



Dhariwal v ADM Consulting Limited & another; Victoria Commercial Bank Ltd (Applicant) (Commercial Civil Suit E213 of 2019) [2023] KEHC 18745 (KLR) (Commercial and Tax) (14 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18745 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL SUIT E213 OF 2019
DO CHEPKWONY, J
JUNE 14, 2023**

BETWEEN

KULWANT KAUR DHARIWAL PLAINTIFF

AND

ADM CONSULTING LIMITED 1ST DEFENDANT

ASHVINDER KAUR MANN 2ND DEFENDANT

AND

VICTORIA COMMERCIAL BANK LTD APPLICANT

RULING

1. Before this Court is an application dated 12th August, 2021 filed under Section 1A, 1B, 3, 3A and 63 of the *Civil Procedure Act* and Order 1 Rule 10 (2) of the *Civil Procedure Rules* 2010 wherein Victoria Commercial Bank Ltd (“the Applicant”) seeks:-
 - a. to be enjoined as an Interested Party after Judgment; and,
 - b. for the prohibitory orders granted on 16th July, 2020, pursuant to the application dated 15th June, 2020 filed by the Plaintiff together with all subsequent amendments to the said orders, be unconditionally discharged and or set aside.
2. The Applicant was directed to serve the Application upon all parties on diverse dates but no response or submissions were filed by the said parties. I have gone through the Affidavits of Service filed and find no proof of service of the application upto either the Plaintiff or the Defendant. The Affidavit of



Service sworn on 4th November, 2021 is in respect to the service of the Hearing Notice of 2nd December, 2021, the Affidavit of service sworn on 24th February, 2022 is in respect to a Mention Notice dated 2nd December, 2021 and the Affidavit of Service sworn on 29th June, 2022 is in respect to Mention Notice dated 24th February, 2022.

3. It is trite that for an Applicant to be granted audience in court for an application, it must first prove service of the application upon the parties. However, in this case, the record shows that all parties attended court on 25th August, 2021 where they sought and were granted time to file their respective Replying Affidavits. That after that neither the Plaintiff's Counsel nor the Defendants' Counsel attended court on subsequent dates despite service upon them. It is therefore evident that they were aware of the application and they respectively chose not respond to it in any way.
4. Since 2021 to date, the application has remained unchallenged. But be that as it may, the court is still obligated to consider the merits of the application before granting any orders thereof.
5. Before delving into the application, it is prudent to outline the background of this case in order to provide context thereto. By a Plaint dated 27th June, 2019, the Plaintiff as the registered owner of parcel of land known as L.R 209/8000/188 offered it as security for a loan advanced to the 1st Defendant whereupon her husband was the former Director while the 2nd Defendant is the current Director of the 1st Defendant. The Plaintiff guaranteed the loan facility whose purpose was for the purchase of parcel of land known as L.R 2327/313 ('the suit property'). The Plaintiff's claim was that the Defendants defaulted in the loan repayments and as result her property being L.R 209/8000/188 was sold in a public auction.
6. The Plaintiff then sued the Defendants for indemnity for the amount of Kshs.122,000,000. The matter proceeded by way of formal proof hearing and Judgment in favour of the Plaintiff was delivered on 30th September, 2019 by Lady Justice W. Okwany and a Decree subsequently issued. Being unable to execute the said Judgment, the Plaintiff approached the court vide an application dated 15th June, 2020 seeking prohibitory orders to be issued over the suit property and for orders of attachment and sale of the same property to satisfy her decree and costs.
7. On 24th June, 2020, Justice W. Okwany heard and allowed the application as prayed and a prohibitory order was issued over the suit property. The Plaintiff was then allowed to proceed and recover the decretal sum. The prohibitory orders were issued on 16th July, 2020 and vide Court Order of 21st January, 2021 was rectified. It is these prohibitory orders that the Applicant is now seeking to discharge and or set aside.

The Application

8. The Application is based on the grounds on its face and the Supporting Affidavit of Clement Gitau, Senior Legal Officer of the Applicant sworn on 12th August, 2021. The Applicant holds that it is aggrieved by the prohibitory orders issued on 16th July, 2020 which it seeks to discharge or set aside.
9. The Applicant holds that it has a registered interest in the suit property by virtue of registered charge instruments. It holds that it advanced loan facilities to the 1st Defendant in the sum of Kshs.325,000,000.00 on diverse dates between 2015-2018 which was secured by the property known as L.R 2327/330 ("the suit property").



10. The Applicant holds that the Plaintiff obtained prohibitory orders over the suit property without disclosing that the land is charged by the Applicant and therefore the willful non-disclosure disentitles her to continue enjoying the prohibitory orders especially since she does not have any legal or equitable interest over the suit property. The Applicant contends that at the time the Plaintiff made the application for prohibitory orders in 2020, she was aware that the suit property had been charged as this information was available in the valuation report she has annexed on the application and therefore, she ought to have enjoined the Applicant as a party in the suit.
11. The Applicant further holds that the 1st Defendant has defaulted in the loan repayments and that it is entitled to exercise its statutory power of sale which has been hindered by the prohibitory orders in place. The Applicant argues that although the Plaintiff is a Decree-Holder, its rights as a registered Chargor supersede her interest, hence it's claim takes precedence over the Plaintiff's claim and thus it seeks to have the prohibitory orders set aside.
12. The Applicant through a myriad of authorities in the submissions dated 14th November, 2022 argues that it has a legal interest in the suit and it ought to be enjoined in the proceedings since it has a registered interest in the suit property.

Analysis and Determination

13. To determine the application dated 12th August, 2021, I have carefully read through the pleadings filed herein the submissions alongside cited statute and case law. The court finds that the issues for determination are:-
 - a. Whether the Applicant can be enjoined in this suit after Judgment;
 - b. Whether the prohibitory orders granted on 16th July, 2021 pursuant to the application dated 15th June, 2020 can be discharged or set aside unconditionally.
14. With regard to the first issue of joinder, the point of departure is in the Law on joinder of parties as enshrined under Order 1 Rule 10(2) of the Civil Procedure Rules which states as follows:-

“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 or settle all questions involved in the suit, be added.”
15. The Supreme Court of Kenya defined Interested Party in the case of *Communications Commission of Kenya & 4 others ...vs... Royal Media Services Limited & 7 others* Petition No.15 of [2014]eKLR relied on its earlier decision in the Mumo Matemo case and held as follows:-

“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.”
16. In regard to the instant application, particularly the annexures attached thereto, it is evident that the Applicant advanced the 1st Defendant a loan facility and the suit property was used as collateral



for the same. This therefore means that the Applicant has a stake in the suit property and more so since the charge was registered, its interest is superior and supersedes that of the Plaintiff. This was the determination of the court in the case of *Paul Gatete Wangai & 13 Others –vs- Capital Realty Ltd & Another* [2020]eKLR, which held:-

“ [96]. Although the Plaintiffs have a beneficial interest in the suit property having purchased the same, the said interest is subordinate to the Bank’s interest as Chargee. A charge is an overriding interest within the meaning of Section 28(g) of the *Land Registration Act*, which means that the rights and interest of a chargee in the charged property are rights in rem and therefore remain superior to any other interest even where there is a sale, transfer or any other disposition in the property.

[97]. It is trite that the bank being the holder of the charge would have first priority over the suit property as long as the land remains charged.”

17. Having found that the Applicant’s registered interest in the suit property by virtue of the charge instruments is superior, the court hereby discharges the prohibitory orders over the suit property issued on 24th June, 2020 and the Orders of the Deputy Registrar issued on 16th July, 2020 and 21st January, 2021 over the suit property.
18. Considering that the suit was already concluded and Judgment issued, this Court finds no need of joinder of the Applicant as interested party especially since the prohibitory orders in respect to the suit property where the Applicant has an interest in, have been discharged. The Plaintiff be at liberty to enjoy the Judgment she obtained save to be aware that she can only pursue other methods of execution from the Defendants without interfering with the suit property herein.
19. However, in the event that the Interested Party still wishes to be enjoined in the suit after Judgment has been delivered, there is no law that bars it to be enjoined in the suit as a court can always order a suit to start denovo since it has already established its legal interest in the suit. In the case of *Jeremiah Mgbanga Msafari –vs- Millicent Zighe Mwachala & 3 Others* [2021] eKLR, the Court held as follows:-

“From the above quoted provisions and case law, it is not correct for Mr. Nyange to claim that there is no provision known in law that provides for an interested party more so after judgment has been delivered. In the case of *Elton Homes vs Davis & others* (2019) eKLR, the court allowed joinder of an Interested Party after Judgment had been entered between two principals without involving him yet he was in occupation of the property from which he was being evicted. The court recognized that the Intended Interest Party had a constitutional right to be heard; The court observed that;

“the constitution of Kenya is very clear on the right to protection of one’s property and the said property cannot be arbitrary(sic) be taken away from such an owner without being heard or accorded an opportunity to ventilate his case”

[33]. It is trite that joinder of an Interested Party is meant to safeguard parties who may otherwise be ignored or side lined by a malicious party/s with the sole purpose of disenfranchising a party’s inalienable right of being heard before being condemned. Further, it is cost saving as it avoids multiple suits when one suit can solve the claim once and for all. It is my finding that the appellant is entitled to a hearing as an interested party being the registered owner of the property in question. His claim should not be dismissed prematurely by being denied the right of hearing. There is no greater prejudice in starting the case denovo than denying the appellant the right to be heard.”



20. The upshot is that the application has merits, the prohibitory orders issued in respect to Land Reference No.2327/330 issued on 16th July, 2020 pursuant to the application dated 15th June, 2020 together with all or any other subsequent amendments to the said order are hereby discharged.
 21. In case of any other proceedings after this ruling which requires participation of the Applicant, I hereby grant Victoria Commercial Bank Limited leave to be joined in these proceedings as an Interested Party.
- It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 14TH DAY OF JUNE 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Maina holding brief for Mr. Wandati for Proposed Interested Party

Court Assistant – Martin

