



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Miscellaneous Civil Application 673 of 2005**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY:-**

1. JOSEPH MBURU GITAU
2. FELISTA WARIARA NDUKU
3. ISAAC MBURU NJUGUNA
4. KEZIAH WANJA KINOTI
5. CECILIA WANJIRU GICHURU
6. GODFREY MUCHANJI AJIAMBO
7. FLACIA NJOKI MUIRURI
8. CHRISTIAN MUCHANJI AJIAMBO
9. MARY WAMBUI KARARI
10. JOSPHAT NJUGUNA MWANGI  
AND 626 OTHERS

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**THE COMMISSIONER OF POLICE.....1<sup>ST</sup> RESPONDENT**  
**THE COMMISSIONER OF LANDS.....2<sup>ND</sup> RESPONDENT**  
**THE HON. THE ATTORNEY-GENERAL.....3<sup>RD</sup> RESPONDENT**

**EX PARTE**

1. JOSEPH MBURU GITAU
2. FELISTA WARIARA NDUKU
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11. AND 626 OTHERS

**RULING**

On 2/5/08, Nyamu, J. granted the applicants prayer for an order of prohibition to prevent the Commissioner of Police, the Commissioner of Lands and the Hon. The Attorney-General from auctioning and interfering with the applicants' quiet possession of LR 209/14582, Nairobi South C. herein. The applicants have filed the Chamber Summons dated 9/10/09 seeking leave to commence contempt proceedings against the Commissioner of Police Mr. Mark Opiyo, the

OCPD and DCIO Langata Police Station for disobeying the decree of the Court issued on 2/5/08. The applicants contend that despite the fact that the decree was served by way of substituted service, by advertisement on 20/6/09 (7). Joseph Mburu Gitau in his affidavit depones that on 23/9/09 the applicants went to the said premises but the OCPD and DCIO violently removed them.

Though this application is ordinarily heard *ex parte*, somehow the respondent's counsel was served and so the Court accorded him a hearing. The respondents filed a replying affidavit sworn by Silas M.C. Opiyo, the Director Planning and Development at Police Headquarters in which he denies having been served with any Court order. That the former Commissioner of Police, OCPD and DCIO Langata too, have denied having been served with any Court order. He also deponed that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants were charged in CRC 1738 with the offence of making false documents contrary to section 357(a) of the Penal Code and it is coming up for hearing on 28/1/2010 and that in light of the said criminal proceedings, this Court should await the determination of that case. That there is an appeal in this case (SM 02) and leave to appeal out of time has been granted. That the land in issue belongs to the Government which has constructed houses thereon i.e. 595 housing units; it is not denied.

I have seen the ruling of the Court dated 2/5/08. The state counsel, then present conceded to the applicant's prayer that the government did not lay any claim on the land the centre of controversy and that is why the Court entered judgment on behalf of the applicant. It seems the same Government has turned around and now lays claim on the same land and has appealed against that decision of this court. Githinji J. granted the respondent leave to appeal out of time in view of the value of land acreage and developments on the land and the public interest. There being a pending appeal arising from that judgment of this Court, this Court cannot ask the respondents to comply with the Court's order of 2/5/08 at this stage. The appeal has to be determined first before such an application can be considered. This is because the subject matter is land, the respondents claim to be in possession having built houses on it and allowing the applicants onto the land would complicate issues. It is also noteworthy that the case touches on public interest. I decline to grant the leave sought in the Chamber Summons dated 9/10/09. The same can only be made after determination of the appeal. By the time this Chamber Summons was filed the Court of Appeal had already granted leave to the respondents to appeal out of time and the applicants were aware of the order. What is not very clear is whether the appeal has actually been filed because neither the appeal case number nor the proceedings were availed to this Court.

The respondents have also raised the issue of there pending in Court CRC 1738/08 in which the 1<sup>st</sup>, 3<sup>rd</sup> and 7<sup>th</sup> applicants have been charged with making false documents in relation to the land in question. The said case is yet to be heard and determined. Though this Court granted an order of prohibition, in light of the intended appeal and the fact

that there is a Court order in CRC 1738/08, this Court cannot ignore the existence of that case. Allowing the applicant back into the land at this stage would but complicate the issues further because the land may be dealt with in a manner that may be prejudicial to the party that may win the case in the end.

The other issue raised is that the applicants were not served with the orders of the Court personally. On 29/6/09, the applicants were granted leave to serve the respondents by way of substituted service in the print media, the applicant's attempts to serve having been futile. The respondents were once represented by counsel in the application before Dulu, J. They are represented here. They are therefore aware of the Court's order of 2/5/09. If it was not for the reasons that the Court has considered above, the respondents should have been asked to comply with the order of 2/5/09 prohibiting them from interference with the land. However, in light of what I have considered above, the applicants are not deserving of leave at this stage. Leave can only be considered after determination of the appeal and the criminal case that are pending. I will therefore, dismiss the Chamber Summons dated 9/10/09 with each party bearing their own costs.

**DATED** at **NAIROBI** this 1<sup>st</sup> day of February, 2010.

**R.V.P. WENDOH**  
**JUDGE**

**Present:-**

**Mr. Nthuku holding brief for Mr. Mutua for applicant**

**Ms. Langat holding brief for Mr. Chege for respondent**

**Muturi, court clerk**