



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISUMU

ELC CASE NO.E007 OF 2021

MIDLAND EMPORIUM LIMITED.....PLAINTIFF

-VERSUS-

COUNTY GOVERNMENT OF KISUMU.....1ST DEFENDANT/ RESPONDENT

CITY MANAGER OF KISUMU.....2ND DEFENDANT/ RESPONDENT

-AND-

PRIME BANK LIMITED.....INTENDED INTERESTED PARTY/ APPLICANT

RULING

Prime Bank Limited the Intended Interested Party/Applicant herein filed a Notice of Motion Application under Order 1 Rule 10 (2) and Order 51(1), (3), (4) of the Civil Procedure Rules, 2010 and all other enabling provisions of the law seeking for orders that:

1. That this Application be certified as urgent and be heard ex-parte in the first instance in respect of prayer 2 below.
2. That this Honourable Court be pleased to order that Prime Bank Limited be joined as an Interested Party in this suit.
3. That the costs of this Application be provided for.

The Application was based on grounds that on 18th March 2017, the Intended Interested Party after requisite negotiations issued a letter of offer to the Plaintiff herein for the advancement of a financial facility of Kshs.300,000,000/=. That subsequent to the Plaintiff's acceptance of the letter of offer, the Intended Interested party proceeded to register a Caution on property number L.R. NO. KISUMU/MUNICIPALITY/BLOCK 13/76.

The Intended Interested Party is bound to suffer irreparable loss and injustice should the Honourable Court proceed to determine the matter without it being joined as a party to the proceedings.

The Application was supported by the Affidavit of George Mathui who stated that the Intended Interested Party presented an offer letter to the Plaintiff in a bid to secure a loan facility of Kshs. 300,000,000/= and the Plaintiff secured a loan facility of the said amount exclusive of interest, costs, charges and expenses from the Intended Interested Party and the security comprised the suit property.

That after the Plaintiff had acquired the loan facility, the Intended Interested Party proceeded to lodge a caution over the said property in order to secure its interests and therefore the Intended Interested Party is a necessary party to the proceedings and has a right of equal protection of the law.

Irene Muthama filed a Replying Affidavit on 21st September 2021 where she stated that despite the fact that the Intended Interested Party issued a letter of offer to the Plaintiff after requisite negotiations, they do not have a recognizable stake and thus lack a standing in the matter. That an Interested Party must have an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation, which is not the case in this matter.

It is the Plaintiff's case that the Intended Interested Party has not sufficiently demonstrated that their interest will not be articulated and that there is no commercial interest as the charge is not registered and can only crystallize after the Plaintiff proves ownership over the suit property. That the bona fide commercial interest in the suit property can only be founded on a charge over the suit property.

It is stated that the Application lacks merit and the Intended Interested Party's participation will delay fair trial and raise the costs of litigation to the prejudice of other parties and prayed that the Intended Interested Party should not be enjoined in the suit property.

The Intended Interested Party filed a Supplementary Affidavit pursuant to leave of court granted on 22nd September 2021 where George Mathui stated that Irene Muthama failed to state whether she was duly authorized by the Plaintiff company to swear the Replying Affidavit. That since corporations are not natural persons it is expected that the deponent would annex a board resolution or written authority authorizing Irene Muthama to swear the Replying Affidavit.

It is stated that the bank holds an informal charge pursuant to a letter of offer dated 23rd January 2016 and 18th May 2017 which was executed by the Plaintiff company and the original title of the suit property was deposited with the bank as security in the account of Midland Hauliers Limited (Under Administration). That Midland Hauliers Limited was placed under administration on 24th April 2019 after it failed to satisfy a demand by the bank dated 9th April 2019.

The Bank had issued Statutory Notices in respect of other properties charged in the account of Midland Hauliers Limited. Some of the Properties where the bank had issued Statutory Notices include the properties in the name of the Plaintiff Company and despite the notices, the Plaintiff Company did not make any steps towards redeeming the properties charged by the bank. The bank issued the Plaintiff with Ninety days Statutory Notice and Forty Days Notice of Intention to sell the suit property.

Intended Interested Party's /Applicant's Submissions

The Intended Interested Party filed Submissions on 28th October 2021 and raised the following issues for determination:

1. Whether the joinder will assist the court in the effective and effectual determination of all questions arising in the suit.
2. Whether the party sought to be joined has any identifiable stake, legal interest or duty in the proceedings.
3. Whether the joinder is likely to prejudice the said party.

It was the Intended Interested Party relied in the case of **Cyprian Andama vs the DPP &AG (2018) eKLR** which restated the principles in the case of **Trusted Society of Human Rights Alliance vs Mumo Matemu (2014) eKLR** where the Supreme court held as follows:

“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.”

It was the Intended Interested Party's Submissions that it holds an informal charge over the suit property and that neither the Plaintiff nor the Respondent has shown how the intended joinder of the Interested Party would prejudice their case.

The Plaintiff failed to serve its submissions pursuant to the directions issued by the court on 22nd September 2021.

ANALYSIS AND DETERMINATION

The Plaintiff herein in its Complaint has alleged that it is registered as the Lessee of property number KISUMU MUNICIPALITY/BLOCK 13/76 from the Government since the year 2003. The Plaintiff avers that it has been paying rates of the suit property to the County Government of Kisumu, the Plaintiff herein filed an Application for Injunction and on 9th February 2021, this Court issued orders for injunctions with respect to the Plaintiff's Application restraining the 1st and the 2nd Defendant from entering or interfering with the suit property and that the County Commander of Police, Kisumu as well as the County Commissioner, Kisumu should protect the suit property from encroachment, invasion by any person and evict any squatters who may attempt to enter the premises pending the hearing and determination of this suit.

On 15th March 2021, the Intended Interested Party filed this instant Application seeking to be enjoined as an Interested Party to this suit. It is the Intended Interested Party's case that the Plaintiff secured a loan facility of Kshs. 300,000,000/= from it and the title to the suit property was deposited to the bank as security. The Plaintiff in its Replying Affidavit has stated that there is no commercial interest as the charge was not registered and can only crystallize after the Plaintiff proves ownership over the suit property.

On the other hand, the Intended Interested Party has stated in its Supplementary Affidavit that the bank holds an informal charge which was executed by among others the Plaintiff company and the Original Title to the suit property was deposited with the bank as security in the account of Midland Hauliers Limited which is under Administration.

Order 1 Rule 10 (2) of the Civil Procedure Rules provides as follows: -

“ The court may at any stage of the proceedings either upon or without the application for either party and on such terms as may appear to the court to be just order that the name of any party whose presence before the court may be necessary in order to enable the court to effectually and completely to adjudicate upon and settle all questions involved in the suit.

In **Francis Kariuki Muruatetu & Another v Republic & 5 others Petition 15** as consolidated with **16 of 2013 [2016] eKLR** the court set out elements applicable where a party seeks to be enjoined in proceedings as an interested party which include the following:

One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

(i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

(ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

(iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.

From the Muruatetu case the Intended Interested Party has clearly demonstrated that it has identified the interest at stake. It is clear from the Statutory Notices issued by the Intended Interested Party to the Plaintiff that the Plaintiff had defaulted in repaying the loan. The Intended Interested Party has also shown the prejudice that it would likely to suffer in the event that it is not likely to be joined as an Interested Party as it stands to suffer irreparable loss and injustice since it has a commercial interest in the suit property. The pleadings filed by the Intended Interested Party clearly show that they are not a replication of what the other parties will be making before this court.

In conclusion, I do find the application dated 15th March 2021 merited and therefore do order that that Prime Bank Limited be joined as an Interested Party in this suit. That the costs be in the cause.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31st DAY OF JANUARY, 2022

ANTONY OMBWAYO

JUDGE

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE