



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 1113 of 2004**

**JOSEPH MUTUA KYENZE .....PLAINTIFF**

**VERSUS**

**CLIFF ONGERI ..... 1<sup>ST</sup> DEFENDANT**

**ISAAC ONGUBO KIBWAGE..... 2<sup>ND</sup> DEFENDANT**

**JOSEPH KALUNDE ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**NO. 1**

**Application for stay of execution pending the hearing and determination of application to SET  
ASIDE all proceedings and judgment dated 4<sup>th</sup> April 2008**

**I. BACKGROUND**

1. In the year 2004, 19<sup>th</sup> October, Joseph Mutua Kyenze

filed suit against Cliff Ongeri, Isaac Ongubo Kibwage and Joseph Kalunde the original defendants 1,2, and 3 on a land matter being LR12715/321, IRNO44738, Original No. 217. share certificate No. 591.

2. His claim was for fraud. That defendant 1 and 2 had wanted to buy his parcel of land but by 6<sup>th</sup> February 1988, they had defaulted in the payment of the sale agreement. The plaintiff rescinded the contract, actually returned the deposits. The 1<sup>st</sup> and 2<sup>nd</sup> plaintiff fraudulently transferred the suit land to their names aided by the 3<sup>rd</sup> defendant, sometime on 11<sup>th</sup> December, 1997. The plaintiff sought orders of revocation of title on grounds of fraud.

3. The third defendant failed to enter appearance and the Deputy Registrar entered Interlocutory Judgment against him on

8<sup>th</sup> December 2004. This was of cause irregular as the rules do not provide for Interlocutory Judgment in land matters.

4. The 1<sup>st</sup> and 2<sup>nd</sup> defendant entered appearance on 9<sup>th</sup> June 2005 through M/s Kili Kori and Associates. A notice of change was filed on 24<sup>th</sup> July 2007 to M/s Kipsang Murugi Mugo and Co.

Advocates and finally after judgment the firm of M/s Kelly and Co. Advocates came on record on 26<sup>th</sup> October, 2007.

5. On the day fixed for hearing of an application *ex parte* dated 13 April, 2005, the plaintiff was granted *ex parte* orders to serve by way of substitute orders. That is the reasons that the first advocate came on record.

6. The Civil Division of the High Court was unable to hear this case on 29<sup>th</sup> and 30<sup>th</sup> November 2006, and 20<sup>th</sup> and 21<sup>st</sup> March 2007. On the 25<sup>th</sup> July 2007 the case was placed before the newly created Land and Environmental Law Division. The plaintiff was ready to proceed but the defendant served his list of documents necessitating the plaintiff to seek time to study the documents. The court granted an adjournment to 30<sup>th</sup> July, 2007 at 11.30am with “getting up” costs to be paid to the plaintiff before the hearing date by defendant 1 and 2. On 30 July, 2007 the defendant had not paid the cost. The hearing nonetheless proceeded to trial. The reasons why the “getting up costs” is said not to have been paid is due to there being no defendants 1 and 2 in court.

7. The plaintiff called evidence under Order 17 rule 2 (1) Civil Procedure Rules the defendant called no evidence. Order 17 r 3 Civil Procedure Rules judgment was delivered on 31st July 2007 in favour of the plaintiff.

8. By an application dated the 1<sup>st</sup> February, 2008, the plaintiff sought prayers to stay execution of the judgment pending the hearing and determination of the appeal. By now the defendant 1 and 2 had changed advocates with leave of court (19.10.07 Visram J Duty Judge) from M/s Kipsang Murugi Mugo and Co. Advocates to M/s Kelly and Company advocates.

9. This application of 1<sup>st</sup> February 2008, was withdrawn and documented by the Deputy Registrar rather late on 29<sup>th</sup> April 2008. The defendant 1 and 2 filed a fresh application dated 4<sup>th</sup> April 2008 seeking prayers for:-

**i) Stay of execution pending the**

**Hearing of the application**

**ii) Prayers for judgment of 31<sup>st</sup> July 2007 be set aside and trial be heard a fresh.**

10. Mr. S.M. Meto appeared. It must be further noted that at all times M.S Meto appeared for the firm M/s Kipsang Murugi Mugo and also for M/s Kelly and company advocates. At all times he had had conduct of this suit before, during and after trial. When he was asked by the plaintiff/respondents advocate about the pending appeal to the Court of Appeal against the decision of the court, he stated that it had been withdrawn. No formal application had been made nor notice was given to the plaintiff/respondent.

11. It was further noted that the reasons of withdrawing the 1<sup>st</sup> application of 1<sup>st</sup> February 2008 is that the defendant 1 and 2 applicant had not yet paid the “getting up fees”. They have since paid the fees. I presume or else the plaintiff/respondent would be able to take issue on this.

12. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed another application dated 24<sup>th</sup> April 2008 seeking leave to amend the defence. This court ruled that under Section 6 of the Civil Procedure Act the application would be heard according to the dates they were filed. It therefore the application of 4<sup>th</sup> April 2008 that was heard.

**II: APPLICATION FOR 4<sup>TH</sup> APRIL 2008**

13. The defendant 1 and 2/ applicants pray I set aside my judgment of 31<sup>st</sup> July 2007 as it was obtained

irregularly. This is because the 1<sup>st</sup> and 2<sup>nd</sup> defendant were absent and had not participated in the hearing of their trial. They have a good defence and it would only be from that they be heard. Extensive affidavit evidence was given.

14. In reply this plaintiff/applicant stated at all times the defendant 1 and 2 were represented. They were able to participate in the trial through their advocates.

### **III: OPINION**

15. In a Civil suit it is mandatory for a plaintiff/s to be present in court during the trial of their case. In the case of a defendant it is not mandatory that they be in court. The defendant can appear through his advocate and be able to finalize their case without necessarily being in court or give evidence.

16. The issue that the defendants did not participate is therefore not true. They had an advocate or record. The court which normally does not adjourn but did so on 25<sup>th</sup> July 2007, 30<sup>th</sup> July 2007 till 11.30am. The advocate had conduct of this case through three firm of advocate of which the last two latter firms the advocate S.M. Meto participated in.

17. A trial was heard and concluded inter parties. This was therefore not a trial conducted under order IXB r 3(a) Civil Procedure Rules, namely, ex parte. If it was then, Order IXB r8 Civil Procedure Rules would apply. It does not in this case. The only option the defendant 1 and 2 have on being aggrieved with this court judgment is to appeal to the court of appeal.

18. It is unclear if there is a notice of appeal filed. If it has, this application is incompetent. If it has not the prayers sought under order IXB rules 8 Civil Procedure Rules is not available to the applicants.

### **IV: CONCLUSION**

19. I can therefore only conclude that the application before me must be dismissed. It is dismissed with costs to the plaintiff/respondent.

DATED THIS 30<sup>TH</sup> DAY OF APRIL 2008 AT NAIROBI

**M. ANG'AWA**

**JUDGE**

S.M. Meto instructed by Kelly & Co. Advocates for the defendant 1 and 2 applicant -present

A. Kimathi instructed by M/s Arimi Kimathi & Co. Advocates for the plaintiff/respondent