



Raymark Limited v Ouma & 10 others (Environment & Land Case E45 of 2021) [2023] KEELC 17655 (KLR) (23 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17655 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E45 OF 2021
FM NJOROGE, J
MAY 23, 2023**

BETWEEN

RAYMARK LIMITED PLAINTIFF

AND

RAYMOND OCHIENG OUMA 1ST DEFENDANT

EVANRAY COMMERCIAL AGENCIES LIMITED 2ND DEFENDANT

NAKURU DISTRICT LAND REGISTRAR 3RD DEFENDANT

JAMES MWANGI GATITU 4TH DEFENDANT

GEORGE KINUTHIA NJUGUNA 5TH DEFENDANT

ALEX WAINAINA HINGA 6TH DEFENDANT

DAVID NJENGA IYAI 7TH DEFENDANT

FREDRICK MWANGI MBUTHIA 8TH DEFENDANT

SIMON NJUGUNA MWANGI 9TH DEFENDANT

ALEX WAINAINA HINGA 10TH DEFENDANT

GEORGE KINUTHIA NJUGUNA 11TH DEFENDANT

RULING

1. The 4th and 5th defendants filed a Notice of Motion dated 18/4/2023 seeking orders that they be granted leave to issue a Third Party notice against Kenya Commercial Bank and that the Third Party be directed to open books of accounts and account statements and supply certified copies to the court herein for a bank account opened and maintained in the plaintiff's name whose number is given.



2. The application is premised on the grounds that the defendants claim to be the lawful bona fide purchasers of part of the suit land from the 1st and 2nd respondent who had purchased the suit property from the 3rd respondent; that the 1st and 2nd respondents have demonstrated that they are the agents of the 3rd respondent; that the suit land was acquired by the 1st and 2nd respondents and the purchase price was deposited in an account in the 3rd respondent's name together with money from the other purchasers of the larger parcel; that the 3rd respondent had however denied the applicants possession of their bought portions claiming that the suit land does not belong to the 1st and the 2nd defendants; that there are criminal proceedings against the 1st and 2nd defendants; that the court being a court of equity, which is bound to do equity, ought to grant the prayers now sought; that the applicants are appalled that this court denied an application filed by the 1st and 2nd respondents seeking orders of a similar nature with self-explanatory facts set out in the application; that the applicants have filed their respective defences and should not be locked out from prosecuting the instant application as was done to the 1st and 2nd respondent herein; that joinder of the Kenya Commercial Bank as a necessary party is necessary for the determination of the existence of the money paid into and held in the account of the 3rd respondent.
3. As admitted by the applicants in the present application a similar application had been filed by the 1st and 2nd defendant on 26/4/2022 which was dismissed with costs on 2/3/2023. The present applicants were joined in this suit in a ruling thereon dated 26/9/2022 following their application dated 31/5/2022. It is then no wonder that the plaintiff has by his grounds of opposition dated 26/4/2023 and replying affidavit dated 27/4/2023 objected to the present application for being res judicata and also on the ground that only an appeal can cure the applicant's dissatisfaction with the ruling delivered on 2/3/2023 on the same issue.
4. The plaintiff also alleges that the applicants are not bona fide purchasers, and that they seem to be making the application at the behest of the 1st and 2nd respondents; that they are not in occupation and can not locate any exact location of plots sold to them within the main parcel and that their case is solely dependent on the 1st and 2nd defendant's claim to title which is now impugned in the present suit. The plaintiff fails to see why the Kenya Commercial Bank should be considered a necessary party in the present suit. He states that the applicants should be concerned with their dealings with the 1st and 2nd defendant's account and not his, and that they have not pinpointed a single transaction to show that they ever deposited any money in the plaintiff's account. He further states that they appear to be applying for witness summons under the aegis of applying for joinder of a third party.
5. The plaintiff had hardly finished voicing its concerns as to the possibility that the applicants were applying for the orders sought at the behest of the 1st and 2nd defendants when the latter set of defendants joined the fray and filed what they labelled as a replying affidavit dated 26/4/2023, reiterating the contents of their now dismissed application that the account whose details are sought contains transactions relating to the sale of the land in dispute, and that instead of the plaintiff reconciling the said account it preferred to institute the present suit over opening the account to scrutiny. This time round, the 1st and 2nd defendants attached to their said replying affidavit 6 bank deposit receipts from Kenya Commercial Bank of stamped with various dates between April 2009 and June 2009, some 10 cheques made out on 11/7/2013 by the plaintiff to various individuals for varying sums and for unknown and unstated reasons, an unclear payment of Kshs 50,000/= to a Kenya Commercial Bank account by one Christopher K. Kinyua and a set of 3 receipts for various sums issued by the plaintiff to three different persons. It is subject to debate as to whether that replying affidavit is conclusive evidence that the instant application is brought at the behest of the 1st and 2nd defendants, but it clearly appears to be attempting to fill in the gaps in the application.



6. However, the principal question vibrating through one's mind as he reads at the instant application is not whether it is brought at the 1st and 2nd defendant's behest but whether it is *res judicata*. In the earlier application dated 26/4/2022, this court stated as follows:

“If the 2nd defendant in the present case was a purchaser for value, it needs documents to establish that it indeed purchased the plot in question and hence justify transfer and registration of title in its name. It is not usual for a purchaser to lack even a scrap of paper evidencing sale to it of real property worth millions. It is even more unusual that of 250 plus persons settled on the suit land, not even one of them has even a copy of a deposit receipt to show they put money into the mentioned account as alleged in paragraph 8 of the Supplementary Affidavit dated 17/2/2023. There are no copies of deposit receipts exhibited which could suggest that any cash or cheque was deposited into the account mentioned. It would be natural for a purchaser to keep such records and produce them when need arises.

There is no defence of the 1st and 2nd defendants on the record. It is even perplexing as to what underpinnings the application at hand is purported to be brought without such a crucial pleading having been filed.

In the ruling in this case dated 26/9/2022 I set out the principles to be considered for the joinder of an interested party. I considered the provisions of Order 1 Rule 10(2) and the following decisions: *Communications Commission of Kenya & 4 Others v Royal Media Services Ltd & 7 others* 2014 eKLR; *Skov Estate Ltd & 5 Others V Agricultural Development Corporation & Another* 2015 eKLR and *Cyrus Wamboka Nyaga Njue V Lucy Kanyua Nyamu* 2019 eKLR. Applying those principles to the present application, I find that the Kenya Commercial Bank is not an interested party in this case and I dismiss the application dated 26/4/2022 with costs.”

7. In the present application, I have noted that the applicants have attached only an agreement dated 11/12/2019 between the 2nd applicant and the 2nd respondent. Their application, if taken without consideration of the replying affidavit filed by the 1st and 2nd defendants, is threadbare, devoid of any contact or transaction they could ever claim to have had with the plaintiff's account that they seek information on, which inanity informed part of the reasoning of this court in dismissing the earlier application dated 26/4/2022 which had also sought the same orders. Also, by the time the application dated 26/4/2022 was prosecuted and ruling issued the present applicants were part of these proceedings, and had remained so for a period of roughly five and a half months, and they can not now feign ignorance of its existence at all.
8. Parties must be vigilant of what transpires in their case even when they are not the ones who are for the time being moving the court for they may find themselves falling afoul of the doctrine of *res judicata* upon raising the same issues that could have been raised while the court was being moved by other parties. In the present instant the applicants could have simply filed their affidavit in support of the motion dated 26/4/2022 as co-defendants to the then applicants and thus communicated to court of their desire to have inter alia Kenya Commercial Bank joined to the present proceedings which they did not, yet these are the same orders that they seek in the present motion. It is for that reason that I find that their non-participation in that earlier application does not entitle them to bring the present application as a fresh issue for determination by this court and in these proceedings.
9. The conclusion is that, I find that the issue of joinder of the proposed Third Party and the wholesale opening of books of account in respect of the plaintiff's account and the provision of copies thereof



are all *res judicata*. The application dated 18/4/2023 thus lacks merit and is dismissed with costs which are to be payable to the plaintiff only.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 23RD DAY OF MAY, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

