



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC NO. 62 OF 2012**

SAMUEL KARINGE NJENGA.....1<sup>ST</sup> PLAINTIFF/APPLICANT  
DAVID KIMANI GATUNGU.....2<sup>ND</sup> PLAINTIFF/APPLICANT  
ROSE WANGUI MUTHAMA.....3<sup>RD</sup> PLAINTIFF/APPLICANT  
ANASTACIA WANJIKU MWANGI.....4<sup>TH</sup> PLAINTIFF/APPLICANT  
JOHN MACHARIA MWANGI.....5<sup>TH</sup> PLAINTIFF/APPLICANT  
MARGARET WAHU KIRIITHI..... 6<sup>TH</sup> PLAINTIFF/APPLICANT  
MARGARET NJERI GITIRI.....7<sup>TH</sup> PLAINTIFF/APPLICANT  
MERCY WAMBUI MUTHONI.....8<sup>TH</sup> PLAINTIFF/APPLICANT  
SALOME WANJA CHEGE.....9<sup>TH</sup> PLAINTIFF/APPLICANT  
RUTH WAMAITHA WAMBUI.....10<sup>TH</sup> PLAINTIFF/APPLICANT  
JULIUS KARIUKI.....11<sup>TH</sup> PLAINTIFF/APPLICANT  
ANDREW NGUNJIRI.....12<sup>TH</sup> PLAINTIFF/APPLICANT  
JOHN WAINAINA KIROI.....13<sup>TH</sup> PLAINTIFF/APPLICANT  
EVA NYAMBURA.....14<sup>TH</sup> PLAINTIFF/APPLICANT  
CHRISTOPHER NJENGA.....15<sup>TH</sup> PLAINTIFF/APPLICANT  
STEPHEN MBUGUA MUNGAI.....16<sup>TH</sup> PLAINTIFF/APPLICANT

**HANNAH NJOKI THUO.....17<sup>TH</sup> PLAINTIFF/APPLICANT**

**SIMON KIMANI MWAURA.....18<sup>TH</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**STEPHEN MBUGUA GATHUNA .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JANE MUTHONI MBUGUA..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

Coming up before me for determination is the Defendants/Applicants Notice of Motion dated 12<sup>th</sup> February 2013 in which the Defendant/Applicants are seeking for the following orders:

1. That the Honourable Court be pleased to discharge and/or set aside the *ex parte* Orders granted against the Defendants/Applicants on 17<sup>th</sup> July 2012.
2. That the Plaintiffs/Respondents by themselves, their servants and/or agents do forthwith deliver and give vacant possession of Dagoretti/Riruta/159 (hereinafter referred to as the “Suit Property”).
3. That the Plaintiffs/Respondents do vacate the Suit Property that they occupy within 7 days of service of this Application.
4. That the costs of this Application be awarded to the Defendants/Applicants.

The Application is supported by the grounds appearing on the face of it together with the Supporting Affidavit of Jane Wanjuhi Kinyanjui sued herein as Jane Muthoni Mbugua sworn on 12<sup>th</sup> February 2013 in which she stated that the Plaintiffs/Respondents obtained *ex parte* orders which allowed their Application for injunction dated 6<sup>th</sup> February 2012 whereas they did not pay the rent arrears amounting to Kshs. 1, 215,000/- as at August 2012 as they led the Honorable Court to believe. She stated that the Plaintiffs/Respondents therefore misled the court into granting them the orders issued on 17<sup>th</sup> July 2012 and that had all the material and relevant facts been brought to the attention of the court, it would not have made the order it did on 17<sup>th</sup> July 2012. She further swore that the leases entered into between the Plaintiffs/Respondents and the 1<sup>st</sup> Defendant had since expired and on that basis the Plaintiffs/Respondents ought to have vacated the Suit Property. She further stated that it was only fair, just and equitable that the said *ex parte* Order be discharged and/or set aside and the Plaintiffs/Respondents be ordered to deliver up and give vacant possession of the Suit Property to the Defendants/Applicants.

The Application is contested. The Plaintiffs/Respondents filed the Replying Affidavit sworn by Julius Kariuki Muya on 14<sup>th</sup> May 2013 in which he stated that the allegation by the Defendants/Applicants that they have not paid up rent arrears as directed by the court vide its orders of 16<sup>th</sup> April 2012 is false as all the Plaintiffs that occupy the Suit Property have cleared their rent arrears to the Defendants and the Defendants had issued to some of them receipts. He further stated that the total amount indicated by the Defendants as owing from the Plaintiffs is a gross exaggeration and a blatant lie further disclosing that the Plaintiffs had on numerous occasions tried to pay the Defendants rent since the making of the court order on 16<sup>th</sup> April 2012 but the Defendants declined to receive those payments which move they suspect is meant to hoodwink the court and have it issue eviction orders against the Plaintiffs on the ground that they have failed to pay rent. He further averred that the Plaintiffs were able and willing to pay their rent arrears accrued since the making of the court order on 16<sup>th</sup> April 2012 and were willing to deposit the same in court from where the Defendants can collect it.

The Defendants/Applicants responded thereto by the Supplementary Affidavit of Jane Wanjuhi Kinyanjui

sworn on 6<sup>th</sup> June 2013 in which she stated that the averment in the Plaintiff's Replying Affidavit at paragraphs 7 and 9 confirm that the Plaintiffs did not pay the rent arrears owed to them as they led the court to believe resulting in their being granted an order of injunction. She further averred that the Plaintiffs were still in rent arrears and that the court would not have granted the orders if this fact was revealed to the court beforehand. She further asserted that the Plaintiffs are trespassers as their leases have expired and /or were terminated therefore trespassers are not entitled to protection of the court of equity and the relief of injunction granted to the Plaintiffs ought to be set aside and/or vacated.

Both the Plaintiffs and the Defendants filed their written submissions which have been read and taken into account in this ruling.

From my review of this file, it is clear that this suit was filed on 7<sup>th</sup> February 2012 by way of a Plaintiff dated 6<sup>th</sup> February 2012. The Plaintiffs simultaneously filed an application under certificate of urgency being their Notice of Motion dated 6<sup>th</sup> February 2012 (hereinafter referred to as the "Motion") seeking inter alia that the Defendants be restrained from evicting them, demolishing their developments or in any manner interfering with their quiet and peaceable occupation and possession of the Suit Property pending the hearing and determination of the application and the suit. It is also clear that the Motion was certified urgent and interim injunction was issued against the Defendants and the Motion was fixed for inter-partes hearing on 16<sup>th</sup> April 2012. When the Motion came up for hearing on 16<sup>th</sup> April 2012, the parties recorded a consent to the following effect:

1. That the Plaintiffs do pay rent arrears within 90 days from today.
2. That in default of paying payment of the outstanding rent arrears within the 90 days, the Defendants be at liberty to apply for the eviction of the said Plaintiffs.
3. That this suit be mentioned on 17<sup>th</sup> July 2012 to confirm compliance and directions on the main suit before Angawa, J.
4. That costs be in the cause.

It is also clear from the file that when this matter came up for mention on 17<sup>th</sup> July 2012, only the Plaintiffs' counsel was in court when the matter was called out. He submitted that parties had not arrived at any agreement and confirmed that the Plaintiffs had paid rent directly to the Defendants. The court proceeded to grant the injunction sought in the Motion and transferred the matter to the Environment and Land Division. Shortly thereafter, counsel for the Defendants arrived in court, apologized for being late and submitted that there had been no compromise between the parties to this suit. It is noteworthy that the Defendant's counsel did not submit to the court that the Plaintiffs had not complied with the consent order to pay rent arrears within the time period agreed. It is further noteworthy that the Defendants had not filed any application to evict the Plaintiffs for non-payment of rent arrears yet this day was more than 90 days from the date of the consent order. In the absence of those submissions, the Judge proceeded to reiterate her earlier order granting the Plaintiffs the injunction. I disagree that this is an ex parte injunction. To my mind, the Defendants had ample opportunity on 17<sup>th</sup> July 2012 to make the submissions they are now making in the instant application to the court to counter any falsehoods the Plaintiffs may have presented to the court. The Defendants failed to utilize that opportunity. As far as I understand it, the consent order recorded on 16<sup>th</sup> April 2012 is now spent and this suit is now proceeding in the usual manner. The issue whether or not rent arrears have been paid is now a matter for determination at the trial. I therefore decline to set aside or discharge the injunction order granted to the Plaintiffs. Further, my finding is that the other orders sought by the Defendants in this instant application are orders of a final nature which cannot be issued at this interlocutory stage of the proceedings. This court cannot allow this suit to be prosecuted to its finality through interlocutory applications of this nature. I therefore direct that the suit be fixed for hearing at the earliest opportunity.

Arising from the foregoing, I hereby dismiss this application. Costs shall be in the cause.

**SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>th</sup> DAY OF November 2013.**

**MARY M. GITUMBI**

**JUDGE**