IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, BOSIRE & WAKI, JJ.A)

CIVIL APPLICATION NO. NAI. 202 OF 2010 (UR. 145/2010)

BETWEEN

PAUL MUNGAI KIMANI & 20 OTHERS.....APPLICANTS

AND

THE ATTORNEY GENERAL & 4 OTHERS.....RESPONDENTS

((An application for injunction pending lodging, hearing and determination of an intended appeal from the
judgment and order of the High Court of Kenya at Nairobi (Wendoh, J) delivered on 12th March, 2010

In

H.C. Misc. Civil Application No. 1366 of 2005)
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RULING OF THE COURT

There are a total of twenty-one (21) applicants named in the motion before the Court. That motion was lodged in the Court on 17th August, 2010 and the applicants therein describe themselves collectively as being members of Korogocho Owners Welfare Association. We were told during the hearing of the motion that some of the twenty-one persons named as applicants have died and that there has, as yet been no other persons appointed as administrators of their estate. The persons named as respondents to the motion are the Attorney-General, the Provincial Commissioner, Nairobi Area, the Commissioner of Lands, the District Officer, Kasarani Division and the Chief of Korogocho Location. The applicants claim that they are poor and landless people and that in the 1970's they and their families were moved by the Government from various places and allowed to occupy certain plots which were carved from Government Land which they identify as Korogocho LR 82-85 CL. If we understand the matter correctly, Korogocho is a slum area. The applicants have their houses built on the land; they freely admit that the land which they occupy is Government land but they say that the Government had promised them that they would be issued with title documents to the plots they occupy on the land. In support of this contention, the applicants have attached newspaper cuttings showing, among other things, that as late as November 2000, the then President Moi had directed that they be settled on the land and issued with title deeds. That has never happened and so on 16th September, 2005, the applicants lodged an originating summons in the High Court, seeking certain declarations under the provisions of the then Constitution. We note that pending the hearing and determination of the originating summons, the High Court had granted to the applicants a conservatory order of injunction in these terms:-

"1. That an injunction do issue restraining the 2nd, 4th and 5th respondents by themselves, their servants and/or agents from demolishing the homes of the applicants herein or otherwise interfering with the quiet enjoyment of their homes in Korogocho Location, or possession of their plots and of all other members of Korogocho Owners Welfare Association on which their semi permanent structures are situated, pending the hearing of the chamber summons."

It appears clear to us that upto the time Wendoh, J gave her judgment dismissing the applicants' originating summons, that order was maintained and respected. The originating summons was dismissed on 12th March, 2010 and the motion, the subject of our ruling, was lodged in the Court on 17th August, 2010. We heard it on 16th November, 2011 and as far as we are aware, the applicants are still occupying their plots and the respondents have not moved to demolish their structures and evict them from the lands.

The applicants ask us to issue an injunction to maintain the status quo until their appeal shall have been lodged, heard and determined. Mr. Ng'ang'a, who argued their motion before us, urged the Court to maintain that position. We note that the applicants aver that they have been in occupation since the 1970's and we note that as late as 2000, the Government was recognizing their right to occupy their respective plots on the lands admittedly owned by the Government. Mr. Mutinda opposed the motion on behalf of the respondents and argued that the applicants' occupation of the land is criminal under ***section 142*** of the Government Lands Act. He, however, did not say what has prevented the Government from bringing criminal charges, if any, against the applicants since the 1970's.

The applicants are raising, prima facie, serious constitutional matters. They appear to have argued before the High Court that the right to life is guaranteed to every Kenyan by the Constitution, both repealed and the current one, means more than the right to be allowed to live, i.e. to exist. We have also looked at the proposed grounds of appeal contained in both the notice of motion and the affidavit in support thereof. We are satisfied that those grounds cannot be dismissed as being frivolous. We are satisfied the intended appeal is arguable. As to whether the proposed appeal will be rendered nugatory if we refuse to grant the injunction sought, we think that it would be wrong to allow the respondents to alienate, transfer, charge, subdivide the lands which the applicants having occupied for such along time and with the apparent explicit approval of the Government.

It would also be wrong to allow the respondents to demolish the structures erected on the land by the applicants and to in effect evict the applicants. The respondents must continue to wait for the final determination of the proposed appeal.

Accordingly, we allow the motion dated the 16th August, 2010 and lodged in the Court on 17th August, 2010 and grant the order of injunction as prayed for in paragraphs 1 and 2 of the said motion. ***Article 23 (3) (b)*** authorizes courts to grant an order of injunction for the purpose of enforcing the Bill of Rights. The costs of the motion shall be in the appeal.

Dated and delivered at Nairobi this 9th day of December, 2011.

R.S.C. OMOLO
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JUDGE OF APPEAL

S.E.O. BOSIRE
.....
JUDGE OF APPEAL

P.N. WAKI

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original**.**

DEPUTY REGISTRAR.