



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

PETITION NO.26 OF 2010

**THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF
FUNDAMENTAL RIGHTS AND
FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES,
2006**

AND

IN THE MATTER OF SECTION 84 (1) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER SECTION 75 (1 & 2) OF THE CONSTITUTION OF KENYA**

**ISAYA WANYONYI.....1ST
PETITIONER**

**WINCELAUS TABAN WAKHUNGU.....2ND
PETITIONER**

**NGICHABE MASIBO KAITA.....3RD
PETITIONER**

(Bringing this petitioner for and on behalf of the Kibora Squatters

Association)

AND

**AGRICULTURAL DEVELOPMENT CORPORATION.....1ST
RESPONDENT**

**THE COMMISSIONER OF LANDS.....2ND
RESPONDENT**

**DIRECTOR LAND ADJUDICATION AND SETTLEMENT.....3RD
RESPONDENT**

**COMMISSIONER OF POLICE.....4TH
RESPONDENT**

THE HON. ATTORNEY GENERAL.....5TH

RESPONDENT

RULING

This is a ruling on a preliminary objection against the Applicant/Petitioners' notice of motion dated 02/2/2011. The motion seeks for stay of execution of orders made on 30/11/10 pending the hearing and determination of the appeal. The application is brought under rules 20 and 21 of the Constitution (Supervisory Jurisdiction & Protection of Fundamental Rights & Freedoms of the Individual) High Court Practice and Procedure Rules 2006 and under Order XLIV of the Civil Procedure Rules and under inherent powers of the court. The application is brought under certificate of urgency.

The facts leading to this application are that the Applicant filed a petition in this court on behalf of Kiboraa Squatters. The officials of the Association filed the petition on behalf of the Petitioners. The petition sought declaratory orders against the five Respondents in respect of several land parcels named in the petition. It was claimed in the petition that land which belonged to the petitioners was taken by the Government for its own use. The land where the petitioners were moved belonged to the 1st Respondent and it is the subject matter of this petition. The petitioners prayer was that the said parcels of land L. R. No.5337, 5345, 5346 Olingatonga and L.R.Nos.2043 and 2992 Sabwani Farm where they have lived for about 40 years be declared their property.

The said petition was struck out for failure to comply with the law. The Applicants now want the court to stay its orders of striking out the petition. It is against this application that the preliminary objection was filed by the Respondents dated 9th February 2011.

The objection raises issues of lack of jurisdiction and also states that the application is incompetent. Parties agreed to dispose of the preliminary objection by way of written submissions. Both parties filed the submissions through their counsels Mr. Zablon Mokuu for the Applicants and Mr. Kiarie for the Respondents.

I have perused the submissions of the parties in support and in opposition of the preliminary objection. In its submissions the Applicant has not responded to the issues of law raised in the preliminary objection. The supporting affidavit gives the history of the petition which was struck out claiming that the 1st Respondents disobeyed the interim orders restraining it from evicting the Applicants. The Applicant further states that by striking out the petition, the injunctive orders in their favour were effectively discharged. The Applicant is likely to suffer substantial loss if evicted by the Respondents.

It is correct to state that the injunctive orders ceased to exist when the petition was dismissed. It would be unprocedural and not in the interest of justice to restore such orders. The law under which the application is brought is inapplicable to an application of that nature. Rules 20 and 21 do not deal with stay of execution of orders. Rule 20 deals with conservatory or interim orders. Rule 21 provides for the mode of presenting an application brought under rule 20 to court. The two rules are hereby inapplicable. Order XLIV of the New Civil Procedure Rules deals with pauper briefs. The subject of pauper briefs is irrelevant in this application. The inherent powers of the court do not apply where there are specific provisions in existence. The Application before me is seeking for stay of orders of this court pending appeal. Before looking at the law applicable to an application of this nature, I wish to analyse the orders given by this court and how they affect the Applicants.

This court simply ordered that the petition was incompetent and that it be struck out. There were interim orders given earlier in favour of the Applicant's that status quo be maintained by the parties. The said orders ended with the striking out of the petition. As the court struck out the petition, it did not make any other order affecting any of the parties. As such the application for stay is misplaced because there is no order to be stayed.

I am well guided by the authorities cited by the 1st Respondent which I find relevant herein. In the case of **HON. PETER ANYANG' NYONG'O VRS REPUBLIC COURT OF APPEAL AT NAIROBI CIVIL APPLICATION NUMBER 273 OF 2007**, the court held that an order which simply strikes out a petition with costs is incapable of being stayed. The court went on to say that an order that strikes out a suit or a cause is incapable of being stayed pending appeal.

Now that the Applicant has filed an appeal against the striking out of the petition, the right place for him to seek stay orders is in the Court of Appeal pending hearing and determination of the appeal. The Court of Appeal rules shall be applicable to any application filed before that court. This court is now *functus officio* after striking out the petition.

I therefore find that the application is incompetent and that this court lacks the jurisdiction to hear it. The preliminary objection is upheld accordingly. The application dated 02/2/2011 is hereby struck out with costs.

F. N. MUCHEMI

JUDGE

Ruling dated and delivered on the 11th day of July, 2011 in the presence of Mr. Mokuu for the Applicant and Mr. Kiarie for the Respondent.

F. N. MUCHEMI

JUDGE