



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 75 OF 2011**

**GEORGE KIMANI MBUGUA..... 1<sup>ST</sup> PETITIONER**

**FELIX WACHIRA KIRKO ..... 2<sup>ND</sup> PETITIONER**

**MIRIAM ANYANGO MALLA (suing as officials of AIRPORT  
VIEW NEIGHBOURS GROUP).....3<sup>RD</sup> PETITIONER**

**VERSUS**

**MINISTRY OF ROADS .....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING NO. 2**

1. On 24<sup>th</sup> September 2013, this court delivered a ruling in which it made an award of kshs 300,000 in damages to each of the petitioners in the matter, as well as the costs of the petition. The ruling was pursuant to a judgment that the court had delivered on 13<sup>th</sup> June 2012 in which it found that there had been a violation of the petitioners' right to housing following the demolitions carried out by the respondents on the night of 20<sup>th</sup> November 2010, and that the petitioners are entitled to compensation.

2. In the said judgment, the court directed the parties to, within six months from the date thereof, negotiate reasonable compensation measures for the petitioners for the loss of their dwellings with a view to ensuring their access to housing. I also directed that the matter be mentioned after six months to confirm whether a resolution had been arrived at. None was, however, reached, and the court then gave its ruling of 24<sup>th</sup> September 2013.

3. The respondents/applicants have now approached this court by way of their application dated 19<sup>th</sup> June 2014 in which they seek the following orders:

***1. That this matter be certified as urgent in the first instance.***

**2. That there be a temporary stay of all execution proceedings and orders consequent upon the ruling and decree of 24<sup>th</sup> September 2013 by Hon Justice Mumbi Ngugi pending the hearing and determination of this application.**

**3. That there be an order of stay of execution of the decree and order of the ruling delivered by Hon Justice Mumbi Ngugi on 24<sup>th</sup> September 2013 pending the lodging, hearing and determination of the intended appeal by the applicant/intended Appellant.**

**4. That there be an order of stay of all execution proceedings and orders consequent upon the decree and order of the ruling delivered by Hon Lady Justice Mumbi Ngugi on 24<sup>th</sup> September 2013 pending the lodging, hearing and determination of the intended appeal.**

**5. Costs of this application be provided for.**

4. The application is expressed to be premised on the following grounds:

**1. The applicants are dissatisfied with the ruling given by the Hon Lady Justice Mumbi Ngugi on 24<sup>th</sup> September 2013.**

**2. The Applicants have since filed a Notice of Appeal to the Court of Appeal dated 26<sup>th</sup> September 2013.**

**3. The Applicants intended Appeal is arguable in that:**

**i. The learned Judge erred in finding that the applicants violated the petitioner's right to housing following the demolitions of the houses on property known as Embakasi land Parcel No 9042/130, 9042/131, 9042/132 and 9042/133.**

**ii. The learned Judge erred in finding that the petitioners were entitled to compensation for violation of the said right to housing yet the petitioners had sufficient notice to vacate the suit premises.**

**iii. That learned Judge erred in law and in fact in not finding that no right could accrue from an illegality.**

**iv. The learned Judge erred in awarding the petitioners damages on the head of violation of the right to housing when no such prayer had been prayed for in the petition.**

**v. The learned judge erred in failing to balance the interests of the petitioners and the countervailing public interest of the applicants.**

**4. Unless the prayer of stay of execution sought is granted, the intended appeal will be rendered nugatory in that:-**

**i. The respondents in execution of the order and decree of the ruling given on 24<sup>th</sup> September 2013 have filed Judicial Review Application seeking orders of mandamus being Nairobi JR Misc. Appl. No 154 of 2014 which application is coming up on 23<sup>rd</sup> June 2014 before Hon Justice G.V Odunga.**

**ii. There is imminent danger that the Applicant will pursuant to the ongoing execution proceedings be compelled to pay the petitioners, public funds in excess of Kshs18,000,000 unless a stay of execution of the order and decree of the ruling of the 24<sup>th</sup> September 2013 is granted by this honourable Court.**

**5. The applicants will suffer great prejudice in that**

***a. Execution of the order of the ruling of 24<sup>th</sup> September 2013 will occasion loss of public funds which funds ought to be protected by this Honourable Court.***

***b. Any payment made to the petitioners from public funds is not easily recoverable.***

***6. It is in the interest of justice that there be a stay of execution of the order and decree of the ruling delivered on 24<sup>th</sup> September 2013 pending the lodging hearing and determination of the intended appeal.***

5. The application is supported by an affidavit sworn by Mr. Musonik Kipnetich, the Principal Secretary in the Ministry of Transport and Infrastructure, to which is annexed an affidavit by Learned State Counsel, Ms. Anastacia Kamande, who was seized of the matter on behalf of the respondents, setting out the reasons for the application. The respondents also filed submissions dated 22<sup>nd</sup> September 2014.

6. According to Ms. Kamande in her affidavit and in submissions before the court, the ruling dated 24<sup>th</sup> September 2013 was read when she was proceeding on maternity leave, but that she did a brief on the outcome of the ruling to the Attorney General. However, by the time the Attorney General released the file, she had already proceeded on leave. Ms. Kamande states that the officer who took the file from the Attorney General's office did not place it before her section head but instead took it to the Registry, and there was therefore no action on the file until she resumed duty on 24<sup>th</sup> March 2014. She states that after she traced the file she immediately filed an application to set aside the taxation ruling in the matter as the respondents are also disputing the costs. She also states that the petitioners have filed an application for execution being Judicial Review Miscellaneous Application No. 154 of 2014.

7. Ms. Kamande submitted that the delay in filing the present application is excusable and was caused by factors beyond the respondents' control, and that the mistake of Advocates should not be visited on the client.

8. According to Ms. Kamande, the amounts payable to the petitioners are in excess of Kshs 18 million. She submitted that the respondents believe that they have an arguable appeal with high chances of success, and she called upon the court to preserve the funds from being released to the petitioners in the interests of the public.

9. Ms. Kamande submitted further that they had not yet managed to file the record of appeal as the Registry had not been able to issue the certificate of delay, and that there was also an application to set aside the taxation dated 23<sup>rd</sup> May 2014. She prayed that the court allows the application and stays the ruling of 24<sup>th</sup> September 2013 without requiring the respondents to furnish security as none is required from the government under the provisions of Order 42 Rule 8 of the Civil Procedure Code.

10. In his response to the application, Learned Counsel for the petitioners, Mr. Ombwayo, relied on two affidavits sworn by the 1<sup>st</sup> petitioner, Mr. George Kimani Mbugua, on 25<sup>th</sup> June 2014 and 1<sup>st</sup> September 2014 as well as written submissions dated 21<sup>st</sup> October 2014.

11. The petitioners aver that the Notice of Appeal against the ruling dated 24<sup>th</sup> September 2013 was filed on 30<sup>th</sup> September 2013, but that it was not served upon the petitioners' advocates until 22<sup>nd</sup> October 2013, way after the time allowed by law. They also argue that the respondents never applied for proceedings for purposes of appeal, and even if they did, they did not serve the petitioners with their application. They further argue that the respondents were under a duty to file a record of appeal against the order dated 24<sup>th</sup> September 2013 within 60 days of filing the notice of appeal, that is by 30<sup>th</sup> November, 2013, and that since they did not do so, the intended appeal has abated by operation of law.

12. It is therefore their submission that the intended appeal having abated, there is nothing for the court to stay. It is also their case that the delay in filing the application for stay of execution is inordinate and has not been explained, and that the reasons given are merely self-serving and meant to exonerate the

respondents' advocates from blame.

13. Mr. Ombwayo reiterated the petitioners' averments. He submitted that the provisions of order 42 of the Civil Procedure Code had not been met as the applicant has not filed a proper appeal since what has been filed is a notice of appeal, and that the record of appeal should have been filed within 60 days of the notice.

14. Mr. Ombwayo submitted further that the respondents had filed application number 174 of 2014 before the Court of Appeal to extend time within which to file and serve the notice of appeal and legitimize the notice of appeal. It was his case that without a valid notice of appeal, an application such as is presently before the court cannot stand.

15. Mr. Ombwayo submitted further that the respondents had not shown what substantial loss they may suffer if the orders for stay are not granted, and it was his case that the respondents stood to suffer no loss. Conversely, the petitioners would suffer if there is delay in execution and the realization of fruits of their judgment, and their rights will continue to be without redress.

16. Counsel further submitted that the application had been brought as an afterthought after the petitioners filed Judicial Review Miscellaneous Application No. 154 of 2014 seeking to enforce the judgment of the court. It was his submission that the petitioners should not be made to pay for the administrative issues at the Attorney General's office, and he prayed that the application be dismissed with costs.

17. In responding to the petitioners' submission that the respondents' notice of appeal is incompetent, Mr Kamande argued that Order 42 Rule 6(4) provides that an appeal is deemed to have been filed when, under the rules of that court, a notice of appeal has been given. It was her submission that a notice of appeal was filed in time but was not served, and that the respondents had made an application to regularize it, which application is pending before the Court of Appeal. It was also her submission that the petitioners have not moved the Court of Appeal to strike out the notice of appeal, and as long as the notice has not been struck out, it is still valid and their application was therefore properly before the court. She submitted further that it was not the intention of the respondents to disobey a valid court order or to deny the petitioners the fruits of their judgment, but that the respondents should have the right to be heard by the court of last resort on any issue.

## **Determination**

18. As has been deponed by the petitioners, the application sought to be stayed by the respondents in the present application was pursuant to a judgment of the court delivered on 13<sup>th</sup> June 2012. According to Ms. Kamande, the respondents intend to appeal against the said ruling, and a notice of appeal was lodged, though it was not served on time, but an application to regularize it is pending.

19. The respondents now seek a stay of the ruling of 24<sup>th</sup> September 2013 in which general damages of kshs 300,000 each were made to the petitioners. The respondents state that the total amount due to the petitioners is kshs 18,000,000.00, and are of the view that this amount should not be paid to the petitioners as it may not be recoverable from them should the respondents' appeal succeed.

20. Though the application seeks to stay the ruling made on 24<sup>th</sup> June 2013 in which the court made an award in damages to the petitioners, in effect, the respondents seek to stay execution in this matter so that they can appeal against the findings of the court in the judgment delivered on 13<sup>th</sup> June 2012 in which the findings of the court with regard to the violation of the petitioners' rights and their entitlement to compensation was made.

21. The grounds for seeking a stay of execution this late in the day is that the Counsel handling the matter was on leave at the time the ruling was delivered, and that the file was kept in the registry and not brought to the attention of her section head. In her affidavit sworn on 19<sup>th</sup> June 2014, Ms. Kamande avers that she was informed by Ms. Muchiri, a colleague in the Attorney General's Chambers, that the court had granted

the respondents temporary stay of sixty days following the ruling of 24<sup>th</sup> September 2013. She avers further that part of the sixty day period was used to engage the Attorney General and the client Ministry on negotiations on the way forward following the ruling. She thereafter proceeded on maternity leave on 8<sup>th</sup> November 2013, resuming duty on 27<sup>th</sup> March 2014.

22. She states that while she was on leave, there was a small confusion in the office and their file on the matter disappeared and was thus never reallocated. She states that in the circumstances, nothing was ever done on the file until she resumed duty and traced the movement of the file from where she had left it.

23. According to Ms. Kamande, by the time she got the file, a bill of costs had been taxed and an application for mandamus had been filed being JR Mic. Appl No 154 of 2014. She submits that she has been vigilant in working on the file since she came back from leave and has filed an application to set aside the bill of costs, which application is pending before court.

24. Ms. Kamande further explains the delay by averring that when she made the application for stay and forwarded it to the Principal Secretary, Ministry of Transport and Infrastructure, the affidavit got lost and she had to print fresh copies and take them personally to the Principal Secretary's office for signature. She argues that if there has been any delay in filing this application, it was due to factors beyond her control. It is her further contention that the respondents would be greatly prejudiced if JR Misc. Appl. No. 154 of 2014 was determined as they have filed an appeal which has a high probability of success.

25. As the court observed in the case of **Charles Kinanga Maena –vs- Joshua Nyamache T. Omasire Kisumu Court of Appeal Civil Appeal No. 93 of 2012**, whether or not to grant an order of stay of execution pending appeal is a matter within the court's discretion, such discretion to be exercised subject to the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules, which provides as follows with regard to orders for stay pending appeal:

***6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 sub rule (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.”***

26. Rule 32 of **The Constitution of Kenya (Protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013 (The Mutunga Rules)** provides as follows with regard to appeals:

***32. (1) An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.***

***(2) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling and the court may issue such orders as it deems fit and just.***

***(3) A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.”***

27. It is worth observing that the conditions imposed by Order 42(6) of the Civil Procedure Rules, particularly with regard to the furnishing of security, are not reflected in the Mutunga Rules. However, I take the view that those conditions are factors which a court dealing with an application such as is presently before me arising from a petition for enforcement of fundamental rights should bear in mind.

28. The question is whether the court should exercise discretion in favour of the respondents/applicants in the present case. In answering this question, I do so by considering another question, whether the explanation given by Ms. Kamande for not filing an application for stay is a reasonable explanation and justification that would warrant the grant of the orders sought.

29. In considering this question, I will do so against the conduct of Counsel for the respondents in pursuing the respondents' case. I note from the record that Ms. Kamande has been diligent in prosecuting this matter on behalf of the respondents, and I am therefore inclined to believe her averments with regard to the circumstances that led to the failure to file a formal application for stay pending appeal or for taking other necessary action in the matter prior to the filing of the present application. I note in this regard that it was only during the time that she avers that she was out of the office that the matter proceeded to taxation in the absence of Counsel for the respondents. In the circumstances, I am satisfied that the explanation for filing the application at this stage is reasonable, and that in the circumstances therefore, the application was filed without unreasonable delay.

30. Order 42 Rule 6 of the Civil Procedure Rules requires the court, prior to granting an order for stay of execution, to be satisfied that substantial loss may result to the applicant unless the order is made. In the present case, the court made a finding that there was a violation of the rights of the petitioners in their violent eviction from their dwellings and demolition thereof, and in the ruling of 24<sup>th</sup> September 2014, made an order for financial compensation to the petitioners. The state argues that it will suffer substantial loss by making a payment in the aggregate of Kshs 18 million to the petitioners as it may not be able to recover the amount from them should its appeal succeed.

31. I am mindful that the compensation to the petitioners will come from taxpayers' funds. The respondents have argued that in light of the court's findings that the petitioners had no proprietary interest in the subject property, no award for compensation should have been made in their favour. It is their submission that they have a right to be heard by the court of last resort.

32. The respondents are also aggrieved by the amount of costs, included in the decretal sum of Kshs 18,046,949, in the amount of Kshs 5,446, 949, which the respondents submit were taxed ex parte and were highly exaggerated.

33. I have considered the respective submissions of the parties. I take the view that, in the present circumstances, an order for stay is merited as, should the state's appeal succeed, the state may have difficulty recovering the amounts paid from the petitioners. Conversely, should the state's appeal fail, the petitioners are entitled not only to the amount due to them but also interest thereon, which can be recovered from the state.

34. The petitioners have argued that the state's appeal has abated as the notice of appeal was not served in accordance with the Court of Appeal Rules, to which Ms. Kamande responds that the notice of appeal has not been struck out, and in accordance with the provisions of Order 42 Rule 6(4), which provides that ***"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."***, an appeal is deemed to have been filed. I am constrained to agree with Ms. Kamande on this point.

35. In the circumstances, I will grant the orders prayed for at prayers 3 and 4 of the application dated 19<sup>th</sup> June 2014, but with no order as to costs.

36. The respondents should now move with dispatch to prosecute their pending applications and appeal if they are serious, as Ms. Kamande urges so strongly in her submissions, in protecting the public purse. The petitioners are also at liberty to apply for a striking out of the respondents' notice of appeal, which they

state did not comply with the Court of Appeal rules, and thereafter they can be at liberty to proceed with their execution proceedings.

**Dated Delivered and Signed at Nairobi this 4<sup>th</sup> day of February 2015**

**MUMBI NGUGI**

**JUDGE**

**Mr Ombwoyo instructed by the firm of Andrew Ombwayo & Co. Advocates for the petitioners**

**Ms Kamande, Litigation Counsel, instructed by the State Law Office for the respondents**