



**MJK v F ML; Family Bank Limited (Interested Party) (Matrimonial Case 71 of 2018) [2024] KEHC 7427 (KLR) (Family) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7427 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MATRIMONIAL CASE 71 OF 2018  
HK CHEMITEI, J  
JUNE 20, 2024**

**BETWEEN**

**MJK ..... PLAINTIFF**

**AND**

**F ML ..... RESPONDENT**

**AND**

**FAMILY BANK LIMITED ..... INTERESTED PARTY**

**RULING**

1. This ruling relates to the application dated 10<sup>th</sup> May, 2023 filed by the Intended Interested Party, Family Bank Limited, seeking for ORDERS THAT:
  - a. Spent.
  - b. Family Bank Limited be joined as an interested party in the proceedings.
  - c. The orders issued on 9<sup>th</sup> January, 2019 in respect of the following properties charged to Family Bank Limited be set aside:
    - a. Kajiado/kitengela/25310.
    - b. Kajiado/kaputei North/10724.
    - c. Kajiado/kaputei North/10444.
    - d. Kajiado/kaputei North/10445.
    - e. Kajiado/kaputei North/10446.



- f. Kajiado/kaputei North/10447.
  - g. L.R. No. 7785/ 1324 Nairobi.
  - d. Costs of this Application be provided for.
2. The application is supported by affidavit sworn by Joan Gachomba (Senior Legal Officer – Family Bank) on 10<sup>th</sup> May, 2023 who deponed inter alia that on 9<sup>th</sup> January, 2019, this Honourable Court issued a court order restraining the respondent from wasting, damaging or alienating and/or otherwise interfering with the properties mentioned above which the applicant holds a duly registered legal charge over the properties which was registered before the suit was commenced. The effect of which is such that the Applicant ought to be made a necessary party in this suit.
  3. She went on to state that the plaintiff failed to disclose to the Honourable Court at the time of filing suit that the properties aforementioned were charged to Family Bank Limited resulting in the orders being issued due to non-disclosure of material fact. The court orders issued on 9<sup>th</sup> January, 2019 are therefore a fetter on Family Bank Limited’s rights as a chargee as provided under Section 80, 81 and 90 of the Land Act, 2012 as they will be unable to realize its security in the event of default by the chargor.
  4. The orders were issued after the legal charge over the properties had been registered on 11<sup>th</sup> September, 2017 and in the circumstances, Family Bank Limited’s rights as a chargee over the properties should rank in priority to the court order issued on 9<sup>th</sup> January, 2019. The said orders should be discharged to ensure that Family Bank Limited’s rights as chargee are not affected by the litigation between the Plaintiff and the Respondent.
  5. The application is supported by replying affidavit sworn by Franklin Mithika Linturi the respondent on 22<sup>nd</sup> May, 2023. He states, *inter alia* that the interlocutory orders were predicated on the outcome of Milimani Commercial Courts Divorce Cause No. 272 of 2019: *Maryanne Jebet Kitany v Franklin Mithika Linturi* and the determination by the trial court of the specific question of whether there is a valid marriage between Maryanne Jebet Kittany and Franklin Mithika Linturi.
  6. The trial court held that the Respondent was in a monogamous marriage with a third party and he could not enter into a valid marriage with Applicant thus the instant suit has been overtaken by events. The instant suit and the Applicant’s appeal against the divorce judgment are foredoomed to fail by operation of law.
  7. He further deponed that the interlocutory orders have occasioned extreme and inestimable hardship on him, his family, business and various third parties to wit stripped his family and him of their homes and properties, granted the Plaintiff exclusive occupation of his family homes, put her under his care and responsibility and caused undue harm and prejudice to various third parties.
  8. He accused the Applicant of extending the life of the interlocutory orders for more than five years, effectively converting them to final orders through dilatory litigation tactics and thus prays for the orders to be discharged.
  9. The application is opposed by Maryanne Jebet Kittany, the plaintiff vide grounds of opposition dated 3<sup>rd</sup> July, 2023 which are premised on the grounds that the Intended interested party has not demonstrated how its joinder will help the court settle all the questions in the originating summons proceedings hence it is an unnecessary party to the proceedings herein.
  10. That this cause arises out of originating summons whose subject matter is based on the Matrimonial Properties Act, 2014 and that the parties herein (the Applicant and Respondent) have a relationship



which is pegged and/ or predicated on the determination of the divorce cause hence the intended interested party has no proprietary interest in this matrimonial cause.

11. She accused the Applicant of introducing commercial and charged titles which issues are a preserve of the Commercial and Tax division and/ or Environment and Land court.
12. The Applicant she further stated has come to court too late in the day (five years later) after the orders in question were made as such it is not a deserving party to the orders sought herein.
13. The Applicant has not demonstrated and/ or laid a foundation to warrant discharge of orders issued on 9<sup>th</sup> January, 2019 and therefore, this Honorable Court is bereft with the jurisdiction to ventilate the Applicant's rights as a chargee under Section 80, 88 and 90 of the Land Act.
14. The Applicant has filed submissions dated 1<sup>st</sup> August, 2023 placing reliance *inter alia* on KING'ORI V CHEGE (2002) eKLR where the court summarized the principles for joining a party to a suit as follows:
  - i. He must be a necessary party.
  - ii. He must be a proper party.
  - iii. In the case of a Defendant, there must be a relief flowing from that Defendant to the Plaintiff.
  - iv. The ultimate order or decree cannot be enforced without his presence in the matter.
  - v. His presence in the matter is necessary to enable the Court effectively and completely adjudicate upon the questions involved in the suit (see GLADYS NDUKU NTHOKI V LETHSEGO KENYA LIMITED: MUENI CHARLES (Intended Plaintiff) (2022) eKLR.

A necessary party was defined as one whose presence is necessary in order to enable the court effectively and completely to adjudicate upon and settle all the questions involved in the suit being one without whom no decree can be made effectively and one whose presence is necessary for complete and final decision on the question involved in the proceedings.

15. The Respondent has filed submissions dated 25<sup>th</sup> May, 2023 placing reliance among others on Kajiado High Court Civil Case No. 7 of 2017: St. Patrick's Hill School Limited v Bank of Africa Kenya Limited and Nairobi Civil Appeal No. 223 of 2016: Barclays Bank of Kenya Limited v Henry Ndungu Kinuthia where the court established that interlocutory orders automatically lapse by operation of the law after 12 months unless the court has given a sufficient reason why such orders should not so lapse.
16. He also relied on Supreme Court Petition No. 9 of 2021: Mary Nyambura Kangara alias Mary Nyambura Paul v Paul Ogari Mayaka & Another where the court held as follows:-
  - (a) The presumption of marriage does not apply where one of the parties lacks the legal right or capacity to marry due to a pre – existing monogamous marriage.
  - (b) The doctrine of presumption of marriage is on its deathbed, given the recent changes in the matrimonial laws in Kenya.
  - (c) The law on matrimonial property does not apply to persons whose relationship does not amount to a marriage.

## Background

17. This matter arises from the orders issued by this court through Hon. J. N. Onyiego on 9<sup>th</sup> January, 2019. It was ORDERED THAT:



1. Pending hearing and determination of this suit, the respondent and/or his servants or agents be and is hereby restrained from evicting and/or excluding the applicant and or in any way interfering with the applicant's peaceful living in the matrimonial homes in LR. No. AKACHIU/ AUKI/ 1338 – MAUA and LR No. Mae Ridge Country Villas No. 16 erected on LR No. 7785/ 1324 IR No. 123703, Runda.
2. Pending the hearing and determination of this suit, an urgent temporary injunction do issue restraining the Respondent, his servants and/or agents from wasting, damaging or alienating and/or otherwise interfering with the following matrimonial properties:-
  - a) KAJIADO/KITENGELA/ 25310.
  - b) KAJIADO/KAPUTEI NORTH/10724.
  - c) KAJIADO/KAPUTEI NORTH/10444.
  - d) KAJIADO/KAPUTEI NORTH/10445.
  - e) KAJIADO/KAPUTEI NORTH/10446.
  - f) KAJIADO/KAPUTEI NORTH/10447.
  - g) L.R. NO. 7785/1324 NAIROBI.
3. Pending the hearing and determination of this application, an urgent temporary injunction do issue restraining the respondent, his servants and/or agents from wasting, damaging or alienating and/or otherwise interfering with the following matrimonial monies and/ or the Applicant's possession therein:
  - a. Range Rover KCR 075F.
  - b. Toyota Lexus KCP 888N.
4. Pending the hearing and determination of this suit, an urgent temporary injunction do issue restraining the respondent, his servants and/or agents from accessing, utilizing withdrawal or any other transaction or alienating and or otherwise interfering with monies held in the following bank accounts:-
  - a) Cooperative Bank Account No. 011XXXX4751500.
  - b) Family Bank Account No. 046XXXX05957.
  - c) Standard Chartered Bank Account No. 875XXXX838500.
  - d) Credit Bank Account No. 002XXXX00006.
  - e) Equity Bank Account No. 018XXXX075323.
5. For avoidance of doubt, the motor vehicles in question as mentioned in prayer 7 shall continue being used by their current users but without changing ownership.
6. To execute these orders, the OCS Runda Police Station is hereby directed to ensure compliance by providing security to the Applicant during her return to the premises under the instructions of the Respondent be withdrawn and the two to make mutually agreed joint security arrangements.



7. To execute these orders, the OCS Runda Police Station is hereby directed to ensure compliance by providing security to the Applicant during her return to the premises at Runda Villa House No. 16 and the security currently manning the premises under the instructions of the Respondent be withdrawn and the two to make mutually agreed joint security arrangements.
8. This being an issue bordering on alleged family affairs, each party shall bear his or her own costs.

### **Analysis and Determination**

18. I have carefully considered the application, the responses thereto and the written submissions filed by the parties and address them as below.
19. The issue for determination, as crafted by the intended applicant are:
  - (a) Whether the intended interested party should be joined as a party.
  - (b) Whether the orders sought against the listed properties on 9<sup>th</sup> January, 2019 should be discharged.
20. It is not disputed that the marriage between the Plaintiff and the Respondent was dissolved through the divorce proceedings. It appears that the plaintiff has since filed an appeal which I suppose is yet to be determined.
21. Secondly the properties alluded to in this originating summons in one way or another are associated with both the plaintiff and the respondent. The substratum of the case is whether they owned it jointly through a joint purchase or acquisition. That is a subject of a substantive hearing.
22. At the same time, it is not disputed that some of the properties are charged to the Applicant. The manner and style and how they were charged and by whom is yet to be clear. That position again will be tested during the substantive hearing of the cause.
23. What then is the position of the Applicant? I think that all that it wants is to safeguard its interest in the properties which it is holding a legal charge. Although I agree with the Plaintiff that its role is peripheral I doubt whether it will sit on the fence as the plaintiff and the Respondent duel.
24. In other words, to the extent that the loan has not been settled and the properties discharged the Applicant will obviously remain edgy and uncomfortable. The court appreciates that it may not do much in this cause in terms of who has overriding rights over each other but to stand on the fence may not be efficacious. It must therefore be allowed to participate in the proceedings in a manner that it will ensure its rights are safeguarded.
25. I find solace in *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* [2017] eKLR, where Mativo. J. (as he then was) in explaining when an interested party ought to be enjoined in a proceeding, stated as follows:-

“A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights. In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established. It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty”.



26. In the premises I find that the application herein is merited only to the extent of allowing the Applicant to be enjoined as an interested party. The court will not have discharged the orders of Onyiego J for the simple reason that it will be venturing into a territory it does not have jurisdiction and may prejudice the determination of this cause.
27. Despite the above finding, it shall not be an occasion for it to ventilate issues which ought to be done at the Commercial and Tax division and or Environment and Land court. The case at hand is sui generis and if the interested party will raise any such issues I believe it shall be stopped on its tracks.
28. Simply put should the Applicant feel that the liabilities are not being settled then this unfortunately shall be a wrong forum to raise and this court is not seized of jurisdiction.
29. The court has also taken note of the delay this matter has taken. I think it is the duty of the parties to fast-track the same. As at now the parties ought to have taken witness stand to determine the true contribution and therefore ownership of the properties.
30. In the premises the application is allowed as hereunder.
  - (a) The Applicant is hereby enjoined as an interested party in this proceedings and further granted 14 days to file and serve any pleadings if need be.
  - (b) The Plaintiff and the Respondent are hereby granted leave within fourteen days after service to file any response and serve if need be.
  - (c) Costs shall await the outcome of the cause.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 20<sup>TH</sup> DAY OF JUNE 2024.**

**H K CHEMITEI**  
**JUDGE**

