



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 432 OF 2013

ATHMAN SALIM MOHAMMED 1ST PETITIONER

WILFRED MULWA KYALO..... 2ND PETITIONER

VERSUS

RESIATO MUNGUTI & NOONGIPA MUNGUTI

Sued as the administrators of the ESTATE OF

SIAMETO OLE MUNGUTI..... 1ST RESPONDENT

SIMON OLE MUNGUTI

Sued as the administrator of the ESTATE OF

NEPURKO MUNGUTI.....2ND RESPONDENT

KESWE OLE NGUTI alias

LEMUNKITI OLE MUNGUTI NAISENEA.....3RD RESPONDENT

MONGA OLE MUNGUTI alias

MOONGA OLE MUNGUTI.....4TH RESPONDENT

MICHAEL SIRONKA MUNGUTI alias

MICHAEL SIRONKA MUNKUTI.....5TH RESPONDENT

KENNEDY PASIMKEI OLE MUNGUTI alias

KENNEY PARSIMEI OLE MUNGUTI.....6TH RESPONDENT

BENSON LEMERIA OLE MUGOT alias

BENSON LEMERIA OLE MUNKUTI.....7TH RESPONDENT

THE REGISTRAR OF LANDS NGONG.....8TH RESPONDENT

THE CHIEF LANDS REGISTRAR9TH RESPONDENT

THE ATTORNEY GENERAL.....10TH RESPONDENT

RULING

Coming before me for determination is the Petitioner/Applicant's Notice of Motion dated 27th November 2013 in which they seek for the following orders:

1. Spent.
2. That the Honorable court be pleased to grant leave to the Petitioner/Applicant to file a notice of appeal out of time from the ruling of the Honorable court.
3. That this Honorable court be pleased to grant *ex parte* conservatory orders of stay of the ruling and order of the Honorable court (Nambuye, J. as she then was) delivered on 17th December 2012 pending the inter-partes hearing and determination of this application.
4. That in the alternative, pending inter-partes hearing of this application and final determination of the intended appeal, the Honorable court be pleased to issue conservatory orders maintaining the status quo and restraining the Respondents, their agents, legal representatives and/or assigns from in any way dealing with, disposing of, selling or otherwise interfering with the titles emanating from Ngong/Ngong/27 (hereinafter referred to as the "suit property").
5. That the costs of this Application be provided for.

The Application is supported by the grounds appearing on the face of it together with the Supporting Affidavits of Athman Salim Mohammed sworn on 29th November 2013 and Ronald Mwanja sworn on the same date. Mr. Mohammed averred that he is the registered proprietor of Ngong/Ngong/23747 arising out of the subdivision of the suit property. He further averred that he and his co-petitioner filed this suit seeking protection of titles to land vested in him. He further averred that counsel for the 1st, 3rd, 4th, 5th, 6th and 7th Respondents filed a Preliminary Objection challenging the jurisdiction of the ELC to hear the case on grounds that there was a case pending before the Probate and Administration division between the respondents which was best placed to deal with the matter. He further indicated that they opposed that Preliminary Objection and the ruling thereof was reserved by Justice Gitumbi on 13th September 2013. He further averred that on 13th September 2013, they were advised that the ruling was taken out owing to the fact that all judges were attending a workshop. He further stated that they were advised that the ruling would be delivered on notice. He further indicated that upon further enquiry 2 months later, he was advised that the ruling was delivered on 20th September 2013. He further stated that upon perusal of the said ruling, he wishes to file an appeal in the Court of Appeal but cannot do so without the leave of the court as the time given to do so was 14 days which lapsed on 5th October 2013. He further indicated that as no notice of the ruling was delivered to his counsel, they honestly believed that the ruling had not been delivered otherwise the notice of appeal would have been filed in good time. He further stated that his counsel has moved with speed to file this application. He further indicated their fear that they may lose their right of appeal as there is a real likelihood that the Respondents may alienate the suit property. He further stated that this court has unfettered power to enlarge time for filing the notice of appeal and to

grant the conservatory orders sought.

In his Supporting Affidavit, Ronald Mwanja stated that he is a clerk employed by counsel for the Petitioners. He averred that on 13th September 2013, he printed out the Daily Cause List for the High Court of Nairobi and handed the same to Mr. Awele, an advocate who had the conduct of this matter. He further stated that from the said cause list, there was a notice that judges were not sitting on that date as they were attending a workshop. He further stated that he proceeded to the court registry and was informed that the ruling would be delivered on notice. He further indicated that he made a further enquiry at the registry on 15th November 2013 when he was informed that the ruling was delivered on 20th September 2013.

The Application is contested. Counsel for the 1st, 3rd, 4th, 5th, 6th and 7th Respondents filed their Grounds of Opposition dated 4th December 2013 stating as follows:

1. That prayer no. 3 of the said Notice of Motion is misplaced in that:
 - a. It is being made in a different file from the one in which the order is made.
 - b. There is no appeal on which an application for stay can be premised on.
2. With regard to prayer no. 4, the same is premature as there is no appeal in terms of **order 42 rule 4** of the **Civil Procedure Rules**.
3. That in any event, there is no positive order in the ruling of the court to attract a preservative order or either injunction or otherwise.
4. That after the dismissal, there is no Petition upon which to premise the conservatory order in **Rule 32** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms)** Practice and Procedure Rules 2013.
5. That no grounds have been shown to warrant leave to file a notice of appeal out of time.
6. That in any event, the Applicants are acting in cahoots with the second respondent, to keep other rightful beneficiaries from the subject land.

Both the Petitioner/Applicant and the 1st, 3rd, 4th, 5th, 6th and 7th Respondents filed written submissions which have been read and taken into account in this ruling.

On the issue of granting leave to appeal out of time, the applicable law is section 7 of the Appellate Jurisdiction Act which provides as follows:

“The High Court may extent the time for giving notice of intention to appeal from a judgment of the High Court for making an application for leave to appeal or for a certificate that he case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired...”

When I look at this matter, it is quite clear to me that the ruling in respect of which the Petitioner wishes to appeal was delivered in the absence of the Petitioners and the 1st – 7th Respondents. Though the court reserved a ruling date of 13th September 2013, the same was delivered on 20th September 2013. Overall, I consider that the court did not issue a ruling notice or serve the same to the Petitioner’s counsel and their absence in court when the ruling was delivered is therefore understandable. I consider that the Petitioners moved with speed in filing this application for leave to file a notice of appeal out of time. I do not see that the Respondents will be prejudiced in any way and do proceed to allow prayer no. 2 of this Application.

Prayer no. 3 of this Application is untenable for the reason that the order in respect of which the Petitioner’s seek to be stayed was issued in a succession cause different from this suit. I cannot therefore grant the same and do proceed to decline it.

Prayer no. 4 of this Application seeks for conservatory orders pending the hearing and determination of the intended appeal. The same is declined for the reason that there is not in existence any appeal as matters stand. I agree with the Respondents that after the dismissal, there is no Petition upon which to premise the conservatory order in **Rule 32** of the **Constitution of Kenya (Protection of Rights and**

Fundamental Freedoms) Practice and Procedure Rules, 2013.

Every party shall bear his own costs.

It is so ordered.

SIGNED AND DELIVERED AT NAIROBI THIS 2ND

DAY OF MAY 2014.

MARY M. GITUMBI

JUDGE