



**Kamau v National Land Commission & 2 others; Thome ‘V’ Resident Welfare Association (Interested Party) (Environment and Land Civil Miscellaneous Application 227 of 2016) [2022] KEELC 13304 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13304 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT AND LAND CIVIL MISCELLANEOUS APPLICATION 227 OF 2016**  
**SO OKONG'O, J**  
**SEPTEMBER 21, 2022**  
**IN THE MATTER OF AN APPLICATION UNDER ARTICLE**  
**165(6) AND (7) OF THE CONSTITUTION**  
**AND**  
**IN THE MATTER OF EXERCISING SUPERVISORY**  
**JURISDICTION OVER THE NATIONAL LAND COMMISSION'S**  
**INVESTIGATIONS AND PROCEEDINGS UNDER ARTICLE**  
**67(2)(E) OF THE CONSTITUTION AND SECTION 14 OF THE**  
**NATIONAL LAND COMMISSION ACT, 2011 TOUCHING L.R**  
**NO. 209/12647/4**  
**AND**  
**IN THE MATTER OF ENFORCEMENT OF THE APPLICANT'S**  
**RIGHTS UNDER ARTICLES 40 AND 50 OF THE**  
**CONSTITUTION**

**BETWEEN**

**STEPHEN GITHINJI KAMAU ..... APPLICANT**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI CITY COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR, PLANNING COMPLIANCE & ENFORCEMENT, NAIROBI  
COUNTY GOVERNMENT ..... 3<sup>RD</sup> RESPONDENT**



**AND**

**THOME 'V' RESIDENT WELFARE ASSOCIATION ..... INTERESTED PARTY**

**RULING**

- 1 The full facts of this case are set out in a detailed judgment of this court that was delivered on January 20, 2022. In his amended originating notice of motion dated December 18, 2018, the applicant averred that he was the registered proprietor of all that parcel of land known as LR No 209/12947/4 (hereinafter referred to as 'the applicant's property') following an allotment that was made to him in 1997 in respect thereof. The applicant averred that he followed due process in acquiring the property and that he had been in possession of the property since he acquired the same and had put up thereon a semi-permanent three-bedroom house.
- 2 The applicant averred that on January 23, 2016, he saw an advertisement in the Daily Nation Newspaper requiring him to appear before the 1<sup>st</sup> respondent for a public hearing that the 1<sup>st</sup> respondent was going to conduct in relation to the title of the applicant's property that was under review. The applicant averred further that in March 2016, he received a complaint from the interested party that the allocation of a parcel of land known as LR No 12647/4 (hereinafter referred to as 'the suit property') to the applicant was illegal and that the property was reserved for a police post. The applicant averred that the said complaint did not indicate the particulars of the complainant and how the complainant was connected to the applicant's property. The applicant averred that the complainant did not include in the complaint the commissioner of lands or any government entity involved in allocation of land and issuance of titles. The applicant averred further that the complaint was not accompanied with the documents describing the interest that the complainant had on the applicant's property. The applicant averred that the proceedings that were conducted by the 1<sup>st</sup> respondent were against the rule of law, articles 47 and 50 of the Constitution and the rules of natural justice. The applicant averred that at the hearing before the 1<sup>st</sup> respondent that was attended by his two friends and his advocate, the 1<sup>st</sup> respondent conducted only three sittings and only a surveyor gave evidence. The applicant averred that the interested party which was the complainant did not tender evidence. The applicant averred that he filed a reply in response to the complaint supported by an affidavit the contents of which was never controverted by the interested party. The applicant averred that the 1<sup>st</sup> respondent ought to have accepted the facts as stated in his reply and affidavit, and dismissed the complaint. The applicant averred that after the third sitting of the 1<sup>st</sup> respondent, the 1<sup>st</sup> respondent reserved its ruling which it delivered on August 22, 2016.
- 3 The applicant averred that the 1<sup>st</sup> respondent's determination was prejudicial to him and that the same offended the Wednesbury Principles. The applicant averred that the said determination was on the following terms;
  1. The allocation to Stephen Githinji Kamau of the purported LR No 209/12647/4 is illegal and the allocation is cancelled and that includes any subsequent transfers of the land to third parties.
  2. The respondent revokes the title in respect of LR No 209/12647/4.
  3. The chief land registrar is directed to effect/implement the revocation.



4. The part of the land with the police post is allocated to the Cabinet Secretary, Ministry of Interior and Coordination of the National Government and the remaining open space is allocated to Nairobi City Council to be held upon trust for the Thome V residents.
  5. The director - land administration is directed to issue the new allocations.
- 4 The applicant averred that although the applicant's property was not the subject of the complaint and was not referred to in the 1<sup>st</sup> respondent's determination, he was apprehensive that he could be dispossessed of the property. The applicant contended that he was not given sufficient time to prepare his case and to respond to the complaint.

In his amended originating notice of motion, the applicant asked the court;

1. To call for the record of the proceedings before the 1<sup>st</sup> respondent touching on investigations of LR No 209/12647/4(the suit property) to determine the legality of the said proceedings and make such orders or give such directions as it considers appropriate to ensure the fair administration of justice.
2. To expunge the name of the applicant from the complaint filed with the 1<sup>st</sup> respondent in respect of the suit property on March 10, 2016.
3. To expunge the name of the applicant from the decision of the 1<sup>st</sup> respondent dated August 22, 2016.
4. To declare that the proceedings of the 1<sup>st</sup> respondent relating to the suit property to which the proprietor was not a party are null and void.
5. To order (in the alternative to (1) to (4) above) the 1<sup>st</sup> respondent to make rules for the better carrying out of its functions under article 68 of the Constitution to enable the review of all grants or dispositions of public land to establish their propriety or legality.
6. To declare that the rules made above shall comply with the provisions of article 47 and 50 of the Constitution.
7. To declare that the rules made above shall inter alia require the 1<sup>st</sup> respondent to supply all parties to its proceedings with copies of those proceedings.
8. To declare that any party to be potentially affected adversely by the 1<sup>st</sup> respondent's review of propriety and validity of title and/or investigations is entitled to be personally served with the complaints lodged with the 1<sup>st</sup> respondent and all notices of the proceedings of the said 1<sup>st</sup> respondent.
9. To declare that any party to be potentially affected adversely by the 1<sup>st</sup> respondent's review of propriety and validity of title and/or investigations is entitled to reply to complaints lodged with the 1<sup>st</sup> respondent and submit memoranda and submissions in opposition to the complaints.
10. To declare that any party to be potentially affected adversely by the 1<sup>st</sup> respondent's review of propriety and validity of any title and/or investigations is entitled to participate in all its proceedings, prosecute applications and cross examine all witnesses who tender evidence before it and tender its evidence in rebuttal.
11. To declare null and void the 1<sup>st</sup> respondent's proceedings in respect of investigations of the validity of title in respect of the suit property.



12. To issue an order of certiorari to bring to the court the proceedings and determination of the 1<sup>st</sup> respondent in respect of the suit property for purposes of quashing the same.
  13. To stay execution of the 1<sup>st</sup> respondent's determination dated August 22, 2016 touching on the suit property pending further orders of the court.
  14. To stay execution of the 1<sup>st</sup> respondent's determination dated August 22, 2016 touching on the suit property pending the making of the rules prayed for in the foregoing sections.
  15. To stay permanently the execution of the 1<sup>st</sup> respondent's determination dated August 22, 2016 and touching on the suit property.
  16. To issue an order of mandamus requiring the 1<sup>st</sup> respondent to undertake the review of propriety and legality of title and/or investigations in respect of the suit property in accordance with the law.
  17. To issue an order of prohibition to prohibit the chief land registrar from acting on the determination of the 1<sup>st</sup> respondent dated August 22, 2016.
  18. To declare that the 1<sup>st</sup> respondent is in contempt of court for purporting to write a second determination and publishing a purported cancellation of title of the suit property during the pendency of this suit and in breach of the orders made on October 13, 2016 and December 5, 2016.
  19. To issue an order of certiorari to bring up to the court the purported second determination in respect of the suit property and dated August 22, 2016 for quashing.
  20. To issue an order of certiorari to bring before the court Kenya Gazette Notice No 6862 for purposes of quashing in so far as the same relates to the suit property and LR No 209/12947/4(the applicant's property).
- 5 The applicant's application was opposed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents and the interested party through separate replying affidavits and a notice of preliminary objection. The application was heard by way of written submissions and in its judgment delivered on January 20, 2022, the court framed the following issues for determination;
1. Whether the application is properly before the court.
  2. Whether the 1<sup>st</sup> respondent had jurisdiction to determine the complaint that was lodged against the applicant by the interested party.
  3. Whether the applicant was accorded a fair hearing and a fair administrative action by the 1<sup>st</sup> respondent.
  4. Whether the 1<sup>st</sup> respondent had jurisdiction to make the impugned determination.
  5. Whether the enforcement notice that was issued by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents was valid?
  6. Whether the applicant is entitled to the reliefs sought.
  7. Who is liable for the costs of the application?



6 On issue number 6 which is the one relevant to the proceedings before the court, the court pronounced itself as follows:

' From the findings that I have made above, the applicant's application fails wholly. The applicant is therefore not entitled to any of the reliefs sought in its amended originating notice of motion. I wish to point out that once it had been brought to the attention of the applicant that the decision of the 1<sup>st</sup> respondent was amended to correct the parcel number for the land that was the subject of review proceedings, the applicant should have considered amending his prayers. The court was left wondering why the applicant is pursuing reliefs in respect of the suit property that does not belong to him. I have also noted that prayers 5 to 10 in the application had already been granted by the court on February 23, 2017 in the case of *Sceneries Limited v National Land Commission [2017]eKLR* that was cited by the applicant. I do not think that it would have been necessary to make the same orders again even if I had found merit in the applicant's application. In any event, the 1<sup>st</sup> respondent's review powers have since lapsed. The rules for better carrying out of its review mandate under article 68 (c) (v) of the *Constitution* and section 14 of the *National Land Commission Act* will therefore serve no purpose. Prayers 12 to 17 could also not have been granted by the court as they relate to a parcel of land in respect of which the Applicant has no interest. In the final analysis and for the reasons given earlier, none of the orders sought by the applicant are for granting.'

7 In its final orders in the matter, the court stated as follows:

' The upshot of the foregoing is that the applicant's amended originating notice of motion dated December 18, 2018 is without merit. The application is dismissed with costs to the respondents and the interested party.'

8 What is now before me is the applicant's application brought by way of notice of motion dated February 22, 2022 in which the applicant has sought the following orders;

1. That the respondents and the interested party be restrained from interfering in any manner whatsoever with the applicant's possession and enjoyment of the property LR No 209/12947/4 ('the applicant's property') pending the lodging, hearing and determination of the applicant's intended appeal from the judgment delivered on January 20, 2022.
2. That there be a stay of execution of the determination of the 1<sup>st</sup> respondent delivered on August 22, 2016 that the applicant's property be forfeited to the Cabinet Secretary, Ministry of Interior and Coordination of the National Government and the remaining open space allocated to Nairobi City Council to be held upon trust for the Thome V residents.
3. That the costs do abide the outcome of the intended appeal.

9 The application is brought on the grounds set out on the face thereof and on the supporting affidavit of the applicant sworn on February 22, 2022. The applicant has contended that the court has jurisdiction to preserve the subject matter of the intended appeal. The applicant has contended that he is aggrieved by the judgment of this court and has lodged a notice of appeal and requested for proceedings to enable him lodge an appeal against the same to the Court of Appeal. The applicant has contended that he is the registered owner of the applicant's property and that following the dismissal of his suit, he is apprehensive that the respondents and the interested parties may evict him from the property. The applicant has contended that he stands to suffer substantial loss of the orders sought are not granted.



- 10 The application is opposed by the interested party through grounds of opposition dated June 16, 2022. The interested party has contended that the application is an abuse of the process of the court. The interested party has contended that the order dismissing the applicant's application was a negative order that cannot be stayed. The interested party has also contended that the application is fatally defective for failure by the applicant to annex a copy of his memorandum of appeal.
- 11 The application was heard by way of written submissions. The applicant filed his submissions dated May 9, 2022. The respondents and the interested party did not file submissions. The applicant has submitted that following the dismissal of his suit, he is apprehensive that he may be evicted from the applicant's property following the orders that were made by the 1<sup>st</sup> respondent on August 22, 2016 before his appeal is heard. The applicant has submitted that he has been in possession of the house on the property for 25 years and that the value of the house is about Kshs 20 Million. The applicant has submitted that the court has power under order 40 rules 1-2 and 10 of the Civil Procedure Rules to grant the orders sought. The applicant submitted that since the application is not opposed, the same should be allowed arguing that the purpose of the application is to preserve the applicant's property. The applicant submitted that the only consideration for the court is whether the appeal would be rendered nugatory if the orders sought are not granted. The applicant cited several authorities in support of his submissions.
- 12 I have considered the applicant's application together with the supporting affidavit. I have also considered the grounds of opposition filed by the interested party in opposition to the application. Finally, I have considered the submissions by the applicant's advocates. The applicant's application has been brought principally under order 42 rules 6(1-6) and order 40 rule 10 of the [Civil Procedure Rules](#) which provides as follows:

#### **Order 40 rule 10**

- (1) The court may, on the application of any party to a suit, and on such terms as it thinks fit—
- (a) Make an order for the detention, preservation, or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein;
  - (b) For all or any of the purposes aforesaid authorise any person to enter upon or into any land or building in the possession of any other party to such suit; or
  - (c) For all or any of the purposes aforesaid authorise any samples to be taken, or any observation to be made, or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.
- (2) The provisions as to execution of process shall apply mutatis mutandis to persons authorised to enter under this rule.'

#### **'Order 42 Rule 6**

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.



- (2) No order for stay of execution shall be made under subrule (1) unless—
  - (a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
  - (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.'

13 There is no doubt from the foregoing provisions of the Civil Procedure Rules that what the applicant is seeking in the application before the court is an injunction and stay pending appeal. What I need to determine is whether the cited provisions give this court jurisdiction to grant the orders sought and whether valid grounds have been put forward to grant the said orders. The applicant's suit that was determined by the court was not an ordinary suit. It was an application brought under article 165(6) and (7) of the Constitution and The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006, LN No 6 of 2006 ('Gicheru Rules'). I have set out herein earlier the reliefs that were sought by the applicant. The applicant did not seek an order of injunction in his application. The cases that have been cited before me where the courts have granted an injunction pending appeal are where the applicant had sought an injunction and the same was refused by the court. Since the applicant did not seek an injunction in his application, i can see no basis upon which i can grant to the applicant an injunction after dismissing his application. I am of the view that order 40 rule 10 of the Civil Procedure Rules apply only in cases where a suit is pending and not after a suit has been dismissed. With regard to the limb of the application seeking a stay of execution of the 1<sup>st</sup> respondent's determination made on August 22, 2016, the following is my view: The stay of execution sought herein was expressly sought in the applicant's suit and the court refused to grant the same for the reasons given in the judgment. The applicant has not persuaded me that there is any valid reason why I should grant the order pending appeal. The applicant has not cited any authority in support of his contention that I have such power. I do not think that a court that has refused to grant and order of stay of execution can be called upon to grant the same order pending appeal. Secondly, the 1<sup>st</sup> respondent's determination made on August 22, 2016 did not touch on the applicant's land; LR No 209/12947/4. The determination concerned LR No 209/12647/4. Although the determination was amended later, the Applicant did not amend its pleadings that continued to refer to LR No 209/12647/4. Since there is no determination made on August 22, 2016 touching on LR No 209/12947/4, there is nothing for this court to stay. Finally, the stay sought if granted would have the effect of staying this court's judgment delivered on January 20, 2022. As rightly pointed out by the interested party, the order made by the court on January 20, 2022 merely dismissed the applicant's application. Being a negative order, the same cannot be stayed.



14 In the final analysis and for the foregoing reasons, I find no merit in the notice of motion dated February 22, 2022. The application is dismissed with costs to the interested party.

**DELIVERED AND DATED AT NAIROBI THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2022**

**S OKONG'O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Dr Kamau Kuria for the Applicant

N/A for the 1<sup>st</sup> Respondent

Ms. Sirma for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Mr Mbithi h/b for Mr Mwinzi for the Interested Party

Ms C Nyokabi - Court Assistant

