



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT 205 OF 2008**

CHRISTOPHER KIRUBI .....  
 PLAINTIFF

VERSUS

MUSES

1. ALI KHAN

2. FIDELITY COMMERCIAL BANK LTD.....  
 DEFENDANTS

**Coram:**  
 Mwera J.

Gitonga for Plaintiff/Applicant

Wachira for 2<sup>nd</sup> Defendant/Respondent

**RULING**

By the notice of motion dated 26<sup>th</sup> April, 2012, the plaintiff cited sections 1A, 63 (e) of the Civil Procedure Act and Order 45 of Civil Procedure Rules for an order:

that the order issued on 13<sup>th</sup> April, 2012 be reviewed and vacated.

In the grounds it was contended the 2<sup>nd</sup> defendant herein filed a notice of motion dated 13<sup>th</sup> March, 2012 seeking to be joined in this suit. Following an *ex parte* hearing, that party Fidelity Commercial Bank, was made a party in the suit with a further order that there be a stay of a mandatory injunction order issued on 27<sup>th</sup> March, 2012 to the plaintiff/applicant. That accordingly, the plaintiff had been condemned, unheard, with the effect that the order has forced the plaintiff to litigate with the 2<sup>nd</sup> defendant – a party with no interest in the subject matter herein. The two had no privity (of contract?) in any way.

Mr. Gitonga, advocate for the applicant swore the supporting affidavit with authority of his client. He deponed that the plaintiff filed an application on 12<sup>th</sup> August, 2008 seeking orders to restrain the 1<sup>st</sup> defendant (Ali Khan Ali Muses) from trespassing over land No. **KWALE/GALU KINONDO/47** and got

a mandatory injunction in his favour. On 12<sup>th</sup> March, 2012? that is when the 2<sup>nd</sup> defendant applied to be joined in the suit whereby the orders under review were made – *ex parte*. The plaintiff/applicant was aggrieved by the same order hence this application. It does not appear as if the 2<sup>nd</sup> defendant's application proceeded to *inter partes* hearing.

In reply to the present application, Sukesha Dabholkar, the deputy general manager of the 2<sup>nd</sup> defendant, averred that it had been brought to his notice that in his affidavit sworn on 13<sup>th</sup> April, 2012, a wrong valuation report had been made an annexure instead of annexing the report regarding plot No. **KWALE/GALU KINONDO/50** which he exhibited (annexture SD1). That when the application dated 12<sup>th</sup> April, 2012 was pending, their advocate commissioned M/S Mashariki Geosurveys Limited to carry out a survey on boundary issues and prepare a report. Such a report was prepared (annexture SD4). That surveyor did not find any encroachment by the 1<sup>st</sup> defendant on the plaintiff's property. That then the order was made final without hearing the bank which has a registered interest – a charge over the land. Now, it is not clear as to which interlocutory application's order was made final without hearing the bank. Can it be assumed that the 2<sup>nd</sup> defendant's application to be joined in this suit initially heard *ex parte* was later made final even without hearing the applicant? It may be asked, when, by who and at whose motion? Let us see. It may unravel presently. But the deponent added that the court exercised powers under the rules to make the 2<sup>nd</sup> defendant a party here without hearing the existing parties – here the plaintiff and the 1<sup>st</sup> defendant. So the prayer for review was apposed. Up to this point, the plaintiff has referred to plot **No. 47** while the 2<sup>nd</sup> defendant referred to plot **No. 50**.

Directed to submit, the plaintiff told the court that in an earlier ruling by Judge Ibrahim on 12<sup>th</sup> March, 2012, he had found that the plaintiff had no claims as regards plot No. 50 which belonged to the defendant. His property was No. 47. Further, reference was made to Azangalala J's ruling in this same matter on what the dispute between the plaintiff and the (1<sup>st</sup>) defendant was. It was then stressed that the subject property here between the plaintiff and the 1<sup>st</sup> defendant was plot **No. 47** while the 1<sup>st</sup> and the 2<sup>nd</sup> defendant had interest in plot No. 50 in which the plaintiff had no interest. That, that being the state of things, then the order to join the 2<sup>nd</sup> defendant ought to be reviewed.

On behalf of the 2<sup>nd</sup> defendant/respondent it was stated that the plaintiff and the 1<sup>st</sup> defendant knew that the 2<sup>nd</sup> defendant held a charge over the entire property including the development that is due for demolition. The two did not inform the 2<sup>nd</sup> defendant when this suit was filed and yet that party was entitled to be notified so that it could be heard. Even if a surveyor found that there was no trespass on the plaintiff's land, still the 2<sup>nd</sup> defendant has a right to be heard in this suit. That there was no new and important matter discovered by the plaintiff to warrant the review sought.

Going by the record, Tuiyott J. made orders regarding the application by the 2<sup>nd</sup> defendant dated 12<sup>th</sup> April, 2012:

allowing the applicant (2<sup>nd</sup> defendant) to be joined in the suit;

that application dated 12<sup>th</sup> April, 2012 was to be served on all parties in the suit; then

it was to be heard on 19<sup>th</sup> April, 2012.

The learned Judge made further orders but they are not the subject in these proceedings. So all in all, the Judge made *ex parte* orders. All parties were to be served for *inter partes* hearing on 19<sup>th</sup> April, 2012. The 2<sup>nd</sup> defendant has not demonstrated that it served its application dated 12<sup>th</sup> April, 2012 on all the parties including the plaintiff with notice of its hearing on 19<sup>th</sup> April, 2012. So until the present application was filed, the *ex parte* orders to join the 2<sup>nd</sup> defendant remained just that. It was thus in error for Sukesha Dabholkar of the 2<sup>nd</sup> defendant to aver that:

**“(4) .....It must be remembered that a final order was made on an interlocutory application without hearing the Bank .....**”

If it may be repeated; when and by who?

With the interest of the parties appearing not to converge on any of the two plots stated herein, it is now directed that the 2<sup>nd</sup> defendant’s application to be joined in this suit dated 12<sup>th</sup> April, 2012 be set down for hearing in the next twenty eight (28) days. All sides to have leave to file whatever affidavits with a view to be heard on that application.

The costs of this application go to the plaintiff/applicant.

Delivered on 12<sup>th</sup> July, 2012.

**J. W. MWERA**  
**JUDGE**