



**Sidian Bank Limited v Ngugi & 5 others (Civil Case
40 of 2020) [2022] KEELC 3651 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3651 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
CIVIL CASE 40 OF 2020
CK YANO, J
JULY 27, 2022
(FORMERLY MOMBASA ELC NO. 78 OF 2019)**

BETWEEN

SIDIAN BANK LIMITED APPLICANT

AND

STELLA NYAKIO NGUGI 1ST RESPONDENT

ANDREW LYALI 2ND RESPONDENT

SAMUEL KIOME RIMBERE MURITHI 3RD RESPONDENT

GODFREY MUGAMBI KIMATHI 4TH RESPONDENT

LAND REGISTRAR MERU CENTRAL 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

RULING

1. The 3rd and 4th respondents/applicants through an application dated 16th June 2021 brought under section 1A,1B, 3A of the *Civil Procedure Act*, article 10 (2) (b) and article 35 and 159 of *the Constitution* of Kenya seek for orders:-

1. That this Honourable court be pleased to issue an order directing the directors of National Registration in the Office of the state for Immigration and Registration of Persons, National Registration Bureau Headquarters Nairobi to give detailed information as to who is the legal holder of identification card No. 10052582 and the identification card registration number of Stella Wanjiru Mureithi and such report be filed before this Honourable Court, before the commencement of the hearing of this suit.



2. That this Honourable court be pleased to grant leave to the 3rd respondent to file further list of documents containing a sale agreement between himself and Michael Mowesley Rukunga.
 3. That this Honourable court be pleased to grant an order directing the 1st respondent (Sidian Bank Limited) to supply the applicants with documents held in their custody relevant for the hearing of this suit as follows:-
 - a) Loan application form
 - b) Copy of sale agreement of the purchase of motor vehicle (trucks) as stipulated in the Banking facility letter dated 3rd May, 2013 clause b of the terms and conditions.
 - c) The evidence of payment of the purchase price as per clause c of the terms and conditions.
 - d) The registration number of further particulars of the motor vehicle bought with the loan amount.
 - e) Guarantorship form
 - f) Notice of default to the estate of the late Michael Rukunga Mowesley.
 - g) Notice issued to the spouse of the charger (sic) who had given consent Stella Wanjiru Mureithi and a copy of her National Identity Card.
 - h) Valuation reports for the three securities.
 4. That costs be provided for.
2. The application is supported by the affidavits of Godfrey Kimathi Mugambi and Samuel Kiome Rimbere Murithi and is premised on the grounds that the information sought is very relevant to shed light on the case before court and that the information can only be made through this application. It is the applicants' contention that they shall be prejudiced in the event the orders are not granted.
 3. The application is opposed by Sidian Bank Limited, the 1st respondent through a replying affidavit sworn by Jackline Ndungu on 30th June 2021. The basis of the opposition in a nutshell, is that the application is barred by the doctrine of res judicata, that the applicants were not parties to the lending contracts and therefore lack privity of contract and have no legal capacity to question the legal validity of the said contracts. The bank contended that the issue before court can be resolved without the information sought by the applicants in the application herein, adding that the documents sought are already in the court's record. It is therefore the Bank's contention that the application is misconceived, vexatious lacking in merit and an abuse of the process of court.
 4. With the directions from court, parties agreed to canvass the application by way of written submissions. The applicants filed their submissions dated 2nd June 2022 on even date while the 1st respondent's submissions are dated 15th June 2022 and filed on 16th June 2022.
 5. The applicants cited the provisions of article 35 (1) (b) of *the constitution* on access to information and section 69 of the *evidence Act* which provides for notice to produce a document, and argued that the true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at trial. The applicants submit that discovery is a formal pre-trial process through which a party to litigation may seek to discover evidence and facts that are crucial to his case, and that a party may seek to discover any fact that is not privileged but is relevant to the subject matter in the suit.



6. The applicants' counsel cited the *Halsbury's laws of England* vol 13 paragraph 13 and relied on the case of *Concord Insurance Company Limited v NIC Bank Ltd* (2013) eKLR, *Abn Amro Bank NV v Kenya Pipeline Company Limited* (2019) eKLR, *Oracle Productions Ltd v Decapture Ltd & 3 others* (2014) eKLR, and a Supreme court of India case *M L Sethi v R P Kapur* 1972 AIR 2379, 1973 SCR (1) 697. The applicants also made reference to Rule 66(1) of *East African Court of Justice Rules of Procedure, 2019* and urged the court to allow the application herein.
7. The 1st respondent submits that there is only one issue for determination in this matter, and that 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 flow 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. Consequently the 1st respondent submits that the matter which the applicants are attempting to front to the court by the application are not and cannot be an issue in this matter. It is the 1st respondent's submission that the additional evidence/documents sought to be adduced in the application are not relevant to the issue(s) which shall fall for determination in these proceedings, and that the production of these documents shall not assist the court in dispensation of justice. The 1st respondent added that it had made available to the court and the applicants all the documents/ evidence that are relevant to the issues before court.
8. The 1st respondent further submits that even if the majority of the said documents were to be an issue, the applicants are not parties to the said documents and are therefore not privy to them.
9. It is further submitted by the 1st respondent that all the matters relating to the propriety of the agreements between the Bank and the borrower's guarantor/chargor are matters that have been litigated in previous proceedings between the Bank and the purported spouse of the chargor, which proceedings have since been determined, and therefore are res judicata. The 1st respondent referred the court to the annexures in the bank's supporting affidavit to the Originating Summons. The 1st respondent submits that the application is an abuse of the court process and is aimed at delaying the finalization of the proceedings in this matter. Further, it is submitted that the applicants have not demonstrated how the additional documents/evidence sought are relevant to these proceedings and how they will assist the court in a fair and just disposal of the matter before court.
10. I have considered the application, the response and the submissions made. The issue for determination is whether the application is merited or not, and whether or not the orders sought should be granted.
11. The Bank filed the Originating Summons dated 24th April 2019 seeking the following reliefs:
 1. An order be and is hereby issued directing the Meru Central Land Registrar to forthwith effect the rectification of the register for land reference number Nyaki/Kithoka/1914 by-;
 - a. Reinstating entry number 3 made on 1/08/2013 in the encumbrances section and entry No. 7 made on 1/08/2013 in the proprietorship sections of the register and;
 - b. Cancelling all other entries made subsequent to the cancellation of entry numbers 3 and 7 in the encumbrance and proprietorship sections of the register for Nyaki/ Kithoka/1914 comprising of entry number 8 made on 16/05/2015, entry number 9 made on 16/06/2015, entry number 10 made on 17/06/2015, entry number 11 made on 9/07/2015, entry number 12 made on 9/07/2015, Entry Number 13 made on 18/08/2015 and entry number 14 made on 23/98/2017 all in the proprietorship section of the register.



2. A permanent restraining injunction be and is hereby issued against the 1st, 3rd, 4th and 5th defendants, whether by themselves, their agents, servants and or otherwise from in any manner whatsoever interfering with the Bank's rights under the charge dated 24/07/2013 registered over the land parcel known as Land Reference number Nyaki/Kithoka/1914 on 01/08/2013 by entries numbers 3 and 7 and in the register for the said property.
 3. The applicants' costs in these proceedings be borne by the respondents jointly and severally.
12. The summons was supported by the affidavit of Beverline Chweya, a Legal Officer of the Bank sworn on 24th April 2019. The Bank's case in brief is that through a letter of offer dated 3/05/2013, it agreed to advance one Wilberforce Ndonga Njenga t/a There Mombasa Traders (hereinafter referred to as "the borrower) an overdraft facility and a term loan and that the two facilities were secured by legal charges over three distinct parcels, including Nyaki/Kithoka/1914 all registered in the name of one Michael Mowesley who had agreed, as the guarantor to the borrower to charge the said properties to the Bank, and a legal charge over Nyaki/Kithoka/1914 was registered to secure the repayment of the amount advanced. The Bank contended that in the course of time, and while the borrower and the guarantor were yet to repay the outstanding charge debt, and while the Bank was yet to discharge the charge, it was established that the suit property had been transferred to the 1st and 2nd respondents, and subsequently to the 3rd and 4th respondents notwithstanding the existing registered charge. That the said dispositions were registered by the 5th respondent despite the fact that the original Title documents were still held by the bank as security. The bank has also exhibited proceedings in various other matters, either pending or decided. These include Mombasa ELC case Number 115 of 2014, Mombasa High court Divorce Cause No. 52 of 2007 and Mombasa Chief Magistrate's Court Criminal case no. 1468 of 2016.
 13. The 3rd and 4th respondents who are the applicants in the instant application filed separate replying affidavits on 6th April 2021 in response to the Originating Summons in which they inter alia averred that they have noted some discrepancies in the charged documents which raise eye brows and suspicion. However, the 3rd respondent/applicant also admitted that he was the original owner of the suit property before he sold the same to Michael Rukunga Mowesley (deceased) in the year 2009. It is further stated that Michael Rukunga Mowesley died and his wife Stella Nyakio, the 1st respondent approached the 3rd respondent to buy the property once they were done with the succession cause in which the property was transmitted to the names of the 1st and 2nd respondents as legal representatives of the estate of the deceased, and they in turn transferred the property in favour of the 3rd respondent who in turn transferred it to the 4th respondent.
 14. The court has gone through the pleadings and the documents attached. Among the documents exhibited are a judgment dated 24th June 2009, a decree nisi issued on 30th October, 2009 and a certificate of decree absolute issued on 16th March 2010 in favour of the deceased against the 1st respondent in the Mombasa High court divorce cause No. 52 of 2007. The suit property was charged in the year 2013. The Bank however states that the entries in respect of the registration of said charge were cancelled without the original title deed of the suit property and the property registered and another title deed issued in the names of the 2nd and 3rd respondents in this application on 16th and 17th June 2015 and again on 9th July 2015, the property was registered in the name of the 1st applicant herein and a title deed issued in his favour, and further on the 16th October, 2018 the property was registered in the name of the 2nd applicant herein and a title deed issued to him on 18th October, 2018. The Bank maintains that the financial facilities that were made available to the borrower on the strength of the charge was never repaid and that the Bank was yet to discharge the property.



15. With the above background, this court is in agreement with the 1st respondent's submissions that the issue before court is whether or not the 4th respondent herein, the Land Registrar Meru Central, acted within the law in cancelling the Bank's charge, and if not lawfully done, what consequence should flow from the determination of the court on this, particularly in respect of the entries made subsequent to the said cancellation. In my considered view, the propriety or otherwise of both the loan agreements and of the identification documents provided to the 1st respondent by the persons who were party to the said documents are not and cannot be in issue in this matter.
16. Further, whereas the applicants have a right to access to information held by the state under article 35 of *the Constitution*, the *Access to Information act* provides the legal framework for access of information by a public or private entity so far as the information is required for the exercise of protection of any rights. In this case, there is no indication that the applicants have invoked that Act and requested the information and the Director of National Registration in the office of the State Department for Immigration and Registration of Persons has denied them access to the information sought. In addition, the orders sought are directed to the said office but it is clear that it is not named as a party to this application or these proceedings. In my view, it is wrong for the applicants to seek orders against an entity which is not a party and which has not been shown to have been requested to act but declined to do so. It would be against the rules of natural justice to condemn a party unheard.
17. Moreover, Section 35 (G) of the *National Police Service Act* No. 11A of 2011 allows the Director of Criminal Investigations to undertake forensic analysis while undertaking investigations where a complaint has been lodged as provided by law. From the material on record, there is no evidence that a report was made to the police to carry out any investigations if it was suspected that an offence or offences were committed. Section 24 of the *National Police Act* gives the Inspector General of Police (and the Director of Criminal Investigation) the jurisdiction to investigate crimes. Therefore if the applicants suspected that an offence had been committed, they would have shared the same with the relevant investigative agencies for whatever investigations and forensic reports they may require. It does not require any court order for such investigations to be undertaken where it is suspected a crime had been committed. After all, under Section 194A of the *Criminal Procedure Code*, there is no bar for parallel proceedings either civil or criminal prosecutions.
18. With regard to prayer 3 of the application, the 1st respondent in response to the application has averred that it has made available to the court and the applicants all documents/evidence that are relevant to the issues before court. The court has noted that this averment has not been controverted by the applicants. There is also no indication that the applicants issued any notice to produce and inspect to the respondent to enable the court make orders for discovery and disclosure of documents. The application therefore has been made mala fides.
19. Prayer 2 of the application is for leave to be granted to the 3rd respondent to file a further list of documents containing a sale agreement between himself and Michael Mowesley Rukunga. Since it has not been demonstrated that any party would suffer prejudice by the grant of such order, the court will exercise its discretion and grant the 3rd respondent leave to file the said further documents. The same to be filed and served within 7 days from the date of this ruling.
20. Given the foregoing, it is my conclusion that prayers 1 and 3 of the application lack merit and the same are dismissed. Prayer 2 is allowed.
21. Considering that the application has partly succeeded and partly failed, I order that the costs of the application to abide the outcome of the main suit.
22. Orders accordingly.



DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF JULY 2022.

C.K YANO

ELC JUDGE

In presence of:

C.A Mwenda

MS Gitari for applicant/1st respondent

Kimathi for 4th and 5th respondents/applicants

No appearance for 2nd and 3rd respondents/applicants

C.K YANO

ELC JUDGE

