



REPUBLIC OF KENYA



**Kipleting v Co-operative Bank of Kenya Limited (Civil Case
05 of 2021) [2024] KEHC 8489 (KLR) (10 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8489 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CIVIL CASE 05 OF 2021**

JR KARANJA, J

JUNE 10, 2024

BETWEEN

THOMAS RUGUT KIPLETING PLAINTIFF

AND

CO-OPERATIVE BANK OF KENYA LIMITED DEFENDANT

RULING

1. The Applicant Esther Jelagat Rotich, vide the Notice of Motion dated 6th May 2022, seeks an order for her enjoinder in this suit as an interested party. This suit was filed on the 15th October 2014 at the Environment and Land Court by Thomas Kipleting Rugut (Plaintiff) against the Co-operative Bank of Kenya Limited (Defendant), but was transferred to this court on 25th October 2018. It arose from the attempt by the Defendant to exercise its statutory power of sale over Land Parcels No Nandi/Chepterit/1130 and Nandi/Kiminda/1716 which secured a loan facility extended to the Plaintiff by the Defendant.
2. Parcel No Nandi/Chepterit/1130 belonged to one Alfred Kiprobon Kemboi while Parcel No Nandi/Kiminda/1716 belonged to David Kirwa Rotich.

To date, ten years later, the suit is still pending hearing and determination. Basically, the present application is anchored on the Parcel No Nandi/Kiminda/1716 and is grounded on the facts that the Applicant is the wife to the registered owner of the property, David Kirwa Rotich, since the year 1988 and are both blessed with four issues.
3. That, the property aforementioned is the couple's matrimonial property but it was only recently that the Applicant learnt that the property had been pledged as security for the repayment of the loan advanced to the Plaintiff and guaranteed by the Applicants husband.



The Applicant's contention is that her consent as the spouse of the registered owner of the property was never obtained and instead the consent was obtained fraudulently from a stranger called Machorie Jepleting Choge.

The Applicant is therefore desirous of being joined in this suit as an interested party for purposes of ventilating and protecting her interest and that of the children of her marriage.

4. Whereas the Plaintiff did not oppose the application, the Defendant opposed the application on the basis of the averments and grounds contained in the replying affidavit deposed by its legal manager, Duncan Matisero on the 11th October 2023, wherein it is contended that the loan facilities were governed by the applicable standard terms and conditions which were accepted by the Plaintiff and the chargor, David Kirwa Rotich. In that regard, the chargors spouse one Machorie Jepleting Choge appeared before an advocate and executed the necessary affidavit of consent of spouse on the 16th July 2012 and if the chargor had more than one spouse he would have declared as much and caused all his wives to consent to the creation of the charge.
5. The Defendant contended further that the Applicant is not only a stranger to itself but also a busy body on hire by the Plaintiff to advance his dirty tactics of dragging and delaying this suit while at the same time avoiding to pay the outstanding loan.
6. Having heard the application as argued in support and opposition thereto by way of written submissions, it is apparent to this court that the issue arising for determination is whether the Applicant has provided or shown satisfactory grounds for exercise of the court's discretion in her favour.

The determination of the said issue would however, be dependent on whether or not the application is competent and proper before this court.

7. In that regard, the Notice of Motion is brought essentially under Section 47 of the [Law of Succession Act](#) and Rules 60 and 73 of the [Probate and Administration Rules](#).

On the outset, the application is improper and incompetent before this court for reasons that it is brought under the provisions of the [Law of Succession Act](#) and the Rules made thereunder, yet the suit is essentially a claim in commercial law arising from a contractual agreement for the advancement of financial loan facilities to the Plaintiff by the Defendant for which the property material to the application was secured by execution of a charge instrument.

8. The suit is far from being a probate and succession cause which is normally governed by an independent and separate legal regime or framework.

In her submissions, the Applicant seems to agree that the application is brought under the wrong provisions of the law by acknowledging that the applicable and proper provision for such an application is Order 1 Rules 10(2) of the [Civil Procedure Rules](#).

9. Despite the clear knowledge that the Applicant fell within the domain of the [Civil Procedure Act](#) and the Rules made thereunder, the Applicant "soldiered" on with the application without utilizing the time and opportunity available for amendment of the Notice of Motion to accord with the provisions of the [Civil Procedure Act](#) and Rules.
10. Such lack of diligence and demonstration of gross indolence on the part of the Applicant militates against any form of indulgence in her favour.

Not even the principles of equity or Article 159(2) (d) of the [Constitution](#) would come to her aid at this juncture.



So, being improper and incompetent before the court, the application is fatally defective and must fall for dismissal without much ado. The application is therefore struck out and dismissed with costs to the Defendant and would still be dismissed if it were to be considered on the merits for the main reason that the Applicant failed to demonstrate and prove the fact that the alleged spouse of the chargor was not a wife for purposes of executing the spousal consent affidavit.

11. The element of fraud in the execution of the affidavit was thus not established and coupled with the fact that there was inordinate delay in bringing this application, the contention by the Defendant that the Applicant is a busy body in this matter being “remotely controlled” by the Plaintiff with a view to delay the suit may as well be held to be true and sustainable regard being given to the decision in the case of *Shah v Mbogo* (1967) EA 116, where it was held that: -

“Discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

12. The Applicant was clearly not deserving of exercise of discretion in her favour by this court. Otherwise, the application stands dismissed with costs and a date be fixed forthwith for the hearing of the main suit.

Ordered accordingly.

DATED AND DELIVERED THIS 10TH DAY OF JUNE, 2024

J. R. KARANJAH,

JUDGE

