



**Munene v Kinyua Mwaniki & Wainaina Advocates (Civil Application E383 of 2022)
[2024] KEHC 11986 (KLR) (Commercial and Tax) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11986 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPLICATION E383 OF 2022**

PM MULWA, J

OCTOBER 3, 2024

BETWEEN

PATRICK MBUTHIA MUNENE APPLICANT

AND

KINYUA MWANIKI & WAINAINA ADVOCATES RESPONDENT

RULING

1. I have been called upon to determine the respondent's application dated 16th November 2023 which seeks a stay of the instant proceedings pending the hearing and determination of Milimani CMELC No. E104 of 2023 (Job Muriithi Nyaga vs Patrick Mbuthia & Kinyua Mwaniki & Wainaina Advocate) and Milimani CMELC No 224 of 2021 (Stephen Muriithi Gathogo vs Patrick Mbuthia Munene).
2. The application is expressed to be brought pursuant to the provisions of Sections 1A, 1B, and 3A of the *Civil Procedure Act*. It rests on the grounds on the face of it and affidavit sworn by Samuel Mwaniki. The gist of the application is that Patrick Mbuthia was the registered owner of the parcel of land known as L.R. No. Nairobi/Block 83/1784 which by a sale agreement dated 22nd January 2021 he sold to Job Murithii. In the transaction, the respondent acted for the purchaser. It was a term of the contract that upon the transfer of the property into the purchaser's name the respondent was to release to the applicant the balance of the purchase price. The balance of the purchase price has not been released and the applicant sued the respondent for the release thereof by the originating summons dated 24th June 2022.
3. The respondent now seeks a stay of proceedings in the instant suit and alleges that despite the ownership transferring to the purchaser the vendor failed to issue a vacant possession as Stephen Gathogo claims ownership of the property, that the parties entered into a deed of variation on 10th



- December 2021 where it was agreed the balance of the purchase price shall be held by the respondent pending hearing and determination of CMELC No. 224 of 2021.
4. The applicant, Patrick Mbuthia opposed the application by the replying affidavit sworn on 29th January 2024 while adopting his averments in his affidavits of 24th June 2022 and 5th December 2022. He avers the application is vexatious, frivolous an abuse of the court process and a violation of the overriding objectives of the Civil Procedure Rules. He alleges that the respondent has failed and or neglected to forward the balance of the purchase price despite repeated demands and denies any deed of variation.
 5. The application was canvassed by way of written submissions. Briefly, the respondent reiterates the grounds set out above and emphasized that the vendor failed to pass vacant possession to the purchaser despite the property being transferred to the purchaser and as a result the parties entered into a deed of variation dated 10th December 2021. The respondent was to hold the balance of the purchase price of the sum of Kshs. 2,995,000.00 pending the hearing and determination of CMELC No. 224 of 2021. The advocate submits the filing of the instant suit is in breach of the deed of variation agreement.
 6. He submits that the applicant has failed to demonstrate forgery of his signature, and therefore the parties are bound by the deed of variation. The respondent argues that the conduct of the applicant has brought about the filing of multiple suits in which the main issue is ownership of the suit property, and the suits are subject to the rule of sub judice. While citing the case of *Kenjab Motors Limited vs Wanjala t/a Zeki motors: Awili (Objector) (Civil Appeal 74 of 2016)* (2023), it urged the court to grant the orders sought.
 7. On the other hand, the applicant submits that it is in the interest of justice and in line with Section 1B of the *Civil Procedure Act* that the court do give directions on the main application and grant the parties a hearing date on the substance of the suit.

Analysis and determination

8. I have carefully considered the instant application and the rival submissions by the parties. The substantive question is whether these proceedings should be stayed pending the hearing and determination of Milimani CMELC No. E104 of 2023 and Milimani CMELC No. 224 of 2021.
9. To the mind of the court, it has been held variously that a stay of proceedings is a grave judicial action which interferes with a party's right to be heard without undue delay as enshrined in *the constitution*. This judicial action is a discretion to be exercised in the best interest of justice.
10. In the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000* the Court persuasively stated thus:

“... In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases,...the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”
11. This court is well aware the applicant has an unfettered right to be heard. Correspondingly the respondent has an equal right to be heard, and these rights have to be balanced. That the parties entered into a deed of variation to have the advocate withhold the balance of the purchase price until the determination of the two suits is not determinantal to either party. The parties are bound by the contract and ought to obey the terms thereof.
12. The question then begs; is it in the best interest of justice to allow the applicant to proceed with the suit, with the knowledge of the existing deed of variation? And what is the impact of allowing the suit



to proceed? The purchaser is yet to enjoy the ownership of the suit property as vacant possession was not passed, and there are cases to be determined on the issue of ownership of the property.

13. In the instant application, I am minded to balance the interests of both parties, as well as weigh the pros and cons of granting the stay orders.
14. I am of the considered view that in the event a stay is not issued, and in the event the respondent is ordered to forward the balance of the purchase price to the applicant, the purchaser will stand to lose both the property and the purchase price already paid. That would not be in the interest of justice.
15. Since the issue of ownership of the subject property is still pending before the subordinate court, I direct there be a stay of further proceedings in this case until the issue of ownership of the property in LR No. Nairobi/Block 83/1784 is determined.
16. Consequently, the respondent's application dated 16th November 2023 succeeds. Costs will be in the cause.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF OCTOBER 2024.

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P. MULWA

JUDGE

In the presence of:

Mr. Gathuri for applicant

Ms. Kerubo hb for Ms. Ngugi for respondent

Court Assistant: Carlos

