



REPUBLIC OF KENYA



**Lewa v Lewa & 2 others (Family Appeal 6 of 2016)
[2023] KEHC 20860 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20860 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL 6 OF 2016**

**G MUTAI, J
JULY 26, 2023**

BETWEEN

KHAMIS OMAR LEWA APPLICANT

AND

HALIMATI OMAR LEWA 1ST RESPONDENT

RIADHA KHAMIS LEWA 2ND RESPONDENT

JUMA KHAMIS LEWA 3RD RESPONDENT

RULING

1. There are two applications pending for determination before this court. The first application is the Notice of Motion dated 27th September 2022 which seeks the following orders:-
 - a. Spent
 - b. That the Registrar of Titles, Mombasa be cited to show cause why he should not be committed to civil jail for a period of six (6) months for wilful disobedience of the court order issued on 22nd September 2021 by Hon. Justice J. N. Onyiego;
 - c. That on failing to show cause under clause 2 above, this honourable court be pleased to punish the Registrar of Titles, Mombasa with a sentence to civil jail and imposing a fine payable by him; and
 - d. That the cost of this application be provided for.
2. The application is premised on the grounds therein and the supporting affidavit of Khamis Omar Lewa sworn on 27th September, 2022.
3. The applicant's argument is that this honourable court issued orders on 22nd September 2021 to the effect that Plot No.1346 /XVI/MSA (Original No.250/XVI) Majengo is part of the estate of Khamis



Omar Lewa (deceased) and the same should revert back to the estate of the deceased as it was sold to Saeed Abdalla Bakhressa. However, despite being served with the said orders the Registrar of Titles, Mombasa has failed to effect the same which amounts to disobedience or contempt of court orders. The applicant stated that it is in the interest of justice that the dignity of the court is upheld.

4. The second application is dated 28th October, 2022 seeking the following orders:
 - a. Spent;
 - b. The honourable court be pleased to enjoin SAEED ABDALLA BAKHRESSA as an interested party to this suit;
 - c. The honourable court be pleased to review or set aside its orders issued on the 22nd of September 2021;
 - d. The honourable court be pleased to rehear the matter and grant the interested party an opportunity to be heard and submit with the leave of court any other information relevant to allow for the just and fair disposition of this matter;
 - e. The honourable court be pleased to order the estate of Khamis Omar Lewa, the parties herein to refund Kenya Shillings Two Million One Hundred Thousand (Kes.2,100,000/-) together with interest at court rates, being the balance of the purchase price duly paid by the interested party herein yet to be reimbursed;
 - f. The honourable court be pleased to order that the return of the Certificate of Title to the estate of Khamis Omar Lewa only be enforced on condition the estate of Khamis Omar Lewa comply with order (5) above within 60 days from the issuance of this order failure to which the property known as MOMBASA/BLOCK XVI /1346 be disposed of and proceeds of the sale utilised to reimburse the interested party;
 - g. The honourable court be pleased to direct the Kadhi's Court, Mombasa to release Kes.700,000/- being the amount deposited at the court in Succession Cause 85 of 2010 for the sale of the property to the firm of Hassan Alawi & Company Advocates;
 - h. Costs of the application; and
 - i. Any other relief that this honourable court may deem just to grant in the circumstances of this case.
5. The application is premised on the grounds therein and the supporting affidavit of Abdalla Bakhressa sworn on 28th October 2022.
6. Mr. Abdalla Bakhressa stated that he was the duly registered attorney of Saeed Abdalla Bakhressa the purchaser. The purchaser entered into an agreement with one Riadha Khamis Lewa as the sole beneficiary of the estate of Omar Khamis Lewa and Juma Khamis Lewa for the suit property at a consideration of Kes.12,000,000/-. The vendor was represented by the firm of Lumatete Muchai & Company Advocates and the purchaser by the firm of Hassan Abdi & Company Advocates. The purchaser deposited Kes.1,200,000/- pending the successful registration of the transfer. On 21st October, the vendors' advocates informed the purchaser that the transfer had been duly registered and requested for the balance of the purchase price. The purchaser became aware that there was a family dispute between the vendors. That some family members had declined to give vacant possession to the suit property.



7. The purchaser through his advocates wrote to the vendors' advocate inquiring on the issue of vacant possession. He then deposited Kes.5,600,000/- inclusive of brokerage fee of Kes.100,000/- and undertook to pay the balance in exchange of vacant possession and the original title.
8. On 17th January, 2017 he rescinded the contract due to the vendor's failure to deliver vacant possession. The vendors' advocate refunded Kes.5,200,000/- leaving a balance of Kes,1,500,000/-. Out of the balance Kes.700,000/- was deposited to Kadhi's Court by dint of Succession Cause No.85 of 2010 in which the applicant herein was ordered to sell the property and deposit the proceeds of sale in court. That despite numerous reminders to restitute the purchaser the vendor or vendor's advocates are yet to settle the same.
9. On 17th May, 2017 the purchaser received a letter from the firm of Marende Necheza Advocates who had taken over from the firm of Lumatete Muchai & Company Advocates seeking Kes.1,000,000/- to be utilised to pay outstanding land rates and institute a suit to obtain orders for vacant possession which he agreed to. He paid Kes.500,000/- to the said firm. They, however, failed to deliver resulting in the institution of Mombasa ELC No. 227 of 2017; Mombasa Saeed Abdalla Bakhressa versus Estate of Riadha Khamis Lewa in which the court declared him the registered owner of the premises and ordered the vendors to give him vacant possession.
10. To date the vendors have not given him vacant possession neither have they appealed the decision of the ELC Court. They have also retained the original title and the balance of Kshs 1,500,000.
11. That he was not aware of these proceedings until 26th October 2022. That the parties have concealed material facts from the court with the intention of depriving him his rightful interest over the property. That his wish is for his interests to be taken into account and he be given an opportunity to be heard. That he will suffer prejudice and financial loss if the orders sought are not granted.
12. In response the applicant filed a replying affidavit sworn on 1st December 2022. He stated that this matter emanated from the Kadhi's Court Succession Cause No. 85 of 2010. That this appeal was filed on the grounds that no consent was obtained from him and his siblings before the signing of the consent by the advocates. In the said consent the Kadhi directed that the property be sold at a value of Kes.7,000,000/- while the interested party relies on a sale agreement for consideration of Kes.12,000,000/-. That the agreement was made before the Kadhi Court made orders for the sale of the suit property.
13. He stated that the purported title deed in favour of the interested party was issued at a time when the Kadhi's Court succession matter was still pending. That the interested party started intermeddling with the deceased's estate even before the determination of the matter at the Kadhi's Court with the intention to disenfranchise the beneficiaries of the deceased's estate.
14. He stated that that he obtained stay of execution of the Kadhi's orders which was compromised on 22nd September 2021.
15. He further stated that the 2nd and 3rd respondent are now deceased as they died in 2016 and 2014 respectively.
16. He further stated that the interested party is not a member of the family or part of the beneficiaries of the estate of Khamis Omar Lewa.
17. He argued that there was no proof that any of the beneficiaries received the sums of money that the interested party is claiming. That they did not obtain the services of a broker neither did they instruct



the firm of Marende Necheza Advocates. Thus they should not be condemned to pay the alleged amounts.

18. In conclusion he urged the court to dismiss the application.
19. The interested party filed a further affidavit sworn on 14th December 2022. He stated that despite him not being a member of the family of the deceased he is affected by the decisions of this court as he has interest in the estate of the deceased. That the issue for sale of the property was in discussion prior to the consent order. That if there was intermeddling the same is attributable to the beneficiaries.
20. He further stated that the property was being sold above the adopted price which was beneficial to the estate. That he was an innocent purchaser. That he has no intention of disenfranchising the beneficiaries. That the vendors advocate received the purchase price on behalf of the beneficiaries.

Applicant's Submissions

21. The matter was canvassed by way of written submissions. The applicant through his advocate Wambo Muyala & Company Advocates filed written submissions dated 12th May, 2023. Counsel reiterated the position in the applicant's replying affidavit and submitted that the agreement of sale is dated 27th July 2015, 5 months before the issuance of the court orders by the Kadhi is an indication of fraud and it also shows that the interested party was intermeddling with the estate of the deceased and thus he should not be enjoined as a party to the suit.
22. Counsel further submitted that no proof that the respondents or the beneficiaries ever received any money or their advocate on record or the applicant and thus no justification for him to be enjoined as a party to the appeal herein.
23. In conclusion counsel urged the court to dismiss the interested party's application with costs.

Submissions for Respondents.

24. Have considered the two applications, the responses therein and rival submissions for both counsels and the issues that emerge for determination are: -
 - a. Whether the orders issued on 22nd September 2022 should be reviewed or set aside.
 - b. Whether the interested party should be enjoined as a party to this suit.
 - c. Whether the Registrar of Titles should be held in contempt of the court order.
25. Vide an amended consent filed on 23rd June 2021, the Hon. Justice J. N. Onyiego on 20th September 2021 made the following orders (issued on 22nd September 2021);
By consent: -
 - a. That the parcel of land known as Plot No.1346/XVI /MSA (Original No.250/XVI) Majengo, is part of the estate of Khamis Omar (deceased).
 - b. That the parcel of land known as Plot 1346 XVI /MSA (Original No.250/XVI) Majengo, which was purportedly sold to Saeed Abdalla Bakhressa be returned to the beneficiaries of the estate of Khamis Omar Lewa, to be held in equal shares.
 - c. The beneficiaries are as follows: -
 - i. Amina Ali
 - ii. Khamis Omar Lewa



- iii. Ali Omar Lewa
 - iv. Shaibu Omar Lewa
 - v. Zainab Omar Lewa
 - vi. Mwanaidi Omar Lewa
 - vii. Maimuna Omar Lewa
 - viii. Halimati Omar Lewa
 - ix. Hassan Said Karisa
- d. That this order supersedes the orders of the Principal Kadhi dated 2nd December 2015.
- e. That this appeal is hereby marked as settled with no orders as to costs.
26. The Principal Kadhi upon reading the consent dated 27th November 2015 and hearing Mr.Shimaka and Mr.Wachenje on 2nd December 2015 issued the following orders:-
- a. That the applicant Halimati Omar Khamisis enjoined in this petition as deceased's beneficiary;
 - b. That the estate property known as Plot No.1346V/XVI located at Majengo be sold at adopted value at least Kes.7,000,000/-;
 - c. That the proceeds of this sale shall be distributed pursuant to decree of the Kadhi;
 - d. That, the 3rd respondent one, Khamis Omar Lewa to give possession of the property to the prospective purchaser;
 - e. That the O.C.S Makupa to ensure compliance of this order.
27. On whether the orders issued on 22nd September, 2021 should be reviewed and or set aside, the Court of Appeal in the case of InterCountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 others [2019] eKLR stated: -
- “The principles that appertain to setting aside of a consent orders are well established in a line of cases including Brooke Bond Liebig vs Mallya (1975) EA 266 where Mustafa Ag. VP stated thus: -
- “The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”
- And in the case of Flora N. Wasike v Destimo Wamboko [1988] eKLR Hancox JA cited Setton on Judgments and orders (7th edition) vol 1 page 124, and reiterated that: -
- “Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy



of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.”

Essentially, the above cited authorities are clear that a consent Order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside.”

28. The Appellant /applicant moved this court vide a Memorandum of Appeal dated 22nd February 2016 and filed on 23rd February 2016. On 27th May 2021. The appellant’s advocate Mr. Muyala informed the court that they were in discussion to compromise the appeal and sought time to record a consent. As result an amended consent was filed on 23rd June 2021 and adopted as a court order on 20th September 2021. The intended interested party has sought to have the same set aside.

29. From the above citation a consent order can only be set aside on the grounds that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside. In this case the intended interested party has raised matters that were not disclosed to court at the time of the recording the consent. The property is in the name of the proposed interested party. An order prejudicing his proprietary interest could only be made in proceedings in which he was a party and had an opportunity of being heard. It is therefore my opinion that the matter could only be determined through a trial.

30. Accordingly, the consent orders of this honourable court made on 20th September 2021 and issued on 22nd September 2021 are hereby set aside.

31. On whether the interested party should be enjoined, the Supreme Court in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others* [2014] eKLR stated: -

“Consequently, 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.”

32. *Mativo J (as he then was) in the case of Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* [2017] eKLR stated:-

“The elements to be to be satisfied where a party seeks to be enjoined in proceedings as an interested party are that:-

- a. the intended interested party must have “an identifiable stake”
- b. or legal interest
- c. or duty in the proceedings

The test is not whether the joinder of the person proposed to be added as an interested party would be according to or against the wishes of the petitioner or whether the joinder would involve an investigation into a question not arising on the cause of action averred by the petitioner. It is whether the intended interested party has an identifiable stake, or a legal interest or duty in the proceedings.

A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights. In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested



party the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established. It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty in the proceedings directly identifiable by examining the questions involved in the suit. From my analysis above, the applicant has demonstrated a legal and identifiable interest and also a duty to participate in the proceedings. An interested party may also be added to the case by the court itself, where it appears to the court that it is desirable to do so to resolve a dispute or an issue. I hold the view that the presence of the applicant will assist the court to resolve the issues raised in this petition.

The Black's Law Dictionary defines an interested party as "A party who has a recognizable stake (and therefore standing) in the matter." It also defines a "Necessary Party" as "a party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings."

An interested party is someone who is identified as being directly affected by the case (in particular, the relief that may or may not be granted by the court depending on whether it finds for or against the claimant)."

33. This appeal had already been marked settled vide the orders of this honourable court of 20th September, 2021. However, since have already set aside the said orders it's only prudent the interested party be enjoined in this suit.
34. On whether the Registrar of Titles should be held in contempt of court order, the applicant's argument is that the Registrar was served with the order to issue the beneficiaries with a fresh title deed over the suit property. That the Registrar queried the authenticity of the court orders vide letter dated 14th July, 2022 which was confirmed by the Deputy Registrar. That the registrar has wilfully disobeyed and or disregarded the same bringing the dignity of the court into disrepute.
35. The court in the case of Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui [2021] eKLR stated:-

"The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. For a party to be cited for contempt, he must have violated and or disobeyed an order that was directed at him... Due to the gravity of consequences that ordinarily flow from contempt proceedings, it is proper that the order be served and the person cited for contempt should have had personal knowledge of that order... The emphasis as shown in the above cases is that there must be "willful and deliberate disobedience of court orders." There cannot be deliberate and willful disobedience, unless the contemnor had knowledge of the existence of that order. And because contempt is of a criminal nature, it is always important that breach of the order be proved to the required standard; first, that the contemnor was aware of the order having been served or having personal knowledge of it, and second; that he deliberately and willfully disobeyed it... But even as courts punish for contempt to safeguard the peaceful and development of society and the rule of law, it must be borne in mind that the power to punish for contempt is a discretionary one and should be used sparingly."



36. From the court's record it's evident that the Registrar of Titles was aware of the orders of the court but failed to act on them. However, I have already set aside the said orders and thus no need for the registrar to show cause.
37. The upshot of the above is that the application dated 28th October, 2022 and filed on 31st October, 2022 by the interested party is hereby allowed in terms of prayer 2, 3, and 4. Prayer 5, 6 and 7 to be dealt with during the hearing of the appeal. Further the application dated 27th September 2022 and filed on the same day is hereby dismissed. The appeal to be fixed for hearing on priority basis.

DATED SIGNED AND DELIVERED IN MOMBASA THIS 26TH DAY OF JULY 2023

GREGORY MUTAI

JUDGE

In the presence of:-

Mr. Abdalla for the Interested Party;

Mr. Lianza holding brief for Mr. Shimaka for the Respondent;

Mr. Arthur Ranyundo – Court Assistant.

