



**Muritu v Continental Developers Ltd; Commissioner of Lands (Interested Party)  
(Civil Case 1945 of 2001) [2023] KEHC 4092 (KLR) (Civ) (2 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4092 (KLR)

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

**CIVIL**

**CIVIL CASE 1945 OF 2001**

**AN ONGERI, J**

**MAY 2, 2023**

**BETWEEN**

**EVANS NJENGA MURITU ..... PLAINTIFF**

**AND**

**CONTINENTAL DEVELOPERS LTD ..... DEFENDANT**

**AND**

**THE COMMISSIONER OF LANDS ..... INTERESTED PARTY**

**RULING**

1. The application coming for consideration in this ruling is the one dated 30/11/2022 seeking the following orders
  - i. That this application be certified urgent and be heard ex-parte in the first instance.
  - ii. THAT the firm of I. Kimondo & Co. Advocates be granted leave to come on record for the defendant in place of the firm of Kosgey & Masese Advocates.
  - iii. That pending the hearing and determination of this application, this court be pleased to grant an order for stay of execution of the judgment dated and delivered on November 19, 2021, the resulting decree and the ruling and certificate on taxation of costs dated November 29, 2022.
  - iv. That pending the hearing and determination of the appeal, this court be pleased to grant an order for stay of execution of the judgment dated and



delivered on November 19, 2021, the resulting decree and the ruling and certificate on taxation of costs dated November 29, 2022.

- v. That this court do to hold that it lacked jurisdiction to hear and determine this case.
  - vi. That consequently the judgment and all consequential proceedings, the decree, the ruling and the certificate of taxation be set aside for want of jurisdiction.
  - vii. That costs be in the cause.
2. The application is based on the grounds on the face of it and supported by the affidavit of Bernard Kingori dated November 30, 2022 in which it is deponed that the cause of action relating to this case is the land title number Nairobi/Block/82/4156 where the plaintiffs claim is founded on the transaction for sale and purchase of the land between the plaintiff and the defendant and seeking an order of specific performance to compel the defendant to transfer to the plaintiff another land equivalent to the land in lieu of Nairobi/Block 82/4156.
  3. That this civil court continued to hear and determine the suit without jurisdiction to do so after the Environment and Land court was established. That the Environment and Land Court was established on 30/8/2012 and the judges of the court were appointed on 1/10/2012 during the pendency of this suit. The matter ought to have been transferred to the Environment and Land Court.
  4. He indicated that the defendant has filed a notice of appeal and will be greatly prejudiced and the appeal rendered nugatory if execution against it is commenced.
  5. The respondent filed a replying affidavit dated 13/3/2023 and further affidavit dated 14/3/2023 in which he also deponed that judgement was rendered on 19/11/2021 and being dissatisfied with the judgment the defendant/applicant filed a notice of appeal. That the application herein seeks a stay for a judgement that was rendered one and half years ago. It was therefore not brought timeously and consequently fails to meet the threshold of granting stay orders.
  6. The parties filed written submissions as follows; the defendant applicant submitted that the issue of want of jurisdiction by the high court regarding land matters can be raised at any stage of the proceedings even after judgement or on appeal. That it is therefore not a valid defence for the plaintiff to oppose the defendant's application on grounds that the subject matter has already been determined and there is judgement.
  7. The applicant submitted that the previous advocate on record for the defendant did not inform the defendant that this matter was indeed proceeding in the civil court, did not inform the defendant of the hearing date or call the defendant to testify in the case hence the defendant was not aware of the judgement delivered until November 29, 2022 when they were informed on the ruling of taxation and hence there was no inordinate delay.
  8. The applicant argued that its application is valid in law and has merit therefore it is not an abuse of the court process. That in any case the plaintiff will be handicapped in attempting to execute and enforce the judgement on record because the High Court exercising its exclusive civil jurisdiction cannot validly enforce judgement relating to land matters.
  9. The respondent in his submission argued that the applicant has not made out a case to merit the granting of the orders sought and indicated that it was an afterthought and the same was filed in bad



faith. That it is evident from the proceeding that the applicant fully participated in the proceedings and tendered no evidence and seeks to raise in the Court of appeal a new issue that was not raised at trial.

10. The issues for determination are as follows;
  - i. Whether this court should grant stay of execution pending appeal.
  - ii. Whether this court has jurisdiction to hear this case.
  - iii. Whether the judgment and decree should be set aside for want of jurisdiction.
  - iv. Who pays the costs of this suit
11. On the issue as to whether this court should grant stay of execution pending appeal, the governing provision is order 42 rule 6 which states as follows;
  - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
  - (2) No order for stay of execution shall be made under subrule (1) unless—
    - (a) the court is satisfied that substantial loss may result to the Applicants unless the order is made, and that the application has been made without unreasonable delay; and
    - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicants”.
12. The duty of this court is to balance the rights of the respondent against the appellant’s right of appeal.
13. The court ordered specific performance. It is in the interest of justice that the appellant be granted stay of execution pending appeal. In the case *Samvir Trustee Limited v Guardian Bank Limited Nairobi* (Milimani HCCC 795 of 1997) Warsame J.(as he then was) stated that the court is empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court by ensuring that orders of stay are granted conditionally.
14. On the issue as to whether this court has jurisdiction to hear this case, I find the appellant ought to have raised the said issue at the trial and not at this stage.
15. I accordingly find that this court cannot set aside the judgment herein and the decree for want of jurisdiction, this case was filed in the year 2001 before the ELC Division was set up and the same was properly determined in this division.
16. I accordingly find no basis for holding that this court has no jurisdiction.
17. I allow the prayer for stay of execution pending appeal.



18. The costs of the application to abide the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS  
2<sup>ND</sup> DAY OF MAY, 2023.**

**A. N. ONGERI**

**JUDGE**

In the presence of:

.....for the Plaintiff/Respondent

.....for the Defendant/Applicant

.....for the Interested Party

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