



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 194 OF 2015

KENNEDY NYAKUNDI MOGAKA.....PLAINTIFF

VERSUS

ESTHER KEMUMA MOGAKA.....1ST DEFENDANT

ZABLON NYAMARI MOGAKA.....2ND DEFENDANT

AND

BANK OF AFRICA LIMITED.....INTERESTED PARTY/APPLICANT

RULING

INTRODUCTION

1. By a Notice of Motion dated 13th July 2020, the Interested Party/Applicant filed an application seeking the following orders:

- a) That this Court does appoint a receiver for purposes of taking over the operations of the development erected on Title Numbers Kisii/Municipality Block II/3, Kisii/Municipality Block II/4, Kisii/Municipality Block II/5 and Kisii/Municipality Block II/6 (hereinafter referred to as 'the **suit properties**') and preserve the assets, records, collecting its dues and rental proceeds and do all that pertains to appoint a receiver under the law pending the hearing and determination of this application;
- b) That this Court does appoint a receiver for purposes of taking over the operations of the development erected on the suit properties and preserve the assets, records, collecting its dues and rental proceeds and do all that pertains to a receiver under the law pending the hearing and determination of the suit herein; and
- c) That all rental proceeds accruing from the suit properties to be collected into an account under the sole control of the appointed receiver and render monthly accounts to the Applicant with respect to all monies received and paid out of this account.

2. In support of the application, Felix Muhati the Debt Recovery Officer of the Applicant bank swore an Affidavit dated 13th July, 2020 in which he averred that the suit properties which are registered in the name of the 1st Defendant were the subject of a charge dated 30th April 2012 and a further charge dated 20th March 2015 (the Charges) issued by the 1st Defendant to the Applicant for the purposes of securing loan advances made by the Applicant to the Defendants and to Ouru Power Limited, a company wholly owned and controlled by the Defendants (the Company).

3. The Applicant further averred that the Defendants and the Company have to date been in default of their loan obligations and despite issuing several demands and notices to the Defendants and the Company, they have deliberately ignored and/or failed to liquidate their indebtedness to the Applicant.

4. It further averred that the amounts owed by the Defendant's and the Company to the Applicant were determined in Kisii HCCC No. 2 of 2018 (formerly ELC No. 106 of 2017 as from Kisii ELC No. 70 of 2017) where by a judgment dated 20th May 2019, judgment was entered in favor of the Applicant against the Defendants jointly and severally for KES 22,958,884.42 and against the Company for KES 210,199,888.14 together with interest at 16% per annum from 1st April 2017 on both amounts until payment in full.

5. The Applicant decried the fact that the Defendants and Company have failed and/or neglected to satisfy the judgment against them and the Defendants have since left the country. Despite the Applicant's best efforts, it has been unable to contact or trace the Defendants.

6. The Applicant contended that the judgment debt due from the Defendants and the Company is recoverable in part from the rental proceeds

of the development erected on the suit properties which the Defendants and the Company are currently benefiting from although payment of the judgment debt has not been forthcoming.

7. Further, the Applicant contends that this application shall not affect the Plaintiff's claim herein which the Bank does not have an interest in. The appointment of a receiver to collect the rental proceeds shall enable the Applicant to recover the sums it is legally entitled to by virtue of the judgment in its favor as against the Defendants while preserving the disputed percentage of the proceeds until the final determination of this suit by the parties herein.

8. The Defendants/Respondents in response to the application, filed Grounds of Opposition on 19th August, 2020. In the said Grounds of Opposition, the Defendants/Respondents stated that the application was pre-mature, misconceived, incompetent and otherwise legally untenable.

9. The Defendants/Respondents also stated that the Interested Party/Applicant herein, having been so admitted in the absence of any substantive pleadings/claims, against either of the parties to the suit cannot file an application seeking substantive orders.

10. It was Defendants/Respondents contention that the Honourable Court is devoid of jurisdiction, to entertain and/or adjudicate upon the subject application.

11. It was also the Defendants/Respondents contention that the Interested Party/Applicant's claim, being founded on an existing charge/further charge, against the Defendants/Respondents her remedy towards recovery of the monies at the foot of the Charge Instrument, is statutorily prescribed. They believed therefore that this application is a subtle attempt by the Interested Party/Applicant, to defeat the statutory prescription provided for under Sections 90, 92 and 96 of the Land Act, No. 6 of 2012.

12. The Defendants/Respondents further stated that the Interested Party/Applicant having commenced the process of forfeiture and exercise of their Statutory Power of Sale, they cannot commence another parallel set of execution proceedings, under the guise of appointment of a Receiver.

13. The Defendants/Respondents in their Grounds of Opposition contended that the instant application, is a veiled attempt to attract execution of the judgment issued vide KISII HCC NO. 2 OF 2018, which touches on and/or concerns separate and distinct parties from those in the instant suit. Consequently, the subject application is destined to occasion a miscarriage of justice.

14. Further the Respondents contended that the subject application, which is primarily concerned with execution proceedings, is barred and/or prohibited by dint of section 34 of the Civil Procedure Act, Chapter 21, Laws of Kenya.

15. The Plaintiff/Respondent who had indicated that he was opposed to the application did not file any response to the application.

16. The court directed the parties to dispose of the application by way of written submissions. The interested Party/Applicant and the Defendants/Respondents both complied by filing their submissions.

ISSUES FOR DETERMINATION

17. Having considered the application, the Grounds of Opposition filed by the Defendants/Respondents in response to the application and the submissions filed by both parties, I deduce the following as the main issues for determination;

- a) Whether this Honourable Court has jurisdiction to hear and determine the application by the Applicant;
- b) Whether the Applicant not being a party to the proceedings is entitled to make the Application;

ANALYSIS AND DETERMINATION

a) Whether the Applicant not being a party to the proceedings is entitled to make the Application;

18. Learned counsel for the Respondent submitted that by virtue of being an Interested Party, the Applicant could not originate the subject Notice of Motion application seeking substantive orders, as if it was a party to the suit. In support of this argument the counsel relied on the decision in the case of **Francis Karioko Muruatetu & Another V. Republic & 5 others, SUP, CT.PET 15 &16 OF 2015 (consolidated) [2016] eKLR** where the Supreme Court stated as follows;

"42. Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties, an interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether new issue to be introduced before the Court." (Emphasis supplied).

19. Counsel further relied on the case of **Methodist Church in Kenya V Mohamed Fugicha & 3 others [2019] eKLR** where the Supreme Court held as hereunder;

"[51] The interested party's case brought forth a new element in the cause: that denying Muslim female students the occasion to

wear even a limited form of hijab would force them to make a choice between their religion, and their right to education: this would stand in conflict with Article 32 of the Constitution. [53]. Yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in *Francis Kariuki Muruatetu & Another v. Republic & 5 others*. Sup. C. Pet. 15 & 16 of 2015(consolidated); [2016] eKLR, as follows (paragraph 41, 42): "Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL) like the proceedings now before us."

20. Counsel also referred this court to the case of **Mwilu Philomena Mbeti V Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party) International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR.**

415. "What emerges from the above decisions is that an interested party is a peripheral party and cannot introduce new issues for determination by the court. Further, that in determining the matters before it, the court will only consider the issues raised in the pleadings by the principal parties. This rule will be particularly unyielding when the matter before court is a private as opposed to a public interest claim".

21. Learned counsel for the Applicant in responding to above submissions by the Respondent submitted that the Applicant, has the right just like any other party in the proceedings to make the application seeking the respective orders. In support of his submission counsel relied on the case of **Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others [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..."

22. Counsel therefore contended that the allegation by the Respondents that the Applicant is not a substantive party to these proceedings is unfounded and baseless.

23. Counsel also contended that the application substantially seeks orders for the appointment of a receiver who is a neutral and impartial officer of the Court to protect the subject matter and it was not concerned with any substantive interests and (or) rights of the parties. He relied on the case of **Nesmith Yogendra Patel (the Legal Representative of Yogendra Purshottam Patel Deceased) v Pascale Mireille Baksh (Nee Patel) & 2 others [2015] eKLR** where the Court stated as follows:

"the object of appointment of the receiver is preserving the subject matter pending the determination of the rights of the parties".

24. It is clear from the submissions of the Respondent that the Supreme Court has in numerous instances explained the role of an Interested Party. As correctly submitted by counsel for the Respondent and supported by the decisions of the Supreme Court, as an Interested Party, the Applicant cannot seek to have his interests in the suit property determined by the court. The Applicant has clearly demonstrated that his interest in the suit property has arisen out of a court judgment or out of the fact the Respondent/Defendants have failed to pay the outstanding loan they took from them and it is therefore not a substantive party. Counsel has referred this court to the decision of the Supreme Court in the case of **Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others [2014] eKLR** to support his argument. However, an analysis of the aforementioned case reveals the court was dealing with the issue enjoining an Interested Party and distinguishing such a party from an **Amicus Curiae**. The court did not in any way change the position held in its decisions in **Muruatetu and the Methodist Church** cases cited hereinabove.

25. From the foregoing, it is my finding that as an Interested Party, the Applicant cannot seek to have its interests protected by this court by appointing a receiver. The Applicant could only have sought protection of its interests in the suit properties if he was a substantive party in the suit.

b) Whether this Honourable Court has jurisdiction to hear and determine the Application by the Applicant;

26. Counsel for the Defendants in his bid to demonstrate that this court has no jurisdiction has raised two points which I consider to be the main issues in answering the question whether this court has jurisdiction to determine the application. The two points are that;

i. The application is statutorily barred by dint of section 34 of the Civil Procedure Act Cap 21 of the Laws of Kenya since the same is primarily based on execution of the Judgment of the High Court in **Kisii HCC No. 2 of 2018** (formerly ELC No. 106 of 2017 as from **Kisii ELC No. 70 of 2017**) delivered on 20th May 2019.

ii. Where there is an express statutory provision dealing with a specific issue and/or legal remedy, the parties are bound to comply with the said provisions. In this regard, he argued that there is an express statutory provision, laying down the requisite procedure to be complied before appointment of a Receiver. Consequently, this Honourable Court has no jurisdiction to help the Interested Party/Applicant to abrogate the law and actualize the terms of the Charge.

27. On the first point, the learned counsel for the Respondents submitted that section 34 of the Civil Procedure Act bars the Applicant from bringing the present application by dint of the fact that there existed a previous suit in the High Court that is **Kisii HCC No. 2 of 2018** (formerly **ELC No. 106 of 2017** and also **Kisii ELC No. 70 of 2017**) relating to the suit properties.

28. Counsel contended that by the Interested Party filing this application, which by itself constitutes a suit by dint of the provisions of Section 2 of the Civil Procedure Act, seeking to execute the judgment issued in a separate suit, he offended the clear provisions of section 34. It was therefore his submission that court has no jurisdiction to determine this application. To support his argument, counsel relied on the decision in the case of **Alice Kerubo Nyambati -Vs- Ochoki Mogaka & Another, Kisii HCC No. 263 Of 2009 (Unreported)**, where the court held as hereunder-

"In filing this suit questioning the attachment of her property in execution of a lawful Court Decree, the Plaintiff is clearly in violation of the mandatory provisions of the law. By being appointed a Guardian Ad Litem, in the Kitale case, she thereby became a Party to that suit. She could only therefore have questioned the execution process in that case. Indeed, even this suit would have been prosecuted in the Kitale case, pursuant to the provisions of Section 34(2) of the Civil Procedure Act, Chapter 21, Laws of Kenya, which allows the executing Court subject to any Objection, limitations or Jurisdiction to treat a Proceeding under this Section as a suit and may, if necessary order payment of additional Court fees, From the foregoing, this suit was wholly unnecessary (Emphasis supplied).

29. It is clear from the submissions of counsel for the Applicant that the Applicant's interests which it seeks to be protected through this application arise from the judgment in the High Court. As rightfully submitted by counsel for the Defendants/Respondents, the Applicant cannot seek to execute a judgment of another Court of competent jurisdiction through this application as this practice is barred by section 34 of the Civil Procedure Act. The said section provides as follows:

"34. Questions to be determined by court executing decree

- 1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.*
- 2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.*
- 3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.*

For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.

30. On the second point, Counsel submitted that the Interested Party/Applicant had issued and served the Defendants with a Statutory Notice under Section 90(2) of the Land Act, 2012, which was exhibited as **annexture "FM 5"** and was yet to comply with the provisions of **Section 96(2) of the Land Act 2012**, which provisions are mandatory. He contended that by filing the subject application and seeking orders for appointment of a Receiver, the Interested Party/Applicant is seeking to shut out or diminish the Defendants/Respondents' right of Redemption, without compliance with the clear provisions of the law. To support his argument, counsel relied on the decision in the case of **Bethwel Allan Omondi Okal -Vs Telkom (K) Limited & 9 Others, (2017) eKLR** where the court held that;

"The Appellant might want to argue that he has a Constitutional right of access to justice and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a Party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High Court by way of Constitutional Petition".

31. He also relied on the case of **The Speaker of the National Assembly -Vs- James Njenga Karume, Court of Appeal, Civil Application Number 92 Of 1992 (1992) EKLR** where the Court of appeal in upholding the doctrine of Exhaustion held as follows-

"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution and an Act of Parliament, that procedure should be strictly followed".

32. Counsel for the Applicant while responding to this issue submitted that the Applicant had made attempts to exercise its rights under Section 90(1) of the Land Act, 2012 and since it is entitled to exercise its statutory power of sale, it is also entitled to apply to this court for the appointment of a receiver. Counsel argued that according to the decision in the case of **Civil Case 506 of 2004-Patrick Thuo Gitandu v Zahir Sheikh & 2 others [2005] eKLR**, where the court is satisfied that there are grounds for thinking that the suit properties will be dissipated, the court would exercise its discretion to appoint a Receiver.

33. From the arguments of both counsels it is common ground that the Applicant had commenced the process of exercising its rights under section 90 (1) of the Land Act which rights were coupled with a suit that was determined in its favor. As correctly pointed out by counsel for the Respondents and in agreement with the decisions cited hereinabove, the provisions of the Land Act touching on the power of sale have not been exhausted. I therefore see no need to appoint a receiver. Furthermore, having also established that the process was the subject of another suit that has already been determined, the court cannot be called upon to appoint a receiver through this application.

34. From the foregoing, it is therefore clear that this court is devoid of jurisdiction to hear and determine the application.

35. The upshot is that the application lacks merit and I dismiss it with costs to the Defendants/Respondents.

DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF JULY, 2021.

J.M ONYANGO

JUDGE