



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mugambi v Mwaita & 3 others; Mart Properties Ltd (Proposed Defendant) (Civil Suit E429 of 2022) [2023] KEELC 20408 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20408 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**CIVIL SUIT E429 OF 2022**  
**JA MOGENI, J**  
**OCTOBER 4, 2023**

**BETWEEN**

**HOWARD MURURU MUGAMBI ..... PLAINTIFF**

**AND**

**SAMMY KOMEN MWAITA ..... 1<sup>ST</sup> DEFENDANT**

**TAIWA HOLDINGS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**DINAH CHELAL ..... 3<sup>RD</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**MART PROPERTIES LTD ..... PROPOSED DEFENDANT**

**RULING**

1. The matter for determination is the Notice of Motion Application dated 21/07/2023, by the proposed 5<sup>th</sup> Defendant brought under Order 1 Rule 10, Order 51 Rule 1 and Order 45 Rules 1 & 2 of the *Civil Procedure Rules* 2010, Section 1A, 1B, 3 and 3A of the *Civil Procedure Act* and all enabling provisions of the law. The 5<sup>th</sup> Proposed Defendant/Applicant is seeking for orders that: -
  1. Spent.
  2. That this honourable court be pleased to stay the orders issued by Hon. Justice Mogeni on the 31/05/2023 restraining the defendants, their servants, agents and employees or any other person from entering, occupying or in any other manner dealing with the subject property pending the hearing and determination of the suit and further directing the OCPD Karen to enforce the orders therein among other orders.



3. That this Honourable Court be pleased to add/join the proposed 5<sup>th</sup> defendant/applicant, Mart Properties Limited, to the proceedings herein as a party purposely to participate in the hearing of the suit herein as a defendant.
  4. That upon joining the suit, the applicant be granted leave to file a defence + Counter-claim and all the necessary documents it shall be relying on in defending the suit and the other parties be granted leave to amend their pleadings to reflect the enjoinder.
  5. That this Honourable Court be pleased to review, vary and/or set aside the injunctive orders issued by Hon. Justice Mogeni on 31/05/2023 pending the hearing and determination of the main suit.
  6. That the costs of this application be provided for.
2. The Application is premised on the grounds as stated in paragraph (a) – (x) on the face of the Application, the annexed Affidavit sworn by Sammy Mwaita on 21/07/2023. I do not need to reproduce them.
  3. The Application is only opposed by the Plaintiff/Respondent vide the Replying Affidavit sworn by Howard Mururu Mugambi on 30/08/2023 and filed on the even date.
  4. Direction were given on 19/09/2023 that the Application be canvassed by way of written submissions. By the time of writing this Ruling, none of the parties had duly submitted.

### **Analysis and Determination**

5. Having carefully read and considered the instant Application and the rival Affidavit, I find that the following issues stand out for determination;
  - a. Whether the Court should stay the orders issued on 31/05/2023.
  - b. Whether the proposed 5<sup>th</sup> Defendant should be enjoined in this suit.
  - c. Whether the Court should review, vary and/or set aside the injunctive orders issued on 31/05/2023.
6. The Applicant has sought the Court to stay the orders given on 31/05/2023 and review/vary/set aside the said orders and further that she be enjoined to the suit as the 5<sup>th</sup> Defendant. I believe the Applicant ought to have first sought to be enjoined and then seek further orders thereafter. But in the spirit of Article 159 of the Constitution of Kenya, I shall first determine the application to be enjoined to the suit.

### **Whether the proposed 5<sup>th</sup> Defendant should be enjoined in this suit**

7. Order 1 Rule 10 (2) of the Civil Procedure Rules stipulates as follows:

“(2) 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.” [Emphasis added]

8. Reading the above provision of the law as repeated verbatim above, the key criteria the court uses in deciding whether to enjoin a person into a suit is whether their presence is necessary for the court to effectually and completely adjudicate upon and settle all questions involved in the suit. In this particular suit, the question that the court must determine is, inter alia, who between the Plaintiff and the proposed 5<sup>th</sup> Defendant is the registered proprietor of the suit property and whether or not the Plaintiff purchased the suit property from the proposed 5<sup>th</sup> Defendant. The dispute pertaining to the directorship of the proposed 5<sup>th</sup> Defendant company also needs to be determined at the main hearing of the suit.
9. Given the forgoing, I note that the applicant is seeking to be enjoined as the 5<sup>th</sup> Defendant. The basis of the Application is that the proposed 5<sup>th</sup> Defendant/Applicant is the registered owner of the suit property being LR No. 13791/3 Karen. That the Applicant was issued with a title deed on 5/07/2002 and immediately took possession of the suit property and has had exclusive possession of the property to date. The Applicant denies ever transferring any property to any third party, not even the plaintiff and that the claims by the plaintiff are not only misleading but a scheme aimed at misleading the Court to give a seal of approval to the illegal and fraudulent schemes employed by the plaintiff to oust the Applicant from the ownership.
10. The Applicant also avers that the injunctive orders were granted in error as the plaintiff/respondent herein concealed from this honourable court that fact that the applicant has been in possession and actual occupation of the suit property since time immemorial. That for this reason, it is therefore necessary to join the applicant herein to the proceedings herein not only to grant him an opportunity to be heard with respect to his proprietary interests over the subject property but also to enable this honourable court effectually and completely adjudicate upon and settle all questions involved in the suit.
11. The Plaintiff/Respondent on the other hand contends that on the question as to whether or not the proposed 5<sup>th</sup> Defendant has the necessary locus standi to be enjoined to this suit, the only capacity in which the said 5<sup>th</sup> Defendant can be enjoined is that of a 2<sup>nd</sup> Plaintiff and not Defendant as the company was indeed the party with which the Plaintiff consummated a sale agreement for the suit property, received consideration for the property and performed its obligations as vendor until completion of the sale process.
12. He maintains that at the time he entered into a sale agreement with the proposed 5<sup>th</sup> defendant, he had carried out proper due diligence on the company and established that at that given time, the shareholders of the company were Miriamu Wangechi Nguthiru and Robert Mwirigi Muthuri. He attached copies of the CR-12 forms received after carrying out a search. That he therefore had no doubts whatsoever that at the time of entering into the sale agreement for the suit property, the directors of Mart Properties Limited were Miriamu Wangechi Nguthiru and Robert Mwirigi Muthuri.
13. It is his contention that at no time during the sale transacted and up to completion of the sale did he obtain any contrary company searches pointing to ownership of the company by Taiwa Holdings and Dinah Chelal as alleged in paragraph 3 of the supporting affidavit of Sammy Mwaita or at all. That if indeed the proposed 5<sup>th</sup> Defendant's ownership changed after completion of the sale transaction to reflect new shareholders/directors, that change cannot invalidate the sale as the same was long concluded and the property transferred to himself.



14. For the avoidance of doubt, it is the Plaintiff's case that there is no relationship between the sale transaction herein and the ownership wrangles relating to the proposed 5<sup>th</sup> Defendant and it suffices that at the time of the transaction, all due diligence pointed to the directors who transacted for the company in the sale and executed all necessary documentation.
15. The plaintiff contends that the sale transaction having been fully completed and the property transferred to myself, the proposed 5<sup>th</sup> Defendant lacks locus standi to be enjoined in this suit as it received full consideration for the property and no longer has any right or interest, legal or equitable, in the property.
16. It is his case that the proposed 5<sup>th</sup> Defendant in seeking to join these proceedings is in effect approbating and reprobating on a matter that if legally contracted and completed with finally, being sale of the suit property to himself.
17. In the case of *King'ori vs. Chege & 3 Others* (2002) eKLR, the court held that:

“The guiding principles for the joinder of a party to a suit is: he must be a necessary party; he must be a proper party; the ultimate order or decree cannot be enforced without his presence in the matter; and his presence is necessary to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit.”
18. In the case of *Central Kenya Ltd -vs- Trust Bank & 4 Others*, Court of Appeal, Civil Appeal No. 222 of 1998 (unreported), the Court of Appeal stated as follows regarding the guiding principles in amendment of pleadings and joinder of parties:-

“All amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”
19. Further, the Court of Appeal of Tanzania in the case of *Tang Gas Distributors Limited v Said and Others* [2014] EA 44 the court took into consideration their equivalent of Order 1 Rule 10(2) of their Civil Procedure Rules and stated as follows:

“That the power of the court to add a party to proceedings can be exercised at any state of the proceedings, that a party can be joined even without applying, that the joinder may be done either before or during the trial, that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been disposed off and there is nothing more to be done that the rules become inapplicable and a party can even be added at the appellate stage”
20. This means that the court has a fundamental duty to do whatever it thinks appropriate in the interest of justice. It is alleged that the Plaintiff purchased the suit property from the proposed 5<sup>th</sup> Defendant. It has also been alleged that the Plaintiff is now the registered proprietor of the suit property. The proposed 5<sup>th</sup> Defendant also alleges to be the registered proprietor of the suit property and that it has never transferred ownership to any third party including the plaintiff. The ownership of the suit property is in issue in this matter and it is pending. The possession of the suit property is also in question as both the plaintiff and the proposed 5<sup>th</sup> defendant allege to be in possession. There is an injunction in force and the proposed 5<sup>th</sup> Defendant alleges that they are affected by the court orders that were issued on 31/05/2023.



21. In associating myself with the above, this Court is of the considered view that the presence of the proposed 5<sup>th</sup> Defendant in the suit is therefore necessary to enable the court to adjudicate the dispute herein fully and finally as between all the parties interested in the same.
22. In my view the joinder of the proposed 5<sup>th</sup> defendant in this suit is required by the very essence of justice that demands that a party should not be condemned unheard. Allowing the proposed 5<sup>th</sup> Defendant will also accomplish the overriding objective as envisaged in the *Civil Procedure Act*, which is to facilitate just, expeditious, proportionate and affordable resolution of disputes. Consequently, the Court finds and holds that the proposed 5<sup>th</sup> Defendant should be enjoined in the suit herein.

### **Whether the Court should stay the orders given on 31/05/2023**

23. Having enjoined the Applicant in this suit, the Court will further go ahead and determine whether its Application for stay of the orders given on 31/05/2023 is merited. The Court delivered a Ruling on 23/05/2023.
24. Order 42 Rule 6(1) of the *Civil Procedure Rules*, 2010 empowers the court to stay execution, either of its decree or that of a court whose decision is being appealed from, pending appeal.
25. Order 42 Rule 6(2) sets out the grounds to be considered and provides as follows: -
 

“No order for stay of execution shall be made under sub- rule (1) unless—

  - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
  - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
26. The purpose and objective of the order for stay of execution is to preserve the substratum of the appeal in order to ensure that the appeal is not defeated. In the case of *Consolidated Marine. vs. Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi), the Court held that: -
 

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
27. The principles governing the exercise of the court’s jurisdiction are now well settled. The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in *Chris Munga N. Bichange Vs Richard Nyagaka Tongi & 2 Others* eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus:-
 

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”
28. The Court has the discretion to allow or reject an application of stay depending on the merits of a case. This discretion is to be exercised judicially while balancing the interests of the parties. From the grounds



of the application, the Applicant was aggrieved by the order/ruling of 23/05/2023. That mandatory injunctive orders were granted without disclosure of the fact that the applicant is in occupation of the subject property and that she had not been joined in the proceedings and as such in the not so clearest of circumstances. The Applicant depones that the injunctive orders restraining the defendants or any other person including the applicant herein from entering, occupying or dealing in any way with the subject property howsoever were issued without according the proposed defendant/applicant the opportunity to be heard as he was deliberately not joined to this proceedings by the plaintiff to give a seal of approval to his fraudulent dealings with respect to the subject property. That the enforcement of the orders obtained by the plaintiff/respondent herein would be prejudicial and would occasion immense injustice to the proposed defendant/applicant since the injunctive orders issued are tantamount to an eviction order by the fact that they are restraining the applicant from occupying the property when she is in actual possession of the subject property.

29. There is nowhere that the Applicant has indicated that she is interested in filing an appeal against the said orders. It is my considered view that this prayer is misguided. Indeed an appeal has not been preferred and further it is evident that the applicant has not met the conditions precedent set out under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules for the grant of orders for stay and this Court is not inclined to grant the order of stay so sought.

#### **Whether the Court should review, vary and/or set aside the injunctive orders issued on 31/05/2023**

30. An application for review is anchored under Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act which provides:

“ Any person who considers himself aggrieved: -

- a. By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Further Order 45 Rule 1 which provides:

“(1) Any person considering himself aggrieved; -

- a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. By a decree or order is hereby allowed, and who from the discovery of new and important matter or evidence, which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.”

31. An order for review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self- evident and



should not require an elaborate argument to be established. See the case of [Kipkolum Kogo v Nyamogo & Nyamogo Advocates](#) [2004] eKLR

32. For an applicant to succeed in an application for review of a decree or order such applicant must satisfy the following conditions: -
  - i. That there has been discovery of new and important matter or evidence that was not available at the time the decree was passed or order made; or
  - ii. There is some mistake or error apparent on the face of the record; or
  - iii. There is some sufficient reason to warrant review to be made; and
  - iv. The application must be made without unreasonable delay.
33. Ordinarily, an application seeking review is not an appeal against the decree or order and therefore a party seeking review must satisfy one of the conditions (i) - (iii) above and additionally must have brought the application without unreasonable delay.
34. If an applicant in an application for review is in effect challenging the basis upon which the judge reached the decision that he/she did, and does not demonstrate to the satisfaction of the court that one of the conditions under Order 45 Rule 1 upon which review may be granted has been met, the court cannot grant and/or order a review. The court in a review application cannot consider the merits of the ruling as that would be within the province of a court exercising appellate jurisdiction.
35. While section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the [Civil Procedure Rules](#) gives the court unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision, such discretion should be exercised judiciously and not capriciously. The court of Appeal in the case of [National Bank of Kenya Ltd -vs- Ndungu Njau](#) (1997) eKLR held thus:-

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter”.
36. The question that arises therefore is whether the Applicant satisfied the conditions to warrant the Court to issue orders for review in respect to the Ruling delivered on 23/05/2023. The impugned ruling was delivered on 23/05/2023 and the instant application was filed on 21/07/2023. A duration of 59 days or so. A period of that kind is unreasonable delay.
37. Secondly, review is impermissible without a glaring omission, evident mistake or similar ominous error. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.
38. Whilst considering the Application for temporary injunction, the court addressed its mind to the various issues and/or allegations, which were contained in the Replying Affidavit filed by the 3<sup>rd</sup> Defendant on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant herein. Having granted the orders of temporary injunction, upon hearing both sides, the Applicant, Mart Properties Ltd is now seeking that the court be pleased to review the orders of temporary injunction, which was issued after due consideration of all the factual and evidential issues that were placed before the court.



39. It is the Applicant's case that the injunctive orders were granted in error as the plaintiff/respondent herein concealed from this honourable court that fact that the applicant has been in possession and actual occupation of the suit property since time immemorial. That the plaintiff/respondent herein mislead this honourable court into rendering a ruling on 23/05/2023 and a consequent order of 31/05/2023 against the applicant herein without being accorded an opportunity to be heard and in utter disregard of the overwhelming evidence tendered by the 4<sup>th</sup> defendant in support of the applicant's ownership of the suit property. It was further contended that unless the orders of 31/05/2023 are varied and/or set aside by this honourable court, the proposed 5<sup>th</sup> defendant/applicant would be available to suffer enormous loss.
40. The applicant avers that the orders were mistakenly granted by this honourable court as there was no disclosure of material facts to the court especially the fact that the applicant herein ought to have been a necessary party to this suit and further that the applicant herein is in actual occupation of the subject property as the registered owner with indefeasible interests thereon.
41. I am of the view that the Applicant is inviting the court to sit on appeal on own decision and thereby have a second bite on the issue. Having made a considered decision, I do not have the jurisdiction to have a second bite on the same issue. To my mind such kind of an action and/or invitation, constitutes seating on appeal on own decision albeit disguised as review.
42. In support of the foregoing observation, I adopt the decision in the case of *Bellevue Development Company Ltd v Francis Gikonyo & 7 others* [2018] eKLR, where the court observed as hereunder;
- “I agree with the judicial policy that is variously set out by the authorities relied by the 2<sup>nd</sup> respondent-*Peter Ng'ang'a Muiruri v Credit Bank Ltd & Anor*, Court of Appeal Civil Appeal No. 203 of 2006 and *Ventaglio International SA and Anor v. The Registrar of Companies and Anor*, Nairobi HC Constitutional Petition No. 410 of 2012 (per Lenaola, J) that the High Court's Constitutional Division, indeed any other Division, cannot supervise any other superior court of concurrent jurisdiction or superior jurisdiction. The supervisory jurisdiction is over subordinate courts under Article 165(6) of the Constitution. I also consider that it is an abuse of the court process for a litigant to seek to obtain through a constitutional petition or indeed any to other court process before the same court of concurrent jurisdiction a different decision from one already rendered by the court in other proceedings over the same matter. The aggrieved party must be content with the devices of appeal or review of the decision already delivered by the court but cannot be permitted to re-agitate the matter through a constitutional petition or other originating proceedings. See *Beta Healthcare International Ltd v Commissioner of Customs, and 2 others*. Nairobi HC Petition No. 125 of 2010 (per Majanja, J.)”
43. The Applicant herein has filed the Application herein to review and same seeks to re-agitate the same issues which were already ventilated before the court.
44. Nevertheless, the Applicant herein has not pointed out any mistake and/or error, which was committed by the court to warrant a review, predicated on the basis of error or mistake. To the contrary, what I have read is a narration of the allegations made by the 3<sup>rd</sup> Defendant on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> defendants from the point of view of Mart Properties which is the company that is alleged to have sold the suit property to the plaintiff. Based on this, the Applicant now seeks to attract and/or accrue an Order of Review, so as to achieve the setting aside of a contentious decision which granted the temporary injunction.



45. Once again, it is my humble view that an error apparent on the face of record must be one that is obvious to the eye, and it must be one which when looked at does not yield two results. It shows itself to the read ordinary reader of the record and not the one looking for something hidden or obscure. I have perused the Ruling delivered on 23/05/2023, the Application dated 21/07/2023, the Affidavit and the annexures thereto and I do not agree with the Applicant's contention that there was utter disregard of the overwhelming evidence tendered by the 4<sup>th</sup> defendant in support of the applicant's ownership of the suit property.
46. The Court was privy to the information that both the Plaintiff and the proposed 5<sup>th</sup> defendant are alleged to be in possession of the suit property. These were allegations made by the parties in the suit at that time that is the Plaintiff and the 3<sup>rd</sup> Defendant. The order of injunction was given in order to preserve the suit property. The Court indeed noted that the suit property is in danger of being alienated. The said order is not an eviction order. It is to preserve the suit property pending the determination of suit.
47. In support of the foregoing observations, I invoke and rely in the holding in the case of *National Bank of Kenya Ltd* (*supra*), where the Court of Appeal stated as hereunder:
- “In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”
48. In light of the foregoing, it is my finding that this is not a proper case for the Court to grant the review sought or even to exercise its discretion in favor of the Applicant in relation to prayer 5.

### **Final disposition**

49. Having dealt with the issues under reference, aside from the application to be enjoined, I come to the conclusion that the subject Application, though disguised as an Application for Review, but same is calculated to invite the court to have a second bite on the issue of Injunction, by sitting on an Appeal on own decision.
50. Nonetheless, the Applicant's Application dated 21/07/2023 only succeeds in terms of prayers 3 and 4 thereof. The Plaint should be amended within 14 days and the 5<sup>th</sup> Defendant be accordingly served with pleadings to enable her file her defence in accordance with the Civil Procedure Rules. The costs of the application shall be in the case.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF OCTOBER, 2023**

**MOGENI J.**

**JUDGE**

In the virtual presence of:-

Mr. Nenda for 5<sup>th</sup> Defendant/Applicant

No appearance for Plaintiff/Respondent



No appearance for the 1<sup>st</sup> – 4<sup>th</sup> Defendant

Ms. Caroline Sagina: Court Assistant.

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**MOGENI J**

**JUDGE**

