



Mungania (Suing as the administrator of the Estate of the Late M'Mungania M'Imbwi – Deceased) v Muriira (Sued as an administrator of the Estate of the Late Lawrence Muriira M'Thiruane – Deceased) & 2 others (Environment & Land Case E005 of 2021) [2024] KEELC 6893 (KLR) (16 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6893 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E005 OF 2021**

CK NZILI, J

OCTOBER 16, 2024

BETWEEN

KATHIRA MUNGANIA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE M'MUNGANIA M'IMBWI – DECEASED) PLAINTIFF

AND

SCOLA KARUTHI MURIIRA (SUED AS AN ADMINISTRATOR OF THE ESTATE OF THE LATE LAWRENCE MURIIRA M'THIRUANE – DECEASED) 1ST DEFENDANT

MUTUMA GITONGA 2ND DEFENDANT

AND

I & M BANK LIMITED INTENDED DEFENDANT

RULING

1. Through an application dated 31.5.2024, the court is asked to add I & M Bank Ltd (the bank) as a 3rd defendant to the suit, stay the execution of the judgment delivered on 11.10.2023, issue a temporary injunction to restrain either the plaintiff or the defendants from disposing of, selling, leasing or transferring the suit property, review, vacate or set aside the judgment, decree and all the consequential orders, and grant leave to the proposed 3rd defendant/respondent to file a defense and participate in the suit herein. The application is supported by affidavits sworn by Victoria Abuti on 31.5.2024 and 22.8.2024.
2. Briefly, the applicant avers that the 2nd defendant/respondent, who was the registered owner of L.R.No. Ntima/Ntakira/2591 (suit land) had sought and obtained a loan facility of Kshs.2,000,000/= from the bank and offered the title deed for the suitland as security. As a result, it was averred that a charge



- instrument dated 24.11.2020 was registered against the title only for the 2nd defendant/respondent to default in repayment of the loan, which as of 28.5.2024 was Kshs.1,397,695.43/=.
3. The applicant avers that it shockingly recently discovered the pendency of this suit, which, unfortunately, the 2nd defendant had failed to disclose to it as was required of him under Clause No. 8 (h) of the charge instrument. The applicant avers that it has a registrable interest over the suit land, which is not only direct but also substantive in nature, hence the need to be joined as a party.
 4. The plaintiff/respondent opposes the application based on the grounds of opposition dated 29.7.2024 that:
 - i. The originating summons was filed on 6.11.2020 relying on official searches dated 4.11.2020 showing no encumbrances on the suit land, and therefore, the charge was subject to an overriding interest under Section 28 (H) of the [Land Registration Act](#).
 - ii. The applicant had a duty to exercise due diligence before accepting the suit land as security, and had they done so, they would have realized that the land was in actual occupation and used by the plaintiff.
 - iii. It was the 2nd defendant, as per the charging instrument, who had an obligation to notify the applicants about the suit.
 - iv. The charge served as a security and never conferred upon the applicant any right to ownership of the land.
 - v. The applicant may sue the 2nd defendant for the recovery of the outstanding loan.
 5. The applicant relied on written submissions dated 22.8.2024. It was submitted that the bank, as a holder of a charge instrument against the suit land, had a right to be heard not only under Article 50 (1) of [the Constitution](#) but also under Order 1 Rule 10 (2) of the Civil Procedure Rules since it was a necessary party to the suit, whom the court, at any stage of the proceedings, could add on such terms as are just with or without an application by any party. Reliance was placed on *Kingori vs Chege & others* (2002) 2 KLR 243 and *Pravin Bowry vs John Ward & another* (2015) eKLR.
 6. The applicant submitted that due to its registrable interest, the cancellation of the 2nd defendant's name from the title register and the replacement with that of the plaintiff stripped it of any security that it holds to secure the 2nd defendant's obligations to the bank, more so after the 2nd defendant had defaulted in repaying the loan.
 7. The applicant submitted that the delay in applying for joinder to the suit was not fatal, for it only recently learned of the changes to the title register; otherwise, it has not been served by summons to enter an appearance by the plaintiff.
 8. Reliance was placed on *CBK Ltd vs Trust Bank (K) Ltd* (2000) eKLR on the proposition that a mere delay was not a sufficient ground for declining leave unless the delay was prejudicial to the opposite party beyond any monetary compensation by way of costs.
 9. The applicant submitted that if the application is allowed, the consequence would be to set aside the judgment so that it could file a defense and participate in the hearing of the suit. Reliance was placed on *Lois Holdings Ltd vs Ndiwa Tamboi & 84 others; Chesitia Marketing Cooperative Society* (proposed 2nd defendant 2021) eKLR.
 10. Again, the applicant submitted that it had an excellent defense to the claim, raising triable issues as per the draft attached to the supporting affidavit. Reliance was placed on *Kenya Game Hunting Union*



vs Glory Gas Hire (2014) eKLR, which cited with approval Patel vs E.A Cargo Handling Service Ltd (1974) E.A 75 and Richard Ncharpi Leiyagu vs IEBC & others (2013) eKLR.

11. The applicant submitted that it learned of the changes to the register and the judgment recently and hastily filed the application.
12. The issue for the court's determination is whether the proposed 3rd defendant is a necessary party to the suit who should be given an opportunity to participate in it and ventilate its defense. Order 1 Rule 2 of the Civil Procedure Rules provides that all persons may be joined as defendants who have any right to relief or where, if separate suits were brought against such person, any common questions of law or fact would arise.
13. Order 1 Rule 10 of the Civil Procedure Rules provides that the court may at any stage of the proceedings order joinder or striking out of any name whose presence before the court may be necessary in order to enable the court wholly and effectually to adjudicate upon and settle all questions involved in the suit be added. Rule (4) thereof provides that where a defendant is added, the plaint shall be amended in such a manner as may be necessary, and the amended plaint be served upon the new and all the original defendants.
14. In Joseph Njau King'ori vs. Robert Maina Chege and others (supra), the court R.N Nambuye J as she then was, set out the guiding principles as:
 - i. He must be a necessary party.
 - ii. He must be a proper party.
 - iii. In the case of a defense, there must be a relief flowing from that defense to the plaintiff.
 - iv. The ultimate order or decree cannot be enforced without his presence in the matter.
 - v. His presence is necessary to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit.
15. In Pravin Bowry vs John Ward & another (supra), the court (Githinji, Mohammed, Kantai J.J.A), the court cited with approval Deported Asians Property Custodian Board vs Jaffer Brothers Ltd (1999) 1 E.A. 55 that a person qualifies to be a defendant where it is shown that the defendant cannot effectually set a defense he desires to set up unless that person is joined or unless the order to be made is to bind that person.
16. The court further cited with approval Sarkar, Code of Civil Procedure, 11th Edition (2011) Vol. a page 887 that Order 1 Rule 10 of the Civil Procedure Rules should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties. Further, the court cited Civicon Ltd vs Kivumatt Ltd & others (2015) eKLR that the objective of the rule is to bring on record all the persons who are parties to the dispute depending on the circumstances, practicability, prejudice, and sufficient interest demonstrated. Additionally, the court cited with approval Meme vs. Republic (2004) eKLR that joinder of parties was permissible, especially where the presence of the party will result in the complete settlement of all the questions involved in the proceedings if the joinder will protect the rights of a party who would otherwise be adversely affected in law and lastly, where the joinder will prevent a likely course of proliferated litigation.



17. As to setting aside the judgment in Lois Holdings Ltd vs Ndiwa Tamboi & others (supra) the court (Mwangi Njoroge J), cited with approval Patel vs E. A Cargo Holdings Service Ltd (supra), that the primary concern of the court is to do justice to the parties and that regular judgment will not be set aside unless there was a defense on merits that raises a triable issue.
18. In Richard Leiyagu vs IEBC (supra), the court (Visram, Koome, and Odek J.J.A) observed that the discretion to set aside an ex parte judgment or order was intended to avoid injustice or hardship resulting from an accident, inadvertence, or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.
19. In the application before the court, the intended 3rd defendant has demonstrated that it has the chargee's right under the Land Act over the suit land property which the 2nd defendant/respondent has not denied and offered it as security for a loan facility.
20. The entry of the proposed 3rd defendant's interest into the copy of the register of the title deed and the registration of the charge instrument took place on 24.11.2020. In filing the suit, the plaintiff had relied on an official search dated 28.9.2016 and 4.11.2020. This was before the charge was registered. So, the plaintiff would not have known the entries made to the register after 4.11.2020. Section 88 (1) (g) of the Land Act provides that there is a binding covenant between the chargor and a chargee not to transfer or assign the land or lease it without prior consent in writing.
21. Applying the case law and the principles discussed above, the discretion of the court to allow for joinder of parties, setting aside the judgment, and leave to file a defense is far and wide. The proposed 3rd defendant/applicant has demonstrated a stake in the suit land, which the Land Act protects. I find it a necessary party to the suit. Similarly, I have looked at the draft defense. It raises triable issues. Thirdly, the proposed third party deserves a chance to ventilate the defense.
22. The 2nd defendant/respondent is the one who authorized the 1st defendant to sign and plead on his behalf by an authority to plead dated 19.8.2021. By that time, the 2nd defendant/respondent knew of the encumbrance registered against the title.
23. The upshot is that I find the application dated 31.5.2024 with merits. It is allowed. The judgment dated 11.10.2023 and the subsequent decree are a result of this set-aside. The originating summons dated 6.11.2020 shall be amended to include I & M Bank Ltd as the 3rd defendant and served upon the defendants, who shall have 30 days to file and serve their responses within 15 days upon service with the amended originating summons.
24. Costs of the application to be in the cause.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 16TH DAY OF OCTOBER, 2024

HON. C K NZILI

JUDGE

In presence of

C.A Kananu

Mwai for Kithome for the 3rd intended defendant

Kajugu for Mwarania for the respondent

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