



Ethics and Anti-Corruption Commission v Waititu & 4 others; Maisiwa and Spare Parts & 3 others (Interested Parties); Gikonyo & another (Intended Interested Party) (Anti-Corruption and Economic Crimes Civil Suit E020 of 2022) [2023] KEHC 1259 (KLR) (Anti-Corruption and Economic Crimes) (23 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT E020 OF 2022
EN MAINA, J
FEBRUARY 23, 2023**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

FERDINAND NDUNGU WAITITU 1ST DEFENDANT

SUSAN WANGARI NDUNG’U 2ND DEFENDANT

SAIKA TWO ESTATE DEVELOPERS LIMITED 3RD DEFENDANT

BIENVENUE DELTA HOTEL 4TH DEFENDANT

BINS MANAGEMENT SERVICES LIMITED 5TH DEFENDANT

AND

MAISIWA AND SPARE PARTS INTERESTED PARTY

LEXIS INTERNATIONAL LIMITED INTERESTED PARTY

EILEEN WANJIKU MBUGUA INTERESTED PARTY

EQUITY BANK (KENYA) LIMITED INTERESTED PARTY

AND

NANCY ELIZA MUTHONI GIKONYO INTENDED INTERESTED PARTY

PIEDMONT INVESTMENTS LIMITED INTENDED INTERESTED PARTY



RULING

1. The 1st and 2nd intended interested parties filed two applications dated September 29, 2022 and October 5, 2022 respectively, seeking to be enjoined to this suit as interested parties. The applications are supported by the affidavits of Nancy Eliza Muthoni Gikonyo sworn on September 29, 2022 and November 9, 2022 and that of Maxwell Otieno Odongo sworn on October 5, 2022 respectively.
2. The applications are brought under sections 1A, 1B and 3A of the Civil Procedure Act and for the 1st intended interested party it is sought that:-
 - a. That the honourable court be pleased to grant leave to Nancy Eliza Muthoni Gikonyo (hereinafter referred to as "the applicant") admitting her as the 5th interested party in the proceedings herein.
 - b. That upon granting order (1) above, the honourable court be pleased to issue an order staying and/or suspending the proceedings herein and/or stopping the sale, transfer and/or any interference with the suit property by any person either directly or indirectly pending hearing and determination of Nairobi HCC No 672 of 2006 (Nancy Eliza Muthoni Gikonyo v Housing Finance Company of Kenya & 2 others).
 - c. That in the alternative to order 2 above, an order do issue from this honourable court granting the applicant leave to file and serve her defence and/or response to the suit herein upon all the parties and pending the hearing and determination of the suit herein, an order of status quo be granted preserving the suit property from any form of sale, transfer and/or interference in any manner by any person, either directly or indirectly.
 - d. That costs of this application be provided for."
3. The gravamen of the 1st intended interested party's application is that she is the owner of property LR No 7785/311 situated in Runda and that she is in pursuit of that interest in HCCC No 672 of 2006 Nancy Eliza Muthoni Gikonyo v Housing Finance Company Kenya and 2 others.
4. The 2nd intended interested party's contention is that it is the true owner of LR No 209/2582 which was fraudulently sold and transferred to the 1st defendant's company, Bienvenue Delta Hotel, at a time when there was in force a court order in HCCC No 806 of 2003 Piedmont Investments Limited v Standard Assurance Kenya Limited, Ufanisi Capital and Credit Limited and Superiorfones Communications Ltd restraining any such transfer or alienation. The application of the 2nd intended interested party seeks orders:-
 1. That the applicant, Piedmont Investments limited, be joined to the suit herein as an interested party.
 2. That costs of this application be provided for."
5. The plaintiff opposed to the applications *vide* affidavits sworn by Paul Macharia on October 28, 2022 and October 7, 2022. The 2nd intended interested party's application was also opposed by the 4th interested party by way of a replying affidavit sworn by Kariuki Kingo'ri on October 31, 2022.



Submissions By The Parties

6. The 1st intended interested party submitted that she is a necessary party to these proceedings. That her proprietary interest in the property LR 7785/311 Runda Grove is still alive, contrary to the averments of the plaintiff; that the court Nairobi HCCC No 672 of 2006 Nancy Eliza Muthoni Gikonyo v Housing Finance Company of Kenya & 2 others has not pronounced itself otherwise and it would be prejudicial if this court declines to grant the prayers sought and grant her audience to present her case before this court makes a determination on the forfeiture application. She urged this court to find that the applicant has proprietary interests in the subject property and should be joined to the proceedings. Reliance was placed on the doctrine of *lis pendens* as defined by the *Black's Law Dictionary*, 9th Edition, that any interests acquired during the pendency of the suit are subject to its outcome. Also cited is the case of *Ali Sheikh Omar v Nabye Said Gubum & 3 others* [2011] eKLR, where the court stated:-

“The doctrine of *lis pendens* rests on the rationale that transfer or dealing otherwise with any property during the pending of a suit should be prohibited because it would otherwise be impossible for any action brought to see a successful termination due to alienations... Surely the doctrine of *lis pendens* is intended to strike attempts by parties to a litigation to circumvent the jurisdiction of a court in which the dispute on rights or interest on immovable property is pending by private dealings that may remove the subject matter of litigation from the ambit or power of the court to decide a pending dispute or frustrate the decree.”

7. The 2nd intended interested party did not file submissions to the application.

8. The plaintiff submitted that both applicants are not necessary parties to these proceedings whose intent is to determine whether the impugned assets are proceeds of corruption and consequently whether an order for forfeiture ought to issue.

9. For the 1st interested party it was argued that she has no legal or equitable right over LR No 7785/311 Runda as her equity of redemption was extinguished with the statutory sale and the excess amounts paid to her husband.

10. With respect to Piedmont Investment limited, the plaintiff acknowledged that the said entity may have an interest on LR No 209/2582 pursuant to the pendency of HCCC No 806 of 2003 Piedmont Investment Limited v Standard Assurance Kenya Limited; Ufanisi Capital and Credit Limited; and Superiorfone Communications limited but submitted that these proceedings are not the proper forum to adjudicate the issues raised by the said intended interested party as it will unnecessarily convolute the proceedings.

11. On its part, the 4th interested party opposed the 2nd intended interested party's application on grounds that:-

“ a) The title adduced by the intended interested party with respect to the property IR No 209/2582 (the "subject property") marked as exhibit MOOI is an incomplete and inaccurate record intended to mislead this honourable court.

b) The 4th interested party has adduced before this honourable court a complete title with respect to the subject property which clearly indicates that whereas it is true that the subject property was registered in the applicant's name on August 14, 2000, a charge was thereafter registered in the name of Standard Assurance Kenya Ltd on September 11, 2002. See a copy of the complete title



marked as exhibit KK-2 in my supporting affidavit sworn on July 12, 2022 or exhibit KK-2 in my replying affidavit sworn on July 8, 2022.

- c) It is apparent that sometimes in 2003, a dispute ensued between the applicant herein and Standard Assurance which led to the orders maintaining status quo being issued restricting Standard Assurance from undertaking any transaction over the land in the case HCCC No 806 of 2003 — Piedmont Investments Limited v Standard Assurance Kenya Ltd. Ufanisi Capital and Credit Ltd, and Superiorfones Communications Ltd on February 26, 2004.
- d) Thereafter, the court in HCCC No 806 of 2003 issued a further ruling on March 25, 2010 which ordered that the entries transferring the title to the subject property to Ufanisi Capital and Credit Ltd and Superiorfones Communications Ltd be cancelled, and reversing ownership to Standard Assurance Kenya Ltd which was then under receivership.

Annexed hereto and marked as KK — 1 is the ruling delivered on March 25, 2010.
- e) It is therefore evident that there were no such court orders issued in HCCC No 806 of 2003 cancelling the transfer to Standard Assurance Kenya Ltd as falsely alleged by the intended interested party in paragraph 4 of the supporting affidavit.
- f) Further, the court orders issued on March 25, 2010 only restrained Ufanisi Capital and Credit Ltd and Superiorfones Communications Ltd from dealing with the subject property and directed them to surrender the title to Standard Assurance Kenya Ltd. As such, the intended interested party's claim that any further transfers by Standard Assurance Kenya Limited were fraudulent and/or unlawful is false and unfounded.
- g) I am advised by my advocates on record, which advice I verily believe to be true, that in the absence of restraining orders against Standard Assurance Kenya limited, the latter was at liberty to transfer the subject property to Superiorfones Communications Ltd as it did on July 16, 2013.
- h) While Superiorfones Communications Ltd was still the proprietor of the subject property, the 4th interested party herein registered a charge over the subject property on August 29, 2013.
- i) The said charge which was eventually discharged on May 2, 2018 with the view of enabling Superiorfones Communication Limited to transfer the title to the subject land to the 3rd defendant herein as deposed in my affidavit dated July 12, 2022.”

12. It is the 4th interested party's contention therefore that in light of the above, the 2nd intended interested party has not sufficiently demonstrated reason to be enjoined to the present proceedings as:-

- “ a) The applicant does not have any lawful or beneficial interest over the subject property that is clearly identifiable or proximate such as to warrant their involvement in the present suit.



- b. The applicant has not demonstrated what prejudice they stand to suffer in the event of a non-joinder as there are no subsisting court orders which have re-instated ownership to the applicant and/or restricted any dealings over the property by Standard Assurance Kenya Limited.”

Analysis And Determination

13. The law on joinder of interested parties was stated by the Supreme Court in *Communications Commission of Kenya (CCK) & 3 others v Royal Media Services Limited & 7 others* [2014] eKLR to be as follows: -

“

“(22) In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this court’s ruling in the *Mumo Matemo case* where the court (at paragraphs 14 and 18) held:-

“[An]interested party is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

14. Further, in the case of *Skov Estate Limited & 5 others v Agricultural Development Corporation & another* ELC No 251 of 2012 [2015] eKLR the court stated:-

“In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in a suit as interested party.

In other words, there needs to be a demonstration that the interest of the person goes further than "merely being affected" by the judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another. A joinder may also be allowed if the intended interested party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claims of the incumbent plaintiff and defendant. The threshold for joinder of an interested party should not be too low, or else, this is prone to open doors for busybodies to be joined to proceedings, merely to spectate or confuse the issues in the matter. Apart from the above, whether or not to join a person as an interested party, must be looked at within the context and surrounding circumstances of each particular case.”



15. From the above decisions, it is clear that for a party to be joined in a suit as an interested party, they must satisfy the court that the joinder will aid in the final settlement of the matter so as to avoid a multiplicity of cases and that their joinder will provide protection for the legal and identifiable rights of the party who will be adversely affected by the decision of the court in their absence.
16. I have carefully considered the issues raised by the intended interested parties. In regard to the 1st intended interested party the issue she has raised which is whether or not the sale of her property was lawful is not one for this court to determine. That is an issue which she ought to have raised in the case where the sale was ordered. As for the 2nd intended interested party the case regarding its assets is a live issue before a court of concurrent jurisdiction and it is only if those proceedings are determined in its favour that it would have an identifiable stake in the property in question and hence become a necessary party to these proceedings which are intended to determine whether the properties were acquired by the 1st defendant through proceeds of corruption.
17. Accordingly, I find the applications dated September 29, 2022 and October 5, 2022 unmerited and hereby dismiss them with costs to the plaintiff/respondent.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 23RD DAY OF FEBRUARY 2023.

E N MAINA

JUDGE

In the presence of:-

Mr. Mbaji for 4th Interested party

Ms Rotich for Kibet for 4th and 5th Defendants

Ms Kojenda for Swaka for 1st Defendant

Mr. Amuga for Intended Interested Party (Piedmont Investment Ltd)

Mr. Makhanu for intended 5th Interested Party

