



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT ATNAIROBI**

**ELC JR. NO.536 OF 2016**

**REPUBLIC.....APPLICANT**

**VERSUS**

**1. THE CHAIRMAN NATIONAL LAND COMMISSION**

**2. THE NATIONAL LAND COMMISSION**

**3. THE ATTORNEY GENERAL.....RESPONDENTS**

**AND**

**MACHARIA KINYANJUI CHAIRMAN KAMITI AMNER DEVELOPMENT ASSOCIATION  
ON**

**HIS OWN BEHALF AND ON BEHALF OF ITS MEMBERS.....INTERESTED PARTIES**

**EX-PARTE PETER NJOROGE WAKABA CHAIRMAN KAMITI FOREST SQUATTERS**

**ASSOCIATION ON HIS OWN BEHALF AND ON BEHALF OF ITS1200 MEMBERS**

**RULING**

1. The ex-parte applicants initiated these proceedings through Chamber Summons application dated 28<sup>th</sup> December 2015 in which they sought leave to apply for an order of certiorari to quash the decision of the respondents made on 5<sup>th</sup> October 2015 validating the allocation of land known as L.R No. Kamiti/Amner/8390(hereinafter “the suit property”) to the interested parties and an order of prohibition to prohibit the respondents from processing leases in respect of the suit property in favour of the interested parties. The applicants also sought an order that the leave sought if granted should operate as a stay of the said decision pending the hearing and determination of the judicial review application. The applicants’ application for leave was heard by Odunga J. who allowed the same as prayed on 27<sup>th</sup> January 2016. Following the grant of that leave, the applicants filed judicial review application on 29<sup>th</sup> January 2016 which application is pending hearing.

2. What is now before me is the applicants’ application dated 22<sup>nd</sup> September 2016 in which they have sought an order that Kinyanjui Macharia, Peter Karanja Kamau, Samuel Mbugua and James Mwangangi Mungera(hereinafter referred to as “the 1<sup>st</sup> , 2<sup>nd</sup> , 3<sup>rd</sup> and 4<sup>th</sup> alleged contemnors” respectively) be punished by committal to civil jail for disobeying and defying the said order of stay which was made herein by Odunga J. on 27<sup>th</sup> January 2016.The application is supported by the affidavit of the chairman of

the applicants, Peter Njoroge Wakaba sworn on 22<sup>nd</sup> September 2016 in which he has stated that the stay order made by Odunga J. on 27<sup>th</sup> January 2016 put on hold the decision of the respondents to award the interested parties the suit property. The applicants have stated that the said order restrained the respondents from processing titles in favour of the interested parties, and barred the interested parties from invading the suit property and interfering with the occupation of the same by the applicants. The applicants have stated further that the said order was served upon the respondents and the alleged contemnors. The applicants have contended that after being served with the said order, the interested parties invaded the suit property and with the assistance of hired goons demolished and burnt down the applicants' dwelling houses thereon. The applicants have claimed that the 4<sup>th</sup> alleged contemnor refused to protect the applicants from the invaders demanding an express order from the court before intervening. The applicants have contended that the 4<sup>th</sup> alleged contemnor has since been providing the 2<sup>nd</sup> alleged contemnor with round the clock security as he constructs a multistoried building on the ashes of the applicants' dwelling houses. The applicants have contended that the alleged contemnors activities aforesaid amount to defiance and a challenge to the authority of the court and should be punished accordingly.

3. The application was opposed by the 1<sup>st</sup> and 3<sup>rd</sup> alleged contemnors. The 1<sup>st</sup> and 3<sup>rd</sup> alleged contemnors opposed the application through a replying affidavit and supplementary affidavit sworn by the 1<sup>st</sup> alleged contemnor on 4<sup>th</sup> November 2016 and 18<sup>th</sup> November 2016 respectively and a Notice of Preliminary Objection dated 4<sup>th</sup> November 2016. The 1<sup>st</sup> and 3<sup>rd</sup> alleged contemnors (hereinafter together referred only as "the alleged contemnors" where the context permits) contended that the applicants' application is fatally defective and incompetent. The alleged contemnors contended that the applicants had misconstrued the meaning and purport of the stay order in contention. The alleged contemnors contended that the applicants have never been in possession of the suit property and that the applicants made attempts to forcefully enter and put up temporary structures on the suit property which move was resisted and repulsed by the interested parties who had all along been in occupation of the property. They contended that the temporary structures aforesaid were put up by the applicants after the order of stay aforesaid to take advantage thereof. The alleged contemnors denied breaching the order of 27<sup>th</sup> January 2016. The 1<sup>st</sup> alleged contemnor denied having been served with the said order. The applicants filed further affidavits sworn on 10<sup>th</sup> November 2016 and 23<sup>rd</sup> November 2016.

4. The application was argued before me on 24<sup>th</sup> November 2016 when Mr. Angima appeared for the applicants while Mr. Gikonyo appeared for the 1<sup>st</sup> and 3<sup>rd</sup> alleged contemnors. The 2<sup>nd</sup> and 4<sup>th</sup> alleged contemnors were not represented. I have considered the applicants' application together with the affidavits filed in support thereof. I have also considered the replying affidavits and grounds of opposition which were filed by the alleged contemnors in opposition to the said application. Finally, I have considered the submissions which were made before me by the advocates for the parties and the authorities which were cited in support thereof.

5. Contempt of court proceedings are quasi criminal in nature. This is because the contemnor is likely to lose his liberty if found guilty of the contempt complained of. On account of this fact, the standard of proof of contempt is higher than proof on a balance of probabilities. See, the holding in the Court of Appeal case of, Mutitika-vs-Baharini Farm Ltd. (1985) KLR 227, where the court stated that the standard of proof in contempt of court proceedings must be higher than proof on a balance of probabilities, and almost but not exactly, beyond reasonable doubt. It follows therefore that for the applicants to succeed in the present application, they have to satisfy the court to a degree beyond a balance of probabilities that the alleged contemnors disobeyed the stay order that was made herein by Odunga J. on 27<sup>th</sup> January 2016. As I have mentioned hereinabove, the applicants were granted leave to apply for, an order of certiorari to quash the decision which was made by the respondents on 5<sup>th</sup> October 2015 to validate the allocation of the suit property to the interested parties and, an order of prohibition to prohibit the respondents from processing leases in favour of the interested parties in respect of the suit property. The court while granting leave made a further order that the said leave shall operate as a stay of the said decision by the respondents which was complained of by the applicants. In my understanding, what was stayed was the respondents' decision to validate the allocation of the suit property to the interested parties and the

processing of titles in their favour following that validation. The respondents are not parties to the present application. That means that they have not disobeyed the said stay order. The alleged contemnors are said to have disobeyed the said order by forcefully entering the suit property and evicting the applicants therefrom by demolishing and burning their dwelling houses.

6. I am in agreement with the submissions by the alleged contemnors that the applicants have misconstrued the meaning of the stay order in contention. There is no doubt on the face of the said order that it did not restrain the respondents or any other person for that matter from entering the suit property or evicting the applicants therefrom assuming that they were in possession of the property. In a judicial review application, the court cannot determine contested factual issues. I am of the view that if the applicants wanted to restrain the respondents and the interested parties from evicting them from the suit property, they should have filed a civil suit for injunction. I am not satisfied that the applicants have established that the alleged contemnors disobeyed the stay order which was made herein 27<sup>th</sup> January 2016. The said order was not directed at the alleged contemnors. The order did not direct them to do or refrain from doing any act. The order did not restrain the alleged contemnors from doing the acts complained of by the applicants. Due to the foregoing, I am not satisfied that the applicants have proved the contempt alleged against the alleged contemnors to the required standard.

7. In conclusion, it is my finding that application dated 22<sup>nd</sup> September 2016 has no merit. The same is accordingly dismissed. The costs of the application shall be in the cause.

**Delivered and Signed at Nairobi this 17<sup>th</sup> day of February, 2017.**

**S. OKONG'O,**

**JUDGE.**

**In the presence of:-**

N/A	for Applicant
N/A	for Respondents
N/A	for the interested Party
N/A	for the alleged Contemnors
Kajuju	Court Clerk.