



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. CASE NO. 923 OF 2012

SIMON MUSILI MUSYOKA.....1ST PETITIONER

PETER KITAVI MWEI..... 2ND PETITIONER

MICHAEL NZIOKA MULIU.....3RD PETITIONER

**(ON THEIR OWN BEHALF AND ON BEHALF OF 1,500 OWNERS OF PLOTS
IN MWENGENYE SETTLEMENT SCHEME, EMBAKASI AREA, NAIROBI.)**

VERSUS

COMMISSIONER OF LANDS1ST RESPONDENT

THE CHIEF LANDS REGISTRAR2ND RESPONDENT

CITY COUNCIL OF NAIROBI.....3RD RESPONDENT

MINISTER OF STATE FOR PROVINCIAL

ADMINISTRATION & INTERNAL SECURITY.....4TH RESPONDENT

THE HON. THE ATTORNEY GENERAL.....5TH RESPONDENT

JAMES GAMAU WAINAINA.....6TH RESPONDENT

SIMON MUTURI WANGUO.....7TH RESPONDENT

RAPHAEL MUIGAI MWANGI.....8TH RESPONDENT

PAUL KAHUTHI KONDIAH.....9TH RESPONDENT

RULING

Coming up before me for determination are two applications as follows:

1. Notice of Motion dated 22nd April 2013 (hereinafter referred to as the “First Application”); and,
2. Notice of Motion dated 28th May 2013 (hereinafter referred to as the “Second Application”).

In the First Application, the Petitioners/Applicants are seeking for an order staying the ruling of the Hon. Lady Justice Mary M. Gitumbi delivered on 19th April 2013 pending the hearing and determination of their intended appeal. The First Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Simon Musili Musyoka sworn on 22nd April 2013 in which he averred that in a ruling delivered by the Hon. Lady Justice Mary M. Gitumbi on 19th April 2013, this Petition was dismissed with costs to the Respondents as a result of which the residents of Mwengenyé face an imminent threat of eviction despite their pending appeal. He further averred that they have an arguable appeal raising solid issues of law and with a high probability of success and that this First Application will not occasion any prejudice to the Respondents. In response thereto, the 8th and 9th Respondents filed their Notice of Preliminary Objection dated 12th May 2013 in which they stated that the First Application is misconceived, cannot lie, is an abuse of the court process and should be struck out. In further response to the First Application, the 8th Respondent filed his Replying Affidavit sworn on 21st June 2013 in which he averred that the Petitioners/Applicants have filed the First Application on the ground of an intended appeal but have not demonstrated that they have filed an Appeal or a Notice of Appeal as required. He further averred that the Petitioners have admitted that they have challenged the court’s judgment in **HCCC No. 298 of 2003** consolidated with **HCCC No. 394 of 2004** before the Court of Appeal wherein they have filed an application seeking stay of execution against eviction and that therefore the First Application is an abuse of the process of the court. He further averred that there is no positive order which has been issued against the Petitioners, their Petition having been dismissed and that consequently, no stay can issue. He further averred that the Petitioners/Applicants have not demonstrated any ownership rights over the suit land and that portions of the same are registered in the names of the 8th and 9th Respondents as evidenced by copies of the title deeds produced in court.

In the Second Application, the Petitioners/Applicants seek for an order of temporary injunction restraining the Respondents from evicting, harassing, threatening, breaking into or in any other way intermeddling and adversely interfering with their quiet, peaceful occupation and possession of the suit land otherwise known as Mwengenyé settlement scheme in Embakasi area, Nairobi pending the hearing and determination of this Second Application. This Second Application is premised on the grounds set out on the face of it together with the Supporting Affidavit of Dr. John M. Khaminwa sworn on 28th May 2013 in which he averred that the Hon. Lady Justice Mary M. Gitumbi on 19th April 2013 delivered a ruling in this matter striking out the Applicants’ Petition and that being dissatisfied with that ruling, the Petitioners/Applicants consequently appealed against the said ruling. He further averred that the Petitioners/Applicants moved to this court vide the First Application and obtained orders staying the said ruling and that when the matter came up for hearing of the First Application the orders staying the adverse ruling were extended to 26th June 2013. He further averred that in blatant ignorance of the extended orders and in contempt of this court, the Respondents have through their agents moved to evict the Petitioners/Applicants from the suit land and that in view of that, it is only just and fair for this court to grant an injunction prohibiting the Respondents from evicting the Applicants. In response thereto, the 3rd Respondent filed his Grounds of Opposition dated 20th June 2013 wherein he stated that the Petitioners/Applicants have not made out a prima facie case, it is incompetent and unmerited and that it is an abuse of the court process. In further response to the Second Application, the 9th Respondent, Paul Kihuti Kondiah, filed his Replying Affidavit sworn on 21st June 2013 in which he stated that the orders sought cannot be granted as the Petition on whose basis it is brought has been dismissed for being res judicata, that the Petitioners have not demonstrated that they have lodged any appeal against the ruling complained of and that the Second Application is an abuse of the court process. He further averred that the Affidavit in support of the Second Application is defective on the ground that it is sworn by the Advocate on record for the Petitioners instead of the Petitioners/Applicants and further that they seek for injunctive orders in respect of a portion of land which is not defined but is simply referred to as “the

whole of Mwingenye Settlement Scheme”.

The 3rd, 8th and 9th Respondents filed their written submissions which have been read and taken into account in this ruling.

To the First Application, I will agree with the submission of the 8th and 9th Respondents to the effect that the order that dismissed the Petition was a negative order which is not capable of execution and cannot therefore be stayed. To support that position, I rely on the case of **Royal Media Services versus Telkom Kenya Limited & 13 Others (2005) eKLR** where it was stated as follows:

“The first application sought in effect prayers for an order which is negative in form. By her Ruling of the 24.9.2004 Lady Justice Mugo dismissed the Plaintiff’s suit for want of prosecution. Is it possible to stay such an order? In my view it is not as there is nothing to stay. The Applicant has appealed against the dismissal of the suit and in due course this will be dealt with by the Court of Appeal. In the meanwhile the order dismissing the suit will remain intact.”

I should also mention at this juncture that the Petitioners/Applicants have not produced any evidence of having filed an appeal against the order they seek to stay. This court therefore finds that there is even no pending appeal and even if there was, an order staying the striking out of the Petition is negative in form and therefore not capable of staying. To that extent therefore, I hereby dismiss the First Application with costs to the Respondents.

To the Second Application wherein the Petitioners/Applicants seek a temporary injunction, I again agree with the submissions of the 8th and 9th Respondents to the effect that a temporary injunction is a remedy granted in the interlocutory stage of a suit, prior to the hearing of the same. In this case, the Petition was struck out. The sought after temporary injunction can therefore not be granted as there is no case awaiting hearing. To that extent therefore I hereby dismiss the Second Application with costs to the Respondents.

It is so ordered.

DELIVERED AND SIGNED AT NAIROBI THIS 23RD DAY OF JANUARY 2015.

MARY M. GITUMBI

JUDGE