June 15, 2022 and submitted that the Petition is *res judicata* having been heard and determined by court of competent jurisdiction in *Kepha Onjuro & others v the Attorney General & 5 others* in Nairobi HC Constitutional Petition No 239 of 2014 and No 575 of 2013, *MCA Peter Imwatek & 15 others v Attorney General & 4 others* (2015) eKLR.

15. The 3rd Respondent referred to the court to the case of *Henderson v Henderson* (1843) 67 ER 313 where *res judicata* was described as follows:

> " ...where a given matter becomes the subject of litigation in, and 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 litigations in respect of a matter which might have been brought forward as part of the subject contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The pleas of res judicata applies, except in special cases, 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 time."

16. The 3rd Respondent submitted that 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. That the petitioners have always been filing suits challenging one thing or another. He argued that the issues revolve around the relocation and eviction from the railway reserve. The notice requires the beneficiaries to produce documents of their next of Kin and nowhere in that notice where the word "eviction" is mentioned. He referred this court to the Maino Maleniu case where the Court of Appeal observed as follow:

> " ...the principle in Anarita Karimi Njeru (*supra*) underscores the importance of defining the dispute to be decided by the court....Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."

17. The 3rd Respondent submitted that the petition was incompetent because it was not accompanied with a supporting by affidavit as required in law. In support of this argument, they referred the court to the case *Charles Okello Mwanda v EACC and 3 others* (2014) eKLR where it was held that the requirement that a petition be accompanied by a supporting affidavit is not a procedural technicality as the affidavit contains the evidence a party wishes to rely on. It was stated further in that case that a petition filed without a supporting affidavit is a fatal technical error as it goes to the root of the petition. He urged the court dismiss the petition.

18. In opposing to the Preliminary Objections, the Petitioners began by responding to ground 2 of the 2nd Respondent's preliminary objection. They submitted that the petition was initially filed in the Constitutional and Human Rights division of the High Court when the 2nd Respondent raised an objection on jurisdiction and the matter was transferred to this court hence that limb is overtaken by events. Further, the Petitioners submit that the petition as filed has complied with the format of Rule 10(2) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*. On jurisdiction, the petitioner submitted thus court has jurisdiction to entertain

the dispute as provided for under article 162 (2) (b) of the *Constitution* and Section 13(3) of the *Environment and Land Court Act*, 2011 which provides thus.....

> " Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 ofthe *Constitution*"

19. On res judicata, the petitioners submit that the 3rd Respondent did not place before this court the germane petitions (575 of 2013 and 239 of 2014) to juxtapose the same with the current petition to enable the court make an informed decision. They went on to cite the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors* (1969) EA which defined a Preliminary Objection thus:

> " 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"

20. The Petitioners cited the case of *Accredo AG & 3 others v Steffano Uccelli and another* (2019) eKLR where it was stated that;

> On the whole. It is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept that constitution based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of cases. It must be sparingly invoked and the reasons are obvious as rights keep evolving, mutating and assuming multifaceted dimensions.
>
> And explanation 6 of section 7 of *Civil Procedure Act* which states thus....
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> > " Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

21. The petitioners contend that the issues in this petition relates to eviction of the petitioners from their houses/homes allocated to them by the Respondents jointly and severally after the relocation from the railway line reserve. Whereas the petitioners in the earlier cases were seeking orders to stop eviction and demolition from the Railway line without allocation options. That the petitioners had renewed their leases with the 1st and 2nd Respondents and evicting them will terminate those leases prematurely. The Petitioner submitted further that their interest in the land does not flow out of contractual obligation per se but stems from the fact of their occupation of public land near the railway reserve. That the 2nd Respondent in partnership with the World Bank made a decision to relocate them to alternative structures build using public funds.

22. The first question this court is called upon to answer is whether or not the petition as filed is res judicata. Each of the parties have elaborately in their written submissions discussed the principle of res judicata and how it does apply to this case. The petitioners pleaded that they have occupied the suit premises for a period of over 30 years. They acknowledged that in 2010, the 2nd Respondent in conjunction with the World Bank undertook a relocation exercise of the people living along the railway line with

a commitment to organize the settlement occupation to insulate the railway line from encroachment. That anchored on this arrangement, the Petitioners were allocated one room each on a long term lease.

23. The petitioners pleaded that they took possession and were paying rent of Kshs 1000 per year to the 2nd Respondent. At paragraph 18, the Petitioners pleaded that out of thin air and with no justification, the Respondents purported to serve notice requiring them to move out of their respective houses. That this notice was served through a notice board mounted in their area of occupation. It is this notice which irked the Petitioners into their bringing this petition. A copy of the impugned notice dated May 2, 2019 was included in the bundle of documents.

24. The Respondents argue that the issue of the impugned notice was also the subject matter in dispute in the *Kepha Onjuro & others* case plus the other mentioned cases which has been heard and determined. In the petition, it is pleaded that there was a Relocation Action Plan. The Petitioners acknowledged that they were temporarily removed to a safe location a few meters from the railway line to allow for construction to take place and thereafter return to get allocation of units.

25. In prayer (b) of this petition, the court is being asked to declare the notice mounted on the gate/ notice board within the area of occupation of the Petitioners as violating their fundamental rights and freedoms. To the extent that the petition pleaded and submitted on the subject of the notice and the Relocation Plan, I am persuaded by the Respondents' views that the same was heard and determined by a court of competent jurisdiction in the case of *Kepha Onjuro and others* case where the same questions were raised so it is *res judicata*.

26. I have taken not of the submission by the Petitioners as set out in the case of *Accredo AG & 3 others* (*supra*) where it was observed that *res judicata* should be invoked sparingly in constitutional litigation because the rights keep evolving, mutating and sometimes assumes multifaceted dimensions. In that case, the trial judge appreciated that constitutional litigation is not exempted from the doctrine of *res judicata*. For the Petitioners to evade the doctrine of res judicata, they ought to have demonstrated how their right had evolved or mutated from the rights litigated in the previous suits.

27. Paragraph 17 of the Petition refers to the unilateral decision by the 1st Respondent to evict them. The issue of the actions of the 1st Respondent removing the occupants from the area in dispute was dealt with at length in the Kepha Onjuro case where the Judge found that the process involved was within the legal frameworks and was valid. The Petitioners' invitation to this court to relook that decision is definitely res judicata. On this account the petition fails.

28. Since this court directed that the petition would also be considered on its merit so I will do so here below. The petitioner pleaded that they moved into the rooms allocated by the Respondents anchored on a lease agreement with the Respondents to occupy for a period of 45 years commencing from the year 2016. They added that the original lease agreement is in possession of the 1st Respondent.

29. The Petitioners aver that on the basis of the lease agreement, they had a legitimate expectation of uninterrupted occupation upto to the expiry of 45 years of the lease. That the threatened eviction would undermine their occupation which started in the year 2010. A copy of the executed lease between the Petitioners and the Respondents was not displayed in the documents filed in support of the petition to verify that indeed they were entitled to stay uninterrupted for a period of 45 years. It is a settled rule of evidence as provided in Section 107 & 109 of the *Evidence Act* that the burden of proof lay at the door step of the Petitioners;

> " 107 (1) provides that: Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."

> "Section 109 of the *Evidence Act* mandates a person who wishes the court to believe in the existence of a certain fact to prove the same by producing/adducing evidence."

30. This claim is brought dependent on the breach of terms of a lease agreement (paragraphs 11-15 of the Petition) which this court has not seen therefore making it difficult to find for the Petitioners. Furthermore, If I proceeded on the presumption that such a lease existed, the Petitioners have admitted that they were served with notice to leave/move out. According to the Petitioners, the impugned notice is in breach of article 47 of the *Constitution* which provides for the right to fair administration action.

31. An inference is drawn from a perusal of petition, that the Petitioners are alleging breach of contract (lease agreement) which in my view are contractual obligations not violation of constitutional rights as alleged. It appears from their argument, that the said lease did not have a termination clause. The court can only find a party to be in breach where the document disclosing the terms alleged to have been broken is produced as already stated, none was availed. The Petitioners besides pleading that the document was in the possession of the 1st Respondent, they did not serve notice to have the said Respondent produce the same in court. However, the Petitioners produced a copy of an unsigned least which I have flipped through and which copy has a termination clause. The termination clause provided the reasons for such termination to be invoked and that prior to such termination the Kenya Railways shall give to the other party 30 days' notice to show cause why the lease should not be terminated.

32. Thus, from the contents of the unsigned lease produced, it is obvious that the Respondents had a right to terminate the lease. The said unsigned lease also had a mechanism for dispute resolution put in place. Because the Petitioners are claiming violation of their rights under article 47 of the *Constitution*, they did not inform this court if they took up the matter with the Arbitration Panel set up under the project. Secondly, Petitioners have not argued that notice served was inadequate. In any event, the Petitioners have pleaded in paragraphs 4 that they had been involved in the process through seminars, meetings, and consultations which culminated into an agreement with the Petitioners being allocated rooms/houses to replace the ones they previously occupied.

33. Despite the Petitioners relying on the Lease agreement, I find a contradiction in paragraph 17 where they pleaded that "the said space and place is their home, housing and have lived there for a period of over 30 years each the 1st Respondent has made a unilateral decision to evict." The contradiction being, are the Petitioners claiming rights derived from living in houses allocated to them by the 1st Respondent post the agreement of 2016 or they are still on the land where the relocation plan was being executed?

34. Further, the letters of authority to occupy annexed in support of Petition are dated 2016. There is no doubt judging from these documents (letters and receipts of payments) that the Applicants are living on the land/houses with permission from the 2nd Respondent. Hence to prove violations of any rights, the Petitioners were under obligation to demonstrate that the Respondents do not have power to cancel the authority they had given to the Petitioners to occupy the house or the land in dispute.

35. As submitted by the Respondents, the Petitioners have in my view and I so hold failed to state and prove their rights which have been and are likely to be violated. They were duly served with notice and they have not pleaded and proved that the notice served was inadequate. They failed to produce an executed agreement that showed the lease could not be terminated whatsoever. In addition, they failed to persuade this court that if the Respondents gave them a right to occupy houses, the said Respondents lost the authority to withdrawn or terminate the right to occupy in the manner applied by the Respondents.

36. In conclusion, I hold that the petition fails, first because it is *res judicata* and secondly because it has not been proved on the standard of balance required under the law. The same is dismissed with an order that each party bears their respective costs.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2023

A. OMOLLO

JUDGE

In the Presence of

Nyaga H/b for Nyambega for the Petitioners

Ms Kerubo h/b for Motari for the A.G

Mr Agwara for the 1st and 2nd Respondents