



REPUBLIC OF KENYA



KENYA LAW
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**Horeria v Murigi (Environment and Land Miscellaneous Application
E001 of 2025) [2025] KEELC 3498 (KLR) (28 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3498 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2025**

JG KEMEI, J

APRIL 28, 2025

BETWEEN

JAMES KIMANI HORERIA APPLICANT

AND

MARGARET NYAKINYUA MURIGI RESPONDENT

RULING

(In respect of the Applicants application dated 28/12/24)

1. On the 28/12/24, the Applicant moved this Court for orders;
 - a. That this Honourable Court be pleased to admit this application for hearing during the current Court vacation, on account of the said urgency.
 - b. That pending the inter- partes hearing and determination of this application, this Honourable Court be pleased to maintain the existing injunction restraining the Respondent, Margaret Nyakinyua Murigu, whether by herself, her agents, servants, and/or any other person and/or persons acting under her instructions, from selling, alienating, transferring, or in any manner dealing with the suit property known as Land Reference No.20528/LR 66365, Garden Estate, Nairobi (hereinafter referred to as “the suit property”) which would have the effect of defeating the Applicant’s rights and interests as established under the Orders of the Court of Appeal Nairobi issued on the 21st February, 2013 subject to a consent agreement adopted by the Court on that day.
 - c. That this Court do make an Order for the Applicant to deposit the sum of Kenya Shillings Six Million Nine Hundred Thousand, Three Thousand, Two Hundred and Forty-six(Kshs.6,903,246/=) only, which sum is less the statutory deductions made by the Applicant for Land Rent and Land Rates amounting to Kshs.2,696,754/- due on the suit land parcel as on 30th June, 1997, which the Respondent requested the Appellant to pay for her and deduct



it from the said sum of Kshs.9,500,000/- ordered to be paid to her by the Court of Appeal Nairobi on 21st February, 2013, into court within TEN (10) days of this order, in full and final settlement of all the monies due to the respondent as ordered by the Court of Appeal Nairobi, on 21/2/2013.

- d. That this Honourable Court be pleased to issue an order compelling the Respondent to collect Kshs.6,903,24/= deposited into Court under prayer 4 above so as to execute and deliver up to the applicant all the registrable transferable documents together with the original title of the suit land parcel No.20528, to enable the Applicant effect transfer into himself of the title to the suit land parcel No.LR.20528, including but not limited to: -
 - i. The Original Grant L.R.NO.66365 being the property Land Reference No.20528 for a term of 99 years from 1/1/1993 issued on 6/6/1995 for the suit land parcel,
 - ii. A duly executed transfer from (in triplicate) of the suit land parcel in favour of the applicant,
 - iii. A certified copy of the Respondents Kenya National Identity card,
 - iv. A certified copy of the Respondent's Kenya Revenue Authority Personal Identification, PIN Certificate,
 - v. Three passport photos of the Respondent; and
 - vi. All other requisite registrable transfer documents which are necessary to effect the registration of the transfer in favour of the Applicant within Ten (10) days from the date of the order.
 - e. That in the event of default and/or refusal by the Respondent to execute the necessary transfer documents within the stipulated time, this Honourable Court be pleased to make an order to authorize the Deputy Registrar of this Honourable Court to execute all the necessary conveyancing documents and instruments of transfer to vest the suit property into the name of the Applicant, in place of the Respondent.
 - f. That this Honourable Court be pleased to issue a mandatory injunction compelling the Respondent to surrender the Original Grant No.LR.66365 for the suit land parcel No.LR.20528 being the suit land parcel to this Honourable Court within (14) days from the date of execution of the order made under prayer 6 above, failing which the Registrar of Lands be directed by this Honorable Court to cancel the existing title and issue a New Grant in the name of the Applicant upon registration of the transfer.
 - g. That this Honourable Court be pleased to issue any or any other Order or Orders, as it may deem fit and just and/or Expedient in the circumstances of this case, to safeguard the Applicant's proprietary rights in the suit property, pending the inter-partes hearing and determination of this application.
 - h. That costs of this application be paid by the Respondent in any event.
2. The Respondent opposed the application. She filed a replying affidavit sworn on 3/2/25 reiterating the litigation history between the parties. She contended that since the Applicant is yet to comply with the Court of Appeal orders issued on 21/2/2013 by paying the sum of Kshs 9.5 Million, the Applicant has no audience before the Court. That the Applicant has not tendered any sufficient explanation to explain why it has taken him close to 9 years to comply with the Court's orders. She contended that



the Applicant has therefore approached the Court with unclean hands and the Application ought to be struck out with costs.

3. Mr Evans Gaturu, Counsel for the Applicant filed a further supporting affidavit sworn on 21/2/25 and detailed the attempts taken to resolve the matter amicably with the Respondent through her Advocate on record to no avail. In this pleading he sought to amend prayers 4 and 5 of the application by offering to pay the full amount of Kshs 9.5 Million in compliance with the orders of the Court of Appeal on 21/3/25. He explained that the amount of Kshs 6,903,246/- was the balance due to the Respondent less the sum of Kshs 2,696,754/- paid for land rates on behalf of the Respondent and consented to by her previous lawyers Ms. Alice Wahome Advocate. That when the Respondent recanted the same on account that she never authorized the deductions, his client decided to pay the full amount of Kshs 9.5 Million to put the matter to rest.

The written submissions

4. The Court has read and considered the submissions filed by the Applicant dated the 21/2/25 & 21/3/25 and the respondent's submissions dated the 19/3/25.
5. Counsel for the Applicant submitted and reiterated the contents of the application and added that the application for execution has been made without delay and it is in the best interest of justice that the orders be allowed to compel compliance on the part of the Respondent. That no prejudice will be suffered by the Respondent on receipt of the balance of the purchase price as ordered by the Appellate Court.
6. Counsel submitted that in an effort to fastrack the resolution of the matter and in good faith, the Applicant is ready and willing to pay the full amount of Kshs 9.5 Million as per the consent judgment. That the deducted amount of Kshs 2,696,754/- had been utilized for the payment of the property outgoings with the approval of the Respondent through her previous counsel on record, Ms Alice Wahome Advocate.
7. Counsel submitted that the Applicant has always handled the conveyance with utmost good faith ever since but was met with strong head winds from the Respondent who devised tactics to defeat the completion of the transaction. It was argued that the actions of the Applicant are in good faith and cannot be termed as being in contempt of the Court orders.
8. Counsel for the Respondent submitted that the Applicant has not met the threshold for grant of equitable reliefs. The consent judgement delivered on 21/2/2013 required the Applicant to pay the Respondent the sum of Kshs 9.5 Million within a period of 90 days. The Applicant has failed to comply with the stipulated order to pay the monies and instead filed the application to urge the Court to rewrite the consent order contrary to trite law that once a consent has been recorded in Court it is binding on the parties and can only be set aside on grounds of fraud, misrepresentation or mistake. That the Applicant has not raised any of the factors necessary to set aside the orders of the Court. See the case of Flora N Wasike Vs Destino Wamboko (1988) EKLR.
9. Counsel submitted that the Applicant has a history of non-compliance throughout the transaction including the consent orders issued by the Court. That the Court ordered the Applicant to pay Kshs 9.5 Million and therefore there is no justification for him to offer the sum of Kshs 6,903,246/-
10. That the Applicant by his conduct has demonstrated a deliberate disregard for equity and justice. That he deserves no audience until he complies with the orders of the Court.
11. As to whether the Court has jurisdiction to vary the consent orders issued by the Court of appeal, counsel for the Respondent took issue with two areas; the Applicant has failed to pay the full sum as



ordered by the Court as well as within the stipulated time. That the Court is being asked to vary the orders of the Court which the Court is devoid of jurisdiction to do so given the hierarchical system of law in our country.

12. Counsel for the Respondent was categorical that a party cannot amend its pleadings through submissions and urged the Court to strike out the application with costs.

Analysis and determination

13. Having considered the application and the responses and the written submissions the key issue for determination is whether the application is merited; who meets the costs of the application.
14. The parties have had a long-standing dispute over the suit land. On the 10/1/96 the Respondent entered into a sale agreement over the sale of the suit land with the Applicant for the consideration of Kshs 10.5 Million. A sum of Kshs 1.8 Million was paid as a deposit with the balance payable upon completion which was 90 days after the date of execution. The suit land was sold with vacant possession. The parties also agreed on special conditions in the agreement to wit; change of user to residential, the apportionment of outgoings and costs and consequences of default interalia. The transaction was not completed as per the terms of the agreement. To protect his interests as a purchaser, the Applicant successfully lodged a caution on the suit land on the 24/2/97 which is still in force. Parties engaged in various correspondences seeking to complete the transaction with the Respondent issuing a completion notice in 2000. It is not clear from the record what became of the notice to complete.
15. Come the year 2001 the Applicant herein filed suit on 13/3/2001 against the Respondent seeking specific performance on the agreement of sale as well as general damages for breach of contract plus costs. The Court noted that out of the total consideration agreed by the parties, by then the Applicant had variously paid the sum of Kshs 5,250,000/- an amount that was not disputed. The court also noted that parties spent a lot of time in connection with the proposed change of user. In its judgement the court noted that despite their apparent wrangles, both parties were willing to conclude the transaction and proceeded to order the Applicant to pay the balance of the purchase price as well as the land rents and rates from the 30/6/1997.
16. Dissatisfied with the said decision of the High Court the Applicant filed an appeal in the Court of Appeal – COA No 41 of 2004 challenging the said decision. On 21/2/2013 the parties entered a consent judgement was entered in the following terms;
 - a. the appellant do pay the sum of Kshs 9,500,000/- to the Respondent within 90 days from today in full and final settlement.
 - b. upon payment of the said sum of Kshs 9.5 Million to the Respondent by the appellant the Respondent shall release all the registrable documents to the appellant including the original grant to LR 20528 Garden Estate Nairobi and a transfer in favour of the appellant James Kimani Horeria.
 - c. The Respondent shall release all the official receipts for payment of the land rents and rates upto 30/6/1997 to enable the appellant to register the said transfer
 - d. Each side shall bear their own costs of the appeal and the superior Court.
17. The above facts are not in dispute.
18. The Applicant avers that the consent judgment is still in force and binding upon the parties. He blames the Respondent for refusing and or ignoring to comply with the orders hence the need to seek for the intervention of the Court. That in an attempt to defeat the orders of the Court, the



- Respondent unsuccessfully filed a Miscellaneous cause Murigu v Horeria (Environment and Land Civil Miscellaneous Application E229 of 2022) [2023] KEELC 17792 (KLR) (25 May 2023) which was dismissed by the Court on 25/5/23. That the application seeks execution of the orders of the appellate Court aforesaid. The Court was urged to allow the application to bring the matter to rest.
19. The Respondent on the other hand insists that the application is unmeritorious for non-compliance with the consent judgment requiring the Applicant to pay the sum of Kshs 9.5 Million within 90 days; the Applicant is in continuous default; there is no explanation given for the delay/default; the Applicant is steeped to vary the consent orders unilaterally; the court has no jurisdiction to vary, set aside or interfere with the decision the Court of Appeal orders given the hierarchical nature of the courts.
 20. As alluded earlier this dispute revolves around the compliance or otherwise of the consent judgement entered on 21/2/2013.
 21. Black's Law Dictionary, 9th Edition defines a consent judgment/agreed judgment as;

“a settlement that becomes a court judgement when the judge sanctions it. In effect an agreed judgement is merely a contract acknowledged in open court and ordered to be recorded but it binds the parties as fully as other judgements.”
 22. It is trite that a consent judgement is not appealable. A consent judgement is equated to a contract between parties and binds the parties and can only be set aside on grounds similar to that would justify setting aside a contract. In the case of N. Wasike v Destinno Wamboko {1988} eKLR the court had this to say;

“It is now settled Law that a consent Judgment or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out. (See the decision in J. M. Mwakio v Kenya Commercial Bank Ltd CA No. 28 of 1982).”
 23. Vide this application, the Applicant seeks to pay the sum of Kshs. 6.9m in full settlement. The Respondent has opposed the applicant's application on the grounds that it amounts to a variation of the Court of Appeal judgment of Kshs. 9.5m. That said, during the pendency of the application there are intervening events that took place; vide the letters dated 7/2/25 and 10/2/25 the Applicant through Counsel informed the Respondent that he is willing to forego the amounts utilised for the payment of property outgoings and pay Kshs. 9.5m as per Court of Appeal judgment and in full settlement. At the same time, the Applicant through his counsel requested details of the Respondents Bank Account so that the Applicant may transfer the funds electronically. Vide the letter dated 17/2/25, Counsel for the Respondent informed Counsel for the Applicant that he was taking instructions on the twin matters stated in the preceding sub-paragraph. What followed shortly thereafter is that Counsel for the Applicant filed an Affidavit sworn on 21/2/25 on the matters stated above and confirmed that his client acknowledges owing 9.5 Million to the Respondent and expressing clear intention to pay.
 24. The court finds that the Applicant has acknowledged the payment of Kshs 9.5 M in full payment in line with the consent judgment. The issue of variation therefore does not arise.
 25. The next area of consideration is whether the Applicant is entitled to the reliefs sought. It is clear that the Applicant was ordered to pay the sum of Kshs 9.5 Million within 90 days being the 21/5/2013. It is not in dispute that the Applicant is yet to comply to date. The parties seem to blame each other for the delay. In his own words the Applicant states that his attempts to comply have been met with resistance (strong head winds) from the Respondent. That the Respondent exhibited a clear intention



to defeat the ends of justice by acts of noncompliance including an allegation to dispose the land to third parties. That said the court has not been shown any deliberate action by the Applicant in form of a cheque drawn in the name of the Respondent and that it was forwarded to her and she declined to accept and or complete the transaction within the 90 days stipulated by the order or at any other time.

26. The Applicant has alluded to the ambiguity in the consent judgement with respect to who was to pay for the outgoings and whether the earlier amounts paid for the rates under the authorization of the Respondent's counsel was to be deducted from the total sum payable. This proposition in my view is misleading. I say so because the consent judgment was clear and if indeed it had any ambiguities none was raised with the court that issued the orders. In any event the question of payment of property outgoings was not within the domain of the consent judgement. To that end,

I agree with the Respondent that the Applicant has not proffered any reasons for the noncompliance of the consent judgment.

27. Did the Respondent acquiesce to the delay/non-compliance? The term 'acquiescence' is used where a person refrains from seeking redress when there is brought to his notice a violation of his rights of which he did not know at the time. Halsbury's Laws of England, 4th Edition, Volume 16 at page 994 states the following about the term 'acquiescence':-

“The term is, however, properly used where a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act.”

28. Evidently there is no evidence to show that the Respondent took any action towards the execution of the consent judgement at all with respect to the payment of Kshs 9.5 Million in her favour.
29. Taking the analogy that the consent judgement is the settlement contract of the parties, the court finds that both parties acquiesced to the delay. As discussed above the Applicant failed to comply while the Respondent acquiesced to the delay by not executing nor raising any issue with the said delay. The silence of both parties speak volumes of their intentions and the court is left wondering why parties would sit on their own judgement unexecuted for over a decade. Moreso, when the Applicant has been in possession of the suit land since 1996/97 to date and a substantial sum of the purchase price already paid to the Respondent.
30. Finally, the court finds that the Respondent has not challenged the sum of Kshs 9.5 million in her pleadings which is taken as an acknowledgement of what is owing and due to her from the applicant.
31. Costs shall follow the event. In this case had the Applicant complied with the orders there would have been no need to file this application. For that reason, I condemn him to pay costs.

Final Orders for Disposal

32. Having considered the application in totality, I conclude that the justice of this dispute will substantially be served by allowing the application. It is so allowed.
33. The Applicant shall bear the costs of the application
34. Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF APRIL, 2025 VIA MICROSOFT TEAMS.



J. G. KEMEI

JUDGE

Delivered Online in the presence of:

Mr. Evans Gaturu for the Applicant

Ms. Ruth Kiunga HB for Mr. Theuri for the Respondent

CA – Ms. Yvette

Order

Paragraph *1 (a)* be and is hereby corrected by the Court pursuant to the provisions of Section 99 of the [Civil Procedure Act](#).

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF MAY, 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

