



**Serem v Diamond Property Merchants Limited; Edpark Estate Management Limited & 51 others (Interested Party) (Arbitration Cause 6 of 2020) [2023] KEHC 3319 (KLR) (Commercial and Tax) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3319 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**ARBITRATION CAUSE 6 OF 2020**  
**DAS MAJANJA, J**  
**APRIL 20, 2023**  
**IN THE MATTER OF AN A**

**BETWEEN**

**HENRY KIPKOGEI SEREM ..... JUDGMENT DEBTOR**

**AND**

**DIAMOND PROPERTY MERCHANTS LIMITED ..... JUDGMENT CREDITOR**

**AND**

**EDPARK ESTATE MANAGEMENT LIMITED & 51 OTHERS .... INTERESTED PARTY**

**RULING**

1. This matter was commenced as an application for recognition and enforcement of an arbitral award under section 36(1) of the *Arbitration Act*, 1995 ('the Act'). On March 13, 2020, the court allowed the Judgment Creditor's application dated January 21, 2020 for recognition and enforcement of the Award dated September 17, 2019 ('the Award'). The court thereafter issued a decree against the Judgment-Debtor directing it to pay Kshs 2,150,000.00 together with interest at 12% pa from August 1, 2018 until payment in full together with costs thereon.
2. In due course, the Judgment Creditor applied for execution by seeking issue of a prohibitory order against the Judgment Debtor's property known as LR No NAIROBI/BLOCK 126/246 ('the suit property'). The court issued a prohibitory order against the suit property on October 13, 2020 ('the Prohibitory Order').



3. The Prohibitory Order precipitated an application by the Interested Parties dated November 16, 2022 seeking to review and or set aside the Prohibitory Order under the provisions of Order 45 rule 1 of the *Civil Procedure Rules*. The application is supported by the affidavits and further affidavit of Calvince Owuor, a director of the 1<sup>st</sup> Interested Party, sworn on November 17, 2022 and March 27, 2023. The Judgment Creditor opposed the application through his affidavit of February 15, 2023. The Judgment Debtor did not participate in these proceedings despite being served with process. The respective advocates made brief oral submissions in support of their irrelative positions.
4. The Judgment Debtor is a property developer and the registered owner of the suit property. It subdivided the suit property and started selling plots to various purchasers among them the Interested Parties. The Interested Parties entered into agreements to purchase plots within the suit property. The purchasers then incorporated Edpark Estate Management Limited in order to protect their interests and for processing the mother title to the suit property which would ultimately be transferred to it. The Interested Parties could not effect transfer of their leases because of the Prohibitory Order.
5. The Interested Parties contend that the suit property no longer belongs to the Judgment Debtor because it had sold to them various parcels whereupon they took possession of their respective parcels and have constructed houses. They further complain that they were not party to the arbitration proceedings and that they were not notified of the proceedings leading to the adoption of the Award. They state that the proceedings took place despite the knowledge that the Interested Parties were in possession of the suit property and that they partially registered close to 20 leases against the suit property.
6. The Interested Parties aver that they have filed a suit; Nairobi Elc No E202 Of 2021 Edpark Estate Management Limited And Others V Henry Kosgey And Another seeking a declaration that they are the legal owners of the suit property. They urge the court to set aside the Prohibitory Order as they stand to suffer irreparable damage as they have constructed their homes on the suit property and reside there.
7. The Judgment Creditor opposes the application. It submits that upon conclusion of arbitration proceedings against the Judgment Debtor, it applied to the court for recognition and enforcement of the Award and thereafter, it took steps to enforce the decree. That through investigations, it found out that the suit property belonged to the Judgment Debtor. It conducted a search on October 15, 2020 which confirmed that the suit property was free from encumbrances. Thereafter it applied for the Prohibitory Order which was registered against the title to the suit property as confirmed by the official search conducted on October 29, 2022. Thereafter the auctioneers proceeded to serve the Judgment Debtor with all notices prior to advertising the suit property for sale. It avers that the Judgment Debtor did not indicate any objection or contest the sale of the suit property.
8. The Judgment Creditor states that it could not have informed the Interested Parties about the arbitration proceedings and subsequent processes as these were normal processes and that it complied with all the applicable procedures. Moreover, he states that he was not aware of the existence of ELC No E202 of 2021 in which the Interested Parties claim an equitable interest in the suit property hence he could not have informed them of this matter. The Judgment Creditor urges the court not to discharge the Prohibitory Order.
9. The application before the court is for review of the Prohibitory Order. Order 45 Rule 1 of the Civil Procedure Rules which has been invoked by the Interested Parties provides as follows:

45 Application for review of decree or order

- (1) Any person considering himself aggrieved-



- (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.

10. The principles governing the exercise of discretion to review a decree or order are now settled. An applicant must make out a case that falls within the grounds set out in the rule. In *Otieno, Ragot & Company Advocates vs National Bank of Kenya Ltd [2020] eKLR*, the Court of Appeal in dealing with an appeal arising from an application for review, stated that, 'An application for review must be specific on the ground on which it is brought.' In this case, the Interested Parties have not clearly stated which ground they invoke however, I would consider they seek review for sufficient reasons being that they were not heard before the Prohibitory Order was made.

11. Since the Interested Parties were not parties to the arbitration proceedings, there was no obligation to serve them with process. Once the court adopted the Award as its judgment, the Judgment Creditor was entitled to proceed with execution in any manner including attachment of moveable and immovable property of the Judgment Debtor. The Judgment Debtor elected to attach the immovable property of the Judgment Debtor. Such attachment is signified by the issue of a prohibitory order as provided under Order 22 Rule 48(1) of the Civil Procedure Rules which provides as follows:

[Order 22, rule 48.] Attachment of immovable property.

48 (1) Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property.

12. I am satisfied that the suit property is registered in the name of the Judgment Debtor and was available for attachment as evidenced by the certificate of official search dated October 15, 2020 which showed the suit property was free of encumbrances. There was therefore no error in the manner in which the Prohibitory Order was issued.

13. Once a prohibitory order is issued, a party who is affected may lodge an objection to the attachment in accordance with Order 22 rule 51 of the Civil Procedure Rules which states, in part, that:

Objection to attachment

51. (1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.



- (2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.
  - (3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.
14. From the above, it is clear that any person who claims or to have a legal or equitable interest has the right to lodge objection proceedings at any time before the sale of the attached property. I only set out these provisions to demonstrate that the procedure for challenging an attachment is prescribed and thus the Interested Parties cannot have recourse to the provisions for review.
  15. Since the execution proceedings are regular and the Interested Parties have a statutory right of relief, I do not detect any error in the Prohibition Order that would warrant review.
  16. I therefore dismiss the Interested Parties' application dated November 16, 2022 with costs to the Judgment Creditor. The Interested Parties shall pay the costs assessed at Kshs 40,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF APRIL 2023.**

**D. S. MAJANJA**

**JUDGE**

**Court Assistant: Mr M. Onyango**

**Mr Wandati instructed by Kisilu Wandati and Company Advocates for the Judgment Creditor.**

**Ms Otieno instructed by Otieno-Okiabara Advocates for the Interested Parties.**

