



Koin v Mathenge; Cooperative Bank of Kenya Limited (Interested Party); Kingori (Intended Interested Party) (Environment & Land Case E074 of 2022) [2023] KEELC 16283 (KLR) (9 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16283 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E074 OF 2022
EK WABWOTO, J
MARCH 9, 2023**

BETWEEN

ESTHER AITA KOIN PLAINTIFF

AND

PETER GITONGA MATHENGE DEFENDANT

AND

COOPERATIVE BANK OF KENYA LIMITED INTERESTED PARTY

AND

CHARLES MWANGI KINGORI INTENDED INTERESTED PARTY

RULING

1. This ruling is in respect to the applications dated July 19, 2022, application dated August 1, 2022, and the application dated October 14, 2022.
2. In the application dated 19th July 2022, the Plaintiff sought for the following reliefs;
 - a. That leave be granted to the Applicant to enjoin the 2nd Interested Party to the suit as the 2nd Interested Party.
 - b. That a temporary injunction be issued against the 2nd Interested Party herein by himself, servants, agents and employees from advertising, offering for sale, leasing, renting, mortgaging, charging, transferring or assigning and/or otherwise dealing with the suit property pending the hearing and determination for this application.
 - c. That a temporary injunction be issued against the 2nd Intended Interested Party herein by himself, servants, agents, and employees from advertising, offering for sale, leasing, renting,



mortgaging, changing, transferring or assigning and/or otherwise dealing with the suit property pending the hearing and determination of the main suit.

- d. That there be a stay of execution of the order dated 22nd June 2022 emanating from Misc Suit No. E871 of 2022.
 - e. Costs of the application plus interest thereon at court rates.
3. The application was supported by the affidavit sworn by the Plaintiff on 19th July 2022. The Plaintiff averred that she bought the property from the Defendant vide an agreement dated 6th November 2015 and she proceeded to occupy the same after doing major repairs to make the house more habitable.
 4. It was deposed that in the year 2018, the applicant entered into a tenancy agreement with Athman Noreein Mohamed and has since been receiving rent from the tenant without any interference until 5th July 2022 where he was ambushed with a purported Court Order emanating from Misc Suit No. E871 of 2022 seeking to attach his property to recovery rent yet the 2nd Interested Party had not entered into a tenancy agreement with the Defendant nor the 2nd Interested Party herein and the 2nd Interested Party proceeded to evict the tenant despite the fact that the purported court order was expressly stated not to be an eviction order.
 5. It was also stated that the Defendant and Interested party had failed to disclose material facts by failing to inform this Honourable Court of the purported statutory sale despite the allegation that the same were within their knowledge.
 6. In the application dated 1st August 2022, the 1st Interested party sought to have the suit strike out as against the 1st Interested Party. The 1st Interested Party argued that it had been wrongly joined to these proceedings and it had no identifiable stake in the same.
 7. In the application dated 14th October 2022, the Defendant sought inter alia an order of discovery and production of documents by the 1st and 2nd Interested Party.
 8. Pursuant to directions issued by this court, it was directed that all the applications to be heard together and the same be canvassed by way of written submissions to enable the court render its ruling.
 9. The Plaintiff filed her written submissions dated 19th September 2022 and 10th February 2023. The defendant filed his written submissions dated 25th January 2023. The 1st Interested Party filed its written submissions dated 15th February 2023 the 2nd Interested Party filed his written submissions dated 12th January 2023..
 10. The Plaintiff submitted in her submissions outlined the following four issues for consideration by the court:
 - i. Whether the applicant can enjoin the 2nd Intended Interested Party to the suit.
 - ii. Whether a temporary injunction should be issued against the 2nd Intended Interested Party herein by himself, servants, agents and employees from advertising, offering for sale, leasing, renting, mortgaging, charging, transferring or assigning and/or otherwise dealing with the suit property pending the hearing and determination of the application and the main suit.
 - iii. Whether there should be a stay of execution of the order dated 22nd June 2022 emanating from Misc Suit No. E871 of 2022.
 - iv. Whether costs of the application plus interest therein at court rates should be awarded.



11. Relying on the cases of *Francis Kariuki Muruatetu & Another – Vs- Republic & 5 others* (2016) eKLR, *Trusted Society of Human Rights Alliance – Vs- Mumo Matemu & 5 others* (2014) eKLR and *Meme – Vs- Republic* (2004) eKLR, it was submitted that the Intended 2nd Interested Party should be enjoined in the suit as his joinder would be to provide protection for the right of a party who would otherwise be adversely affected in law.
12. On the grant of a temporary injunctive relief sought, it was argued that the 2nd Interested Party has already entered the suit property where he ambushed tenant with a purported court order emanating from Misc Suit No. E871 of 2022 seeking to attach his property to recover rent yet he had not entered into a tenancy agreement with them. He proceeded to evict the tenant despite the fact that the purported court order was expressly stated not to be an eviction order. The tenants' household goods and other movable property are at a risk of being auctioned if the court does not grant the orders sought which is causing irreparable harm. The cases of *Giella – Vs- Cassman Brown* (1973) EA 358, *Mrao Ltd – Vs- East American Bank of Kenya Ltd* (2003) eKLR, *Pius Kipchirchir Kogo – Vs- Frank Kimeli Tenai* (2018) *Mugo wa Karanja – Vs- Ecobank (Kenya) Limited & Another* (2019) eKLR were cited in support.
13. On whether there should be a stay of execution of the order dated 22nd June 2022, emanating from CM Misc Suit No. E871 of 2022, Counsel submitted that Order 42 Rule 6 of the *Civil Procedure Rules* outlines the principles guiding the grant of stay of execution which include the following: -
 - a. That the court must be satisfied that substantial loss may result to the applicant unless the order is made.
 - b. That the application has been made without unreasonable delay.
 - c. Security as the court orders for due performance of such decree an order as may ultimately be binding on him.
14. It was further submitted that on 5th July 2022, the Plaintiff's tenant was unlawfully evicted and hence the need to stay the order dated 22nd June 2022 emanating from Misc Suit No. E871 of 2022.
15. On issue of costs and interest, Counsel made reference to section 27 of the *Civil Procedure Act* and further stated that the court should exercise its discretion and grant costs to the Plaintiff. The cases of *Party of Independent Candidate of Kenya – Vs- Mutula Kilonzo & 2 others* (2014) eKLR and *Devvan Dattan – Vs- Dawda* (1949) EACA 35 were cited in support.
16. In respect to the Defendant's application dated 14th October 2022 seeking for discovery and production within 14 days by the 1st Interested Party, the Plaintiff submitted that she was not opposed to the same since the intended discovery will establish that the 1st Interested party is a necessary party to the proceedings and will also held the court conclusively determine the issues.
17. The proposed 2nd Interested Party opposed the Defendant's application for production and discovery for the reasons that allowing the same would amount to aiding an adverse party to the proceedings and it will be prejudicial to him.
18. I have considered all the applications, the rival affidavits and written submissions filed and the main issues for determination in respect to the said applications are as follows: -
 - i. Whether Charles Mwangi Kingori should be joined to these proceedings as a 2nd Interested Party.



- ii. Whether this court should stay the proceedings in respect to Milimani CM Misc Application No. E871 of 2022.
 - iii. Whether an order of temporary injunction in respect to the suit property can be issued as against the proposed 2nd Interested Party.
 - iv. Whether the suit should be struck out as against the 1st Interested Party.
 - v. Whether the Defendant has made out a case for issuance of an order of discovery and production against the Interested Parties.
19. I shall now proceed to address all the issues sequentially.
20. On the first issue, Order 1 Rule 10, (2) of the *Civil Procedure Rules*, which provision states as follows;

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

The *Black’s Law Dictionary* defines “interested party” as:-

“A party who has a recognizable stake (and therefore standing) in a matter.”

21. The Supreme Court in *Francis Kariuki Muruatetu & another v Republic & 5 others* [2016] eKLR set out the broad principles to be considered in an application for joinder to proceedings:-

“From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party: 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...”



22. Lenaola J. (as he then was) in [David Nyekorach Matsanga and Another vs Philip Waki and 3 Others](#) [2015] eKLR, said as follows:-

“The issue of enjoining a party as an Interested Party was addressed by the Supreme Court in *Communications Commission of Kenya & 4 Others vs Royal Media Services Ltd. & 7 Others* (2014) eKLR in the following words;

“An Interested Party is one who has a stake in the proceedings, though he or she was not a party to the cause *ab initio*. He or she is the 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 interests will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. A party could be enjoined in a matter for the reason that;

- i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- ii. Joinder to provide protection of the rights of a party who would otherwise be adversely affected in law;
- iii. Joinder to prevent a likely course of proliferated litigation.

...As was stated in *Communication Commission of Kenya & Others (supra)*, a party adversely affected, would need to join proceedings filed by another to protect its interests and also to avoid proliferated litigation.”

23. On the ground that joinder can be permitted to allow a party to protect its right which would otherwise be adversely affected in law if absent, Mativo J. in [Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others](#) [2017] eKLR states:-

“The test is not whether the joinder of the person proposed to be added as an interested party would be according to or against the wishes of the petitioner or whether the joinder would involve an investigation into a question not arising on the cause of action averred by the petitioner. It is whether the intended interested party has an identifiable stake, or a legal interest or duty in the proceedings.

A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights ...”

24. On the threshold to be reached by a party seeking joinder, the holding by Muriithi J. in [Benjamin K Kipkulei v County Government of Mombasa & Another](#) [2015] eKLR is useful:-

“...The test for joinder of a party as an interested party is not that the applicant must show a stake or interest that must prevail in the suit, as that is not possible before the full hearing of the matter; the applicant should demonstrate a legal interest that calls for hearing before a decision on the dispute before the court is adjudicated. In common judicial parlance, I would say that the applicant ought to show on ‘an arguable case’ basis that he has an interest recognized in the law and capable of protection. As a registered proprietor of the suit property upon public auction which is subject of challenge in these proceedings, the



proposed party has an identifiable stake and legal interest in the property the subject of, and therefore an interest in, the proceedings before the Court.”

25. Essentially therefore, any person who, though not a party to proceedings pending in court, has an interest in the subject matter of such proceedings to the extent that they will be affected by the decision of the court whichever way the decision goes, then such person qualifies to be termed as an interested party and ought to be allowed to join such proceedings to protect his or her interests.
26. In the instant case, I have considered the Plaintiff's averments in respect to the proposed 2nd Interested Party who has an interest in the suit property after purchasing the same and subsequently evicting the Plaintiff's tenant who was in occupation. In view of the foregoing, am satisfied that it is necessary to join the intended 2nd Interested party as a party to this suit as this will aid the Court in effectively determining the dispute between the parties. The presence in this suit of the Intended 2nd Interested party is necessary to enable the court to effectually and completely adjudicate upon and settle all issues arising herein.
27. In respect to the stay of proceedings of Milimani CM Misc Application No. E871 of 2022, George M. Muiruri t/a Philips International Auctioneers and Charles Mwangi Kingori vs Peter Gitonga Mathenge. The Plaintiff submitted that she was evicted from the suit property by the 2nd Intended Interested Party on the basis of an order issued by Hon. Mr. Lesootia PM issued in respect to the said case despite the fact that the said order was clear that no eviction should issue.
28. I have taken note that the prayer for the stay of the said proceedings of the subordinate court has been done in a totally different matter being this current suit, the Plaintiff ought to have either filed an appeal against the said order or sought for review of the same and subsequently seek to stay the said proceedings. In the circumstances, I am unable to stay the said proceedings in Milimani CM Misc Application No. E871 of 2022, George M. Muiruri t/a Philips International Auctioneers and Charles Mwangi Kingori vs Peter Gitonga Mathenge.
29. The 1st Interested party has sought to have the suit struck out as against them for lack of identifiable stake and having been wrongly joined to these proceedings.
30. In *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (Civil Appeal No. 35 of 2000) same court expressed itself as follows:

“A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved”.

Similarly, in *D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another* [1980] eKLR, Madan JA, stated:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided



it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it”.

31. Having perused the pleadings filed herein, it is evident that striking out the same without hearing the parties would be draconian. Taking all the above into account, I do not consider this to be a proper case for striking out the suit as against the 1st Interested Party at this stage. The said prayer is declined.
32. On whether a temporary injunction ought to issue as against the 2nd Interested Party, the court record shows that an order of temporary injunction was already granted on 25th April 2022 as against the Defendant and it is only fair in the circumstances that the same be issued to extend to the 2nd Interested party who has been joined to these proceedings.
33. In respect to the orders sought by the Defendant for discovery and production of documents as against the Interested Parties, the 2nd Interested Party objected to the same on the grounds that there is no dispute between the Defendant and Interested Parties and further that allowing the said application would be prejudicial to the 2nd Interested Party. The Plaintiff supported the said application on the basis that the discovery would enable the court conclusively determine the issues before it.
34. Whether or not the court should order discovery and production of documents is a matter of discretion to be exercised in a judicious manner for purposes of fostering justice of the case. Section 22 of the [Civil Procedure Act](#) states:

“Subject to such conditions and limitations as may be prescribed, the court may, at any time, either on its own motion or on the application by either party-

- a. Make such orders as may be necessary or reasonable in all matters relating to the delivering and answering of interrogatories, the admission of documents and facts and the discovery and inspection, production, impounding and return of documents or other material objects producible as evidence.”

The court has the power to summon any person to produce such documents or adduce evidence as the case may be.

35. 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 as can be seen from Section 22 of the [Civil Procedure Act](#) the scope of discovery is quite broad. A party may seek to discover any fact that is not privileged but is relevant to the subject matter in the suit. The emphasis should be that the documents sought are relevant to the issue before the court.
36. The learned Authors of [Halsbury Laws of England Vol 13](#) opine at paragraph 38 that, discovery will not be ordered in respect of irrelevant allegations in the pleadings, which even if substantiated could not affect the result of the action nor in respect of an allegation not made in the pleadings or particulars, nor will discovery be allowed to enable a party to fish for witnesses or for a new case, that is to enable him start a new case.
37. Regarding the centrality of discovery, the court observed in [Oracle Productions Ltd v Decapture Ltd & 3 Others](#) [2014] eKLR that pre-trial discovery is so central to litigation that the entire Order 11 of [Civil Procedure Rules](#) (2010) has substantially devoted to it, including sanctions for non-compliance. Orders 4 and 7 now require parties to file and serve documentary evidence with their pleadings, while Order 14 empowers the Court to order production, impounding and return of documents. The court was emphatic that discovery should be limited solely to matters in contention and relevance will only be gauged or tested by pleadings or particulars provided.



38. It should be added that discovery is also intended to aid a party access vital documents to his case that are solely in the custody of the opposite party, thus levelling the litigation ground. (*Ramji Megji v Kisii University* [2016] eKLR). The court emphasized in *Concord Insurance Co. LTD v NIC Bank Ltd* [2013] eKLR that only relevant documents should be disclosed and that relevance is to be tested in the pleadings, and that discovery should not be used as a fishing expedition. (*Selecta Kenya Gmbh & Co Kg & another v Peter Wanderi* [2015] eKLR).
39. What the court was saying in that decision, was that if a document would throw light on the matter in dispute, the discovery of that document would be considered relevant even though the document may be inadmissible in evidence in the long run. It is the relevance of the document and not its admissibility that matters.
40. Having considered the arguments on record and the applicable provisions of the law, I am satisfied that the documents sought to be discovered are relevant to the dispute before court. The argument put forward by the 2nd Interested party would be prejudicial to his case is not an issue for determination at this stage. That issue will be determined during the trial of the main suit. The interested parties have also not denied that the documents sought are in their exclusive possession. In other words, they have not shown that the Applicant could in any other way access those documents other than through discovery and production.
41. I am satisfied that the Defendant has succeeded in persuading the court that it is entitled to discover documents it seeks and that this court is satisfied that those documents are relevant to the matters in question in this suit.
42. On the issue of costs and interest as it relates to the application as was submitted by the Plaintiff, Section 27 of the *Civil Procedure Act* gives the court the discretion to grant costs and having considered the same I do not deem it fit to grant any orders of costs to either party and in the circumstances, I would direct each party to bear own costs.
43. Consequently, the Plaintiff's application dated 19th July 2022, the 1st Interested Party's application dated 1st August 2022 and the Defendant's application dated 14th October 2022 are disposed in the following terms:
- i. Charles Mwangi Kingori is hereby joined as the 2nd Interested Party.
 - ii. That pending the hearing and determination of this suit, a temporary injunction is hereby issued restraining the 2nd Interested party from advertising, offering for sale, leasing, renting, mortgaging, charging, transferring or assigning and/or otherwise dealing with the suit property pending the hearing and determination of this suit.
 - iii. An order is hereby issued for discovery and production within 14 days from the date of the order by the 1st Interested party a copy of the statutory notice, notification of sale, Auctioneers notice, Certificate of posting, Valuation report, loan statement, auctioneer's instructions, change documents and all documents relating to the sale of House No. 10 on L.R. No 209/12221/57.
 - iv. Any other relief sought not expressly granted is declined.
 - v. Each party to bear own costs of the applications.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH MARCH 2023

E.K. WABWOTO



JUDGE

In the presence of:

Mr. Sichangi for the Plaintiff.

Mr. Munyiri holding brief for Mr. Owuor Chacha for 1st Interested Party.

No appearance for the Defendant.

No appearance for the 2nd Interested Party.

Court Assistant – Caroline Nafuna.

E.K. WABWOTO

JUDGE

