



REPUBLIC OF KENYA



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Sang v NCBA Bank PLC & another; Kipketer (Proposed Third Party) (Civil Case E002 of 2020) [2024] KEHC 4823 (KLR) (10 May 2024) (Ruling)

Neutral citation: [2024] KEHC 4823 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE E002 OF 2020
RN NYAKUNDI, J
MAY 10, 2024**

BETWEEN

PETER KIPSIGEI SANG PLAINTIFF

AND

NCBA BANK PLC 1ST DEFENDANT

**JOSEPH M. GIKONYO T/A GARAM INVESTMENTS
(AUCTIONEERS) 2ND DEFENDANT**

AND

BEATRICE JERUTO KIPKETER PROPOSED THIRD PARTY

RULING

1. Before me are two application. The 1st application is the Notion of Motion dated 12/10/2021 and the 2nd application is the Notice of Motion dated 19/10/2021.

The 1st application

2. In the Notice of Motion of dated 12/10/2021, the Applicant, Beatrice Jeruto Kipketer seeks the following orders;
 1. Spent.
 2. The Applicant herein be enjoined in the Suit known as E002/2020 as a third party.
 3. That a stay of further execution of the exparte consent order given on 6/10/2021 by Hon. E. Ogola J herein be granted pending the hearing and determination of this application interpartes.



4. That the Consent dated 27/9/2021 and adopted on 6/10/2021 be reviewed, vacated, varied and/ or set aside.
 5. That this Honourable Court be pleased to grant stay of further execution of any aspect of possession of the suit premises arising from the consent order in HCC No. E002 of 2020 pending the hearing and determination of Civil Appeal No. E130 of 2020, Beatrice Jeruto Kipketer v Prayosha Ventures and 5 Others against the Ruling delivered by Hon. Justice Hellen A. Omondi on 27/5/2021.
 6. An inhibition be and is hereby registered against the Title Eldoret Municipality Block 4/335 until further orders of the Court.
3. The 1st application is premised on the grounds therein and is further supported by the affidavit sworn by Beatrice Jeruto Kipketer on 12/10/2021.

The Applicant's Case

4. She deposed that she is the spouse of the registered proprietor of the premises known as Eldoret Municipality Block 4/335 hereinafter referred to as suit property which is subject of this application, that she got married to Sammy Kipketer Cheruiyot in 2003 where we have been blessed with 5 children who are currently in various schools who depend on the asset to pay their fees and that together with her husband, she built and contributed to the putting up of the building as my husband was carrying out his Athlete duties. Further, that they built the property in the year 2003 to 2004 when we started letting out the premises for rent to interested tenants and that they signed certain leases with tenants and have been in physical occupation up to now and been earning rent as the source of income to the family.
5. She maintained that as a spouse she enjoys overriding interest under the law on the asset hence the spousal consent is mandatory in every transaction involving the suit property and that the current status quo on rent collection on the building otherwise known as Kibargoi House has been vested in their family with the permission of the Court and that the bank advanced a facility and charged the said title in favour of Prayosha Ventures Ltd in 2015 but she did not appear before the lawyer Mr. Kiplagat Kalya who executed the Charge as she did not sign the spousal consent as a mandatory requirement of law.
6. She further deposed that she lodged a complaint at the Directorate of Criminal Investigation (DCI) in 2017 against the lawyer and the bank about the illegal process, the DCI went ahead to verify the said signature on the legal charge. It is against this backdrop that the court was given a report by a document examiner/a handwriting expert who presented the report in Court that it was a mere forgery and filed a suit in the Eldoret Elc376/2017 and 384/2017 which were later transferred to the commercial division and consolidated in HCCC 54/2018 and that suit is now pending before the High Court at Eldoret.
7. She later in 2020 learnt of an advertisement in the dailies paid by Garam Investment Auctioneers purporting to sell by way of public auction the building on 20/6/2020 and later on 26/6/2020 and rushed to Court and sought an interim stay order which was granted by the Hon Judge Stephen Kibunja in court whereby the auction was stopped and when the matter came up for hearing the Honourable Judge Hellen Omondi (as she then was) she fixed the application for hearing. She maintains that she learnt that the bank had staged an auction and indeed sold forcefully the asset to my detriment which to date no formal disclosure was done by the bank. To date No professional valuation was done contrary to section 97(1) of the [Land Registration Act](#) and that no property or title passed at the botched sale on the reason that the term of the lease had lapsed hence this legal wrong vitiated the sale.



8. She contends that the Respondent (auctioneers) and the bidder's Advocates failed to conduct due diligence-threw caution to the wind and proceeded with it nonetheless and then Judge upon being notified of the commission of the legal wrongs that arose at the botched sale on 2/7/2020 granted an order for status quo to be maintained on the suit property and the Plaintiff in the meantime sought to sue the bank for a refund of the monies allegedly spent in the botched sale.
9. According to the Applicant, having regard to the ongoing Appeal and the Application, the bank and the Plaintiff alone could not have arrogated themselves powers to declare certain conditions on the property in a consent in her absence.
10. The Applicant maintains that, she recently through their advocates learnt that Eldoret HCCC No. E002 Of 2020 Peter compromised by a mere consent dated 27th September at the Eldoret Commercial Courts before Hon. Justice Ogola J on the 6th October whereby the parties falsely misled the Honourable Judge of the High Court to adopt the consent as an order of the Court and that there is evidence from the registry that the Honourable Judge sitting at Eldoret was not sitting on 4th October as he was engaged in a meeting when the matters were taken out of the day's list and that the date of 6th October was taken ex parte. The Applicant contends that despite the notice to the Court users, it is evident that the parties advised by advocates who are officers of the court, colluded and orchestrated a scheme to fraudulently sneak in a consent and with stealth tactics filed the same and had it adopted in Court. The Applicant contends that prior to the impugned consent order, she was informed that a ruling was delivered on 27/5/2021 Hon. Justice Hellen A. Omondi which ruling she is dissatisfied with and therefore preferred an appeal. The Applicant maintains that while on the 27/5/2021 by Hon. Justice Hellen A. Omondi delivered the Ruling on the suit property subject of the consent, it is imperative to note that an Appeal was preferred against the order in Kisumu E130/2021 Beatrice Jeruto Kipketer vs Prayosha Ventures Ltd and 5 others.
11. The Applicant contends that no full and frank disclosure was made to the Court before the said Consent was filed. adopted yet the parties involved are active litigants in the Civil Appeal E130/2021 at Kisumu Court of Appeal.
12. The Applicant further contends that suit property herein is still pending a ruling on inter alia validity of the auction and on the contested spousal consent subject of HCCC 54/2018 in the High Court and that justice is yet to be done in her Application and Appeal.
13. The Applicant maintains that the Parties in their collusion and attempt to defeat justice introduced the contention of possession of the property yet the existence of the lease term of the suit property in question has not been determined by a Court of law.
14. The Applicant further deposed that on 27/5/2021 she immediately instructed her advocates to appeal the said ruling and that their Appeal herein has a reasonable chance of success hence the consent that was recorded before this Court on 6th October was pre-emptive of the Appeal/Application Kisumu E094/2021 and E130/2021 and is therefore not proper before a court of equity. The Applicant believes that if the Plaintiff executes the consent order/decreed in Eldoret HCCC No.E002 Of 2020 on the building erected on Eldoret Municipality Block 4/335 then their appeal herein E130 2021 will be rendered nugatory, if they succeed and we shall have no audience before the Judge as the impugned consent will have taken effect. The Applicant maintains that the title in dispute ought to be preserved as there is cogent evidence that the auction staged on 26/6/2020 orchestrated the commission of irredeemable legal wrongs which form the basis of the aforesaid Appeal but in the meantime. the impugned consent order has convoluted these proceedings to an extent whereby the Plaintiff and the defendants have colluded to vacate the right of Appeal and right to be heard hence the reason the



consent should be stayed. Further, that the commission of legal wrong is the basis in which the alleged "public auction" was conducted on a non-existent title or "lease" which had expired way back in May 2018 by effluxion of time. According to the Applicant the impugned title Eldoret Municipality Block 4/335 ought to be preserved in the interim until a judicial pronouncement from a higher court being the Appellate Court is made.

15. The Applicant maintains that the title in question is also subject of complaint at Directorate of Criminal investigation where the title has been used to guarantee a facility to Prayosha Venture Ltd from the defunct NIC Bank now known as NCBA Bank PLC with a forged spousal signature before Kalya and Company Advocates in Eldoret in 2015 when the legal charge was executed.
16. The Applicant urged the Court in the interest of justice that an interim stay in terms of prayers 3 & 4 of the Motion be granted pending the hearing and determination of the appeal.

The 2nd Application

17. In the Notice of Motion of dated 19/10/2021, the Applicant, Sammy Kipketer Cheruiyot seeks the following orders;
 1. That the proposed interested party be joined to the suit as interested party.
 2. That the proposed interested party has legally identifiable proprietary rights over the property more particularly Eldoret municipality block 4/335.
 3. That the consent order emanating therefrom and adopted on 6th october,2021 be and is hereby set aside.
 4. That pending hearing and determination of the plaint, this court be pleased to issue an order of inhibition prohibiting any dealings with the suit property more particularly Eldoret municipality block 4/335;
 5. That the proposed interested party be granted leave to file responses to the plaintiff's plaint.
 6. That costs be in the cause.
18. The 2nd application is premised on the grounds therein and is further supported by the affidavit sworn by Sammy Kipketer Cheruiyot on 19/10/2021.
19. He deposed that he is the proprietor of the subject property Eldoret Municipality Block 4/335, that the Consent Order adopted on 6th October,2021 was by collusion and is also contrary to the policy of this Honourable Court and that said consent was given without sufficient material facts which would have enabled the court to arrive at just determination. He maintained that proprietary rights were incapable of being transferred by the 1st Defendant to the Plaintiff under the circumstances as they were voided by operation of the Law upon lapse of the Lease period and that he pre-emptive rights to renewal of the lease of subject property when it reverted back to the state after expiry of the leasehold tenure.
20. According to the Applicant the 1st Defendant had no legal capacity to transfer the said proprietary rights and that the sale is not only voidable but void under the Law.
21. He further deposed that manner in which the purported renewal and purported registration of the subject property is currently under consideration and investigations in other forums and that from the foregoing, he has identifiable stake in these proceedings and will ultimately be affected by the decision of this Honourable Court. he maintained that his interests will not be well articulated unless I appear in the proceedings, and champion my cause. According to the Applicant they have sufficient legal ground



to demonstrate at the at the hearing of the said suit to the intent that the proprietary rights had not vested on the 1st Defendant and thus any purported sale by auction or the consent dated 6th day of October, 2021 are prima facie null and void ab initio at Law.

22. The Applicant maintain that it is in the best interest of justice that I be joined to this suit, orders of inhibition granted and leave be granted to the interested party to file responses to the Plaintiff's suit.

The 1st Defendant's response

23. The 1st Defendant opposed both applications vide the Replying Affidavit sworn on 24/1/2022, by Stephen Atenya, a Senior Legal Counsel of the 1st Defendant.
24. He deposed that the Application at hand is conceived in mala fides, lacking in merit, an outright abuse of the court process and the orders sought are untenable and that he is aware suit property herein, LR Number Eldoret Municipality Block 4/335, forms the subject of a protracted legal tussle initiated by Prayosha Ventures Limited (as the borrower), Sammy Kipketer Cheruiyot (the Proposed Interested Party herein), Stephen Kipkiyeng Tarus (the Chargors) and the Proposed Third Party (as the Chargor's spouse) against the 1st Defendant concerning the 1st Defendant's right to exercise its statutory power of sale in Eldoret HCCC 54 of 2018.
25. He stated that the 1st Defendant's decision to proceed with the sale of the suit property was necessitated by the persistent default by the parties involved and their reluctance to provide a proposal acceptable to the 1st Defendant Bank and that the outstanding amount as at the date of the scheduled sale stood at Kshs.470,105,380.86.
26. He deposed that in the said suit, the Proposed Third party/Applicant raised grounds regarding the accrual of the statutory power of sale, which was rebutted by the 1st Defendant Bank and satisfactorily answered by the Court, culminating in two rulings by the Honourable Learned Judge (H.A. Omondi) dated 15th March, 2019 and 21st February, 2020 whereupon the applications for injunction were dismissed. He added that issue of spousal consent, was well ventilated by the Trial Court which noted that the burden of distinguishing the identity card number as owned by the Applicant fell on the Proposed Third Party/Applicant through a specialist from the Office of Registrar of Persons.
27. He maintained that the 1st Defendant Bank's right of statutory power of sale having accrued and the Court affirming the same, 1st Defendant Bank instructed its Auctioneers to issue the requisite statutory notices and proceed with the public auction sale. Consequently, the public auction was held on 26th June 2020 at 12.00 noon in compliance with all the requirements under the Auctioneer Act and Rules. The suit property was sold to the highest bidder at Kshs 60,000,000.00 and that subsequently, a Memorandum of sale was executed by the purchaser, the Plaintiff herein, which placed a timeline on the payment of the balance of the purchase price.
28. He further deposed that in an effort to continually frustrate the 1st Defendant Bank and scuttle the public auction sale, the proposed third party advertised a false and malicious caveat emptor in a newspaper of nationwide coverage and that the Proposed Third party/Applicant sought interim stay orders in respect of the suit property. I am aware that the orders issued on 22nd May, 2020, maintaining status quo, expired on 4th June 2020. A subsequent and similar order was issued on 2nd July 2020. Notably, he stated that the public auction sale was conducted upon the lapse of the interim orders, and at the time, there was nothing stopping the 1st Defendant Bank from exercising its statutory power of sale. He further stated that as at 2nd July, 2020, when the subsequent order was entered in respect of the property, the sale had already been finalized and the property duly transferred to the 3rd Respondent



and shortly afterwards, the Plaintiff filed the instant suit seeking orders inter alia to declare the public auction sale null and void ab initio on account of the alleged expired leasehold term.

29. He further deposed that upon discovery of the suit, the Proposed Third party/Applicant filed a Notice of Motion Application dated 1st December 2020 under a Certificate of Urgency in Eldoret HCCC 54 of 2018 seeking orders inter alia to join the Plaintiff as a Respondent to the suit and to declare the concluded public auction sale void. He however, contended that the equity of redemption of the Chargor extinguishes upon the fall of the hammer at the public auction sale and that accordingly, the Proposed Third party and the Chargor lost their proprietary interest at the fall of the hammer and upon the declaration that the Plaintiff being the highest bidder.
30. According to the 1st Defendant the application by the proposed third party to annul the sale in Eldoret HCCC 54 of 2018 was conceived in bad faith with the intent of vexing the Court into derailing the steps taken by the 1st Defendant Bank in realizing the suit property. He contended that considering that the sale had at that point reached the completion stage, the rightfully party to pursue such orders in respect of the suit was the Plaintiff, instead, he stated that the Proposed Third party/Applicant chose to abuse the joinder proceedings with the intent of disrupting the 1st Defendant Bank's realization process and that he is aware that the Application was well considered by the Honourable Learned Judge (H. A. Omondi) vide the Ruling delivered on 27th May, 2021 which settled any issues regarding the public auction sale and the resultant transfer thereof. Further, he stated that the Learned Honourable Justice H. A. Omondi rendered a Ruling that answered the issues as paraphrased below:
 - i. The prayer to join the Plaintiff as a Proposed Third party/Applicant in Eldoret HCCC No.54 of 2018 was denied on the reason that the sale had been concluded and thus the matter was capable of proceeding without the input of the Plaintiff.
 - ii. Further, regarding the revocation of the auction sale, the Court found no merit since the only recourse available to the proposed third party lied in damages pursuant to Section 99 of the [Land Act](#).
 - iii. On the issue of status quo and validity of the auction, the Court affirmed that at the time the auction sale was conducted, there was nothing stopping the process. The Court held that no adverse orders could be issued in respect of the suit property without calling the purchaser.
 - iv. The Court in its obiter stated that it was upon the Plaintiff to decide which cause of auction to pursue if at all there were any reservations concerning the suit property and it was not the business of the Court as the umpire to dictate to the Plaintiff the direction to pursue in its litigation.
31. He further deposed that the Proposed Third party/Applicant herein preferred an appeal Kisumu Court of Appeal Civil Appeal No. EI30 of 2021 to the Court of Appeal faulting the decision of the Trial Court through an application under Rule 5(2)(b) of the Court of Appeal Rules, 2010 and the same is yet to be determined.
32. He maintained that in a bid to amicably settle the instant suit, the Plaintiff and the 1st Defendant negotiated and entered into a consent which was ultimately adopted as an order of the Court on 12th October, 2021.
33. In response to the allegations by the Proposed Third party, he pointed out that the 4th Respondent duly discharged its duty of obtaining the spousal consent from the Applicant. A supplementary Affidavit sworn by the Advocate who was in charge of verification disclosed this factual position.



34. He contended that having adduced the evidence showing that the Proposed Third party's spousal consent was obtained, the burden thereafter shifted to the Proposed Third party and the Chargor to substantiate by adducing evidence that the person presented for the said procedure was not the spouse. In further response to the allegations regarding the title being the subject of investigations by the Directorate of Criminal Investigations, he stated that the said investigations are still pending and have never been concluded. He contended that in a common law jurisdiction like ours, takes an adversarial approach in adjudication as opposed to an inquisitorial one and therefore it would be improper for the Applicant to subject this Honourable Court into assuming an inquisitorial role by entertaining the allegations on the spousal consent which has already been considered by the Honourable Court in Eldoret HCCC 54 of 2018 and whose investigations are yet to be relied on by the Proposed Third party to throw into disarray the strides made by the Plaintiff and the Defendants in compromising the suit.
35. According to the 1st Defendant, the Proposed Third party's reliance on the issue of spousal consent and validity of the title of the suit property obtaining the orders herein amount to res judicata and that the import of the doctrine res judicata is premised on bringing an end to litigation. Further, the 1st Defendant maintains that joinder proceedings, even though pursued at any stage of the main proceedings must involve a wholesome inquiry into the intent of the proposed party and the importance of the said proposed party's presence to the proceedings of the suit.
36. Based on the foregoing, he stated that the issue at hand in the present suit concerned the alleged validity of the leasehold title and the Applicant has not demonstrated that his input will be beneficial in resolving the instant suit in any other way other than by consent of the parties herein. He maintained that a consent can only be set aside on the same grounds that would justify the setting aside of a contract and that the Proposed Third party and Interested party herein have not adduced and/or attached any evidence in their Affidavits to show that the consent is vitiated on account of any of the reasons advanced thereunder. He contended that with the Applicants' right of redemption extinguished upon the fall of the hammer coupled with the fact that the Applicant not being party to the sale and resultant transfer between the 1st Defendant Bank (Chargee) and the Plaintiff (Purchaser) disqualifies the Applicant from applying for orders to set aside and/or review of the consent ultimately adopted as an order of the Court on 12/10/2021.
37. He maintained that at the present moment, the substratum of the appeal has already been disposed by way of public auction which makes the Proposed Third Party/Applicant recourse only vested in damages and reiterated that the Application smacks of a malicious attempt by the Applicant to re-open a suit that has already been resolved amicably by consent of the parties without any probable cause. He contended that a party approaching a Court of Equity seeking equitable remedies similar to the ones sought herein must lay bare ALL the material facts for the Court to make a just determination.
38. In the end, he stated that the Proposed third party/Applicant is undeserving of the orders sought particularly those of review for distorting facts to this Honourable Court and creating an impression that the consent order is vitiated by way of an illegality.

The Plaintiff's Case

39. The Plaintiff opposed the application dated 12/10/2022 vide his affidavit filed on 13/10/2021. He deposed that this instant application is the application is frivolous, vexatious, an abuse of the due process of the law and is only intended to annoy and cause an injustice to me for the following reasons:-
- a. The proposed third party/Applicant made an application similar to the instant application in Eldoret HCCC No. 54 of 2018 dated the 1st December, 2020 in which the third party applicant sought and void and the plaintiff here enjoined in the said suit.



- b. The said application was canvassed before the Honourable lady Justice Omondi and in her Ruling dated the 27th May, 2021, the honourable judge dismissed the said application
 - c. The proposed third party applicant preferred an appeal against the said ruling via Kisumu Civil Appeal E130/2021 Beatrice Jeruto Kipketer vs NCBA & 5 Others.
 - d. Concurrent with the filing of the said appeal, the proposed third party applicant filed an application at Kisumu Court of Appeal dated the 17th June 2021 for the following orders;
 - i. This Application be certified urgent and its service be dispensed with.
 - ii. The Court be pleased to stay the intended renewal of lease and/or forced transfer of Eldoret Municipality Block4/335 arising from the auction sale conducted on 26th June 2020.
 - iii. The Court be pleased to stay the proceedings in the High Court at Eldoret Hccc No. 54 of 2018 Prayosha Ventures Limited and Two Others Versus NCBA Bank Plc And Three Others.
 - iv. The auction process led by the 4th Respondent herein conducted on 26th June 2020 be declared a null and void on the basis that no sale transpired as the security/title sought to be realized had expired by effluxion of time.
 - v. The costs do abide the outcome of the Appeal.
 - e. The appeal and the application in the Court of Appeal have not been heard and determined and are therefore pending for determination.
 - f. The proposed third party applicant has filed the instant application during the pendency of the appeal in Kisumu Civil Appeal E130/2021 Beatrice Jeruto Kipketer vs NCBA & 5 Others and the aforesaid application before the court of appeal is seeking similar prayers sought in the application the subject of the appeal and the application pending before this court
 - g. The net effect is that the proposed third party applicant is seeking to prosecute the same set of facts in multiple forums at the same time and through the back door cause the court to sit on its own appeal contrary to the law, a clear abuse of the due process of the law.
40. The Plaintiff contends that the application before Court is res-judicata for the following reasons;
- a. The Proposed Third party applicant made an application dated the 1st December 2020 in Eldoret HCCC No. 54 of 2018 seeking the following orders:-
 - i. This Application be certified as urgent and be heard in the first instance.
 - ii. Pending the hearing and determination of this suit, Peter Kipsigei Sang be enjoined as the 3rd Respondent to the suit forthwith
 - iii. The status quo as at 2/6/ 2020 be maintained.
 - iv. The sale and auction of the property known as Title No. Eldoret Municipality Block4/335 held between 26th -30th June 2020 be staged pending the hearing and determination of the application
 - v. The entire sale and auction of the property known as Title No. Eldoret Municipality Block4/335 held between 26th-30th June 2020 by the 2nd Respondent be declared null and void



- vi. The 2nd Respondents be compelled to produce the proceedings of the auction conducted on 26/6/2020.
 - vii. That this Honourable Court do grant a stay of the intended sale purported to emanate from the unlawful and or unprocedural Auction conducted on the 26th June 2020 payment of purchase price, transfer and/or any other dealings on Eldoret Municipality Block 4/335 Kibargoi House by the Respondents their agents and or servants pending the hearing and determination of the Application herein.
 - viii. That leave be granted to the Applicant/Plaintiff to further amend the amended Plaintiff in accordance with annexed plaintiff.
 - ix. Costs be in the cause.
- b. The application was canvassed before Lady Justice Omondi, who rendered her ruling on the 27th May 2021 and that in her ruling the Court dismissed the application and specifically found that enjoining the Plaintiff misjoinder of parties.
 - c. The court in fact ruled that it is not the responsibility of the Court to advise parties on joinder but the said application the dated 1/12/2020 filed in Eldoret HCCC No. 54 of 2018 ought to have been filed in the present suit. The court observed that the third party chose not to join the instant suit and must therefore suffer the consequences of the election.
 - d. That from date of the pronouncement of the Court's Ruling on the 27th May, 2021 Eldoret in HCCC 54 of 2018 until the determination of this suit, that is four months ago, the Applicant deliberately chose not to apply to join the suit herein despite the Court advising her to join it as the most appropriate thing to do instead of seeking to enjoin me in the main suit which is entangled with so many issues pertaining to spousal Consent and legality of Charge which I am not a necessary party for their determination.
 - e. That Paragraph 28 of the Court's Ruling partly read as follows; "Of course one would expect that logically if Peter Kipsigei Sang is seeking the court to determine the validity of the auction conducted on 26th June 2020 and in fact demanding a refund of the purchase price, this would be a window of opportunity for the applicant to join, but then that is not an option she wants to consider, and certainly this court as an umpire cannot direct a player in the field on where to kick the ball of litigation. I do not think I can say any more in the spiral web, this matter must be put to rest one way or the other. I have rendered myself twice on this matter and perhaps the applicant ought to consider taking up the matter to a court of superior jurisdiction"
 - f. That it is evident from the above Ruling extract at Paragraph 28 that the Applicant chose from the onset not to have herself enjoined in the suit herein.
 - g. The Third party preferred an appeal at the court of appeal as application in the Court of Appeal for stay. The appeal and the application at the court of appeal are still pending determination.
 - h. The Proposed third party applicant's substantive prayers and foundation of the prayers sought herein are substantially the same as the orders sought and the basis of the said application dated the 1st December 2020 in Eldoret HCCC No.54 of 2018 and the appeal and the application in the court of appeal are the same.
 - i. The application must therefore fail on that account of the principal of res judicata.



41. The Plaintiff further deposed that the proposed third party applicant filed an application seeking to stop the auction sale in Eldoret HCCC No.54 of 2018 via her application dated 21st January, 2020. The court dismissed the application therefore vide its Ruling dated the 20th February 2020 paving the way for the auction leading to the purchase by the Plaintiff on the 26th July 2020. He contended that the Third party did not appeal against the aforesaid dismissal and in law is deemed to have conceded to the finding of the court and that the subsequent agitations including the instant application is therefore founded on quick sand as the foundation upon which any claims she may have had were pulled billed beneath her feet by the Ruling. He stated that subsequent, to the aforesaid ruling dated 20th February 2020 the Defendants proceeded to advertise the property for auction, which auction took place on the 26th June 2020 wherein he was declared the highest bidder. He further stated that he paid the full purchase price of Kenya Shillings Sixty Million Five Hundred Thousand (Kshs. 60,500,000/-) and all the completion documents were given to him and was however unable to be registered as the proprietor of the property because his advocates noticed that the lease had and expired needed to be regularized.
42. He stated that the Defendants took too long to respond to his request to have the Certificate of lease being regularized prompting him to institute the instant suit and that they subsequently headed to his pressure through the institution of the suit and sought time to regularize the title documents, which they finally did culminating in the consent dated the 9th September 2021 and adopted by the Court on the 12th September 2021 adopted by the Court on the 6th October, 2021. He added that subsequent to the recoding of the consent compromising the suit the following events have taken place:-
- a. The Property was subsequently transferred and registered in his name after which he took physical possession , occupation and ownership of the same from the 27th September, 2021 to date.
 - b. That as part of taking over of the property, I noticed that the door was therefore not easy to identify the various spaces within the building. I therefore branded all the doors.
 - c. Upon taking physically occupation of the premises, the tenants started signing new contracts with me and started paying rent to me for the month of October, 2021 from 1st October, 2021 pursuant to the notice of change of ownership to tenants dated the 28th September, 2021
 - d. That I have also proceeded to change the name of the premises to Kossons Business Centre from the previous name Kibargoi House 2021 from the previous name Kibargoi House 2021.
 - e. That I also employed Lekato Security Company Limited guards to provide security in the premises from the 1st October 2021 and even entered into a binding contract with them.
 - f. That subsequently, the Counsel for the Applicant started writing and circulating a number of letters to the tenants urging them to stop paying rent to myself even before the filing of the instant suit.
 - g. That the Tenants have since stopped paying rent to me due to the circulation of letters to the Tenants urging them to stop paying loss and to myself having spent a colossal amount of Kshs. 60, 500,000/= in purchase of the property, having been registered as the legal owner of the property and having assumed physical occupation and possession of the same.
 - h. From the foregoing, the status quo is that I am currently in occupation and possession of the premises as laid out in paragraph 14 al-e) above.



- i. That I thus urge the Court to decline to entertain the invitation to interfere with the parties consent order which was arrived by the parties mutually and consensually with the interest of settlement of the suit herein and in conclusive determination of their issues.
 - j. That further we urge the Court to decline from accommodating the to re-open a matter which has already been determined by way of a mutual Consent Order and where he had clear opportunity to put forth the issues she now seeks the Court to consider and determine but declined.
 - k. That it is also misleading for the Applicant to baselessly assert that the Judge Hon. Justice Hellen Omondi was in hurry when she made her Ruling dated the 27th May, 2021 without any justifiable reason supporting the allegation.
 - l. That the correct position is that the Judge in delivering its Ruling soundly considered all the issues that arose in accordance to the principles of law and supported the same with proper reasoning and case law.
 - m. That it is sad that the Applicant has approached this Court mischievously and maliciously seeking for her indolence to be accommodated by the honourable Court way after change of ownership of the premises was effected to me.
 - n. That in fact it is the Applicant who seeks to take advantage of the fact that the Judge is new in the station by concealing material facts in relation to the suit property more particularly by misrepresenting that the Consent Order was arrived at exparte which is a misnomer.
 - o. That the recording of the said two consents and subsequent adoption of the same by the Court as Court Orders marked the suit as settled and determined as between the Parties in the suit.
 - p. That the Application herein violates the doctrine of res-judicata since the Consent Order dated the 27th September 2021 having conclusive end which legally means that the suit having been determined cannot be re-opened.
 - q. That the Applicant elected not to join the suit from the onset having acknowledged the existence of the suit herein by quoting EldoretHCCC No. 54 of2021 but chose not to join.
 - r. That the Applicant consequently can be directed to insulate his claim for nullification of the auction sale and subsequent transfer of the property through the verdict of the Court of Appeal in Kisumu Court of Appeal No. E130 of 2021
 - s. That the Court verdict in Kisumu Court ofAppeal No. E130 Eldoret Municipality Block4/335 was valid or not and declare the transfer illegal by cancelling the new registration of the property.
 - t. That the Plaintiff being the registered owner of the suit property will greatly be prejudiced and will suffer grave injustice if application to re-open the suit is allowed.
43. The Plaintiff maintains that the Court, the court ought to take judicial notice of a peculiar trend since the initiation of Eldoret HCCC 54 of2018 The previous registered owner of the property Sammy Kipketerlost his attempt to stop the bank from auctioning the property and never preferred any appeal. The said Sammy Kipketerhas not challenged the sale either and that it was upon the dismissal of his application to stop the sale that the Proposed Third party came into the picture.
44. He further deposed that upon my taking over the property, his advocates and agents received a letter issued by the current Third party's advocates in which the advocates were purporting to represent the



previous registered owner and that Sammy Kipketervisited the site during the take over and insulted him and his agents in the process of the taking over. He however declined to file an application in court when advised to do so but instead has chosen to hide behind the wife. According to the Plaintiff it is clear that the Proposed Third party and her spouse, the former registered owner are colluding to defeat the interest s of justice, however the Plaintiff contends that the Proposed Third party has now conveniently chosen not to seek to enjoin the husband (the previous registered owner) in her application and that her application is therefore incapable of being determined in the absence of her spouse.

45. In the end, the Plaintiff urged the Court to make an interim decision regarding the payment of the rent by:-
- a. The proposed third party's advocates have issued several correspondences as explained to curtail payment of rent to me.
 - b. The stay orders did not address the question of rent payment. The Third party did not make material disclosure to the court to enable the court to make the appropriate orders.
 - c. The third party's spouse did not pay the loan he guaranteed despite the massive rent collections from the premises, leading to the subsequent sale.
 - d. Unless the court makes interim appropriate orders, the third party and her family will continue unlawfully benefiting even now when they are not the proprietors of the property.
 - e. That I pray that the court lift the stay orders pending the hearing and determination of the application and allow me to continue collecting rent on account of the fact that I am the new registered owner of the property and I have heavily invested in the same by paying a whopping Kenya Shillings Sixty Million Five Hundred Thousand (Kshs 60,500,000.00) as the purchase price.
 - f. In the alternative, the court be minded making a decision that protects my interest.
46. The Plaintiff prayed that the application be dismissed with costs.

The submissions.

47. This Court directed parties to file and serve their respective submission and only the Plaintiff herein filed his. In the said submissions the Plaintiff framed the following issues for determination;
- a. Whether the Interested and the third parties have recognized legal claim against the Plaintiff/ Applicant.
 - b. Whether the Statutory power of sale by charge extends to renewal of an expired lease.
 - c. What is the legal effect/implication of a Consent Judgment to third parties and /or interested parties.
 - d. Whether the application dated 12/10/2021 is Sub-judice.
 - e. Whether the prayers seeking to vacate, vary and or stay the Consent order dated the 27/9/2021 and adopted on 6/10/2021 and any other consequential prayers can be granted by the Court,
 - f. Whether the issues of spousal Consent and Validity of the Auction Sale can be entertained in this Suit.
48. I have duly considered the said issues I and need no to reproduce the same here.



Determination

49. I have duly considered both applications, the affidavits both in support of and in opposition to the application herein as well as the submissions filed. In my view the only issues for determination is whether the orders sought can be issued. From a cursory perusal of both applications it clear that the primary both of contention between the parties herein is the consent order issued by Hon. Justice Ogola on 6/10/2021. The Applicants want this Court to stay and or vary the said consent order.
50. It is without a doubt that subject matter forming the dispute at hand is property known as Eldoret Municipality Block4/335 which the Applicants contended was irregularly sold to the Plaintiff by the Chargee herein. It also worthwhile to note that the said subject matter has been subject of litigation in various forums. Currently, there is a pending Civil Case being HCCC No. 54 of 2018 filed at the High Court in Eldoret and an appeal being Appeal No. E130 of 2021 filed at the Court of Appeal In Kisumu.
51. For purposes of clarity this Court will restrict itself to handle the matters before as framed by the parties herein without subjecting itself to issues that are not before it. For record purposes the matter before me was filed one Peter Kipsigei Sang as against NCBA Bank Kenya PLC and Joseph M. Gikonyo T/A Garam Investments (Auctioneers) in light of being declared the highest bidder in a sale by an auction conducted by the two Defendants herein. The Plaintiff being unable to be registered as the proprietor of the suit property as the lease had expired he then moved this Court to compel the Chargee to regularize the transfer.
52. Consequently, upon learning of the existence of this instant suit the Applicants herein sought to be enjoined to the proceedings herein having learnt there exists a consent order which the Applicants maintain touches directly on the issues at hand before the case that is filed at the Court of Appeal.
53. In the 1st application, the Applicant has premised her case on the issue of a spousal consent and the validity of the auction sale in view of the subject matter. Without saying much on the said issues I want to categorically point out the said issues are not an issue before this Court but issues awaiting determination before the Court of Appeal in Kisumu in Civil Appeal No. E130 of 2020 and such I restrain myself from commenting on the same.
54. The Applicants request that this Court varies and or set aside the consent order that was issued on 6/10/2021. They argued that no complete disclosure was provided to this Court prior to the adoption of the said order, despite the fact that the parties involved are still parties in Civil Appeal No. E130/2021.
55. Facial examination of the record shows existence of a consent order which reached by the Plaintiff and the 1st and 2nd Defendant in the presence of Honourable Justice Ogola on 6/10/2021.
56. The Court of Appeal gave the grounds upon which consent judgment may be set aside in the case of *Board of Trustees National Social Security Fund versus Micheal Mwalo* [2015] eKLR as follows;

“The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.” (emphasis mine).



57. In the case of case of *Windsor Commercial Land Company Ltd & others v Century National Merchant Bank Trust Ltd* SCCA 114/2005:
- “The Court will not interfere or disturb a consent order between the parties other than on those grounds in which it would interfere with any other contract. These would include mistake, misrepresentation, duress and undue influence.”
58. Prudence, indeed will dictate that parties legal effect deprived from the consent orders should be deliberately be bound unless there is evidence that every material fact in their possession was invariably mistaken or misrepresented to warrant a variation or complete setting aside the order. It is integral as the Court held in *Flora N. Wasike v Destinno Wamboko* [1988] eKLR that:
59. “It is now settled Law that a consent Judgment or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out . (See the decision in *J. M. Mwakio v Kenya Commercial Bank Ltd* CA No. 28 of 1982).”
60. In the case of *Frank Phipps & Pearl Phipps v Harold Morrison* SCCA 86 of 2008 Harris JA stated:
- “As a general rule, an order obtained by the consent of the parties is binding. It remains valid and subsisting until set aside by fresh proceedings brought for that purpose. *Kinch v Walcott and Others* [1929] A.C. 482 “The bringing of fresh proceedings would normally be guided on the obtaining of the consent order by fraud, mistake or misrepresentation.”
61. *Wildung v Sanderson* [1897] 2 CL 534:
- “A consent Judgment or order is meant to be the formal result and expression of an agreement already arrived at by the parties to the proceedings embodied in an order of the Court. The fact of its being so expressed puts the parties in a different position from the position of those who have simply entered into an ordinary agreement. It is of course, enforceable while it stands, and a party affected by it cannot if he concludes, he is entitled to relief, simply wait until it is sought to be enforced against him, and then raised by way of defence. The matters in respect of which he desires to be relieved. He must, when he has completed obey it, unless and until he can get it set aside in proceedings duly constituted for this purpose.”
62. From the above case Law consent Judgments are rarely impeachable once pronounced and adopted by the court unless on the rarest occasions on grounds which also vitiates a contract. As to whether this is the position in the instant case behoves in this Court to evaluate the circumstances prior, during and after the adoption of the consent.
63. It is evident from the consent order dated 6/10/2021, that neither of the Applicants is a party to the aforementioned consent order. The Applicants are requesting that this court either stays or reviews and or sets aside the aforementioned consent order. Is it then possible for this Court to modify or revoke a consent order in favour of non-parties to the litigation?. It would be absurd for this Court to suspend or alter a consent order in favour of persons who are not parties to it, given the guidelines and restrictions governing consent orders. With the exception of stating that an appeal is now pending, the applicants have not provided any justification for the aforementioned consent to be revoked or evidence to proof on a balance of probabilities existence of fraud, error, concealment of material facts or misrepresentation against the persons involved.



64. It is the law in Kenya that consent judgements freely entered by the parties and adopted by the court in so far as the dispute duly admitted and recognised by the court itself cannot be set aside at whim or capriciously. The judgement so adopted by the court enjoys enforceability and validity according to the rules and measures within the applicable statutes. Of course there are grounds to impeach a consent order as supported by the above case law. The principle of legal certainty and finality of litigation imposes burdens on individuals or litigants to generally harmonise their negotiations in good faith capable of general accountability regarding the purported consent and the seriousness of its existence to bind the parties to the consent.
65. The need for threshold on the scope and effect of recording a consent has to be borne in mind in those circumstances to achieve the interests of justice as in the case of a trial on the merits. To a great extent of course for present purposes there is no conflict as to the consistency in our jurisprudence on what constitutes the subject and powers of the court to vary or set aside the adopted consent judgement or ruling. The court in session has power to do so within the ramification of the well-established principles and guidelines. Sometimes finality of litigation, limits the scope of such review jurisdiction. As a matter of emphasis the circumstances in which a consent judgement may be interfered with were considered by this court in *Hirani v Kassan* [1952] 19 EACA 131 where the following passage from Section on judgements and orders, 7th Edition Vol 1,P 124 was approved. “Prima facie any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud of collusion or by an agreement contrary to the policy of the court of if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement. The compromise agreement was made an order of the court and was thus a consent judgement. It is well settled that a consent judgement can be set aside only in certain circumstances e.g on the grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract.
66. In this case the parties and their advocates consented to the consent in very clear terms, they were certainly aware of all material facts and there could have been no mistake or misunderstanding. The conditions of setting aside the impugned consent judgement from the affidavits evidence filed by the respective parties challenging it as entered between the parties and adopted by the court are not evident at all. The court which entered the consent judgement had the jurisdiction and whatever it is the parties are aggrieved about to me it is not based on vitiating elements. The consent judgement has the quality of finality and speedy dispensation of justice.
67. In respect to this case, there is a consent judgement where parties to the cause of action fashioned out an agreement as to how to settle there dispute out of court and did apply to the court to adopt the judgement in the terms they had agreed upon. It is the order of that court and its settled terms the aggrieved parties are challenging that it was adopted without notice or none-disclosure of material evidence. My reading of this consent and its background information is that the parties to this consent were bound and legally so to enter that consent with its legal implications without involving the other parties at that stage. I don't think to me one can read too much of those terms as having constituted fraud, or fraudulent misrepresentation, mistake, misconception, or any other vice which affords a ground for setting aside the compromise consent on which the order was based.
68. In my further considered view, the rationale and significance at the stage of those proceedings pending before that court of concurrent jurisdiction is the whole idea of the law allowing consent judgement was to present either of the parties to the mortgagor/mortgagee agreement to settle the terms of the dispute. The sworn affidavits envisage a situation or a consent which was entered and from the onset of it threatens the textual rights and the interest of other parties bringing in an emerging paradigm on



all the attributes of the impugned consent order. It is therefore suggested that setting it aside is the only necessary remedy to place the parties on the same fulcrum. However, it is a case to me which sits very comfortably within the reasoning adopted by the court and the designed consent invariably a valid judgement of the court unless and until it is varied, set aside or vitiated by this court or by one superior to the High Court.

69. This court is also being asked to grant stay of execution of the consent judgement or even any other proceedings pending determination by any of the primary parties or interested party who has joined the proceedings. The law on stay of execution pending appeal or proceedings has been well settled in many local cases: *Madhupaper v Crescent Constitution*, Nairobi civil application number 60 of 1990, *Consolidated Marine v Nampijja* and another, Nairobi Civil application number 93 of 1989 (Nyarangi, Gachuhi, JJA and Kwach AHJA on 13 July 1989, *FK Kiongo v VPN Mukubwa and another* Nairobi civil application number 63 of 1988 (Platt, Gachuhi and Apaloo, JJA on 3 June 1988), *Stephen Wanjohi v Central Glass Industries Ltd.*, Nairobi High Court Civil Case Number 6726 of 1991 (Hayanga J on 3 March 1995). The laid down principles on grant of stay of execution as elucidated in the above cases include the following:
- a. The court does not make the practice of depriving a successful litigant fruits of its judgement.
 - b. The court should then consider whether there are special circumstances which mitigate in favour of granting the order of stay and the onus will be on the applicant to prove or show such special circumstances
 - c. The court would likely grant stay where the appeal would otherwise be rendered nugatory or the appellant would suffer loss which would not be compensated in damages.
 - d. Where the appeal is against an award of damages the established practice is that stay will normally be granted where the appellant satisfies the court that if the damages were paid, then there will be no reasonable prospect of recovering them in the event of the appeal succeeding.

In the same authorities “ Once an applicant has brought forward solid grounds for seeking stay, the court is then called upon to weigh the risk inherent in granting a stay and the risks inherent in refusing stay. This balancing process is what is here referred to as the courts discretion. Much as the court will not make the practice of depriving successful litigants, fruits of their judgement and much as the mere filing of an appeal and probability of success will not qualify as stay of execution, while a court will be concerned about the appeal not being rendered nugatory ultimately it is about how the court weighs these considerations and what they translate to in the particular case.

70. My understanding of these principles and legal guidelines, is that a successful litigant may not be deprived of the fruits of his or her litigation without a good cause. Normally not even a Notice of Appeal unless there is good reason that the appeal in question may be rendered nugatory if stay orders are not granted by the court. Herein the Applicants and Respondents addressed the court on various issues that it would be utterly unjust for this court to proceed with the case as there is a pending appeal before the court of appeal and another suit before the environment and land court. If one was to delve into the issues as originally pleaded, one can see the plaintiff, NCBA Bank and Joseph M. Gikonyo T/A Garam Investments. That alone prima facie in obiter under Article 162, Section 13 of the Land and [Environment Court Act](#) and Section 150 of the [Land Act](#) does oust the jurisdiction of the ELC Court.
71. If I am wrong on this matter of jurisdiction, any party aggrieved by this obiter is at liberty to appeal. The Karisa Chengo Case is still good law in the interpretation of Article 162 (3) of [the Constitution](#). All in all in the instant case on the merits of stay of execution, this court is of the considered view that it is not proper for it to deprive the applicant in the main matter of the fruits of his litigation just because there



has been an appeal lodged against the judgement of this court and also regard being the respondents/ applicants failure to show that the appeal would be rendered nugatory in the event stay is denied.

72. Having regard to the said judgement, I am not persuaded that it would be just and convenient to make the order for a stay of execution of the judgement pending the hearing and determination of the intended appeal. That decision of stay and preservation of the subject matter with a realistic prospect of succeeding falls within the ambit of the court of appeal. As to the effect of the ELC jurisdiction the guiding principles remain within the discretion of that court and merely using an affidavit evidence averred by an Applicant is not sufficient evidence to demonstrate that ruination would occur in absence of this court downing the tools or of granting stay for that matter.
73. Applying the above principles, the request for stay for proceedings pending all those references of litigations pending elsewhere is also denied. I find solace in the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR Gikonyo J held that: “ Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent.”
74. Being guided by the foregoing, this Court cannot thus stay and or vary the consent ordered dated 6/10/2020.
75. Regarding the prayer requesting the registration of an inhibition against the Eldoret Municipality Block 4/335 title. As you are already aware, the Court of Appeal is now considering an appeal that deals with the aforementioned topic. It would be wise, in my opinion, for the applicants to request the aforementioned order in that specific forum and/or wait for its decision, as issuing it in the present instance would be without any basis. The principles set out in *East African Industries v Trufoods* [1972]EA 420 and *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR as read with order 40 (1) & (2) of the *Civil Procedure Rules*, the Applicants as of now have not shown a recognizable legal right over the said property which is worthy of protection until the clock of litigation is reversed by the court of competent jurisdiction or in any event by an Appellate court as submitted by the parties in this forum.
76. Whether the renewal of the lease agreement within the measurement of the scales of justice would see the pendulum tilt in favour of the aggrieved parties is not a matter for now before this court. It therefore my considered view that from the circumstance of this case this Honourable court should down tools in granting any orders to preserve the suit property. Surprisingly so, parties there may be substantial issues to be tried in a substantive suit on the conveyance of the said property but that is no longer a justiciable issue before this court.
77. On the whole I am satisfied that the Applicants have not at all fulfilled the requirements to enable this court exercise its discretion to grant the various remedies as pleaded in the filed applications as against the plaintiff. Consequently, having lacked the merit test, the applications are dismissed with costs payable to the plaintiff.
78. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 10TH DAY OF MAY 2024

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R. NYAKUNDI

JUDGE

