



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 90 OF 2017**

**JUJA COFFEE EXPORTERS LIMITED.....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....DEFENDANT**

**MIQDAD ENTERPRISES LIMITED.....INTERESTED PARTY/APPLICANT**

**RULING**

1. Before me for determination is a Notice of Motion dated 21<sup>st</sup> August 2017. The Interested Party Miqdad Enterprises Ltd prays for Orders that:-

**1. Spent**

**2. The present application be heard in priority over the Plaintiff's Notice of Motion dated 19<sup>th</sup> April 2017 seeking injunctive Orders to restrain the sale of parcel of land known as Title Number Lamu/Block IV/2.**

**3. The Applicant be joined to the present proceedings as an Interested Party or in such other capacity as the Honourable Court may deem fit.**

**4. The Honourable Court be pleased to strike out or dismiss the Plaintiff's Notice of Motion dated 19<sup>th</sup> April 2017 for want of Locus standi and for being moot.**

**5. Alternatively, and without prejudice to (4) above, the Applicant be granted leave to file and serve on all the parties herein, within seven(7)days of the Order or within such other periods as the Honourable Court may deem just, its response to the Plaintiff's Notice of Motion dated 19<sup>th</sup> April 2017.**

**6. The costs of this Application be awarded to the Applicant to be paid by the Plaintiff and Defendant jointly and severally.**

2. The Notice of Motion is supported by the annexed affidavit of the Applicant's Director one Abdil Maalim Dayib and is premised inter alia, on the grounds that:-

**1. The Applicant saw an advertisement for sale on 24<sup>th</sup> April 2017 of all that parcel of land known as Lamu/Block IV/2 registered in the name of Lamu Gineries Ltd. The Applicant subsequently attended the Public auction and emerged the highest bidder at Kshs 270,050,000.00/-. The said bid was accepted and it signed a Memorandum of Sale dated the same day followed by the issuance of a Certificate of Sale dated 25<sup>th</sup> April 2017.**

**2. The Applicant had paid the entire purchase price by 3<sup>rd</sup> May 2017 and expected that the Defendant would execute the documents necessary to get the suit property registered in its name. The Defendant however dragged its feet prompting the Applicant to issue it with a demand letter dated 5<sup>th</sup> May 2017.**

**3. The Defendant responded to the demand letter on 9<sup>th</sup> May 2017 alleging that it had cancelled the auction and recalled the Certificate of Sale apparently on the basis of a Court Order issued herein on 24<sup>th</sup> April 2017. The Order was however not enclosed in the letter.**

**4. On 15<sup>th</sup> May 2017, the Applicant filed Mombasa ELC Civil Case No. 169 of 2017; Miqdad Enterprises Ltd –vs- National Bank of Kenya Ltd and obtained interim injunctive orders restraining the Defendant from purporting to cancel the auction, the Memorandum and Certificate of Sale.**

**5. The Applicant has perused this file and has since established that the Defendant has failed to inform the Court herein that the sale took place on 24<sup>th</sup> April 2017 and that there is in existence Mombasa ELC No 169 of 2017.**

**6. It is therefore evident that the Applicant's interests in the present suit will not be protected or adequately protected by any of the parties herein yet the applicant will adversely be affected by any orders issued in this suit in favour of the Plaintiff.**

**7. It is accordingly necessary that the Applicant's right to a fair hearing under Article 50(1) of the Constitution be upheld by allowing its participation in the present suit.**

3. In response to the said application, the Plaintiff through a Replying Affidavit sworn by its Director Tauhida Tahir Said on 13<sup>th</sup> October 2017 and filed herein on the same date avers that the Application is misconceived and an abuse of the Court process as no relief is claimed against the Interested Party and the Defendant has not applied for third party proceedings for indemnity and contribution against the purported Interested Party.

4. The Plaintiff further avers that the Application is bad in law for being omnibus and lacking in specificity as the applicant applies to strike out the Plaintiff's Motion dated 19<sup>th</sup> April 2017 even before being permitted to join the suit. The Plaintiff accuses the Interested Party of abusing the process of the Court and failing to disclose that in the said Mombasa ELC No. 169 of 2017, an application for the transfer thereof to Malindi was prosecuted and is pending determination by the Court. It is the Plaintiff's case that if anything, this Application should be dismissed to await the decision on the transfer of the matter filed in Mombasa.

5. The Defendant is equally opposed to the Interested Party's Application on what are termed in their submissions points of law, and on the basis of facts and pleadings filed by all parties to this suit which form part of the record of the Court.

6. I have taken into consideration the Application and the response thereto. I have also carefully perused and studied the submissions and authorities put before me by the Learned Advocates for the parties.

7. Order 1 Rule 10(2) of the Civil Procedure Rules provides as follows:-

***“(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.”***

8. Arising from the foregoing, it is my considered view that for one to qualify to be enjoined in proceedings under Order 1 rule 10(2) of the Rules aforesaid, she/he must not only be a necessary party but also a proper one against or for whom a remedy must flow to or from the other side. It must be a party whose presence is necessary for the court to effectually and completely adjudicate the matter and without whose presence any resultant decree cannot be enforced.

9. In *Jan Bolden Nielsen –vs- Hersman Philipus Steyn & 2 Others (2012)eKLR*, Mabeya J observed as follows:-

***“In my view, “a necessary party” is a person who ought to have been joined as a party and in whose absence no effective decree can be passed in a proceeding by the Court. If a necessary party is not impleaded, the suit may be a non-starter as the reliefs sought if granted, may be ineffective.”***

10. Quoting from the decision in the English authority of *Amon –vs- Raphael Tuck & Sons LN(1956)1 All ER 273*, Mabeya J. in the *Jan Bolden Nielsen* case (Supra) went on to state that:-

***“The party to be enjoined must be someone whose presence is necessary as a party. What makes a person a necessary party? ....The only reason which makes a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party....***

***It is not enough that the intervener should be commercially or indirect interested in the answer to the questions; he must be directly and legally interested in the answer to the question. A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally-that is by curtailing his legal rights. That will not be the case unless an order may be made in the action which will operate on something in which he is legally interested.”***

11. In the matter before me, the Applicants aver that they attended a public auction on 24<sup>th</sup> April 2017 at which they emerged the highest bidder at Kshs 270,050,000/- for all that parcel of land known as Lamu/Block IV/2 registered in the name of Lamu Gineries Ltd. It is further their case that their bid was accepted and they proceeded to sign a Memorandum of Sale and were issued with a Certificate of Sale thereafter on 25<sup>th</sup> April 2017.

12. It is further the Interested Party's /Applicant case that they proceeded to pay the entire Purchase Price to the Defendant Bank on 3<sup>rd</sup> May 2017 but when they asked the Defendants to execute the documents necessary to get the suit property registered in its name, the Bank declined. By a letter dated 9<sup>th</sup> May 2017, the Bank informed the Applicant that they had cancelled the auction and recalled the Certificate of Sale on the basis of a Court Order issued herein on 24<sup>th</sup> April 2017.

13. The Applicant is now apprehensive that it will be adversely affected by any orders issued herein in favour of the Plaintiff especially after they perused this Court file and realised that the Defendant has failed to inform this Court that the sale took place on 24<sup>th</sup> April 2017 and further that the Applicants have since filed Mombasa ELC Civil Suit No. 169 of 2017 in which they obtained Orders restraining the Defendant Bank from purporting to cancel the auction, the Memorandum of Sale as well as the Certificate of Sale.

14. A perusal of the Plaintiff filed herein by the Plaintiff on 21<sup>st</sup> April 2017 reveals that the Plaintiff is seeking inter alia, the following Orders against the Defendant:-

***i) A declaration that the 45 day notification of Sale dated 16/2/2017 issued by the Defendant's Auctioneers to the Plaintiff was/is fatally premature, irregular, wrongful, unjustified, null and void;***

***ii) An order that the notification of sale dated 16/10/2016 issued by the Defendant to the Plaintiff be set aside, revoked, cancelled and/or withdrawn for all purposes;***

***iii) An injunction do issue to restrain and prevent the Defendant by itself and/or its agents, servants, employees, assigns or otherwise howsoever from interfering with the Plaintiff's quiet possession of or marketing and/or advertising for sale or selling, leasing, sub-dividing, receiving or taking possession of the Charged suit properties being Title No. Lamu/Block IV/2 to secure the outstanding amounts of USD 36,095,495.41/- plus the sum of Kshs 12,295,739.50/-(DR) with interest and other charges thereon pending a consent settlement with the Defendant;***

***iv) In the alternative and without prejudice to (iii) above, an order that parties do engage in a negotiation for a structured consent settlement; and***

***v) Costs and interest.***

15. From the foregoing and a perusal of the entire Plaintiff, it is evident that the Plaintiff is questioning the validity of the Bank's right to realise its securities. As it were, the Applicant is not privy to the contractual relationship of the Bank/Customer and/or Chargee/Borrower existing between the Defendant Bank and the Plaintiff. Those are the relationships in my view which form the basis of the Plaintiff's suit as well as the Bank's opposition to the suit.

16. From the facts before me even if the Plaintiff's suit and the application for injunction dated 19<sup>th</sup> April 2017 is dismissed such a dismissal would not result in the transfer of the suit property to the Interested Party which is what the Interested Party craves herein. Indeed and looking at the issues in controversy in totality, the Court will still either way be left to determine the question as to whether the suit property should be transferred to the Interested Party or not.

17. I say so because, it is evident from the material placed before me that in order to secure its interests against the Bank, the Applicant herein chose to file Mombasa ELC Civil Suit No. 169 of 2017. In the Defendant Bank's Defence filed in the said case, the Defendant admits that there was no proper and legal auction sale of the suit property and the monies paid by the Applicant were refunded after the Orders of injunction were issued.

18. In my considered view, any issues that may arise herein are only between the Applicant and the Defendant and do not concern the Plaintiff in any way. Where the Applicant were to be enjoined herein, that would lead to separate and new issues being pleaded and/or raised in order to capture the Applicant's grievances yet the clear issues herein between the Plaintiff and the Bank will remain pending for determination.

19. As it were, the Applicant has already filed the separate suit in Mombasa to vindicate its claim against the Defendant Bank. Accordingly I am not satisfied that the Applicant is a necessary party and that its joinder in the suit would enable the Court to determine the real issues in question.

20. The Application dated 21<sup>st</sup> August 2017 is consequently dismissed with costs.

**Dated, signed and delivered at Malindi this 25<sup>th</sup> day of May, 2018.**

**J.O. OLOLA**

**JUDGE**