



REPUBLIC OF KENYA



**Mukuba v Gitonga (Civil Appeal E034 of 2022)
[2024] KEHC 3780 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3780 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E034 OF 2022
EM MURIITHI, J
MARCH 20, 2024**

BETWEEN

LUCY MUKUBA APPELLANT

AND

PETER GITONGA RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 24/5/2023, pursuant to Article 162 (2) (B) of the Constitution, Order 50 of the Civil Procedure Rules, Section (4) of the Environment and Land Court Act and all other enabling provisions of the law, the Applicant seeks that:
 1. Spent
 2. This honourable Court be pleased to set aside all its orders made since the filing of this appeal for want of jurisdiction.
 3. This appeal be struck out with costs to the Respondent.
 4. Costs of this application and the appeal be borne by the Appellant/Respondent.
2. The grounds upon which the application is premised are that this being a land matter which originated from Nkubu ELC Case No. 5/2015, an appeal therefrom ought to have been filed in the Environment and Land Court, as the Constitution is clear on which court should hear and determine land disputes. Therefore, all the orders in this appeal by this court were made without jurisdiction and should be set aside as a matter of course. In his supporting affidavit sworn on even date, the Applicant avers that the Respondent did not have the right to appeal, and his advocates filed a notice of preliminary objection dated 21/3/2022, which for reasons that are not clear, was not heard. He avers that he should be reimbursed the unnecessary costs he has incurred in this appeal, which was filed irregularly in the civil division instead of the Environment and Land Court division.



3. The Applicant swore a further affidavit on 3/7/2023 in support of his application.
4. The Respondent filed grounds of opposition to the application on 25/9/2023 that:
 1. The application has been overtaken by events as the appeal is spent and this court has become functus officio.
 2. The application is meant to irritate the court as it is fictitious, frivolous and an abuse of the due process of the Law.
 3. The applicant has participated in what he is now asking the court to undo and as such he has submitted himself to the jurisdiction of the court.

Submissions

5. The Applicant urges that this appeal ought to have been filed in the Environment and Land Court and not in this court, and cites *Owners of Motor Vessel Lilian S v Caltex Oil (Kenya) Limited* (1989) KLR and *Constantine Joseph Advocates LLP v The Honourable Attorney General* (2022) eKLR.
6. The Respondent urges that the appeal is already spent and the Applicant has all along submitted to the orders of this court. She urges that the application is a waste of judicial time which is not meant to achieve any ends of justice, and thus it should be dismissed.

Analysis and determination

7. The issues for determination are whether the orders of this court ought to be set aside for want of jurisdiction, and whether the appeal should be struck out.
8. The Appellant moved the court on 10/3/2022 seeking stay of her impending eviction from L.R No. Nkuene/Mitunguu/1116 pending the hearing of the application and the appeal.
9. The Respondent opposed that application vide grounds of opposition dated 14/3/2022 and a replying affidavit sworn on the same date.
10. Upon full hearing of the application inter partes, the court by its ruling of 7/7/2023 held in relevant part:

“...There is no appeal from the decree of the trial court. What is sought to be appealed from is an order from decision to allow with supervision by the police, of the demolition of parts of the appellant’s house said to be constructed on the Respondent’s land...Rule 29 of Order 22 of the *Civil Procedure Rules* on which the application resulting in the order for police assistance in demolition of the appellant’s encroaching constructions, as asserted in the Submissions of the Counsel for the Appellant, is not one for which appeal lies as of right. No leave has been obtained for the present appeal. The Court does not consider that there is a competent appeal capable of being launched against the order of the trial court, and upon which an application of stay pending appeal may be moved. However, in the interests of justice so that more harm is not caused than is sought to be avoided by the demolition of the appellant’s house constructed on the respondent’s land, the court will consider the application on the merits...What is not permissible is the use of process of the court to delay and avoid the execution of lawful court process. That is a clear abuse of the process of the court. The court cannot allow the appellant to regurgitate her case by the present proceedings and stall the enjoyment of the fruits of judgment by the Respondent... Accordingly, for the reasons set out above, the Court orders that the Appellant shall pay for



the costs of the Government Surveyor to attend within fourteen (14) days the disputed site and demarcate the boundary on parcel of land No. Nkuene/Mitunguu/1116 whereupon the appellant shall remove any encroaching buildings or construction on the Respondent's parcel of land aforesaid within the next seven (7) days, and in default thereof the respondent shall be at liberty, with the assistance of the relevant Officer Commanding Police Station Mitunguu Police Station to demolish the buildings and or constructions. The advocates for the parties shall in accordance with their duty under section 1A (3) of the Civil Procedure Act assist the court in enforcing the order.”

11. This court that finds that the Applicant's participation throughout the entire period by filing of pleadings herein is an act of submission to the jurisdiction of this court. The Applicant is hereby estopped from claiming lack of jurisdiction.
12. The court notes that the disputed land was indeed surveyed on 19/6/2023 and a report filed on 20/6/2023. It is indicated in that report that the Respondent demolished the part of her building encroaching on the Respondent's land.
13. There is nothing left for this court [or, for that matter, the Environment and Land Court] to do, as this matter has been concluded. The appeal is spent.

Orders

14. Accordingly, for the reasons set out above, this court finds that the application dated 24/5/2023 has no merit and it is dismissed.
15. There shall be no order as to costs.
16. File closed.

Order accordingly.

DATED AND DELIVERED ON THIS 20TH DAY OF MARCH, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S L. Kimathi Ikiara & Co. for the Appellant.

Mr. Ondari for the Respondent.

