



Koin v Mathenge Gitonga & Co Advocates; Co-Operative Bank of Kenya Limited & another (Interested Parties) (Environment & Land Case E074 of 2022) [2023] KEELC 18367 (KLR) (22 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18367 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E074 OF 2022
EK WABWOTO, J
JUNE 22, 2023**

BETWEEN

ESTHER AITA KOIN PLAINTIFF

AND

MATHENGE GITONGA & CO ADVOCATES DEFENDANT

AND

CO-OPERATIVE BANK OF KENYA LIMITED INTERESTED PARTY

CHARLES MWANGI KING'ORI INTERESTED PARTY

RULING

1. On March 9, 2023 this court granted orders restraining the 2nd interested party from advertising, offering for sale, leasing, renting, mortgaging, changing, transferring or assigning and/or dealing with the suit property pending the hearing and determination of the suit.
2. The 2nd interested party feeling aggrieved by the said orders has now moved this court vide an application dated March 21, 2023. The said application seeks the following orders.
 1. Spent.
 2. There be a stay of execution of the orders given on March 9, 2023 pending the hearing and determination of this application.
 3. The orders issued on March 9, 2023 be reviewed, set aside or amended by removing the restrain on leasing, renting or dealing with the suit property.
 4. Costs of this application be provided for.



3. The application was premised on the grounds that, the applicant was in occupation of the suit property as the lawful and registered owner of the same, the applicant was condemned unheard as he was not served with the application dated July 19, 2022 which led to the issuance of the orders that he seeks to have them reviewed, the applicant was only joined as a party on March 9, 2023 and hence no substantive orders could be issued against him when he was not a party to the suit, the orders purported to evict the applicant from the property when there was no such prayer in the subject application and that the court has purported to issue final orders before hearing the merits of the case. The court was also informed that the said application has been brought without undue delay.
4. During the hearing of the application, Counsel for the 2nd interested party informed the court that no response had been filed and the court should consider the application as unopposed and proceed to grant the prayers sought. However, on record there was a replying affidavit sworn by Esther Aita Koin the plaintiff herein on June 6, 2023. There were also grounds of opposition filed by the Plaintiff dated June 6, 2023.
5. I have considered the application together with the replying affidavit and grounds of opposition filed by the Plaintiff. The main issue for determination is whether the applicant has met the threshold for review.
6. The 2nd interested party argues that he purchased the suit property L.R. 209/12221/57 House No. 100 Five Star Phase 1 South C at a Public Auction conducted by M/s Leakey's Auctioneers on behalf of Co-operative Bank on November 25, 2022 and he took possession of the said house and has been there ever since. That he was joined to this suit on March 9, 2023 and that the orders issued by this court did not direct that he be evicted. He also averred that he has no issue with the preservation of the suit property pending hearing of the suit. He however stated that he has a problem with orders restraining him from leasing and renting or dealing with the property since there is no clarification as what amounts to dealing with the property.
7. The plaintiff on the other hand opposed the application and sought for the same to be struck out for the reasons that the 2nd interested party has filed a Notice of Appeal which notice divests the jurisdiction of the court. The said Notice of Appeal has never been withdrawn. It was also stated that what was sought for review is a substantial order of the court not made in error which is manifesting defective and the available remedy was just to pursue an appeal.
8. The plaintiff also argued that the 2nd interested party has never been the beneficial or ostensible owner of the suit premises. The plaintiff deposed that she was evicted despite clear orders issued by this court. It was also averred that the court delivered its orders on March 9, 2023 simply restraining the 2nd interested party from interfering with the suit premises pending determination of the suit which according to her interpretation restores the status quo prior to the malicious evictions at the instance of the 2nd interested party. The plaintiff also averred that through her advocates, she wrote a letter to the OCS Akila Police Station seeking assistance to be restituted to the house pending determination of the suit because the 2nd Interested Party closed it up and left.
9. It was also argued that the 2nd interested party had filed a Notice of Appeal and hence therefore cannot pursue review at the same time.
10. The plaintiff contends that the 2nd interested party's application is an abuse of the court process in that the 2nd interested party is pursuing a review when he has already filed a Notice of Appeal. I have considered this argument, however the Court of Appeal in the case of *Multichoice (Kenya) Limited v Wananchi Group (Kenya) Limited & 2 others* (2020) eKLR settled the issue when it held that filing



of a Notice of Appeal perse is not a bar for one to pursue a review and this court is bound by the said decision. As such I am unable to uphold the Plaintiff's position to the contrary.

11. On the second issue, whether this court should review its orders issued on March 9, 2023. The 2nd Interested Party appears to be complaining that the court condemned him unheard when it issued the orders of March 9, 2023 and further that the said orders were ambiguous as it does not clarify what amounts to dealing with the property.

12. In *Salama Mahmoud Saad v Kikas Investment Limited & anor* [2014] eKLR review of court orders is discussed as follows;

“...Before a review is allowed in the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”

13. I have also considered the ground of sufficient reason. In *Michael Mungai v Ford Kenya Elections & Nominations Board & others & 2 others* [2013] eKLR, the five judge bench discussed the grounds of “sufficient reason” as follows:

“A decree or order may also be reviewed for any sufficient reason. In our opinion, sufficient reason can only be deduced from the facts and circumstances of a particular case before the court. For example, in the case of *Ngororo v Ndutha & another*[1994] KLR 402 the Court of Appeal held that any person, though not party to a suit, whose direct interest is affected by a judgement is entitled to apply for review. Such a reason can be ‘sufficient reason’ for the purposes of Order 45 Rule 1(1) for reviewing a decree or an order. An applicant must indeed place convincing evidence before a court for the court to be satisfied that there is sufficient reason to review its decision.

14. Paragraph 9 of the ruling delivered on March 9, 2023 clearly confirms that the 2nd interested party was served and filed his written submissions in respect to the applications dated July 19, 2022, August 1, 2022 and October 14, 2022. His written submissions were dated January 12, 2023. Hence therefore the 2nd Interested Party cannot claim to have been condemned unheard before issuance of the said orders. The court clearly considered the application and granted the orders sought after considering the responses and submissions that were filed by all the parties therein.

15. In view of the foregoing, the court hereby finds that the Application dated March 21, 2023 has not met the threshold to warrant the review of the court orders and the same is hereby dismissed with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF JUNE 2023.

E.K. WABWOTO

JUDGE



In the presence of

Mr. Sichangi for Plaintiff.**

N/A for the Defendant.

Mr. Owour Chacha for 1st Interested Party.

Mr. Kimani for 2nd Interested party.

Court Assistant – Caroline Nafuna.

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