



REPUBLIC OF KENYA



**KENYA LAW**  
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**Murithi & another v Sidian Bank Limited & 4 others (Environment & Land  
Case 40 of 2020) [2023] KEELC 17917 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17917 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 40 OF 2020**

**CK YANO, J  
JUNE 14, 2023**

**BETWEEN**

**SAMUEL KIOME RIMBERE MURITHI ..... 1<sup>ST</sup> APPLICANT**

**GODFREY MUGAMBI KIMATHI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SIDIAN BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**STELLA NYAKIO NGUGI ..... 2<sup>ND</sup> RESPONDENT**

**ANDREW LYALL ..... 3<sup>RD</sup> RESPONDENT**

**THE LAND REGISTRAR MERU CENTRAL ..... 4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the 3<sup>rd</sup> and 4<sup>th</sup> respondent's third party notice dated November 9, 2022 and the 5<sup>th</sup> and 6<sup>th</sup> respondents' notice of motion dated December 1, 2022.
2. By the 3<sup>rd</sup> party notice dated November 9, 2022 issued to one Wilberforce Ndonga Njenga T/a There Traders, the 3<sup>rd</sup> and 4<sup>th</sup> respondents claim against the proposed 3<sup>rd</sup> party full indemnity in respect of all the claims made by the applicant against the 3<sup>rd</sup> and 4<sup>th</sup> respondents, and all damages, loss and expenses and cost of the suit.
3. The grounds this claim is based are-;
  - i. That the proposed 3<sup>rd</sup> party fraudulently caused the illegal and purported to charge the property parcel Number Nyaki/Kithoka/1914 without the consent of the late Michael Rukunga Mowesley with the sole aim of depriving him and his estate the said parcel of land,



- ii. That as a result of (i) above, the proposed third party misled the applicant to issue him with Kenya shillings Ten Million ( Kshs 10,000,000/=) and that the said transaction was tainted with negligence and impropriety, and (iii) that the said Kshs 10,000,000/= was deposited to the proposed third party's account but he failed/refused/ignored to pay back the applicant with the sole intention of having the charged property of the late Michael Rukunga Mowesley sold off by the Bank, and that due to his action of the commission and or omission, the applicant now wants to dispose of the property to recover their monies.
4. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents have listed particulars of fraud illegality and impropriety against the proposed third party as follows-;
  - i. That you fraudulently caused the suit property to be charged in favour of the applicants while you knew that the late Michael Rukunga Mowesley was gravely unwell and without the consent of the 1<sup>st</sup> respondent to transfer the said property.
  - ii. That you facilitated the fraudulent signing of a spousal consent by one Stella Wanjiru Mureithi who purported to be the deceased wife while the bonafide and legitimate wife is the 1<sup>st</sup> respondent.
  - iii. That you fraudulently obtained Kenya shillings ten Million ( Kshs 10,000,000/) from the applicant while purporting to use the title of the suit properties belonging to the deceased.
5. The applicant opposed the 3<sup>rd</sup> and 4<sup>th</sup> respondents 3<sup>rd</sup> party notice through a replying affidavit sworn by Jackline Ndungu, the Bank's Legal Officer on February 28, 2023. Relying on legal advice, the deponent believes that the said 3<sup>rd</sup> party notice is misconceived, totally lacking in merits and filled with the sole objective of delaying the determination of the bank's originating summons after directions have been issued by the court on filing of written submissions. That the 3<sup>rd</sup> party notice is a strange document in as far as these originating summons are concerned and in particular in proceeding brought under Order 37 of the *Civil Procedure Rules, 2010*. That the 3<sup>rd</sup> party notice is without doubt, a nefarious abuse of the process of the court and should be struck out.
6. It is the applicant's contention that the 3<sup>rd</sup> party notice herein will not aid the court in determining the issues before this court. That the grounds of fraud, illegality and impropriety advanced in the 3<sup>rd</sup> party notice by the 3<sup>rd</sup> and 4<sup>th</sup> respondents against Wilberforce Njenga Donga t/a There Traders have got nothing to do with the issues before the court for determination in this matter. The applicant's view is that if the 3<sup>rd</sup> and 4<sup>th</sup> respondents, who were not privy to the contractual relationship between the borrowers and the Bank, have any claim against Wilberforce Njenga Donga, t/a There Traders, they should institute separate legal proceedings and seek appropriate reliefs against him.
7. The 5<sup>th</sup> and 6<sup>th</sup> Respondents notice of motion dated December 1, 2022 is brought pursuant to Section 1A, 1B & 3A of the *Civil Procedure Act*, Order 19 Rule 2 and Order 37 Rule 19 of the Civil Procedure Rules and seeks for orders-;
  1. That this application be certified as urgent.
  2. That this Honourable court be pleased to order that the proceedings herein be deemed to have been begun by filing a plaint.
  3. That if prayer 1 is granted, this Honourable court be pleased to enjoin as a 7<sup>th</sup> defendant, the chargee in the controversial charge Wilberforce Ndonga Njenga T/a There Mombasa Traders.
  4. That the said Wilberforce Ndonga Njenga T/a There Mombasa Traders be served with summons to appear and pleadings in this matter.



5. That the applicants herein be at liberty to file a defence and counterclaim.
  6. That the applicants be allowed to call their witness and the suit proceed via vivo voce evidence.
  7. That the applicant/respondent produced all the relevant documentation including Bank Account statements of the said Wilberforce Ndonga Njenga.
  8. That the 6<sup>th</sup> Respondent/applicant be allowed to cross examine the applicant/respondent's witnesses.
  9. That the 6<sup>th</sup> respondent/applicant be allowed to call its witnesses to adduce evidence before this Honourable court.
  10. That costs of this application be provided for.
8. The 5<sup>th</sup> and 6<sup>th</sup> respondents' application is supported by the affidavit sworn by Wachira Nguyo a state counsel attached to the Attorney General's office and further predicated upon the grounds thereon. The deponent has given a background of how the applicant/respondent moved this court and states that on October 25, 2022 when the matter was coming up for inter parties hearing, very serious issues touching on the controversial charge dated July 24, 2013 arose. Firstly, that the charge presented for registration was defective and thus not capable of being registered, that the certificates for verification were blank and had not been properly filled out and details missing contrary to Section 56 of the [Land Registration Act](#), that spousal consent had errors and not executed in accordance with the law, among others. Counsel for the 5<sup>th</sup> and 6<sup>th</sup> respondents urged the court to grant the orders sought in the interest of justice.
  9. The applicant opposed the 5<sup>th</sup> and 6<sup>th</sup> respondents' application through a replying affidavit by Jackline Ndungu, a legal officer with the Bank, sworn on September 28, 2023. Relying on advise, the deponent believes that the application is misconceived, totally lacking in merits and filed with the sole objective of delaying the Bank's originating summons after directions have been issued by the court on filing of written submissions. That the application is a nefarious abuse of the process of the court and should be dismissed with costs. That the 5<sup>th</sup> and 6<sup>th</sup> respondents are even yet to file their responses despite being granted opportunities by the court on several occasions. It is the applicant's contention that the question of whether or not the bank's charge was valid and registrable is not an issue for determination before this court in these proceedings and that the presence of the intended 3<sup>rd</sup> party will not aid the court in determining whether or not the land registrar, Meru acted within the law when he purported to cancel the entries noting the bank's duly registered charge in the register for the suit property without prior notice to the Bank or a duly registered discharge of charge. The applicant further contends that the 5<sup>th</sup> and 6<sup>th</sup> respondents will not suffer any prejudice if the court proceeds to determine the issues in question in this matter and urged the court to dismiss the application with costs.
  10. The 3<sup>rd</sup> party notice and the application dated December 1, 2022 were canvassed together by way of written submissions. The 3<sup>rd</sup> and 4<sup>th</sup> respondents did not file any submissions but relied on the submissions filed by the 5<sup>th</sup> and 6<sup>th</sup> respondents on February 2, 2023. The 5<sup>th</sup> and 6<sup>th</sup> respondents cited the provisions of Order 1 Rule 15(1) of the Civil Procedure Rules and relied on the case of [Hass Petroleum \(K\) Limited Vs Iota Engineering and Construction Limited \(formerly Iota Excavations and Rentals Ltd\)](#), [White Lotus Projects Limited \(Intended 3<sup>rd</sup> party\) \[2021\] eKLR](#) where the court considered the pleadings and found there was triable issues between the defendant and third party as to liability of the third party. That there is also establishment of the nexus between the plaintiff, the defendant and 3<sup>rd</sup> party, the manner in which the dispute between the defendant and the 3<sup>rd</sup> party is to be tried that necessitates the court to hear from all three parties in full and final determination of the dispute.



11. The 5<sup>th</sup> and 6<sup>th</sup> respondent's counsel also relied on the case of *Oceanfreight (EA) Ltd Vs Technomatic Ltd & another and Gachago v Attorney General [1981] KLR 232* in which the Court of Appeal stated that third party proceedings are not dependent on there being a contract binding the intended third party, nor on there not being a different case pending before the court or before a court of equal jurisdiction. It is the 5<sup>th</sup> and 6<sup>th</sup> respondents' submissions that there is a connection between the parties herein and the intended third party.
12. On whether the court can allow the proceedings herein by way of originating summons to proceed as though the same were originated by a plaintiff, counsel for the 5<sup>th</sup> and 6<sup>th</sup> respondents cited Section 19 of the *Civil Procedure Act* and Order 13 Rule 1 and relied on the case of Cyril J. *Haroo & another V Ubumi Services Limited & 3 others [2014] eKLR* and *Brollo Kenya Limited v David Oyatta T/a Oyatta & Associates [2015] eKLR* and urged the court to proffer a similar holding.
13. In their submissions filed on March 8, 2023, the advocates for the applicant gave a brief background of the originating summons herein and submitted that there is only one issue for determination in this matter, which is whether or not the purported cancellation of the Bank's Charge by the Meru Land Registrar was lawfully done and if not lawfully done, what consequences should follow from the determination of the court on this, particularly in respect of the entries made subsequent to the purported cancellation of the Bank's Charge. That consequently, the matters which the 5<sup>th</sup> and 6<sup>th</sup> respondents are attempting to front to the court by the application are not and cannot be in issue in this matter. It is their submissions that the 5<sup>th</sup> and 6<sup>th</sup> respondents' application is an abuse of the court process and is aimed at delaying the finalization of the proceedings in this matter. That it has not been demonstrated how the reliefs sought are relevant to these proceedings and how the issuance of those reliefs will assist the court in a fair and just disposal of the issues before the court.
14. It was further submitted that the filing of the application by the 5<sup>th</sup> and 6<sup>th</sup> respondents at the last minute when directions on disposal of the originating summons have been issued by the court is an affront by the 5<sup>th</sup> and 6<sup>th</sup> respondents to circumvent the wheel of justice and delay the disposal of the suit and referred to the court records. It is the applicant's submissions that the court should not be used as a conduit to delay justice to a party and argued that the application is an abuse of the process of court and should be dismissed with costs to the bank.
15. On the 3<sup>rd</sup> and 4<sup>th</sup> respondent's third party notice, the applicant's counsel submitted that the same will not aid the court in determining the issues before this court. The applicant's counsel relied on the case of *Interactive Advertising Limited & another v Equity Bank Limited and 2 others [2016] eKLR* which quoted with approval *Yafesi Walusimbu v Attorney General of Uganda [1959] EA 223* and submitted that the threshold relating to third party notices has not been met by the 3<sup>rd</sup> and 4<sup>th</sup> respondents herein as they have not demonstrated that the issues for determination in this suit are substantially the same issues arising between them and the intended 3<sup>rd</sup> party. Additionally, that the 3<sup>rd</sup> party notice as filed offends the provisions of Order 1 Rule 15 (1) (c) of the Civil Procedure Rules which mandatorily requires that leave be sought from the court by way of summons in chambers supported by an affidavit before issuance of a third party notice. It is therefore the applicant's submissions that the 3<sup>rd</sup> party notice is not merited and should be struck out with costs to the bank.

### **Analysis And Determination**

16. I have considered the 3<sup>rd</sup> party notice by the 3<sup>rd</sup> and 4<sup>th</sup> respondents and the application by the 5<sup>th</sup> and 6<sup>th</sup> respondents, the responses and the submissions filed. The issues for determination are whether this court can exercise its discretion in favour of the 3<sup>rd</sup> and 4<sup>th</sup> respondents and issue third party notice



to the intended third party and whether the orders sought by the 5<sup>th</sup> and 6<sup>th</sup> respondents should be granted or not.

17. The legal foundation on third party Notice is to be found under order 1 Rule 15 of the Civil Procedure Rules which provides as follows-
  1. Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)-
    - a. That he is entitled to contribution or indemnity, or
    - b. That he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff, or
    - c. That any question or issue relating to or connected with the said subject –matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and third party or between any or either of them, he shall apply to the court within fourteen days after the close of pleadings for leave of the court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex-parte supported by affidavit.
18. It is clear from the provisions of Order 1 Rule 15 (1) of the Civil Procedure Rules that an application for leave to issue third party notice must be made ex-parte. In the present case, there is no application that has been made by the 3<sup>rd</sup> and 4<sup>th</sup> respondents. Instead, the 3<sup>rd</sup> and 4<sup>th</sup> respondents proceeded to file a third party notice as though leave has already been issued by the court. Order 1 Rule 15 (1) (c) of the Civil Procedure Rules mandatorily requires that leave be sought from the court by way of chamber summon supported by an affidavit before issuance of a third party notice. It is therefore my finding that the third party notice dated November 9, 2022 is incompetent and is hereby struck out with costs to the applicant/respondent.
19. On the application dated December 1, 2022 by the 5<sup>th</sup> and 6<sup>th</sup> respondents, this court has looked at the central issues that is before the court. The only issue for determination in my view, is whether or not the Land Registrar, Meru acted within the law in cancelling the Bank's charge and purported to transfer instruments in favour of the 3<sup>rd</sup> and 4<sup>th</sup> respondents, all without prior notice to the Bank in view of the existing registered interest as chargee over the suit property and when the Bank was yet to discharge the property. In my considered view, the issues fronted by the 5<sup>th</sup> and 6<sup>th</sup> respondents' application herein cannot be in issue in this matter. I note that this matter has been pending before court since 2019, and the court has issued directions on how the originating summons should be canvassed. Indeed the applicant has already filed its submissions on December 5, 2022. In the premises, I am in agreement with the applicant's submissions that the 5<sup>th</sup> and 6<sup>th</sup> respondents' application is aimed at delaying the finalization of this matter and is an abuse of the court process. Consequently, I find that the notice of motion dated December 1, 2022 is devoid of merit and the same is dismissed with costs.
20. In the result, the third party notice dated November 9, 2022 is struck out and the notice of motion application dated December 1, 2022 is dismissed with costs to the applicant.
21. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF JUNE 2023**

**In the presence of**

**Court assistant V. Kiragu**



**Ms Gitari for applicant**

**Ms. Gikundi holding brief for Ms. Kiome for 3rd & 4th respondent**

**Mrs. Otieno for 1st & 2nd respondents**

**No appearance for A.G for 5th and 6th Respondents.**

**C.K YANO**

**JUDGE**

