



Ayubu v I & M Bank Limited & another; Kipkorir (Interested Party) (Civil Suit 24 of 2018) [2022] KEHC 15228 (KLR) (21 June 2022) (Ruling)

Neutral citation: [2022] KEHC 15228 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL SUIT 24 OF 2018
SN MUTUKU, J
JUNE 21, 2022**

BETWEEN

DAVID ISOE AYUBU PLAINTIFF

AND

I & M BANK LIMITED 1ST DEFENDANT

**JOSEPH GIKONYO T/A GARAM INVESTMENTS AUCTIONEERS 2ND
DEFENDANT**

AND

KIPSOSION RERIMOI KIPKORIR INTERESTED PARTY

RULING

1. The Plaintiff obtained a financial facility from the 1st Defendant on September 26, 2011. The Plaintiff executed a charge over his property Ngong/Ngong/9895 (the suit property) as security. He fell in default and on 30th January the 1st Defendant sold the property to the Interested Party through the 2nd Defendant in a public auction.
2. The Plaintiff filed a plaint seeking a permanent injunction to restrain any dealings with the suit property, an order for cancellation of the sale, an order compelling the 1st Defendant to render a proper and accurate account in respect of the Plaintiff's loan account, general damages, costs of the suit and interest.
3. By a judgment delivered on December 2, 2020, the suit was dismissed with costs to the 1st Defendant.
4. The Plaintiff filed a Notice of Motion dated December 9, 2020 seeking stay of execution pending the hearing and determination of an intended appeal. The application was dismissed in a Ruling delivered on July 9, 2021.



Notice of Motion

5. The dismissal of the Plaintiff's Notice of Motion paved the way for the current application. It is a Notice of Motion (the application) dated November 16, 2021 by the 1st and 2nd Defendants (the applicants) brought under various provisions of the law as shown on the face of it. The application seeks the following orders:
 - i. That this application be certified urgent.
 - ii. Service of this application be dispensed with at first instance.
 - iii. That the Land Registrar at Kajiado North District Land Registry be forth with compelled by an order of this Honourable court to remove on the suit property known as Title Number Ngong/Ngong/9895 the existing restriction dated November 6, 2018.
 - iv. After removal aforesaid, the Land Registrar at Kajiado North District Land Registry be forthwith compelled to register the suit property known as Title Number Ngong/Ngong/9895 in the name of Kipsosion Rerimoi Kipkorir, the interested party herein.
 - v. That cost of this application be provided for.
6. The application is supported by grounds found on the face of it and in the supporting affidavit sworn by Boniface Abuya on November 16, 2021. The case for the applicants as can be discerned from the grounds in support of the application is that this court, on October 22, 2018, issued a restriction against any dealings on the suit property until the hearing and determination of this suit. This restriction was registered against the suit property. On December 2, 2020, the Plaintiffs suit was dismissed with costs to the 1st Defendant. Consequently, on July 22, 2021 a Decree was issued as per the judgment.
7. The Plaintiff was dissatisfied with the outcome of his case and preferred an appeal. He applied for stay of the judgment pending the appeal but the application was dismissed by this court in a ruling delivered on July 9, 2021. The Decree was booked on August 22, 2021 at Kajiado North District Land Registry but Registrar at the said registry refused to cancel the inhibition and register the Decree arguing that the Decree should be amended to include a further order directing him to remove the inhibition registered against the suit property.
8. It is upon the refusal of the Land Registrar to remove the restriction against the suit property that the Applicants are seeking orders to compel the Land Registrar to cancel the inhibition and register the Decree to allow for the transfer and registration of the suit property in the name of the Interested Party
9. The Plaintiff filed Grounds of Opposition dated March 10, 2022 in response to the application. His arguments are that this Honourable Court lacks jurisdiction to hear and determine the application for reasons that the court is functus officio having rendered its final judgement; that the 1st and 2nd Defendants have no legal capacity to lodge the current application since the suit property was fraudulently, unlawfully, irregularly and illegally sold to the Interested Party; that the Interested Party should file his own suit seeking a vesting order; that the Land Registrar Kajiado North is not a party to the suit and therefore should not be condemned unheard; that the application is made in bad faith and is meant to defeat the due process of the court and render the Appeal No. E331 of 2021 nugatory.
10. It is further argued that the Defendants have no proprietary interest in the suit property if indeed the same was sold in a public auction and hence lack legal capacity to present this application and that the appeal has high chances of success whereby the same is listed therein.



Submissions

11. This court directed that this instant application be canvassed by way of written submissions. The Applicant filed their submissions dated January 24, 2022. They submitted on two issues: firstly, whether this Honourable Court can compel the Registrar to remove/lift the inhibition registered against the suit property and secondly whether the Interested Party is entitled to be registered as the proprietor of the suit.
12. On the first issue, they submitted that section 68(1) of the [Land Registration Act](#) provides that the court may make an inhibition order inhibiting for a particular time, or until the occurrence of a particular event, or generally until further order, the registration of any dealing with any land. They also relied on section 70(b) of the said Act which provides that an inhibition shall not be cancelled except on proof of satisfaction to the Registrar, *inter alia*, of the occurrence of an event stated in the inhibition.
13. It is their argument that the event contemplated in this case was the hearing and determination of the suit which has come to pass with the order dismissing the suit through a judgment delivered on December 2, 2020 dismissing the suit. It is their argument that the inhibition order automatically lapsed on the dismissal of the suit vide the judgment and that the continued existence of the same does not serve any useful purpose as the suit has already been heard and determined.
14. On the second issue, they submitted that the judgment dated December 2, 2020 confirmed that they complied with the law and duly served the Plaintiff with the requisite notices before the 1st Defendant exercised its statutory power of sale. It is their argument that the property lawfully passed to the Interested Party who was declared the highest bidder at the public auction.
15. They further argued that the Registrar's refusal to effect registration in favour of the Interested Party is in breach of Section 4 of the [Fair Administrative Action Act](#) No. 4 of 2015; that the Applicant's right to transfer or deal with the suit property has been hindered by the Registrar's refusal to cancel the inhibition order and that this is prejudicial to the Defendants and Interested Party who have been denied the fruits of the judgment.
16. The Plaintiff filed his submissions dated April 22, 2022. He submitted that this Honourable court lacks jurisdiction to determine the application herein as the court became functus officio having rendered its final judgment.
17. They argued that the Defendants lack capacity to lodge the current application seeking to vest the suit property in the interested party since they have no proprietary interest in the suit property if indeed the same was sold in public auction.
18. They further argued that the Land Registrar Kajiado North should not be condemned unheard as the same contravenes the rules of natural justice. That further the Applicants have not demonstrated by way of evidence the general allegations made against the Registrar and argued that this application is bad in faith and aims to render their appeal nugatory by ensuring the Plaintiffs property is transferred.
19. They submitted that the Applicant's application is bad in law, is fatally defective and incurable and should be dismissed with costs.

Determination

20. I have read the Notice of Motion and the grounds in support of the same, the Grounds of Opposition, rival submissions and cited authorities. From the rival arguments, it comes out clearly that the main



issues for determination in this matter are whether this court has jurisdiction to hear this application by virtue of being *functus officio* and whether the application under consideration is merited.

21. In *Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf And On Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR, the Court of Appeal stated that: -

“*Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”

22. It was further stated that, “The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions...”

23. In *Silvanus Kizito v Edith Nkirote Mwiti* [2021] eKLR, while citing, with approval the case of *Leisure Lodge Ltd vs Japhet Asige and another* (2018) eKLR, the court was of the view that the court retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment is delivered provided such proceedings do not amount to re-trying the cause but geared towards bringing the litigation to an end. That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding

24. While citing *Mombasa Bricks & Tiles Ltd & 5 others vs Arvind Shah & 7 others* [2018] eKLR, the court in the Silvanus Kizito case, above, said in respect to the doctrine of *functus officio* that:

“I understand the doctrine, like its sister, the res-judicata rule, to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level’. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.

It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes.

As was held by the court of Appeal in *Telkom Kenya Ltd vs John Ochanda*, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.

Put in the context of the application before me, I do not consider the Decree/holder to ask the court to rehear and make a decision about the disputes in the file on the merits.....”

25. In this matter it is not in dispute that judgment was entered on December 2, 2020, dismissing the entire suit with costs to the 1st Defendant and that a Decree was issued on July 22, 2021 as per the judgment delivered. Further that an application for stay pending appeal was filed but was dismissed via a ruling delivered on July 9, 2021.

26. The above cited authorities are clear on the issue of *functus officio* and I am guided by the decisions. The question to ask in this matter is whether the orders being sought by the Applicants are consequential, complementary, supplementary and necessary. The court while dealing with this issue in *Telkom Kenya Ltd vs John Ochanda* held that, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.



27. The judgment delivered on December 2, 2020 is to the effect that the Defendants complied with the law and duly served the Plaintiff with all the requisite notices before the 1st Defendant exercised its statutory power of sale. With that pronouncement, the property lawfully passed to the Interested Party, who was declared the highest bidder at the public auction, at the fall of the hammer. The Interested Party duly paid the deposit and balance of the purchase price in accordance with the memorandum of sale.
28. It is the Defendants/Applicants case that having complied with all the conditions, the Interested Party is entitled to be the registered proprietor of the suit property. I find the order sought to compel the Land Registrar to remove the restriction from the suit property a consequential, complementary, supplementary and necessary order given that the Land Registrar has failed to do so on the strength of the judgment which in my view was the contemplated event in line with Section 68(1) of the [Land Registration Act](#). This court must come to the aid of the Applicants for ends of justice to be met.
29. I have considered the issue raised that the Land Registrar has been condemned unheard. I appreciate the fact that it is the Land Registrar who has failed to remove the restriction, not because he has proprietary rights over the suit property but because in his view, a court order was required for him to do so. There is no prejudice suffered by the Land Registrar in making this order in my considered view.
30. On the issue whether the Application has merit, I have considered the provisions of sections 68 (1) and 70 of the [Land Registration Act](#). Under Section 68 (1), “The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge”.
31. Under Section 70, “The registration of an inhibition shall not be cancelled except in the following cases —
- (a) on the expiration of the time stated in the inhibition;
 - (b) on proof to the satisfaction of the Registrar of the occurrence of an event stated in the inhibition;
 - (c) on the land, lease or charge being sold by a charge, unless such sale is itself inhibited; or
 - (d) by a consequent order of the court.”
32. It is clear to me that the order to compel the removal of the inhibition is required given that the Land Registrar has failed to act as the law provides in the above sections. However, since both section 68 and 70 contemplate an order of the court consequently issued, the Applicants are in order to seek the intervention of this court.
33. The law under section 70 of the [Land Registration Act](#) is clear that an inhibition can be cancelled on proof of the satisfaction of the Registrar of the occurrence of an event stated in the inhibition. The event stated in the inhibition was, “the hearing and determination of this suit.” From the proceedings herein the judgment was delivered and the court dismissed the case in favour of the Defendants and the Interested Party herein and a decree was issued on July 22, 2021. Further, on August 22, 2021, the Decree was booked at Kajiado North District Land Registry.
34. In [Dorcas Muthoni & 2 Others...vs... Michael Ireri Ngari](#) (2016) eKLR, the court held that: -
- “An order of inhibition issued under Section 68 of the [Land Registration Act](#) is similar to an order of prohibitory injunction which bars the registered owner of property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed of. The Court issuing such an order must



be satisfied that the applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial.”

35. From this authority it is clear that the orders for inhibition are given at interlocutory stage until further orders or until the suit is disposed of. In the instant case the suit was finalized and judgment was entered dismissing the suit. The application under consideration is merited.

36. The Plaintiff raised an issue of lack of legal capacity by the 1st and 2nd Defendant to lodge this instant application, arguing that they have no proprietary interest in the suit property if indeed the same was sold in public auction. The 1st Defendant argued that they are unable to undertake any transactions on the suit property including transferring the suit property to the interested party in exercise of the statutory power of sale, as a result of the inhibition registered against the property.

37. I have considered this issue. In *Priscilla Jesang Koech ...vs... Rebecca Koech & 3 others* [2018] eKLR, the Court held that:

“Locus standi is the cornerstone of any case. Before a party files a case, he or she must be certain that they are clothed with the requisite capacity to sue and be sued. In the case of *BV Law society of Kenya vs Commissioner of Lands & Others*, Nakuru High Court, Civil Case No. 464 of 2000. It was held that:

‘If a party has no *locus standi*, then the said party cannot bring a suit to court. The issue of *locus standi* goes to the root of any suit and the said issue of *locus standi* is a point of law which is capable of disposing of a matter.’”

38. In this matter and from the record herein the 1st Defendant are the transferors herein. In completing their statutory power of sale the property has to be transferred to the Interested Party. The same however cannot be effected reasons that there exists an inhibition placed on the suit property. Under section 3 of the *Land Registration Act*,

- (1) 1) A proprietor may transfer land, a lease or a charge to any person with or without consideration, by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve.
- (2) A transfer shall be completed by—
 - (a) filing the instrument; and
 - (b) Registration of the transferee as proprietor of the land, lease or ` charge

39. It is my considered view that the 1st Defendant, in exercising its role as transferors, has a locus standi to be heard in this matter as this court ordered that the interested party is entitled to be registered as proprietor of the suit property having purchased the same through public auction.

40. My conclusion of this matter is that the Applicants in the Notice of Motion dated November 16, 2021 have successfully executed this application. Consequently, I grant prayers 3, 4 and 5 of the Notice of Motion dated November 16, 2021. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 21ST JUNE 2022.

S. N. MUTUKU

JUDGE

