



Wamwea v Standard Chartered Bank Kenya Limited & another (Civil Case E057 of 2020) [2024] KEHC 8215 (KLR) (Commercial and Tax) (4 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8215 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E057 OF 2020**

PM MULWA, J

JULY 4, 2024

BETWEEN

THOMAS KABAKI WAMWEA PLAINTIFF

AND

STANDARD CHARTERED BANK KENYA LIMITED 1ST DEFENDANT

KUBATA BRUNO KILUNGA 2ND DEFENDANT

RULING

1. This ruling is in respect of the 2nd defendant's Notice of Motion dated 21st December 2023 seeking orders that the 2nd defendant's name be struck out from this suit. The application is brought under Order 1 Rule 10(2) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the [Civil Procedure Act](#). The application is anchored on the grounds stated on the face of it.
2. In support of the application, Kubata Bruno Kilunga, the applicant (2nd defendant) in his affidavit sworn on 21st December 2023 depones that he purchased House No. 214 erected on L.R No. Nairobi Block 101/73 New Kitisuru Estate by public auction for the sum of Kshs. 49 million. That a transfer was prepared and he was issued with a Certificate of Sale.
3. The applicant contended that he was an innocent purchaser for value and without notice of any defect and therefore protected under Section 99 of the [Land Act](#) as a purchaser of property sold in exercise of 1st defendant's statutory power of sale; that he was not a proper party in this suit as no cause of action had been demonstrated against him; and that his inclusion in the suit herein was only meant to vex and embarrass him, was unprocedural and an abuse of the court process. He avers that plaintiff has not pleaded fraud, misrepresentation or other dishonest conduct on the part of the 1st defendant to which he had actual or constructive knowledge.



4. The application is opposed by the plaintiff through his Replying Affidavit sworn on 12th March 2024 and submissions dated 14th March 2024. He states that in his amended plaint he seeks to have the sale nullified and/or revoked and hence the 2nd defendant is a necessary party as such orders will affect him directly. The plaintiff adds that Section 99 of the *Land Act* envisages a situation where the sale can be nullified and the applicant would have to seek damages from the 1st defendant.
5. Further the plaintiff submitted that the 2nd defendant ought to participate in these proceedings, after all courts have severally held that orders should not be made against persons who are not parties to a suit and further that courts should exercise caution before striking out a party from proceedings unless in the clearest of circumstances (cited case – *Peter Njuguna Gitau v Daniel Kiprono Kiptum & 3 others* [2022] eKLR).
6. The plaintiff urges the court to dismiss the application by the 2nd defendant.
7. Before delving into the merits of the application, it is necessary to give a brief background of the case. The plaintiff's case is that sometimes on 15th April 2018 he was advanced a loan facility by the 1st defendant amounting to Kshs. 25 million and the same was secured by a legal charge over L.R. No. Nairobi/Block 101/73. That on alleged default the suit property was sold on 21st January 2020 without the 1st defendant issuing the relevant statutory notices. The plaintiff alleges that the 1st defendant was in breach of statutory care and its actions constituted malice, ill-will and fraud.
8. According to the plaintiff, the 1st defendant deliberately ignored valuation reports previously commissioned by itself and proceeded to sell the suit property at a price that was grossly undervalued, that is Kshs. 48,750,000/-.
9. The 2nd defendant filed his defence denying the plaintiff's claim against him with a notice that he would raise a preliminary objection in limine to have his name removed from the proceedings.

Analysis and Determination

10. Having carefully considered the application, the plaintiff's response and submissions, the issue for determination is whether the 2nd defendant (applicant herein) should be struck out from the suit.
11. The application dated 21st December 2023 is based on the grounds that the further amended plaint does not disclose any cause of action against the 2nd defendant and that he was an innocent purchaser for value without notice of any defect in title.
12. Order 1 Rule 10(2) of the *Civil Procedure Rules* provides:

“(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
13. The 2nd defendant's argument is that no reasonable cause of action has been disclosed against him to warrant his enjoinder in these proceedings. That Section 99 of the *Land Act* 2012 offers an innocent purchaser of property protection and the plaintiff's remedy, if any, lies in damages against the 1st defendant.



14. Pointedly, I must add that it is only if the process leading up to the sale and transfer was illegal or fraudulent, that the transfer can be challenged and the plaintiff may adduce evidence to prove fraud or conspiracy at the trial as against the purchaser. In the case of *Elegant Freighters v Oriental Commercial Bank (Formerly Delphis Bank Limited)* HCCC 66 of 2005; the Ochieng, J. (as he then was) stated thus:
- “...since the plaintiffs have indicated an intention to plead fraud in the draft amended plaint, I find that there is a possibility that it may have a claim that could be sustainable against the defendant...I say so because a sale that was otherwise deemed valid, can be set aside on the grounds of fraud.”
15. In the instant application; the 2nd defendant objects to his being enjoined on the grounds of being a *bona fide* purchaser for value and for not being privy to the charge between the plaintiff and the 1st defendant herein and for having been registered as the proprietor of the suit property. He points out that the chargor who is prejudiced by unauthorized, improper or irregular exercise of power of sale has remedy in damages against the person exercising the power of sale.
16. I have considered the pleadings in this matter and have noted that the only time the 2nd defendant is mentioned in the further amended plaint is at Para. 2 (description) and Para.2 and 3 of the reliefs sought. The 2nd defendant is only mentioned as the party who bought the suit property after the 1st defendant exercised its statutory power of sale. I do not agree with the assertion by the by the mere fact that he has sought for nullification of the sale of the suit property, makes the 2nd defendant a necessary party to the proceedings.
17. Nowhere in the further amended plaint has it been shown that the 2nd defendant had notice of any defect affecting the whole process leading to the sale and subsequent transfer of the suit property, or that the transfer thereof was secured through fraud, conspiracy or malice.
18. The upshot is that the application dated 21st December 2023 has merit and it is allowed with costs to the 2nd defendant.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF JULY 2024.

P. MULWA

JUDGE

In the presence of:

Ms. Muriranja for Plaintiff

Mr. Otieno for 1st Defendant

Mr. Ochieng for 2nd Defendant/Applicant

Court Assistant: Carlos

