



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**JUDICIAL REVIEW RIGHTS DIVISION**  
**JR ELC MISC. APPL. NO. 25 OF 2009**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE CHIEF LAND REGISTRAR ..... 1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF LANDS ..... 2<sup>ND</sup> RESPONDENT**

**THE KENYA ANTI CORRUPTION**

**COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**THE COMMISSIONER OF POLICE ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**CITY COUNCIL OF NAIROBI ..... 1<sup>ST</sup> INTERESTED PARTY**

**ELIJAH ADUL ..... 2<sup>ND</sup> INTERESTED PARTY**

**ANN ATIENO ..... 3<sup>RD</sup> INTERESTED PARTY**

***EX PARTE***

**JOHN NGARURO MUGO**

**RULING**

1. Before the Court today is a Notice of Motion dated 13<sup>th</sup> November 2012 filed on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties, who are the applicants (“the Aduls”), against the *ex-parte* applicant (“Mugo”), who is the alleged contemnor. The application seeks the following orders;

1. *That an order for committal for contempt of this Honourable Court do issue against JOHN NGARURO MUGO (the applicant/Respondent herein) for a period of six (6) months or such other period as the court may determine or until they purge their contempt of this Court for wilfully causing the construction, occupation and rental of the suit premises despite the preservatory orders in force.*
  2. *That costs of and occasioned by the contempt of court proceedings herein be taxed and paid personally by the Applicant/Respondent and in default thereof, execution to issue forthwith.*
  3. *That the court be pleased to grant any such or further orders which it deems fit and expedient in the circumstances of this case.*
2. The Motion is supported by the verifying affidavit of Ann Atieno Adul sworn on 13<sup>th</sup> November 2012.
  3. The basis of the application is an order issued by Msagha J, on 31<sup>st</sup> July 2013 stating as follows;
    1. *That HCCC ELC JR 56 of 2009 be and is hereby consolidated with HCCC ELC JR 25 of 2009.*
    2. *That all parties herein be and are hereby restrained from dealing/interfering with the suit premises. The two suits having been consolidated and notwithstanding the stay orders granted in HCCC ELC JR 56 of 2009 the conflicting information as to acquisition of the property by the Applicant and the competing interest of the other parties call for the preservation order. All parties herein shall keep off the suit premises until this matter is finally resolved and determined.*
  4. The applicants' contend that despite this order being in force, Mugo continued to construct on the suit property, **NAIROBI BLOCK 63/410** ("suit property"), has completed construction and is now collecting rent in complete violation of the said order.
  5. The *ex-parte* applicant opposes the application on the basis that he has not committed any contempt as alleged or at all. He contends that the issue of whether he was entitled to continue building was dealt with by a ruling of Msagha J., in **ELC No. 295 of 2010, John Ngaruro Mugo v Elijah Adul and Ann Atieno Adul**, where the Court dealt with an injunction application filed by the *ex-parte* applicant seeking to restrain the interested party from interfering with the suit property. The *ex-parte* applicant's view is that the application for contempt is a roundabout way of litigating the application for injunction.
  6. I have considered the parties' depositions and submissions and I take the following view of the matter. Whether or not the *ex-parte* applicant has committed contempt depends on understanding the nature of the dispute between the parties.
  7. Mugo and the Aduls are embroiled in an on-going dispute concerning the suit property in **ELC No. 295 of 2010**. Both parties claim that they have title to the suit property. Upon filing the suit, Mugo applied for an injunction against the Aduls restraining them from trespassing, developing, alienating, selling, charging or transferring and evicting the plaintiff. The Aduls countered by filing an application to restrain Mugo from collecting rents, letting or dealing with the building constructed on the suit property pending hearing of the suit.
  8. After hearing both applications, Msagha J., in a ruling dated 28<sup>th</sup> September 2010 stated as follows; "*Both parties allege that they are purchasers for value without notice and that is a very serious triable issue. That being the case, it may not be appropriate to restrain the plaintiff from an investment that he believed belonged to him. The best I can do as I have said is to preserve the subject matter. To do so, I order that the plaintiff who is now said to be in possession shall not alienate the premises or sell the same or in any manner deal with the same including charging to the detriment of the defendants' interest. The order shall be registered and determined or further order of the court. Each party shall bear their own costs of these applications. Orders accordingly.*"
  9. The said suit has not been prosecuted since the application for injunction was disposed

determined.

10. In the meantime, Mugo filed this matter in order to forestall criminal investigations and arrest in relation to the suit property. The orders sought in the Notice of Motion dated 29<sup>th</sup> May 2009 are as follows;

1. *THAT orders of certiorari be issued to remove to this Honourable Court for the purposes of quashing the fraudulent and illegal certificate of lease issued to the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties herein by fraud without informing the exparte applicant contrary to rules of Natural Justice and backdated fraudulently to give a false impression that it was a first registration so as to invalidate the applicants leasehold interests in the suit land.*
2. *THAT orders of mandamus be issued compelling the Commissioner of Lands and the Registrar of Lands to fight graft and fraud in the Lands Registry by cancelling the 2<sup>nd</sup> and 3<sup>rd</sup> interested party's certificate of lease if at all the same was issued by the Registrar of Lands and which certificate of lease was not available and could not be reflected in the Register of Lands as at the 12<sup>th</sup> November 2008 when the applicant conducted official search in the Registry at the Lands Office.*
3. *THAT orders of prohibition be issued directed at the Commissioner of Police and all officers serving under his command prohibiting them from arresting and charging the applicant in court in relation to the fraudulent Land Transaction herein touching on Nairobi/Block 63/410 until proper investigations are conducted by Kenya Anti Corruption Commission and appropriate recommendations made to the Attorney General for the prosecution of all persons and the public individuals involved in the scam.*
4. *THAT the costs of this application be provided for.*

11. It is therefore apparent that there are two suits deal with the suit property and are intended to achieve the same result, that is, a determination of the owner of the suit property. It is against the background, the application for contempt must be examined. In my view, it is an attempt to "review" the orders of Msagha J., in **ELC No. 295 of 2009**. Hence I am reluctant to find in favour of the applicants.

12. In any event, I do not think there is contempt in the sense that the orders in **ELC No. 295 of 2009** dealt with the status of the property pending the hearing of the said suit. Those orders were already in force when the order in the present suit were issued. Hence reference to "**all the parties are hereby restrained from dealing with the suit premises**" must be read together with the order in **ELC No. 295 of 2009** to mean that Mugo remains in possession of the property. It is noteworthy that the Adults application to restrain collection of rent was dismissed in the same decision hence an order of committal for contempt cannot lie.

13. The net result of my finding is that the Notice of Motion dated 13<sup>th</sup> November 2012 is dismissed with costs.

14. I would be remiss if I did not state that it would be in the interests of the parties to resolve the core issue for determination which is in **ELC No. 295 of 2009** rather than proceed on collateral litigation that may not resolve the dispute.

**DELIVERED and DATED at NAIROBI this 6<sup>th</sup> day of August 2013.**

**D.S. MAJANJA**

**JUDGE**

Mr Omondi instructed by Christine Oraro and Company Advocates for the applicants/2<sup>nd</sup> and 3<sup>rd</sup> interested parties.

Mr Gikaria instructed by Anthony Gikaria and Company Advocates for the ex-parte applicant