



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

**AT NAIROBI**

**ELC CASE NO. 1103 OF 2014**

**KIGWE COMPLEX LIMITED.....PLAINTIFF**

**VERSUS**

**JEREMIAH GITHIGO IREGI.....1<sup>ST</sup> DEFENDANT**

**MICHAEL WAWERU.....2<sup>ND</sup> DEFENDANT**

**TITUS KAMAU KARIUKI.....3<sup>RD</sup> DEFENDANT**

**AND**

**O.C.P.D. KASARANI.....4<sup>TH</sup> DEFENDANT**

**MR. MUNYAMBU.....5<sup>TH</sup> DEFENDANT**

**MR. WAMBUGU.....6<sup>TH</sup> DEFENDANT**

**AND**

**MR. GATONYE AND OVER 200**

**OTHERS.....7<sup>TH</sup> DEFENDANT**

**AND**

**NAIROBI CITY COUNTY.....1<sup>ST</sup> INTERESTED PARTY**

**THE NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. This is a ruling in respect of a notice of motion dated 29<sup>th</sup> January 2016 brought by the Defendants/Applicants. The application seeks stay of execution and/or enforcement of orders given on 11<sup>th</sup> November 2015 pending hearing and determination of an intended appeal to the Court of Appeal.

The orders which the applicants are aggrieved with are Order numbers (2) and (3) contained in a ruling delivered on 11<sup>th</sup> December 2015 which state as follows:-

**(2) “That the County Government Nairobi revokes/cancels the temporary occupation licences (TOL) issued to the hawkers to carry on businesses on the KPLC Way leave forthwith and to require the hawkers to vacate the site within 15 days of being served a notice to vacate which notice should be served forthwith failing which an eviction order directed at the hawkers do issue”**

**(3) The OCPD Kasarani Police Station, the Directorate Nairobi County Government and The County Environment officer,**

**Nairobi County to oversee the implementation of the orders issued herein.”**

2. The above orders were given following an application by the Plaintiff/Respondent who had complained that the applicants had invaded a KPLC wayleave adjacent to its apartments and had blocked its parking and septic tanks. The respondent could not access its septic tanks to empty the same as there was no access to them due to the blockage by the applicants who were operating their businesses on the way leave. The respondent had been ordered to remove filth water emanating from the septic tanks but it could not comply due to the applicants’ occupation of the area.

3. The applicants had not preferred any appeal against the ruling of the court given on 11<sup>th</sup> December 2015 as at the time of filing this application. This is because the period for appeal had lapsed and they required leave to file an appeal out of time from the Court of Appeal. The question which then arises is whether the present application is competent given the fact that no appeal had been preferred to the Court of Appeal.

4. Order **42 Rule 6(4) of the Civil Procedure Rules** provides as follows:-

**(4) “For 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. The applicants have clearly deposed in their affidavit that they were late in filing a notice of appeal as they did not know the date the ruling was delivered and that they intend to seek leave of the court to file an appeal out of time. It is therefore clear that they could not properly be heard to base their application for stay under **Order 42 of the Civil Procedure Rules** as they had not filed any appeal. Though the applicants subsequently got leave of the court to file the appeal out of time, that leave could not operate to cure the current application which was clearly filed contrary to the procedure given. The applicants ought to have first obtained leave of the Court of Appeal to file the appeal out of time before they could apply for stay of execution pending appeal.

6. Even if we assume that the application was properly filed, the question which will need to be answered is whether the applicants have satisfied the conditions for grant of stay of execution pending appeal. The three conditions stipulated under Order 42 Rule 6(2) are firstly, the application ought to be brought without unreasonable delay. Secondly, the applicant must demonstrate that he will suffer substantial loss should stay not be granted. Thirdly, there has to be security given for the due performance of such decree or order as may ultimately be binding on him.

7. In the instant case, the ruling of the court was given on 11<sup>th</sup> December 2015. The present application was made over a month after the ruling. Considering the nature of the orders and what they intended to cure, I find that the application as not brought without unreasonable delay. There was an environmental disaster awaiting to happen. NEMA had seen that and had issued an enforcement notice to the respondent to comply but the respondent could not comply due to the occupation by the applicants on the area in dispute.

8. On the second condition of demonstration of substantial loss, I do not think that the applicants have

demonstrated that they will suffer substantial loss. The applicants were operating on the area under temporary occupation licence given by the first interested party. Those licences have since been revoked in compliance of the court's ruling of 11<sup>th</sup> December 2015. The applicants were operating temporary structures as can be seen from the photographs attached to the affidavits in this matter. I find that the applicants have not demonstrated what loss they will suffer if stay of execution is not granted. One cannot issue stay of execution where what is sought to be stayed has already happened. The temporary occupation licences have already been revoked. If it is a question of the applicants being evicted, that bit of the order has not been executed. I have seen an application for issuance of an eviction order in the file by the respondent. This application has not been prosecuted. This court cannot therefore stay something which has not even been issued.

9. The issue of security is normally considered if the court finds that substantial loss will befall the applicants. I therefore find that the applicants' application of 29<sup>th</sup> January 2016 lacks merit. The same is hereby dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

Dated, Signed and delivered at **Nairobi** this **20th** day of **June**, 2017

**E.O. OBAGA**

**JUDGE**

In the presence of:-

Mr. Mwangi for Mr. Gitonga for 2<sup>nd</sup> interested party

Mr. Ngeresa for Mr. Kinyua Njagi for the applicant

Mr. Wachira for Mr. Rusha for respondents

Court Assistant - Hilda

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