



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.276'A' OF 2017

ALTON HOMES LIMITED.....1ST PLAINTIFF/RESPONDENT

JOHN KANGOGO.....2ND PLAINTIFF/RESPONDENT

-VERSUS-

DAVIS NATHAN CHELOGOI.....1ST DEFENDANT/RESPONDENT

JOHN NDUATI NJUGUNA.....2ND DEFENDANT/RESPONDENT

SAMUEL KUGEWA NDEGWA.....3RD DEFENDANT/RESPONDENT

JOSHUA OMONDI HALLONDA.....1ST INTERESTED PARTY/APPLICANT

TRANSNATIONAL BANK.....2ND INTERESTED PARTY/APPLICANT

COMMERCIAL BANK OF AFRICA LTD.....3RD INTERESTED PARTY/APPLICANT

RULING

This suit was filed on **27th April 2010**, by the Plaintiffs/Respondents who sought various Orders against the 1st, 2nd and 3rd Defendants herein. Various interlocutory applications were canvassed and determined before viva voce evidence was taken. The hearing of the main suit commenced before me on **23rd June 2015**, and was finalized on **4th October 2016**. Thereafter the parties were directed to file written submissions. However before compliance of the above directives, I was transferred from Milimani ELC to Thika ELC in the year **2017**. Thereafter the matter was forwarded to Thika ELC for writing and delivery of Judgment by myself. The said Judgment was pronounced on **23rd February 2018**, and the court entered Judgment in favour of the Plaintiffs as against the three Defendants. After delivery of Judgment, the file was taken back to Milimani ELC as the suit property is situated in Nairobi.

From the court record, it is evident that the Plaintiffs/Respondents did file an application for enforcement of the said Judgment and/or Decree on **13th June 2018**. Subsequently, the Court rendered its Ruling on **7th February 2019** and allowed the Plaintiffs'/Respondents' said Notice of Motion application. It is alleged by the 1st Applicant (proposed 1st Interested Party) herein that following the Orders issued by the court emanating from the Ruling of **7th February 2019**, he was evicted from the suit property together with his family.

Thereafter the proposed Interested Parties filed the instant **Notice of Motion** application dated **4th March 2019** and sought for the following Orders:-

1) That Leave be granted to the Proposed Interested Parties to be enjoined in this suit.

2) That the 1st Proposed Interested Party's occupation prior to the eviction carried out on title No.Nairobi/Block 26/113, on the 1st of March 2019, be restored pending the hearing and determination of this application.

3) That there be Stay of Execution of the Judgment entered on the 23rd February 2018, and subsequent Decree pending the hearing and determination of this application.

4) *That the Judgment entered on the 23rd of February 2018, be reviewed and orders granting specific performance on Nairobi/Block 26/113, and other consequential orders be set aside.*

5) *That the costs of this application be awarded to the 1st Proposed Interested Party.*

The Application is premised on the grounds stated on the face of the application and **Supporting Affidavit** of **Joshua Omondi Hallonda**. These grounds are:-

a) *That there has been material breach of the 1st Proposed Interested Party's right to human dignity, right to protection and the right to a fair hearing without any lawful justification.*

b) *That the 1st proposed Interested Party bought the suit property title No.Nairobi/Block 26/113, on 4th April 2014 following and advertisement by the 2nd Interested Party for the value of Kshs.24,000,000/= without Notice of any pending litigation or competing claim over the same property.*

c) *That the sale was facilitated by the 2nd Defendant as the registered owner having defaulted in a loan secured by the property and the 2nd Interested Party having commenced the security realization process.*

d) *That the sale was in a market overt, the property having been advertised in the Newspaper by the 3rd Proposed Interested Party giving Notice to all prospective buyers as well as interested parties.*

e) *That the 1st proposed Interested Party has been living in the said property with his family from June 2014 until the 1st of March 2019, when he was inhumanely evicted without being afforded a hearing and or Notice.*

f) *That it is only fair and just that quiet and peaceful possession be restored prior to the eviction pending the hearing and determination of this application.*

g) *That all along from the time of purchase of the suit property the 1st proposed Interested Party was not privy to any proceedings, advancing competing interests to his ownership.*

h) *That there was no caution, caveat, injunction or any form of*

Notice placed against the property to warn off the 1st proposed Interested Party of the ongoing dispute in court.

i) *That the 1st proposed Interested Party being a registered proprietor, his ownership and possession could not be revoked without being afforded an opportunity to be heard.*

j) *That the omission of the proposed Interested Parties to the suit was actuated by malice and bad faith with the intention of stealing a march against the proposed Interested Parties.*

k) *That had the 1st proposed Interested Party's presence been made known to the trial court, the specific performance order would not have been issued and executed.*

l) *That the eviction order granted on the 7th February 2019 is irregular as it was obtained with material non disclosure on the change in status of the property.*

m) *That the property is currently charged to the 3rd proposed Interested Party who equally has had no Notice of a competing title or interest.*

n) *That it is in the interest of justice that the orders sought are granted.*

In his **Supporting Affidavit**, **Joshua Omondi Hallonda** reiterated the contents of the grounds in support of the application and further averred that he is the registered owner of the suit property **LR.No.Nairobi/Block 26/113**, having purchased the same in response to an advertisement for sale that had been placed in the Daily Newspaper by the 2nd proposed Interested Party in exercise of its Statutory Power of Sale. He annexed the said Certificate of Lease and Newspaper Advertisement as annexures **JOH-1** and **JOH-2**. He also averred that at the time of purchase, he had no **Notice** of defect in title, competing interest or any claim as the advertisement was a **Public Notice** and the Plaintiffs/Respondents herein never made any response to it. Further that at the time of purchase, the property was registered in the name of 2nd Defendant and there was no encumbrances other than a Charge in favour of the 2nd proposed Interested Party. He annexed the said agreement as **JOH-4** which showed that the proceeds of the Sale would be paid to an account preferred by the 2nd proposed Interested Party. It was his contention that he took possession of the suit property in **June 2014**, and has lived thereon with his family without any Notice of a competing claim until when he was evicted from the suit property.

He alleged that the said eviction was irregular as he never participated in the proceedings that culminated into the Specific Performance Order and subsequent eviction proceedings.

He contended that he has charged the suit property to **Commercial Bank of Africa**(3rd proposed Interested Party) to secure facility of **Kshs.4,000,000/=** who had also transacted on the said land without Notice of any competing interest of claims by the Plaintiffs. He further contended that had the court been made aware of his presence and legal standing in the suit property, the eviction Orders would not have been issued without him having been given an opportunity to be heard. Further, that his omission in the suit has caused substantial injustice that can be remedied by reviewing and setting aside the Judgment and the subsequent Orders that followed. He deposed that the manner that the eviction was carried out was inhuman and contrary to justice and equity.

The application is contested. It was alleged that the Plaintiffs/ Respondents filed Grounds of Opposition on **7th June 2019**. However the said Grounds of Opposition are not on record though they have been referred to by all the parties in their submissions. The Court takes cognizance of the fact that this file was referred to this court from Milimani ELC and maybe the said Grounds of Opposition were misplaced at the said Registry.

The 2nd Interested Party supported the application by filing a **Replying Affidavit** through **Silas Aluku** on **19th August 2019** and urged the Court to allow the instant application totally.

Further this application is also supported by 3rd proposed Interested Party who filed a **Replying Affidavit** through **Dr. Jacob O. Ogula**, the Head Remedial Management at the 3rd proposed Interested Party who averred that the said application is merited and should be allowed for the interest of justice. He contended that the suit property **Nairobi/Block 26/113**, is registered in the name of **Joshua Omondi Hallonda**, the 1st

Applicant herein, who was registered as such on **16th May 2014**. That the 3rd Interested Party advanced to **Crane Travel and Tours** an overdraft of **Kshs.2,000,000/=** and **USD 20,000** and a legal Charge dated **1st April 2016**, was registered using the suit property. He deposed that as part of its due diligence, the 3rd proposed Interested Party conducted a search in respect of the suit property at the Lands Registry and was issued with a Certificate of Official Search dated **6th April 2016**. The said Certificate of official Search confirmed **Joshua Hallonda**, as the registered proprietor of the suit property and did not reveal any other encumbrances registered against the title to the said property. That there was **no inhibition, caution, restriction or Court Order** registered against the said title. Further that the 3rd proposed Interested Party was not a party to or privy to the court's proceedings resulting to the Judgment of the court dated **23rd February 2018**, and only became aware of it after the 1st proposed Interested party was evicted from the suit property.

The deponent further averred that without any **caution, inhibition, restriction or Court Order** registered against the suit property, it was not possible for the 3rd proposed Interested Party to determine whether there was any dispute, court proceedings, or competing interest affecting the property at the time the Charge was registered. He also contended that the Orders of the court issued on **23rd February 2018**, have adversely and negatively impacted upon the reliability of the 3rd proposed Interested Party's security over the suit property without affording it an opportunity to be heard. He urged the Court to allow the instant application for the interest of fairness and justice which will enable the 3rd proposed Interested Party to ventilate its case.

The application was canvassed by way of written submissions. The 1st proposed Interested Party through the **Law Firm of O.G Law LLP Advocates**, filed the written submissions on **14th August 2019**. The 2nd proposed Interested Party through the **Law Firm of Ngaiywa & Kibet Partners LLP Advocates**, filed their written submissions on **3rd October 2019**, and the 3rd proposed Interested Party through **Wainaina Ileri & Co. Advocates**, filed their written submissions on **26th September 2019**. All the above submissions were in support of the instant application. The Plaintiffs/Respondents filed their written submissions on **15th October 2019** through the **Law Firm of Havi & Co. Advocates** who urged the Court to dismiss the application herein.

The Court has carefully read and considered the above written submissions, the cited authorities, the relevant provisions of law and the Court records and renders itself as follows:-

There is no doubt that a Judgment was entered in favour of the Plaintiffs/Respondents on **23rd February 2018**. Part of the Judgment has been enforced through the eviction Order that was issued by the court on **7th February 2019**. It is evident that due to the enforcement of the said Orders of the court issued on **7th February 2019**, the 1st proposed Interested Party was evicted from the suit property. It is also evident from the annexures to his application that the 1st proposed Interested Party was registered as the proprietor of the suit property **Nairobi/Block 26/113** on **16th May 2014**. A Certificate of Lease **JOH-1** is annexed to that effect. Further, it is evident that he purchased the suit property from **Nduati John Njuguna**, 2nd Defendant herein vide a Sale Agreement dated **4th April 2014**. The said suit property was transferred to the 1st proposed Interested Party **Joshua Omondi Hallonda** while this suit was on-going. The court had pointed that fact in its Judgment dated **23rd February 2018**. Though the 2nd Defendant had alleged in its defence and evidence in court that he had sold the suit property to one **Joshua Hallonda** and that the same was sold after he defaulted in payment of a Bank loan, the 2nd Defendant had not deemed it fit or necessary to avail such evidence. The 2nd Defendant did not produce evidence of such sale of the suit property to **Joshua Hallonda**, the Charge or the Certificate of Lease in the name of **Joshua Hallonda**. The court had stated as follows on page 27 of its Judgment:-

“The 2nd Defendant alleged that he sold the suit property to Joshua Halonda. However, there was no official Search produced in court to show that indeed the 2nd Defendant sold the suit land to the 3rd Party. The 2nd Defendant also stated that the suit property was sold by the Bank to the 3rd Party. There was no evidence to that effect. If the 2nd Defendant sold the suit property to a 3rd Party, he did so while litigation was on-going”

The question that begs answers is why the Defendants especially the 2nd Defendant chose to keep away the above referred evidence from the

court. Further, had the 2nd Defendant tendered the above evidence referred to by the court, would the court have arrived at a different finding or given different orders?

What is evident is that though the suit was filed on 27th April 2010, viva voce evidence was taken between the year 2015 and 2016. The 2nd Defendant had sold the suit property in 2014, but there was no attempt by any of the parties thereon to enjoin Joshua Hallonda as a party to the suit. The court would not understand why the parties chose to omit such a joinder, given the fact that while the suit was proceeding, the suit property was registered and occupied by a 3rd party who was not taking part in the proceedings.

Failure to enjoin Joshua Hallonda to the suit meant that the suit proceeded in his absence and Orders were given which were adverse to a property that he was the registered owner and he was in occupation without his knowledge or presence.

Having laid the above background, the Court finds that there are two issues for determination herein. These are:-

i. Whether the Interested Parties should be enjoined in this suit.

ii. Whether the Court should vary, review and/or set aside its Judgment delivered on 23rd February 2018 and other consequential Orders.

The Applicants have sought to be enjoined as Interested Parties.

Interested Party has been defined by **Black's Law Dictionary, 9th Edition** as:-

“A party who has a recognizable stake (and therefore standing) in the matter”.

Further in Rule 2 of the Constitution of Kenya (Protection of the Fundamental Rights and Freedoms) Practice and Procedure Rules 2013, ***‘Interested Party’*** is defined as:-

“A person or entity that has identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation”.

It is not in doubt that the Judgment herein was delivered on 23rd February 2018. Though we can rightly say that the matter was concluded at that point, there are enforcement proceedings that were initiated by the Plaintiffs/Respondents. In fact, eviction Orders were issued on 7th February 2019, wherein the 1st proposed Interested Party was affected. The 1st proposed Interested Party is the registered owner of the suit property. He has been evicted from the suit property and therefore he has an identifiable stake in the proceedings. Further the 2nd proposed Interested Party who had given a loan to a Company owned by 2nd Defendant and the said loan had been secured by a legal Charge over the suit property advertised the suit property for sale after the 2nd Defendant allegedly defaulted in payment of the said loan. It is through the exercise of the Statutory Power of Sale by the 2nd proposed Interested Party that the 1st proposed Interested Party happened to buy the suit property. The 2nd proposed Interested Party has a duty in the proceedings. Again, the 3rd proposed Interested Party is the current Chargee of the suit property having given out a loan of **Kshs.2,000,000/= plus USD 20,000** to the 1st proposed Interested Party. A legal Charge over the suit property has been registered in its favour. Therefore the 3rd proposed Interested Party has equitable interest or recognizable stake in the suit property and thus a legal interest in the proceedings.

Order 1 Rule 10(2) of the **Civil Procedure Rules** provides that:-

(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.”

The above provisions of law provides that the joinder of parties may be done at any stage of the proceedings. There are enforcement proceedings on-going and the Court cannot find and hold that this matter is completely closed.

The Plaintiffs have alleged joinder cannot be done once a Judgment has been delivered since the proceedings are closed. However, as the Court stated earlier, there are enforcement proceedings and these enforcement proceedings have affected the 1st & 3rd proposed Interested Parties standing over the suit property. The Court finds that the proposed Interested Parties are necessary parties herein and their presence is necessary to enable the court to effectively and completely adjudicate upon the matter herein. The Court will rely on the case of **JMK...Vs...MWM & Another (2015) eKLR**, where the Court of Appeal held:-

“It is not in dispute at all that when the Appellant applied to be made a party to the proceedings on 10th June 2014, there were no pending proceedings before the Industrial Court to which he could have been made a party, the Judgment having been delivered on 30th May 2014.

The Appellant however had not applied solely to be added as a party to the suit, he had also applied for review and setting aside of the Judgment of the court to give him an opportunity to be heard. On other words, the Appellant was effectively applying for

review and setting aside of the Judgment of the Industrial court and an order for de novo hearing of the suit, which would afford him an opportunity to be heard”.

Though the Plaintiffs/Respondents submitted that the above authority is distinguishable from the present case, the Court finds that the 1st proposed Interested Party has been affected by the enforcement of the Judgment of the court delivered on **23rd February 2018**, while he was still in occupation of the suit property. The proposed Interested Parties are necessary parties herein and the Court finds and holds that they have persuaded the court on their necessity in this proceedings and thus they are now enjoined as Interested Parties herein.

The next issue is whether the court should review and or set aside the Orders of Specific Performance on **Nairobi/Block 26/113** and other consequential Orders thereon.

The application for review is anchored under **Order 45 Rule 1** of the **Civil Procedure Rules** and **Section 80** of the **Civil Procedure Act** which provides:-

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by Act, may apply for a review of judgment to the court which passed decree or made the order, and the court may make such order thereon as it thinks fit.”

It is evident that the court delivered a Judgment on **23rd February 2018** against the Defendants herein. However, the Defendants did not file any Appeal though the 2nd Defendant had filed a Notice of Appeal and application to be allowed to Appeal out of time. The said application was not prosecuted. It is also evident that in the said Judgment, the Court issued various Orders which included cancelling of title deed issued in favour of 2nd Defendant and an Order of Specific Performance wherein the 1st Defendant was directed to transfer the suit property to the Plaintiffs/

Respondents herein. However, what has now come to the attention of the court is that indeed the suit property was sold and transferred to **Joshua Omondi Hallonda**, the 1st Interested Party on **16th May 2014**. It is evident that this information was not fully disclosed to the court during the course of the hearing since the said Certificate of Lease was never produced as exhibit in court. However, from the annexures availed by the 1st Interested Party, the questions posed by the court has been answered. The Certificate of Lease and Charge documents have been annexed. It is now clear that indeed the suit property was sold to **Joshua Hallonda** in **April 2014**.

The 1st Interested Party is therefore aggrieved by the Decree of this Court and has come to court for review.

The said review is sought under **Order 45 Rule 1**, which provides:-

(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 a review of judgment to the court passed the decree or made the order without unreasonable delay.”

It is evident that viva voce evidence was taken while the 1st Interested Party was the registered owner of the suit property. However, he was not enjoined as a party and he therefore never participated in the proceedings. A Judgment and Decree were issued in the **year 2018**, while he was still in occupation of the suit property but without his knowledge. The Court therefore finds that adverse orders were issued that affected the 1st and 3rd Interested Parties without their knowledge or participation, and the said adverse Orders can be classified as **‘any other sufficient reason’** that would warrant this Court consider a review of its Judgment.

It is evident that the 1st and 3rd Interested Parties did not participate in the proceedings yet they stand to suffer from the Decree of the court. The right to fair trial entails that no party should be condemned unheard. See the case of **JMK...Vs..MWM & Another (supra):-**

“The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.”

Further in case of **Patriotic Guards Ltd...Vs...James Kipchirchir Sambu (2018 eKLR)**, the Court of Appeal held that:-

“There is need to restate the importance of a fair trial as guaranteed by the Constitution. The right to a fair trial remains at the heart of any judicial determination and courts should endeavor to protect and uphold the same. It is a cardinal rule and it emanates from the principle of natural justice.

It is not in doubt that the right to be heard is a valued right and which is enshrined in our Constitution. This right was not observed herein because for reasons not made clear to this court, the 2nd Defendant failed to bring on board the 1st Interested Party whom he had sold the suit property to, and thus orders were issued by this Court which Orders have adversely affected the 1st Interested Party. The Constitution of Kenya is very clear on the right to protection of ones property and the said property cannot be arbitrary taken away from such an owner without being heard or without being accorded an opportunity to ventilate his case.

For the above reasons, the Court finds that the Interested Parties and especially the 1st Interested Party needs to be given an opportunity to present their case. This opportunity can only be achieved by reviewing of the Judgment of the court that was delivered on **23rd February 2018**.

The Plaintiffs/Respondents have submitted that the Applicants did not seek for **review** of the said Judgment and then have the matter heard *de novo*. However, the Court finds that it has inherent powers under **Section 3A** of the **Civil Procedure Act**, to issue any such orders that are necessary for the end of justice to be met.

For the above reasons, the Court finds that the Applicants have ably convinced this Court that failure to involve the Interested Parties in the hearing of the main suit is a sufficient reason to allow the review of the ensuing Judgment. Consequently, the Court allows the review of the Judgement entered on **23rd February 2018** and set aside the said Judgment and all the other consequential orders thereof. Let this matter be heard *de novo* wherein the Interested Parties will be made parties to the suit so that they can ventilate their concerns.

The upshot of the foregoing is that the Applicants' **Notice of Motion** application dated 4th March 2019 is found to be merited and the same is allowed in terms of **prayers No.2, 4, 5 and 6**. Costs of this application to

be met by the 2nd Defendant herein.

Further, the Court directs the 2nd Defendant/Respondent to meet costs incurred by the Plaintiffs/Respondents herein in the enforcement or execution of the reviewed Judgment as he omitted to avail crucial evidence in court. On prayer No.4, the 1st Interested Party's occupation prior to the eviction from the suit property, be restored pending the *de novo* hearing and determination of the main suit herein.

It is so ordered.

Dated, Signed and Delivered at Thika this 25th day of October 2019.

L. GACHERU

JUDGE

25/10/2019

In the presence of

Mr. Odhiambo for the 1st Applicant/Interested Party

Mr. Mutiso holding brief for Mr. Havi for the Plaintiffs/Respondents

M/S Waweru for the 2nd Defendant/Respondent

M/S Njiru holding brief for M/S Kariuki for the 3rd Interested Party.

No appearance for 1st & 3rd Defendants/Respondents

No appearance for 2nd Interested Party

Lucy - Court Assistant

L. GACHERU

JUDGE

25/10/2019