



**REPUBLIC OF KENYA**

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

**Misc Civ Case 487 of 2005**

**IN THE MATTER OF THE LAND CONTROL ACT (CAP.302)**

**AND**

**IN THE MATTER OF AN APPLICATION BY ENKASITI FLOWER GROWERS LIMITED  
UNDER SECTION 8 (1) FOR EXTENSION OF THE PERIOD TO MAKE AN APPLICATION  
FOR CONSENT IN RESPECT OF A CONTROLLED**

**TRANSACTION TO THE KAKUZUI/THIKA LAND CONTROL BOARD**

**RULING**

On 12.06.06 Enkasiti Flower Growers Ltd the plaintiff herein filed notice of motion under section 3A of the Civil Procedure Act (Cap.21), Order XLIV rule 2 and Order L rule 1 of the Civil Procedure Rules applying for the following orders:-

1. That this honourable court be pleased to review and set aside or discharge its orders made on 07.02.06 directing that:-
  - i) There be a stay of execution of the Ruling delivered herein on 07.02.06 for 30 days pending an appeal against the said Ruling.
  - ii) If the appeal fails, the 21 – day extension granted to the applicant company shall run from the date of determination of the appeal.
  - iii) If no Appeal is filed within 30 days, the 21 – day (extension) shall begin to run from the expiry of 30 days.
2. That the costs occasioned by this application be borne by the defendant in any event.

The grounds upon which the application is based are:-

- a) The said orders granting stay of execution pending appeal were made in excess of the limited jurisdiction of this honourable court in that:-
  - i) There was no formal application before this honourable court upon which the defendant's prayer for stay pending appeal could be entertained and/or granted.
  - ii) In any event there is no right of appeal against the Ruling and order which the defendant sought to be stayed.

b) In the circumstances there is an error apparent on the face of the record and/or sufficient for this honourable court to review the said order.

c) It is just and equitable to grant relief.

The application is supported by the affidavit of Walter Amoko of Inamdar & Inamdar Advocates for Enkasiti Flower Growers Ltd (plaintiff herein).

When the application came up for hearing before me on 17.07.06, the applicant (plaintiff company Enkasiti Flower Growers Ltd) was represented by learned counsel, Mr. W.A. Amoko while the respondent (defendant company Protein & Fruit Processors Ltd) was represented by its director, Patrick Kirono Mwaura.

The history of this matter is briefly that on 07.02.06 I delivered a ruling giving the plaintiff Enkasiti Flower Growers Ltd Extension of time of 21 days to apply for Land Control Board Consent regarding the transfer of L.R. No.1087/1 Title IR. 58576 containing 32.74 hectares situate in Gatanga Road, Thika in the Thika County Council. Immediately upon delivery of the Ruling, the respondent/defendant company Protein & Fruit Processors Ltd made an oral application through its director Patrick Kirono Mwaura for 2 months stay of execution of the Ruling pending appeal against the Ruling. Counsel for the plaintiff company Enkasiti Flower Growers Ltd opposed the application for stay, contending that these are special proceedings and the court had no jurisdiction to entertain an informal oral application for stay. Alternatively, counsel argued that even if the court had jurisdiction to entertain the oral application for stay, the successful plaintiff company still opposed any stay of execution of the Ruling given its favour as it would nullify the Ruling which had given the plaintiff company 21 days to apply for Land Control Board Consent. Counsel also contended that the 2 months stay sought was unreasonably long.

In reply the director of the respondent/defendant company Protein & Fruit Processors Ltd referred to the unlimited jurisdiction of the High Court granted by section 60 (1) of the Constitution of Kenya and urged the court to exercise such jurisdiction to grant the stay sought, contending that if stay was not granted and execution of the Ruling of the court ensued, the intended appeal against the Ruling would be rendered nugatory.

I considered the oral application for stay and the opposition mounted against it. It was my view that section 60 (1) of The Constitution of Kenya gave me unlimited jurisdiction to hear the application for stay even though it was made orally and that the wider interests of justice dictated that if the respondent/defendant company Protein & Fruit Processors Ltd was aggrieved by my ruling and wished to challenge it, the respondent should be given a chance to challenge it. In the premise, I granted 30 days stay of execution of the ruling pending appeal against it. The ruling was concluded thus:

‘If the appeal fails, the 21 days extension granted to the applicant company shall run from the date of determination of the appeal. If no appeal is filed within 30 days, the 21 days shall begin to run from expiry of the 30 days.’

The notice of motion application filed on 12.06.06 subject matter of the present Ruling is in essence a replay of the objection raised before me on 07.02.06 to the application for stay of execution of the ruling I gave that day. The applicant has argued that there is an error on the face of the record in that I lacked jurisdiction to entertain the oral application for stay of my ruling made on 07.02.06 for 30 days pending appeal against the said ruling.

For the record, part of the applicant (plaintiff) company’s complaint was that he was given no opportunity to respond to the respondent (defendant) company’s submission on section 60 (1) of The Constitution of Kenya. The reference to section 60 (1) of The Constitution was made by respondent (defendant) company in response to the applicant (plaintiff) company’s own argument that this court had no jurisdiction to entertain the oral application for stay. I asked applicant’s counsel if he specifically sought to address the court regarding section 60 (1) of The Constitution and he conceded that he did not, but gave the excuse that he had earlier objected to reference being made to section 60 (1) when Mr

Mwaura was responding to his argument that the court had no jurisdiction and that I had overruled his objection. Firstly, I can't find anything in the record that counsel objected to reference being made by Mr Mwaura to section 60 (1) of The Constitution. Secondly, there was nothing to stop counsel from asking to be allowed to respond to the argument about the said section 60 (1). Thirdly there was nothing to stop the court from considering the applicability or otherwise of section 60 (1), whether or not any party had raised it. It is a matter of law. The fact of the matter is that applicant's counsel had started the argument of lack of jurisdiction and the opposing side in response countered it with reference to section 60 (1) of The Constitution. If counsel felt an urge to specifically respond to it, there was nothing to stop him from asking to so respond. He did not ask and cannot now be heard to complain over the matter.

The principal anchor of the notice of motion application subject matter of the present Ruling seems to be section 3A of the Civil Procedure Act. The section provides as follows:

**'3A. Nothing in this Act shall limit or otherwise effect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'**

As already observed, in my ruling of 07.02.06 granting extension of 21 days to apply for Land Control Board Consent, I noted the defendant company's reference to section 60 (1) of The Constitution of Kenya, which *inter alia* gives the High Court unlimited civil jurisdiction. I then proceeded to say:

**'If the respondent company is aggrieved by this court's Ruling and wishes to challenge it, I think it would be unfair to deny the respondent company a chance to challenge the Ruling. I am of the view that the wider interests of justice demand that the respondent company be given a chance to contest the Court's Ruling. Accordingly, stay of execution of the Court Ruling is granted for 30 days pending appeal against the said Ruling.'**

I was clearly of the view that I had jurisdiction on account of section 60 (1) of The Constitution of Kenya and that the justice of the case demanded that I should grant the oral application for stay of execution of the Ruling. Now the applicant (plaintiff) company reminds me of the existence of section 3A of the Civil Procedure Act giving the same court inherent power to 'make such orders as may be necessary for the ends of justice'. In my view this section of the Civil Procedure Act the applicant company seeks to rely on to persuade me to review my ruling of 07.02.06 and set aside or vacate the order of stay I granted the respondent (defendant) company can also enure to the benefit of the respondent company vis-a-vis the order of stay granted to it on 07.02.06, and I am of the considered view that it should so enure.

The upshot is that I find no merit in the notice of motion application filed on 12.06.06 asking me to review and set aside or discharge my ruling of 07.02.06. I reaffirm my said ruling and order that the notice of motion filed on 12.06.06 be and is hereby dismissed. Costs shall be in the cause.

There was a preliminary objection by the respondent (defendant) company to the notice of motion just adjudicated upon, which by virtue of the conclusion reached in this Ruling is now rendered to be of no consequence.

Orders accordingly.

**Delivered at Nairobi this 12<sup>th</sup> day of October, 2006.**

**B.P. KUBO**

JUDGE