



Sameja t/a Business 2000 v Shah & 4 others; Bealine Kenya Auctioneers (Interested Party) (Civil Case 689 of 2001) [2024] KEHC 8776 (KLR) (Civ) (10 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8776 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 689 OF 2001

AN ONGERI, J

JULY 10, 2024

BETWEEN

AZIM SAMEJA T/A BUSINESS 2000 PLAINTIFF

AND

LAKHAMSHI VIRPAL SHAH 1ST DEFENDANT

KAMLABEN LAKHAMSHI SHAH 2ND DEFENDANT

SURESHCHANDA LAKHAMSHI SHAH 3RD DEFENDANT

ASHOK KUMAR LAKHAMSHI SHAH 4TH DEFENDANT

HIGHPARK INVESTMENT 5TH DEFENDANT

AND

BEALINE KENYA AUCTIONEERS INTERESTED PARTY

RULING

1. The application coming for consideration is the one dated 24/10/2023 brought under Order 1 Rule 3 & Rule 10, Order 51 Rule 1 of the Civil Procedure Rules, 2010; Sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#) and all other enabling provisions of the Law seeking the following orders;
 - i. That this application be certified urgent and heard ex-parte in the first instance and the orders herein granted accordingly.
 - ii. That Bealine Kenya Auctioneers, the proposed Interested Party be joined to these proceedings as an Interested Party.



- iii. That the Interested Party be granted leave of the court to respond to the Notice of Motion dated 14/09/2023 herein filed by the objector.
 - iv. That the costs of this application be provided for.
2. The application is based on the following grounds;
- i. The proposed Interested Party is a firm of auctioneers duly licensed under the provisions of the *Auctioneers Act* no. 5 of 1996.
 - ii. By a Notice of Motion dated 14/9/2023, Jitendra Kumar Lakhmshi Shah, an objector seeks orders for setting aside the order of attachment, sale and auction of all that property known as the Nairobi LR NO. 209/5802 which execution is lawfully being carried out by the proposed Interested Party following the orders of the court made on 17/05/2022.
 - iii. The subject execution is being undertaken by the proposed Interested Party towards recovery of the decretal sums in the decree made by the court in this matter on 06/04/2017.
 - iv. The instant Notice of Motion is, therefore, seemingly seeking to impugn the subject execution already commenced and taken out by the proposed Interested Party and any order emanating from the said application is, undoubtedly, likely to affect the proposed Interested Party.
 - v. Consequently, in the event that the Notice of Motion dated 14/09/2023 is heard and determined by this honourable court without the proposed Interested Party being afforded an opportunity to be heard, there is every likelihood that adverse orders may be issued against the proposed Interested Party and hence condemned unheard against the rules of natural justice.
 - vi. The joinder of the proposed Interested party shall, undoubtedly, crystallise the dispute herein towards an expeditious and just determination of the matters before this honourable court.
 - vii. The rules of procedure require that leave of this honourable court be sought and obtained before joinder of the proposed Interested party to these proceedings to enable the said proposed Interested Party to file a response to the Notice of Motion dated 14/09/2023 if it so desires.
 - viii. The joinder sought herein is intended to enable the proposed Interested Party to actively participate in the matter and also file substantive application (if need be) and the intended joinder will not occasion any prejudice and/or hardship to any of the parties herein.
 - ix. It is therefore in the interest of justice and it meets just that this application be allowed as prayed for.
3. The application is supported by the affidavit of the applicant in which it is deposed that notice of motion dated 14/09/2023, Jitendra Kumar Lakhmshi Shah, an objector seeks orders for setting aside the order for attachment, sale and auction of all that property known as the Nairobi L.R. No. 209/5802 which execution is lawfully being carried out by the proposed Interested Party following the orders of the court made on 17/05/2022.
4. That the subject execution is being undertaken by the proposed Interested Party towards recovery of the decretal sums in the decree made by the court in this matter on 06/04/2017.
5. That the instant motion is, therefore seemingly seeking to impugn the subject execution already commenced and taken out by the proposed Interested Party and any order emanating from the said application is, undoubtedly, likely to affect the proposed Interested Party.



6. That consequently, in the event that the Notice of Motion dated 14.09.2023 is heard and determined by this honourable court without the proposed Interested Party being afforded an opportunity to be heard, there is every likelihood that adverse orders may be issued against the proposed Interested Party and hence condemned unheard against the rules of natural justice.
7. That the proposed Interested Party on record, M/s. MM Law advocates and the joinder of the proposed Interested Party shall, undoubtedly, crystallise the dispute herein towards and expeditious and just determination of the matters before this honourable court.
8. That the rules of procedure require that leave of this honourable court be sought and obtained before joinder of the proposed Interested Party to these proceedings to enable the said proposed Interested Party to file a response to the Notice of Motion dated 14/09/2023 if it so desires.
9. That the joinder sought herein is intended to enable the proposed Interested Party to actively participate in the matter and also file substantive applications (if need be) and it will not occasion any prejudice and/or hardship to any of the parties herein.
10. That it is therefore in the interest of justice and it meets just that this application be allowed as prayed for.
11. The defendant/respondent filed grounds of opposition (GOO) dated 10/11/2023 in which it is stated as follows;
12. That the application is frivolous, vexatious, scandalous and an abuse of the court process.
13. That the application, the Notice of motion application as drafted is totally defective, untenable, superfluous, grounded on wrong provisions of law and ought to be dismissed.
14. That at the onset there is no application for review, varying and or setting aside of the preservative orders issued by the court on the 7th June, 2019 and therefore this court cannot purport to vacate orders it has not been invited to review.
15. That the orders sought in the application are unmerited and there is no justifiable reason advanced for changing the orders for stay issued by the superior court and replace them with orders allowing the objector to issue a bank guarantee in a matter where they are not parties their application having been dismissed.
16. That the orders for stay of execution and terms of stay were issued by the Court of Appeal and not this court and therefore the court has no locus to alter the terms of stay as set by the Supreme Court.
17. That the purported 'Bank Guarantee' attached to the application is for kshs.25,000,000/= whereas the decretal sum as it stands now is way over kshs.51,000,000/= hence it is not adequate to cover the judgment award in the matter as the court record will bear witness.
18. That the appellant advocate has no locus to file any pleadings in this matter and the application as filed is fatally defective given that the firm of M/s Kiboi & Associates are representing an objector whose application was dismissed vide the ruling dated 17th May, 2022 which is subject to appeal and until the appeal is heard and allowed, the objector is and remains non-party in these proceedings hence the current application is a non-starter.
19. That the application is incompetent *abi nitio* and the deponent of the supporting affidavit has no capacity to depone to contentious issues as he purports to do so and since he is not the sole administrator of the estate of the deceased Kamlaben Lakhamshi Shah but the grant of representation was granted to joint administrator being the applicant and one Rajnikant Lakhamshi Shah hence the



applicant cannot swear affidavits solely without authority of his co-administrator and the offending affidavit ought to be struck out forthwith.

20. That prayer 2 of the application as drafted is resjudicata since the same prayers for lifting the orders of 16th May, 2019 had been sought by the parties in the application dated 20th December, 2019 and this court dismissed the same vide its ruling dated 17th May, 2022 as the court record will bear witness.
21. That the application as drawn is fatally defective, misconceived, untenable and an abuse of the court process and ought to be dismissed forthwith.
That the plaintiff/respondent prays that this application be dismissed with costs.
22. The plaintiff did not oppose the application dated 24/10/2023.
23. The application was opposed by the replying affidavit of the defendant, Jitendrakumar Lakhamsi Shah dated 10/11/2023.
24. In it he stated that there is no basis or justification for the auctioneer to actively participate in the matter herein. There are no issues to be determined between him and the said auctioneers and none of the prayers in the application are sought against the auctioneer.
25. The parties filed written submissions as follows; the proposed interested party submitted that the orders of the court made on 17/5/2022 placed the proposed interested party at the center of the suit and the proposed interested party has a duty as an officer of the court to render an account in respect of the Property known as LR. No. 209/5802 which was/is subject of the said attachment.
26. The proposed interested party argued that the objector's opposition to the application herein is informed by the fact that he is apprehensive that the proposed interested party is likely to tender evidence that demonstrates contemptuous conduct on his part wherein he demolished the development that was previously erected on the suit land at the time this court made the order for attachment on 16/5/2019.
27. The objector/respondent alternatively submitted that the proposed interested party is not named on the face of the pleadings. Further the application by the objector which the auctioneer seeks to be enjoined has the parties clearly set out on the face of the application. The auctioneer is not an applicant or a respondent or included in the parties.
28. The objector/respondent further argued that the decree of the court has already been stayed and the order of stay has effectively deactivated the entire execution process and the auctioneer's involvement in the matter has also been stayed.
29. Moreover, the application by the objector seeks to have a bank guarantee replace Nairobi LR No. 209/5802 and that issue has nothing to do with any auctioneer. The bank guarantee is not issued to the auctioneer or for the benefit of the auctioneer.
30. The defendant/respondent in opposition to the application herein in its submissions reiterated what was submitted by the objector/respondent. It added that the applicant has not disclosed any recognizable stake or identifiable interest in the matter. Thus, joining the auctioneers as interested parties in this case is not only unnecessary and uncalled for but will result in the clouding of issues and add confusion in the matter.
31. The sole issue for determination in the application dated 24/10/2023 is whether the Interested Party/applicant should be enjoined to these proceedings.



32. This case is at execution stage and the joinder of the interested party will serve no purpose since the proceedings have long been concluded.
33. In the case of *Communication Commission of Kenya & 4 others v Royal Media Services Limited & 7 others* [2014] eKLR the supreme Court of Kenya held as follows;
- “(22) In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court’s Ruling in the *Mumo Matemo* case where the Court (at paragraphs 14 and 18) held:
- “[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...”
- (23) Similarly, in the case of *Meme v. Republic*, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:
- “(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) joinder to prevent a likely course of proliferated litigation.”
34. The court has a discretion to enjoin any party either on its own motion or on application by a party to the suit.
35. However, in the current case, it has to be established that the interested party has an identifiable interest in the subject matter of the suit.
36. The Objector is also not a party to the suit and he has no basis for setting aside the order of attachment, sale and auction of the suit property which execution is lawfully being carried out by the proposed Interested Party following the orders of the court made on 17/05/2022.
37. The objector did not appeal against the said order made on 17/05/2022.
38. The interested party has a duty to execute the mandate of the court and to give an account regarding the proceeds of sale of the suit property.
39. This case was concluded on 6/4/2016 and the execution is long overdue.
40. The terms of the sale have already been settled for the sale of the judgment debtor’s property known as L.R NO. 206/5802 by the said auctioneer who is now seeking to be enjoined to this suit.
41. The plaintiff in this case has a valid judgment which has not been appealed against and the execution of the said judgment should proceed forthwith.
42. I find that the application dated 24/10/2023 has no merit and the same is dismissed with no orders as to costs.



DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
10TH DAY OF JULY, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

