



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. APPEAL CASE NO. 37 OF 2014**

**UFUNDI SAVINGS & CREDIT CO-OPERATIVE SOCIETY LTD...APPELLANT**

**VERSUS**

**FRANCIS GITARI NDIRANGU & 99 OTHERS.....RESPONDENT**

**TITUS E. OBARA & 199 OTHERS.....1<sup>ST</sup> INTERESTED PARTY**

**ALEX G. MARETE & 19 OTHERS.....2<sup>ND</sup> INTERESTED PARTY**

**CO-OPERATIVE BANK OF KENYA.....3<sup>RD</sup> INTERESTED PARTY**

**EUNITA KERUBO RATEMO & 60 OTHERS.....4<sup>TH</sup> INTERESTED PARTY**

**RULING**

Coming up before me for determination are 6 applications, 5 of which are review applications (hereinafter jointly referred to as the “Review Applications”). The Review Applications are as follows:

1. Appellant’s Notice of Motion dated 11<sup>th</sup> November 2015 (hereinafter referred to as the “Appellant’s Review Application”);
2. Respondent’s Notice of Motion dated 24<sup>th</sup> October 2015 (hereinafter referred to as the “Respondent’s Review Application”);
3. The 1<sup>st</sup> Interested Party’s Notice of Motion dated 14<sup>th</sup> December 2016 (hereinafter referred to as the “1<sup>st</sup> IP’s First Review Application”);
4. The 1<sup>st</sup> Interested Party’s Notice of Motion dated 16<sup>th</sup> March 2017 (hereinafter referred to as the “1<sup>st</sup> IP’s Second Review Application”); and,
5. The 3<sup>rd</sup> Interested Party’s Notice of Motion dated 27<sup>th</sup> November 2015 (hereinafter referred to as the “3<sup>rd</sup> IP’s Review Application”).

In addition to the Review Applications, there is also pending for determination the Proposed 4<sup>th</sup> Interested Party’s Notice of Motion dated 20<sup>th</sup> September 2016 (hereinafter referred to as the “Proposed 4<sup>th</sup> IP’s Application”).

The Review Applications all seek review of the Ruling delivered by this court on 17<sup>th</sup> July 2015 (hereinafter referred to as the “Impugned Ruling”) in which the court granted the Appellant an order of stay of execution of the Award of the Co-operative Tribunal but ordered the Appellant to deposit all rental income from the suit property to this court and the clarification issued by this court on 28<sup>th</sup> October 2015 to the effect that in the Impugned Ruling, the court was referring to gross rent with no deduction of expenses and that the gross rent was to be deposited into the court and not to an interest earning account.

**The Orders Sought in the Review Applications**

In the Appellant’s Review Application, the Appellant is seeking the following orders:-

1. Spent.

2. That the court be pleased to review or vary the orders made on 17<sup>th</sup> July 2015 to deposit rental income in court.
3. That upon reviewing the orders made, the court be pleased to make orders that the rent to be deposited in court is the net rental income received from the building on L.R. No. 209/2571 Nairobi (Ufundi Plaza) (herein referred to as the “suit property”).
4. That the above orders remain in force until the hearing and determination of the appeal.
5. That the court be pleased to issue any other order that it may deem just and expedient for the ends of justice.
6. That costs of this application be in the cause.

In the Respondent’s Review Application, the Respondent is seeking for the following orders:

1. The court be pleased to lift, discharge or vary the order for stay of execution given on 17<sup>th</sup> July 2015.
2. The court be pleased to issue a temporary injunction restraining the Appellant from selling, disposing off, charging or further charging the suit property pending the hearing and determination of this appeal.
3. The Respondent through their investment vehicle Kiingilio Housing Co-operative be allowed to manage the suit property and be collecting the rent pending the hearing and determination of this appeal.
4. That costs of this application be provided for.

In the 1<sup>st</sup> IP’s First Review Application, the 1<sup>st</sup> Interested Party is seeking for the following orders:

- a) Spent.
- b) That an order do issue discharging the Appellant from collecting and depositing rental income from the suit property pursuant to orders issued on 17<sup>th</sup> July 2015.
- c) That this honourable court do issue orders authorizing the 1<sup>st</sup> Interested Party to collect and depositing their share of rental income in court pending the hearing and determination of this appeal.
- d) That the honourable court grant leave to the 1<sup>st</sup> Interested Party to take out a Notice to Show Cause against the Appellant for disobeying the court orders issued on the 17<sup>th</sup> July 2015.
- e) That costs of this Application be provided for.
- f) That any other relief that this honourable court may deem fit to grant.

In the 1<sup>st</sup> IP’s Second Review Application, the 1<sup>st</sup> Interested Party is seeking for the following orders:

1. Spent.
2. Spent.
3. That the orders of stay issued in this cause in favour of the Appellant on 17<sup>th</sup> July 2015 be discharged without any conditions.
4. That the Appellant be ordered to file an account of all the money collected from the tenants within the suit property from 9<sup>th</sup> December 2014 and that amount be deposited into court within 30 days of the order of the Honourable Court.
5. That pending the hearing and determination of this appeal, the court be pleased to appoint a reputable real estate managing agent from amongst LLOYD Masika, Tysons Ltd and Ebony Estates Ltd or any other firm to take the inventory of all tenants occupying the suit property, collect all rent and service charge and manage the building.
6. That the office space and ancillary areas occupied by the Appellant within the suit property be measured for purposes of calculating and levying rent and service charge payable and that the Appellant does pay into court the sum determined to be rent.
7. That costs of this application be in the cause.

In the 3<sup>rd</sup> IP’s Review Application, the 3<sup>rd</sup> Interested Party is seeking the following orders:

1. Spent.

2. The court be pleased to review and set aside its ruling delivered on 17<sup>th</sup> July 2017.

3. The court be pleased to grant a stay of execution of the ruling delivered on 17<sup>th</sup> July 2015 and in particular, as relates the deposit of the proceeds of the rental income from the suit property into the court.

4. That the costs of and incidental to this application abide the results of the appeal.

### **Supporting Documents, Replies and Submissions in the Review Applications**

#### **1. The Appellant's Review Application**

The Application was supported by the affidavit of Alphonse Maragia Makori sworn on 11th November 2015. The Appellant averred that on 28th October 2015, the court directed that the rent payable into court was the gross rental income. Further, that the rent from the suit property was Kshs 47, 889,872/- and was payable at different times depending on when respective tenants commenced their tenancy. The Appellant stated that the rent was payable through a management agent, Value Zone Ltd and that according to the agent, gross rental income for the months of August and September 2015 was Kshs 6,425,955/- against an expenditure of Kshs 3,171,284 leaving a balance of Kshs 3,254,671. Further, that there was a monthly payment to the 3rd interested party's loan of Kshs 3.3 million which had last been paid in July 2015 and had accumulated arrears of Kshs 7.5 million. It is the Appellant's case that it was practically impossible to deposit all rental income without payment to their 22 listed service providers including the management agents, cleaners, security, lift repairs and maintenance as well as utilities such as water and electricity.

The Appellant averred that their failure to pay the service providers would result in breach of contractual obligations in addition to rendering the premises uninhabitable due to its unclean state, lack of security, disconnection of water and electricity and malfunctioning lifts which will result in tenants vacating and no collectable rent. Further, that the Appellant would also be exposed to penalties from non-payment of statutory dues such as rates, land rents and VAT in addition to exposing them to labor disputes owing to non-payment of salaries to their staff. Lastly, the Appellant urged that the rental income be deposited in a joint interest earning account to be agreed to by the parties.

The Respondent filed a replying affidavit sworn by Francis Gitari Ndirangu on 8th December 2015 and grounds of opposition dated 7th December 2015 where they stated that the suit property was not a gift to the Appellant but a replacement of the collapsed building previously known as Gateway House which was owned by 15,000 shareholders while the Appellant was a mere custodian holding the suit property for the 15,000 shareholders.

The Respondent contended that in a bid to defeat an injunction issued by the Tribunal on 30th May 2012, the Appellant charged the suit property to the 3rd Interested Party for a loan of Kshs. 160 million without consulting the Respondent. Further, that this was done while the Appellant had an existing loan with K-Rep Bank which stood at Kshs 50,907,557/- as at 24th June 2013 and despite existing orders, award and a permanent injunction thereon. Further, that the Appellant sought and obtained a further loan of Kshs 15 million while orders for stay of execution at the Tribunal were subsisting.

It is the Respondent's contention that despite the Appellant being ordered to pay rent for the premises under its occupation which comprise 2 floors of the suit property, the Appellant was not remitting its rent which forms part of the rental income which should be deposited in court. Further, that since rent from the suit property was payable as an item on its own while service charge and VAT were separate items, it was possible for the Appellant to submit gross rental income to the court which did not direct that deposits accruing from service charge be deposited.

According to the Respondent, loans of the Appellant do not constitute service charge and do not go towards maintenance of the building. The Respondent contended in this regard that the loans were personal to the Appellant's sacco business which applied for the loan to finance its working capital. The Respondent stated that the loan had no attachment to the rental income accruing from the suit property and that payment of Kshs 3.3 million to the 3rd Interested Party towards financing the loan was an extortion, betrayal and abuse of trust. The Respondent contended that the Appellant's sacco and the investment arm were 2 different entities since not all members of the sacco were investment shareholders who owned the suit property.

The Respondent stated that it was only fair for the Kshs 7,500,000/- allegedly taken to the 3rd Interested Party from the rent account be deposited in court by the Appellant. It is the Respondent's averment that by the time of making this Application, the Appellant had not deposited the rent accruing for the months of October, November and December 2015 which remained unexplained. According to the Respondent, this Application had been made with dubious intentions of sneaking and passing as part of service charge some items which were personal and pertinent to the Appellant sacco business such as loan installment repayment, staff soft loans, salaries and costs, auctioneer and lawyer charges, marketing and advertisement, postage, telephone, printing, stationery and VAT which do not form part of service charge.

Further, that the alleged net rent had not been explained as the expenses to be deducted in arriving at the alleged net rent had not been tabulated. Lastly, that the Appellant will not be prejudiced by depositing the whole rental income and can always apply for provision if necessary.

In response to the Respondent's replying affidavit sworn on 8th December 2015, the Appellant filed a supplementary affidavit sworn by Alphonse Maragia Makori on 22nd January 2016 where it stated that the Respondent's assertion that it represents 14,780 members was non-factual and a misrepresentation since the Respondent was a group of only 100 members. Further, that most of the issues which were raised by the Respondent were fit for appeal hearing and not this Application.

According to the Appellant, the issue whether the building belongs to the investment members or the Appellant is a key and fundamental issue for determination in this Appeal. The Appellant stated that from the time the order was made, it had deposited amounts totaling Kshs 8,179,877 being payments received for the period starting August- November 2015 which amounts had not been paid in the installments of

June and July 2015 and not paid in the 3<sup>rd</sup> Interested Party's account directly as evidenced by annexed copies of deposit slips and court slips.

The 1st Interested Party opposed the Application through a replying affidavit sworn by Titus E. Obara on 21st December 2015 where it was contended that the plot sold belonged to the investment members and not the Appellant as alleged. Further, that the investment members who were legitimate owners and majority shareholders were never consulted before the credit facility was applied for. It is the 1st Interested Party's submission that some of the expenses meted out by the Appellant were unrealistic, unwarranted and exaggerated. Further, that not all expenses quoted by the Appellant were pertinent and/or mandatory to warrant a review as sought by the Appellant. According to the 1st Interested Party, all the money collected should be deposited in court and not the net collection as suggested by the Appellant.

The Appellant in its joint submissions dated 1st March 2016 submitted that it was seeking to have the orders of 17th July 2015 reviewed or varied to the extent that the expenses in terms of service charge, VAT collected and income Tax be allowed to be expended and paid to Kenya Revenue Authority as the case may be. It is the Appellant's submission that the orders of 17th July 2015 cannot be enforced without offending/breaching other mandatory statutory requirements. Counsel submitted that from the receipts made and received from tenants, there was no provision for income tax which was due and payable from the rent received in accordance with the Income Tax Act. Counsel submitted that as at the date of the submissions, the Appellant had deposited a total of Kshs 9,399,629 /- in court contrary to the Respondent's assertion that the Appellant had no intentions of depositing the rental income in court.

Further, that the Appellant was ready and willing to abide by the court orders contrary to the Respondent's claim. In support of this Application, the Appellant referred the court to the cases of Jeremy Mudaki Asava vs. Brown Otengo Asava & another(2015)eKLR, Biren Armitral Shah & another vs. republic & 3 others(2013)eKLR, Nairobi City Council Vs. Thabiti Enterprises Ltd(1997)eKLR, Anthony Gachara Ayub vs. Francis Mahinda Thinwa(2014)eKLR and Kimita vs. Wakibiru(1985)KLR 317.

The Respondent in joint submissions dated 7th March 2016 reiterated the facts as pleaded in their replying affidavit and submitted that there was no need to disturb the order of 17th July 2015. Counsel stated that from the letters of offer to lease annexed to their replying affidavit, remittances by tenants were properly itemized and that rent, VAT and service charge were separate items. In respect to loan repayment, it was submitted that this was not an item under service charge and that the loan was personal to the Appellant's sacco business and had no attachment with the rental income from the suit property. Counsel stated that the letter of offer and acceptance dated 29th December 2014 issued by the 3rd Interested Party shows that the loan applied for and obtained was the Appellant's working capital.

The Respondent contended that the Appellant's sacco and the investment arm were 2 different entities run under the same management board. Further, that since no accounts had been furnished, it was hard to tell if the money deposited in court was inclusive of VAT and service charge. It was also submitted that while in court, on 28th October 2015, the Appellant's Counsel assured the court that the rental income in the sum of Kshs 7.5 million was safe only for the Appellant to reluctantly deposit Kshs 3,325,748/-. Further, that income tax which was payable at the end of the year could be released by the court on application and that in any event, no evidence had been placed before the court appointing the Appellant as a tax agent with mandate to withhold income tax. Lastly, Counsel contended that no new discovered issues or evidence which were not within the knowledge of the Appellant had been raised to enable the court vary its orders issued on 17th July 2015

The 2nd Interested Party also filed joint submissions dated 3rd March 2016 and conceded the Application to the extent of income tax being deducted before rental proceeds are deposited in court. Further, that the money being deposited in court can be deposited in a joint interest earning account.

## **2. The Respondent's Review Application**

The Application is supported by the affidavit of Francis Gitari Ndirangu sworn on 24th October 2014 in which it was stated that the Appellant had disobeyed the orders issued on 17th July 2015 and had not deposited any rental income arising from the suit property since July 2015. According to the Respondent, the Appellant had continued to wrongfully utilize the rental income from the suit property at the expense of the Respondents who were the real beneficiaries.

The Respondent stated that the order for stay of execution was oppressive and continued to create more hardship to them by depriving them the fruits of their judgment which was now being squandered by the Appellant. Further, that the Appellant who was only interested in the rental income was not keen on prosecuting this appeal. The Respondent was apprehensive that unless an injunctive order issues, the Appellant would secretly sell the suit property in collusion with the 3<sup>rd</sup> Interested Party which would greatly prejudice the 15,000 members.

It is the Respondent's contention that if the suit property is put in their hands through their vehicle by the name Kiingilio Housing Co-operative Society Ltd, it will be well managed and become resourceful to the 15,000 members. Further, that the Appellant was on the verge of collapsing and was in a financial quagmire due to bad debts and would not be in a position to refund rental income to the beneficiaries since it had no other known assets.

The Appellant filed a replying affidavit sworn by Alphonse Maragia Makori on 11th November 2015 stating that this Application lacked merit, was frivolous, vexatious and an abuse of the court process. The Appellant averred that the court did not impose a specific time within which it was to deposit the rent in court and further, that the nature of the tenancy in the premises was that payment of rent was quarterly. That while some rent had since accrued, other rents which had been paid were not payable until the months of October and December. Further, that the Appellant had sought clarification from the court on which rent was payable into court whether gross or net rent after payment to their various service providers.

The Appellant denied that it had delayed the prosecution of this appeal stating that the Tribunal had not signed the proceedings to enable it file the appeal owing to lack of a substantive chairperson. Further, the Appellant denied misusing the rental income and there being conspiracy between it and the 3rd Interested Party stating that before the ruling of 17th July 2015, it had regularly paid all installments due and payable and that no issues had been raised by the 3<sup>rd</sup> Interested Party or creditors as to outstanding payments. Further, that the

Appellant's application for review of the court orders of 17th July 2015 was necessary to avert a serious breach of contractual obligation between the Appellant and its tenants.

The 1st Interested Party also opposed this Application through a replying affidavit by Titus E. Obara sworn on 26th November 2016 where it was contended that the Appellant had not complied with the court orders requiring rent to be deposited in court 4 months after the issuance of the order. The 1st Interested Party however stated that discharging the orders would expose majority investment members to prejudice since they partly supported the sale of the suit property contrary to their views. The 1st Interested Party also expressed fear that unless the injunction was issued, the Appellant might charge the suit property to another institution.

It is the 1st Interested Party's contention that majority of the investment members did not recognize Kiingilio Housing Co-operative Society Ltd which was not part of the suit at the Tribunal and whose formation was unknown. According to the 1st Interested Party, the rental income should be deposited in court as directed or to an escrow account opened in the joint names of the advocates for purposes of preservation and further, that a body be formed from the majority members for purposes of selling the suit property, collecting rent and furnishing the court with accounts if the Appellant fails to comply with the court orders.

The 1st Interested Party submitted that this Application should be refused since the award of the Tribunal stopped the Appellant from selling or charging the suit property and therefore, that the prayer for injunction adds no value. In respect to the prayer seeking to have Kiingilio Housing Co-op Society Ltd allowed to collect rent pending the determination of the appeal, it was submitted that Kiingilio was not a party to the proceedings before the Tribunal. The 1st Interested Party submitted that allowing a stranger who had no order in its favour to come in at this stage and collect rent in respect to the suit property would create an untidy situation.

The 2nd Interested Party filed a replying affidavit sworn by Alex G. Marete on 1st February 2016 where they contended that the Respondent which comprises a group of 100 members does not represent the 15,000 members. Further, that the Respondent were previously involved in the management of the Appellant's society as delegates and executives for several years when alleged mismanagement and impropriety happened to the society and can therefore not be trusted. According to the 2nd interested party, Kiingilio Housing Coop Society Ltd is a society without the authority, mandate or consent of the investment members and any orders issued against the Appellant at the instance of the Respondent would be disastrous and detrimental to investment members.

The 2nd Interested Party contended that the best way forward would be for the Appellant to continue collecting rent and depositing the same in court or an interest earning account which would be more beneficial to members. Further, that the issues raised by the Respondent would be best addressed in the hearing of the appeal.

The 3rd Interested Party opposed this Application through a replying affidavit sworn by Benson Kilonzi Kioko on 4th May 2016. The 3rd Interested Party stated that it had a considerable pecuniary interest on the rental which the court on 17th July 2015 directed be deposited in court. The 3rd Interested Party stated that by a letter of offer dated 5th November 2013, the Appellant secured a financial facility amounting to Kshs 160 million which was secured by a charge registered over the suit property dated 25th November 2013, a duly registered all assets fixed and floating debenture as well as a duly registered deed of assignment of rental income dated 25th November 2013.

According to the 3rd Interested Party, there had not been a complete repayment of the monies owed by the Appellant and that as such, its interest in the suit property subsists. The 3rd Interested Party averred that it was at risk of incurring colossal loss being aggrieved by the orders of 17th July 2015. Further, that the lifting of the stay of execution orders would expose its interest in the suit property which may be disposed before the repayment of the colossal amount owed to it. The 3rd Interested Party further contended that it would be prejudicial to it to have the suit property managed by the Respondent or any of its entities. It is the 3rd Interested Party's assertion that the interest of justice would be better served by disallowing this Application and that the status quo remain in place with the net rental income from the suit property being collected by the court.

The Appellant filed joint submissions dated 1st March 2016 and reiterated the facts as set out in its replying affidavit and submitted that the claim by the Respondent that it has breached the order issued on 17th July 2015 was misleading and lacking in bona fides. Counsel submitted that the Appellant had deposited the entire gross income and that the prayer seeking to have the orders discharged on the ground that it had failed to comply has not been proved.

In respect to the order for temporary injunction sought it was submitted that there was no evidence to show that there had been a move to dispose, sell or in any way deal with the suit property in a manner that may affect the shareholders. Counsel argued that the allegation made by the Respondent that there was a conspiracy between it and the 3rd Interested Party to sell the suit property were unsubstantiated and should be dismissed. Further that a co-operative property cannot be disposed or dealt with without compliance with procedures set out under the Cooperative Society's Act and the Public Procurement and Disposal Act and further, that there must be approval from the Ministry of Co-operatives and the Public Procurement Authority.

On the prayer seeking to have Kiingilio Housing Co-operative Society appointed to collect rent it was submitted that Kiingilio was a stranger to these proceedings and cannot participate in these proceedings or have orders issued in their favour. Further, that Kiingilio Housing Cooperative Society was a society exclusive of the Respondent and can therefore not be entitled to collect rent on behalf of the Appellant and its members. The Appellant submitted that appointing Kiingilio to manage the suit property would be unlawful, illegal and contrary to the law of contract and the Co-operatives Societies Act.

The Respondent in joint submissions dated 7th March 2016 submitted that the Appellant had with impunity breached and disobeyed the orders of 17th July 2015. That 4 months after the issuance of the order, the Appellant deposited Kshs 3,325,748/- and further, that rent for the months of August, September and October 2015 had not deposited and that the delay which was unreasonable had also not been explained. It is the Respondent's submission that the Appellant did not come to court immediately to report that it did not collect the rent or explain why it could not deposit the rent forthwith.

Counsel stated that no accounts had been availed by the Appellant as to how Kshs 3,325,748/- was arrived at and that the Appellant was not

fit to be entrusted with the duty of managing and collecting rent. Further, that the Appellant had not indicated in the list of tenants if it was paying rent for the 2 floors under its occupation which was in flagrant breach of the court orders which directed that all the rental income from the suit property be deposited in court.

In respect to the order for temporary injunction sought, the Respondent relied on the case of *Giella vs. Cassman Brown & Co. Ltd.* (1973) E.A 358 and Order 40 Rule 1(a) of the Civil Procedure Rules. Counsel submitted that the suit property was in danger of being wasted or alienated by the Appellant and its agent, the 3rd Interested Party, which would be extremely prejudicial to the Respondents as the absolute owners of the suit property. The Respondent argued that the balance of convenience was in favour of a temporary conservation injunctive order being issued restraining the Appellant and 3rd Interested Party from further charging or selling the suit property pending the hearing and determination of this appeal. Lastly, that their prayer to be granted authority to manage and collect rent has been prompted by the Appellant's dismal failure in discharging the obligation and properly accounting for all the rental income arising from the suit property which is received and entrusted to it. The Respondent urged that this would remove conflict of interest, suspicion and enhance accountability.

The 3rd Interested Party filed submissions dated 16th May 2016. Counsel referred to Order 45(1) of the Civil Procedure Rules, 2010 and submitted that the court has powers to review its own orders. The 3rd Interested Party stated that its interest in the suit property subsists since there has not been a complete repayment of the money advanced to the Appellant and further, that the orders of 17th July 2015 would occasion a great injustice upon it.

Counsel submitted that this constitutes new and important matter of evidence which was not before the court at the time of making the order of 17th July 2015 directing the Appellant to deposit the rental proceeds from the suit property into court. The 3rd Interested Party submitted that had the court been privy to this information, it would have decided differently in order to accommodate its interest. The 3rd Interested Party referred to the case of *Pancras T. Swai vs. Kenya Breweries Ltd* (2014) eKLR for the proposition that it is only upon the emergence of issues of fact that a court will be able to review its own decision. Counsel submitted that the only party who could have appropriately adduced the facts as to how much rental income was due to it was the 3rd Interested Party and that the application for review had been done with urgency after the orders were brought to its attention.

Further, that there was sufficient reason to review the orders of 17th July 2015 since the 3rd Interested Party stood to be denied Kshs 3,000,000/- for the indeterminate future in the event the order is not reviewed and its interests catered for. The 3rd Interested Party submitted that if the review is not allowed, it would receive no return on investment of the colossal amounts advanced to benefit all the parties to this suit thereby losing more than the original parties to the suit. It is the 3rd Interested Party's submission that the only recourse available to it would be to declare a default and exercise remedies available to a chargor which would further complicate this dispute and affect every party's claim to a share of the suit property. The court was referred to the cases of *Valla Bhadas Karsandas Jivraj & others* (1965) EA 700 and *Lakhamshi Brothers Ltd vs. R. Raja & Sons* (1966) EA 313 as cited in *Nguruman Ltd vs. Shompole Group Ranch & another* (2014) eKLR for the submission that a slip order will only be made where the court is fully satisfied that it is giving effect to the intention of the court at the time when Judgment was given or in the case of a matter which was overlooked where it is satisfied beyond doubt as to the order which it would have made had the matter been brought to its attention.

In further submission, the 3rd Interested Party stated that there was no collusion between it and the Appellant in bringing their respective applications for review, and in taking over of the existent K-Rep (now Sidian bank) facility that existed before the dispute at the Tribunal. Counsel argued that each of the respective parties had their own interest to protect and not a common interest that would suggest collusion, fraud or conspiracy.

Counsel submitted that there was no proof of fraud, collusion or conspiracy between the Appellant and 3rd Interested Party and reliance was placed on the case of *Central Bank of Kenya Ltd vs. Trust Bank Ltd & 4 others* (1996) eKLR for the submission that the standard of proof in fraud cases is beyond balance of probabilities. The court was also referred to the case of *Vijay Morjaria vs. Nansingh Madhusingh Darbar & another* (2000) eKLR for the proposition that fraudulent conduct must be distinctly alleged and distinctly proved and further, that it is not allowable to leave fraud to be inferred from facts.

The 3rd Interested Party also referred to the case of *Equity Bank vs. West Link MBO Ltd* (2013) eKLR for the submission that courts of law exist to administer justice and that in so doing, they must balance between competing rights and interests of different parties within the confines of law to ensure ends of justice are met. Counsel argued that the circumstances of the case necessitates the exercise of the court's inherent jurisdiction and reference was made to the case of *Aikman vs. Muchoki* (1984) KLR 360 where it was stated that in the field of civil law it is of utmost importance that courts uphold the rights of parties to commercial transaction. The 3rd Interested Party stated that it was only seeking to enforce a valid commercial contractual relationship between it and the Appellant. The court was urged to take into consideration the position of the 3rd Interested Party which was an innocent party only intent in following through its commercial rights and obligations and those owed to it by the Appellant.

Further, it was submitted that contrary to the Respondent's assertions, review would not curtail them from enjoying the fruits of their judgment since the award of the Tribunal was clear that the Respondents were only entitled to 40% of the proceeds from the suit property with no mention of the rental proceeds. It is the 3rd Interested Party's submission that the amount claimed is specified and is capable of apportionment upon review as the said obligation predates the award of the Tribunal. Lastly, it was submitted that the request to have *Kiingilio Co-operative Society Ltd* manage the suit property was untenable and unjust since the Respondent had shown by conduct that they held the Appellant and 3rd Interested Party in contempt. That the Respondent would therefore not service the loan leading to a default which would complicate the already tempestuous dispute to the detriment of the parties herein.

### **3. The 1<sup>st</sup> IP's Second Review Application**

This Application is supported by the affidavit of Titus Obara on 16th March 2017 and is premised on grounds that following a determination by the Tribunal, the suit property belongs to 14,999 investing members of the Appellant. Therefore, that the Appellant who has no proprietary interest in the suit property is occupying offices in the suit property without paying rent which is prejudicial to the rightful owners and therefore, that the Appellant must pay rent forthwith without further delay.

It is the 1st Interested Party's contention that since a lawful finding has been made as to the ownership of the suit property, there is no justification for the Appellant to collect, receive or manage funds belonging to 14,999 other persons and consequently, that it is proper for the court to appoint a real estate agent to carry out that task. Lastly, that the orders sought are lawful, reasonable and consistent with the award of the Tribunal and will not prejudice any party to this appeal.

The Appellant's response to this Application is in a replying affidavit sworn by Alphonse Maragia Makori sworn on 3rd April 2017 where it was stated that the Application is frivolous, vexatious and an abuse of the court process. Further, that the provisions under which the Application is premised do not give the court the power and basis to grant the orders sought. The Appellant contended that no compelling and justifiable grounds were given by the 1st Interested Party to warrant the orders for review and setting aside sought. Further, that no evidence was adduced to substantiate the allegation that rent was not being deposited in court.

According to the Appellant, the claim for ownership was still in dispute and subject to adjudication and further, that the issue of the Appellant's claim to pay rent can only be effectively determined in this appeal. Lastly, that this Application is only intended to add confusion and delay the expeditious disposal of the appeal.

The Respondent opposed the Application through a replying affidavit sworn by Francis Gitari Ndirangu on 6th April 2017 where it was deposed that the orders sought were a duplication of the orders sought in the Respondent's Review Application. The Respondents stated that they had a special interest to protect and were the most competent to manage the suit property which, together with 14,870 other members, they gallantly fought to preserve. Further, that since the award of the Tribunal was not in favour of the 1st Interested Party, the 1st Interested Party had no interest in the award to enforce since they were for sale of the suit property as evidenced by copies of their minutes of 14th March 2012 and 12th April 2012.

The 3rd Interested Party opposed this Application through a replying affidavit sworn by Benson Kioko Kilonzo on 6th April 2017 where it was stated that the existence of orders dated 17th July 2015 directing the Appellant to deposit its rental proceeds in court exposed the 3rd Interested Party's legal pecuniary interests in the suit property. That this Application seeking the appointment of a 3rd party to manage and collect rental income from the suit property would further prejudice it. The 3rd Interested Party averred that it ranked higher in priority to any other party herein in relation to the rental income from the suit property since it had a registered security over the rent amounting to Kshs 3,000,000/- per month which it had been denied for close to 20 months. A copy of the deed of assignment dated 25th November 2013 was annexed and it was contended that the same was perfected in November 2013 before this matter went before the Tribunal and the appeal preferred herein.

The Respondent filed submissions dated 28th April 2017 where they argued that the orders sought in this Application were similar to the orders sought in the Respondent's Review Application and that the 1st Interested Party needed not have filed another application seeking similar orders.

The Appellant in submissions dated 28th April 2017 stated that this Application would cause more confusion and complicate this matter in addition to delaying the expeditious disposal of the case. In respect to the orders seeking variance or the setting aside of the stay orders in its favour, Counsel argued that the 1st Interested Party was well represented by their advocates and that the matter was heard inter partes. Further, that this Application was disguised as a review was an appeal since the Application faulted the decision in a general manner.

It is the Appellant's submission that staying the award of the Tribunal would be wrong in principle and an outright misapprehension of the law since the stay was granted under clear and explicit provisions set out under Order 42 of the Civil Procedure Rules, 2010. Counsel argued that the issue whether the Tribunal members exercised prudence in their decision making was a matter for this court to determine after a full hearing in exercise of its appellate jurisdiction and not at the interlocutory stage.

The Appellant averred that no useful purpose would be served in allowing this Application which seems to contradict orders already issued by the court.

The 1st Interested Party filed joint submissions dated 19th April 2017 in respect to all the applications before the court. In respect to this Application, it was submitted that the same was meritorious and would ensure that the court's appellate jurisdiction is properly exercised. Counsel argued that the 1<sup>st</sup> Interested Party would not be prejudiced since rent shall be collected by an agent appointed by the court, and further that the Appellant would have no alternative but to pay rent to the 14,999 persons adjudged to be owners of the suit property in compliance with the Tribunal's award. Lastly, that no party would be prejudiced by non compliance with any aspect of the award.

The 2nd Interested Party in submissions dated 28th April 2017 stated that the applications by the Appellant, Respondent and 3rd Interested Party were sufficient to adequately address all outstanding interlocutory issues. Counsel averred that the issue was who leads and controls the rent collected from the suit property and that the 1st Interested Party was laying claim to 100% entitlement with zero percent for the Appellant. Further, that whereas the 1st and 2nd Interested Party claimed 50:50 on the part of the Appellant, the Appellant lay claim to 60:40 in its favour viz its members which issue can only be determined in the pending appeal. Further, that the 1st Interested Party could only challenge the court orders issued on 17th July 2015 through review or preferring an appeal.

In respect to the prayer seeking the appointment of a credible estate agent to collect rent and deposit the same in court, it was submitted that there was no evidence that the Appellant had failed to discharge that mandate as imposed by the court. The 2nd Interested Party contended that the Application was unnecessary and unwarranted and was not intended to add any value.

The 3rd Interested Party filed joint submissions. In respect to the 1<sup>st</sup> Interested Party's Review Application, the 3rd Interested Party submitted that it would be greatly prejudiced by orders seeking to keep it away from its legal entitlement to the rent which was security for loan granted to the Appellant in the year 2013.

It was the 3rd Interested Party's submission that it ranks higher in priority in relation to the rental income of the suit property since the

registered deed of assignment over the rental income takes precedence and priority over unsecured creditors and decree holders. The court was referred to the case of Waki Ltd vs. Kitayama Construction Ltd & 3 others (2016) eKLR for the proposition that legal charges provide legitimate expectation that if the chargor failed to meet their obligations, the chargee would become entitled to realize the security in priority over other creditors. The 3rd Interested Party submitted that any attempt to deprive it its interest in the rental proceeds would be illegal and unconscionable in the circumstances.

In further submission, the 3rd Interested Party stated that there had not been a complete repayment of the money owed by the Appellant and as such, that its interest in the suit property subsists. Counsel submitted that the 3rd Interested Party was in danger of being severely prejudiced having released funds which may have been utilized for the benefit of the parties to this suit in one way or another. Further, that the 3rd Interested Party had no interest in the ownership dispute of the suit property as its interest was limited to it as security for the sums advanced.

It is the 3rd Interested Party's submission that having advanced a colossal sum to the benefit of all parties in this suit, a lack of return on its investment would curtail its commercial plans thereby causing it more suffering than the original parties to this suit. Counsel argued that the 3rd Interested Party would have no recourse other than declaring a default and exercising remedies available to a charger thereby complicating this dispute and directly affecting each party's claim to a share of the suit property.

#### **4. The 3<sup>rd</sup> IP's Review Application**

This Application is supported by the affidavit of Benson Kilonzi Kioko sworn on 27th November 2015. The 3<sup>rd</sup> Interested Party's case is that it was not able to produce new and important matter of evidence before the court as it was not a party to the proceedings at the material time. Further, that there is new and important evidence that the proceeds from the rental income deposited in court are due to the 3rd Interested Party by dint of a duly registered Deed of Assignment of the rental income dated 25th November 2013 which predated the orders granted by the court. A copy of the letter of offer dated 5th November 2013 as well as the Deed of Assignment dated 25th November 2013 have been annexed as evidence. It is the 3rd Interested Party's averment that it will continue to incur substantial financial loss if this Application for review is denied.

The Respondent opposed the Application through grounds of opposition dated 14th December 2015 where it was contended that this Application was a duplication of the Appellant's Review Application and was therefore an abuse of the court process. Further, that this Application for stay of execution was unmerited and brought with the intention of circumventing the award given on 9th December 2014.

According to the Respondent, 14,779 shareholders will be deprived of the fruits of their judgment if the rental income is put in the hands of the Appellant as sought. Further, that the order for deposit of rental proceeds was intended to preserve the income on behalf of the judgment creditor in the event the Appellant is not successful in the appeal. The Respondent averred that the issue of the charge and loans owed by the Appellant to the 3rd Interested Party was before the court through the application dated 8th January 2015 and was therefore not a new matter as alleged.

It is the Respondent's contention that the Appellant has other sources of income from its core business and can comfortably meet its financial obligations towards the 3rd Interested Party. Further, that the loan sought to be repaid from the rental income was sought and advanced in total and willful disregard of the injunction granted on 30th May 2012 by the Tribunal with the intention of defeating the judgment entered in favour of the Respondent and that the court should not give effect or perpetuate the wrong doing. The Respondents stated that the charge and deed of assignment cannot override or defeat the court orders issued on 30th May 2012, the judgment and award issued on 9th December 2014 as well as the order of 17th July 2015.

The Respondent also contended that the 3rd Interested Party who was not a party to the award of the Tribunal or Order of 17th July 2015 cannot seek to review an order which is not binding on it. That the court was being asked to rewrite its ruling owing to the negligence of the 3rd Interested Party in failing to exercise due diligence. Further, that allowing this Application would be prejudicial and oppressive as it would deprive the Respondent and other shareholders of their financial interest. In addition, that allowing the review would be tantamount to ordering the shareholders to pay a loan on behalf of the Appellant which is an entity different from the investment arm comprised of the Respondent and 14,999 other shareholders.

The 1st Interested Party through a replying affidavit sworn by Titus E. Obara on 21st December 2015 stated that the supporting affidavit was false and misleading since the Appellant who was party to the proceedings before never raised the issue of the loan before the Tribunal and that this Application was therefore an afterthought intended to defeat the court orders of 17th July 2015. Further, that the depositing of rent in court was never an issue as the Appellant's Counsel had assured the court that they were willing to have the entire rental proceeds deposited in court.

It is the 1st Interested Party's contention that the loan which the 3rd interested party contends constitutes new matter was a matter in the public knowledge and that the review sought is not merited. Further, that it was clear from the supporting affidavit that there was collusion between the 3rd Interested Party and the Appellant to misappropriate members' investments by advancing further loan facilities despite existing injunctive court orders. According to the 1st Interested Party, the 3rd Interested Party is guilty of laches having brought its application 5 months after the ruling was delivered. Lastly, it was averred that the majority shareholders had suffered irreparable loss and damage.

The Appellant in joint submissions dated 1st March 2016 stated that it was not opposed to the 3rd Interested Party's Review Application. Further, that there was no scheme hatched between it and the 3rd Interested Party seeking to dispose the suit property and further, the transactions were above board with clear and noble intentions.

The Respondent filed joint submissions dated 7th March 2016. In respect to the 3<sup>rd</sup> IP's Review Application, the Respondent reiterated the facts as pleaded in their replying affidavit and argued that it was not privy to the contract between the Appellant and the 3rd Interested Party.

Further, that the 3rd Interested Party extended the loan on security of the suit property despite existence of orders issued on 30th May 2012 and that in charging the suit property, the Appellant was intent on depriving them and other shareholders of their interest in the suit property.

It was also submitted that the issuance of membership cards by the Appellant was intended to hoodwink members that there had been a separation of the two entities and that the suit property had been transferred to Ufundi Housing Cooperative society which had not been registered contrary to section 91 of the Cooperative Societies Act. Counsel urged that the court should not perpetuate the fraud and that the 3rd Interested Party should not be allowed to benefit from its wrong doing. The Respondent argued that the charge was created in bad faith to defeat the orders of the Tribunal and further, that neither the Appellant nor the 3rd Interested Party had produced before this court an order lifting or discharging the injunction order. It is the Respondent's submission that it was not privy to the alleged Deed of Assignment of Rental Income which does not override the award or decree of the Tribunal given on 9th December 2014.

The Respondent's Counsel submitted that the Appellant does not have any rent arising from the suit property and that consequently, the 3rd Interested Party has no right to claim for rent which the Appellant has no right to. Further, that it would be inequitable for the court to vacate its order granted on 17th July 2015 since the Respondents who had been denied possession of the building through the stay order would also be deprived the fruits of their judgment. The Respondent also stated that allowing the rental income to be appropriated by the Appellant would be tantamount to ordering the 15,000 shareholders to pay for a loan which they had not benefited from on behalf of the Appellant which was different from the investment arm.

In further submission, the Respondent contended that no new facts had been presented to warrant the review of the orders issued on 17th July 2015. Further, that whatever had been presented was well within the knowledge of the 3<sup>rd</sup> Interested Party and the Appellant and that the court had occasion to consider the issue of the charge when it issued the orders of 17th July 2015. Lastly, that the 3rd Interested Party which was not party to the award of the Tribunal or the orders of 17th July 2015 cannot seek to review orders which are not binding upon it.

In its joint submissions dated 19th April 2017, the 1st Interested Party submitted that this Application had no merit as it sought to vary the judgment of the Tribunal to the detriment of 14,999 members. Counsel submitted that the 3rd Interested Party had not appealed against the judgment of the Tribunal and that its application seeking to make the judgment a nullity was incompetent. It is the 1st Interested Party's submission that the 3rd Interested Party would not be prejudiced if the Appellant pays the rental proceeds into court which will protect its interests.

The 2nd Interested Party argued in submissions dated 3rd March 2016 that this Application was an attempt to stay these proceedings and cause suffering to the old and retired members. It was submitted that the amount claimed by the 3<sup>rd</sup> Interested Party can be paid after shareholders have been paid what is due and payable to them. Lastly, it was submitted that the amount directed to be deposited be deposited until the appeal is heard and determined.

In respect to this Application, the 3rd Interested Party argued in submissions filed on 3rd May 2017 that since it was not party to the dispute before the Tribunal, it was procedurally barred from appealing the Tribunal's decision. Reference was made to section 81 of the Co-operative Societies Act and it was argued that the 3rd Interested Party sought refuge under Order 45 Rule 1 of the Civil Procedure Rules, 2010.

Counsel submitted that the 3rd Interested Party became an interested party the moment the court issued orders requiring the deposit into court of the rental income from the suit property which had already been assigned to the 3rd Interested Party on 25th November 2013, 16 months prior to the orders issued on 17th July 2015. It is the 3rd Interested Party's submission that the only way for it to approach court in order to protect its interest is by first seeking joinder in this appeal as an interested party and thereafter seeking a review of the orders of 17th May 2015.

### **Determination of the Review Applications**

The applicable law in determining the Review Applications is as follows:-

**Section 80 of the Civil Procedure Act** provides that,

*“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 this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”*

Then **Order 45 Rule 1 of the Civil Procedure Rules, 2010** provides that:-

*“(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 which passed the decree or made the order without unreasonable delay.”*

Going by the legal provisions cited above, the parties are only entitled to a review of the Impugned Ruling if they have discovered new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced by them at the time the order was made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. In this particular case, the parties appear to be relying on “any other sufficient reason” and seek the review of the Impugned Ruling in the following areas:

1. Whether to discharge the order of stay of execution.
2. Who is to collect the rent from the suit property pending the hearing and determination of this Appeal.
3. Whether to deposit in court the gross or net rent or no rent at all.
4. Whether the Appellant should pay rent for the space it occupies in the suit property or not.
5. Whether the Appellant should account for all rent collected since 9<sup>th</sup> December 2014 and deposit it in court.
6. Whether to issue an order of temporary injunction against the Appellant.

The following are my findings:

### **1. Whether to discharge the order of stay of execution.**

Both the Respondent and the 1<sup>st</sup> Interested Party requested the court to discharge the order of stay of execution granted to the Appellant in the Impugned Ruling. The following is the reasoning of the court for the grant of the order of stay of execution given by this court in the Impugned Ruling:

*“Shall the Appellant/Applicant suffer substantial loss if the orders of stay are not granted? To that question, my answer is in the affirmative as if the suit property is transferred to the Respondents as ordered by the Tribunal, this Appeal will be rendered nugatory and the Appellant/Applicant shall lose the suit property which to my opinion qualifies to be categorized as substantial loss. Has this Application been made without unreasonable delay? To that question, my answer is also in the affirmative. This Appeal was filed on 9<sup>th</sup> January 2015 after the Award/Judgment had been delivered on 9<sup>th</sup> December 2014. The last question to answer is whether to order the Appellant/Applicant to furnish security for due performance of such decree or order as may ultimately be binding on it. To that question, my answer is that the suit property shall remain intact during the hearing of this Appeal until its determination. Should the Respondents succeed in this appeal, they will take over the suit property and will thus suffer no loss.”*

The Respondent stated that the order for stay of execution was oppressive and continued to create more hardship to them by depriving them the fruits of their judgment which were now being squandered by the Appellant. The 1<sup>st</sup> Interested Party similarly objected to the order of stay of execution. My finding on this issue is that there is an Appeal before this court which has the potential of changing the Award issued by the Co-operative Tribunal on the ownership of the suit property. The Appeal has to be given a chance to be heard and determined. Between the time the Appeal was filed and its determination is a period of time in which the court has to direct how the suit property shall be preserved. This issue was considered by the court in the Impugned Ruling and the court granted the Appellant the order of stay of execution of the Award. No sufficient reason has been given by the Respondent, the 1<sup>st</sup> Interested Party or any other party to this suit as to why this court should discharge the order of stay of execution. This court declines to discharge the order of stay of execution and proceeds to dismiss prayer no. 1 in the Respondent’s Review Application and prayer no. 3 in the 1<sup>st</sup> IP’s Second Review Application.

### **2. Who is to collect the rent from the suit property pending the hearing and determination of this Appeal.**

The Appellant has been in possession of the suit property from the time the same was purchased and occupies two floors in the same building. It has also been collecting and expending the rental income emanating therefrom since the building was acquired. In fact, the suit property is registered in the name of the Appellant. The ownership of the suit property was the key and fundamental issue for determination before the Co-operative Tribunal and is the same issue for determination in this Appeal. During the hearing of the case before the Co-operative Tribunal, the Appellant remained in occupation of the suit property and continued to collect and expend the rental income therefrom. In the Impugned Ruling, this court allowed the Appellant to continue to collect rent from the suit property and deposit it in court pending the hearing and determination of this Appeal. However, the Respondent seeks a review of this order and to be allowed to collect the rent through its society going by the name Kiiigilio Housing Co-operative. Similarly, the 1<sup>st</sup> Interested Party also sought to be allowed to collect the rent but subsequently asked the court to appoint a real estate agent to collect rent from the suit property and deposit it in court pending the hearing and determination of this Appeal. This court is reluctant to disturb the order in the Impugned Ruling for the reason that the Appellant is in possession of the suit property and has been so since the suit property was purchased. My reasoning is that for the short period of time it will take to determine this Appeal, it is not useful to disturb the status quo by appointing the Respondent or a real estate agent to collect the rent from the suit property. The Appellant has a claim of ownership over the suit property just like the other parties who seek to collect the rent. Further, the most important point is that the Appellant is merely collecting the rent and depositing it in court so that the party that is successful in the Appeal shall be entitled to the rent paid into court. This court therefore declines to vary the order in the Impugned Ruling allowing the Appellant to continue to collect the rent and to deposit the same in court pending the hearing and determination of this Appeal.

The upshot of the foregoing is that prayer no. 3 of the Respondent’s Review Application and prayer no. 5 of the 1<sup>st</sup> IP’s Second Review

Application are dismissed.

### **3. Whether to deposit in court the gross or net rent or no rent at all.**

In the Impugned Ruling, this court ordered the Appellant to deposit the gross rental income collected from the suit property into court pending the hearing and determination of this Appeal. The Appellant, being aggrieved with this order, informed the court that if it obeys this order, it will be in breach of its contractual and mandatory statutory obligations. The Appellant seeks for the court to allow it to deposit net rent after deducting expenses incurred in relation to its list of 22 service providers including a loan repayment to the 3<sup>rd</sup> Interested Party. Here below is an excerpt of the Impugned Ruling in which the order to pay all rental income to court was granted:

***“The last question to answer is whether to order the Appellant/Applicant to furnish security for due performance of such decree or order as may ultimately be binding on it. To that question, my answer is that the suit property shall remain intact during the hearing of this Appeal until its determination. Should the Respondents succeed in this appeal, they will take over the suit property and will thus suffer no loss. However, in the intervening period of the hearing and determination of this Appeal, I shall order the Appellant/Applicant to deposit all rental proceeds from the suit property to this court for safekeeping until this Appeal is heard and determined.”***

In granting the order of stay of execution to the Appellant in the Impugned Ruling, the court gave the condition that the Appellant pay into court the gross rental income from the suit property. This was meant to be in lieu of a request to the Appellant to furnish security for due performance of the Award. The court was cognizant that the suit property being a physical building would remain intact and even appreciate in value by the time the Appeal is determined so that if the Respondent succeeds in the Appeal, they will merely take the building together with its appreciated value. However, the rental income had to be secured so that if the Appeal fails, then the Respondents would not lose out on the rental income. That being the reasoning of this court, it proceeded to order the Appellant to collect and pay into court the gross rental income.

In addition, while I am cognizant of the fact that there are expenses tied to the rental income, I am also aware that the Appellant imposes service charge on the tenants in the suit property which is utilized to meet the essential services to keep the building usable. The Appellant can use that provision for the purpose of running the suit property. Further, this Appeal belongs to the Appellant. It is noticeable that while this Appeal was filed in the year 2014, it is now 4 years down the line and the Appellant has not filed a Record of Appeal to expedite the hearing and determination of this Appeal. This court takes the view that the ball is in the Appellant's court to expedite the hearing and determination of this Appeal so that it does not suffer long from having to pay into court the gross rent. The court therefore declines to vary or set aside the order in the Impugned Ruling for the Appellant to pay into court the gross rental income from the suit property.

The upshot of foregoing is that this court dismisses the Appellant's Review Application and the 3<sup>rd</sup> IP's Review Application.

### **4. Whether the Appellant should pay rent for the space it occupies in the suit property or not.**

In the Impugned Ruling, the issue of the Appellant paying rent for the two floors it occupies in the suit property was not directly addressed but there was an assumption that the Appellant does not pay rent for the space it occupies as it is the landlord. I also observe that though the Appellant lost the case before the Co-operative Tribunal, it was not ordered to pay rent to the Respondent. This issue of asking the Appellant to pay rent has been raised in the 1<sup>st</sup> IP's Second Review Application in prayer no. 6. The issue of whether or not the Appellant should pay rent for the space it occupies in the suit property is closely tied to the issue of who owns the suit property. This issue shall be determined in the hearing of the Appeal and cannot be determined at this interlocutory stage. Accordingly, prayer no. 6 of the 1<sup>st</sup> IP's Review Application is dismissed.

### **5. Whether the Appellant should account for all rent collected since 9<sup>th</sup> December 2014 and deposit it in court.**

9<sup>th</sup> December 2014 is the date when the Award was delivered. The order to the Appellant to collect and pay rent into court in the Impugned Ruling was delivered on 17<sup>th</sup> July 2015. Accordingly, this court allows prayer no. 4 of the 1<sup>st</sup> IP's Second Review Application with a slight variation that rent collected from 17<sup>th</sup> July 2015 and not 9<sup>th</sup> December 2014 to read as follows:

***“That the Appellant is ordered to file an account of all the money collected from the tenants within the suit property from 17<sup>th</sup> July 2015 and that amount be deposited into court within 30 days of the order of the Honourable Court.”***

### **6. Whether to issue an order of temporary injunction against the Appellant.**

The prayer for the court to issue an order of temporary injunction against the Appellant restraining the Appellant from selling, disposing off, charging or further charging the suit property pending the hearing and determination of this appeal is prayer no. 2 of the Respondent's Review Application. The Respondent contended that in a bid to defeat an injunction issued by the Tribunal on 30th May 2012, the Appellant charged the suit property to the 3<sup>rd</sup> Interested Party for a loan of Kshs. 160 million without consulting the Respondent. Further, that this was done while the Appellant had an existing loan with K-Rep Bank which stood at Kshs 50,907,557/- as at 24th June 2013 and despite existing orders, award and a permanent injunction thereon. Further, that the Appellant sought and obtained a further loan of Kshs 15 million while orders for stay of execution at the Tribunal were subsisting.

In these circumstances, I find the request for an order of temporary injunction to be merited and do grant the same. Prayer no. 2 of the Respondent's Review Application is hereby allowed.

### **The Proposed 4<sup>th</sup> IP's Application**

In the Proposed 4<sup>th</sup> IP's Application, the Proposed 4<sup>th</sup> Interested Party is seeking the following orders:-

1. Spent.
2. That the court be pleased to grant leave to the firm of Ratemo Oira & Company Advocates to come on record for Eunita Kerubo Ratemo & 60 other interested parties.
3. That the court be pleased to allow the applicants be joined as 4<sup>th</sup> interested party in their own right as shareholders of plot no. 209/4291 formerly Gateway House owned by members of the Appellant.
4. That the court be pleased to allow the applicants to participate in the proceedings like any other party in the suit.
5. That the court be pleased to order that Kshs 4,941,896.31 be released to the firm of Ratemo Oira & Company Advocates to offset some of the decretal sum owed by the Appellant to Eunita Kerubo Ratemo & 60 interested parties to enable the 4<sup>th</sup> interested party pay school fees for their children who are currently out of school.
6. That the court be pleased to order the Appellant to pay all the outstanding amount from the decretal sum to the remaining interested parties instead of the sum lying idle in the court account.
7. That costs of the application be in the cause.

The Application was supported by an affidavit sworn by Eunita Kerubo Ratemo on 20<sup>th</sup> September 2016 where she averred that they were retired civil servants who had not been paid their investments from the suit property and had no other source of income. She stated that they were investors and creditors who were not represented by other parties in the suit. She averred that they were the 4<sup>th</sup> Interested Party in the Co-operative Tribunal case where the Appellant was ordered to pay them Kshs. 4,941,893.31 as evidenced by annexed copies of decrees. The Proposed 4<sup>th</sup> Interested Party also annexed as evidence a bundle of share certificates to confirm that they were bona fide investors in the suit property in dispute. She averred that allowing them to participate in these proceedings would greatly increase and enhance the outcome of the appeal before this court.

Through a supplementary affidavit sworn on 28<sup>th</sup> March 2017, the Proposed 4<sup>th</sup> Interested Party stated that the Respondent's replying affidavit was intended to lock out more than 60 shareholders of the Appellant who contributed Kshs. 2,100/- towards the purchase of former Gateway House and that majority shareholders thereof were not represented by the Respondent and the 1<sup>st</sup>-3<sup>rd</sup> Interested Parties. Lastly, that the court should allow them to participate in these proceedings so that they can get their shares contribution from the suit property.

The Appellant through an undated replying affidavit sworn by its chief executive officer, Alphonse Maragia and filed in court on 6<sup>th</sup> December 2016 stated that it had no objection to the Proposed 4<sup>th</sup> Interested Party being enjoined and allowed to participate in these proceedings. The Appellant opposed the prayer for release of funds stating there were many conflicting interests including ownership and shareholding which were contentious. Further, that out of the purported 15,000 members, only 320 are in these proceedings. It was also the Appellant's contention that the money deposited in court is subject to a claim by the 3<sup>rd</sup> Interested Party. However, that the Appellant was not averse to a settlement agreement that caters for all parties.

The 1<sup>st</sup> Interested Party responded to this Application through a replying affidavit sworn by Titus Obara on 30<sup>th</sup> January 2017 where it objected to the release of the deposits made in court stating that the said monies belonged to investment members. Further, that the Appellant should look for money and settle the claimant's decree directly without interfering with monies belonging to investors herein. Further, that the Proposed 4<sup>th</sup> Interested Party's interests were covered in the representative suit herein. The 1<sup>st</sup> Interested Party contended that the Proposed 4<sup>th</sup> Interested Party who never joined the suit at the primary level despite being given an opportunity was seeking joinder at this appellate stage as a delay tactic to frustrate legitimate owners from enjoying their investments.

The Application was canvassed by way of written submissions. The Proposed 4<sup>th</sup> Interested Party filed submissions dated 28<sup>th</sup> March 2017 reiterating the facts as pleaded.

The Respondent filed submissions dated 6<sup>th</sup> April 2017 stating that they were opposed to joinder of the Proposed 4<sup>th</sup> Interested Party who was granted an opportunity to either join as claimants or respondents in the representative suit before the Tribunal. Counsel submitted that since only the 1<sup>st</sup> Interested Party showed interest in support of the sale of the suit property by the Appellant, all other members were regarded as claimants in support of the preservation of the suit property and that the Proposed 4<sup>th</sup> Interested Party's interests continue to be represented by the claimants herein. Counsel submitted that the Proposed 4<sup>th</sup> Interested Party's interests were represented in the representative suit before the Tribunal and they can therefore not be joined at this stage.

It was also submitted that the 4<sup>th</sup> Interested Party had not disclosed the capacity in which they wished to be joined whether as appellants or as respondents and therefore, that they should not be allowed to participate in these proceedings without direction which would only clog the proceedings. Counsel argued that joining the Proposed 4<sup>th</sup> Interested Party at this stage would only increase the cost of proceeding and hamper expeditious disposition of the suit thereby negating the overriding objective envisaged under sections 1A and 1B of the Civil Procedure Act.

The Respondent further submitted that it was misleading for the Proposed 4<sup>th</sup> Interested Party to claim that they were the 4<sup>th</sup> Interested Party in Tribunal Case No. 375 of 2010 since they would have been a party to these proceedings and therefore would not seek leave for joinder.

Counsel submitted that the decrees annexed by the 4<sup>th</sup> Interested Party did not emanate from the proceedings before the Tribunal in case no. 375 of 2010.

Counsel submitted that the rental proceeds deposited in court did not belong to the Appellant and were not available for attachment pursuant to the award of the Tribunal in the Proposed 4<sup>th</sup> Interested Party's favour. That the funds were being preserved by the court for the Respondent and granting an order for release to the Proposed 4<sup>th</sup> Interested Party would be tantamount to varying the order for stay of execution granted by the court on 17<sup>th</sup> July 2015. The Respondent submitted that the Proposed 4<sup>th</sup> Interested Party was at liberty to proceed with execution against the Appellant by following the proper procedure provided under Order 22 of the Civil Procedure Rules, 2010.

Two issues present themselves for determination in this Application. The first is whether or not to enjoin the intended 4<sup>th</sup> Interested Parties into this appeal. **Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010** provides for joinder of parties and sets the criteria for who can be joined. This order provides that,

***“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 main dispute in this suit relates to the suit property which is claimed by all the parties in this appeal. The Proposed 4<sup>th</sup> Interested Parties have a pecuniary interest in the suit property just like the other claimants thereto who are already parties to this suit. It is my consideration therefore that the presence of the Proposed 4<sup>th</sup> Interested Parties is necessary to enable the court to effectually and completely to adjudicate upon and settle all questions involved in this suit. In that regard, I allow prayer no. 2, 3 and 4 of the Proposed 4<sup>th</sup> IP's Application. On the issue of releasing the rental proceeds deposited by the Appellant, this prayer is declined as it shall abide the outcome of the appeal. Prayers no. 5 and 6 of the Proposed 4<sup>th</sup> IP's Application are dismissed.

The costs in respect to all the applications shall be in the cause.

**SIGNED AND DATED AT NAIROBI BY HONOURABLE LADY JUSTICE MARY M. GITUMBI THIS 11<sup>TH</sup> DAY OF MAY 2018**

**MARY M. GITUMBI**

**JUDGE**

**DELIVERED BY HONOURABLE JUSTICE SAMSON OKONGO ON THE 18<sup>TH</sup> DAY OF MAY 2018**

**SAMSON O. OKONG'O**

**PRESIDING JUDGE**