



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC JUDICIAL REVIEW CASE NO.9 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL  
REVIEW ORDERS OF PROHIBITION AND CERTIORARI**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF  
KENYA, ARTICLES 10(2), 40, 67 AND 249**

**AND**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 28, 29(d),(f),  
31(b),40(3),47 & 60(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT, 2012**

**AND**

**AND IN THE MATTER OF AN APPLICATION BY  
CHANIA TRAVELLERS CO-OPERATIVE  
SAVING AND CREDIT SOCIETY LIMITED.....APPLICANT**

**-VERSUS-**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR.....3<sup>RD</sup> RESPONDENT**

**THIKA SUB-COUNTY LAND REGISTRAR....4<sup>TH</sup> RESPONDENT**

**AND**

**DANIEL TIMOTHY MURIUKI.....1<sup>ST</sup> INTERESTED PARTY**

**PATRICK KARANJA NGUGI.....2<sup>ND</sup> INTERESTED PARTY**

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

PETER MWANGI CACHERU.....4<sup>TH</sup> INTERESTED PARTY

CECILIA WAMAITHA MWANGI..... 5<sup>TH</sup> INTERESTED PARTY

### RULING

The Exparte Applicant herein **Chania Travellers Co-operative Sacco Ltd**, filed a **Chamber Summons** dated **17<sup>th</sup> August 2017**, and sought for leave to be allowed to seek by way of Judicial Review Orders of Prohibition against the 3<sup>rd</sup> and 4<sup>th</sup> Respondents or any Respondents in the matter from enforcing the decision of 2<sup>nd</sup> Respondent contained in Kenya Gazette dated **17<sup>th</sup> July 2017**, in relation to **LR.No.Thika Municipality Block 8/184**. In the said **Chamber Summons** application, the Exparte Applicant named five Respondents among them the **National Land Commission**, 2<sup>nd</sup> Respondent and five Interested Parties among them **Co-operative Bank of Kenya**, 3<sup>rd</sup> Interested Party.

The Exparte Applicant was granted leave to file the substantive application for Judicial Review within a period of 14 days after leave to do so was allowed.

However, the 4<sup>th</sup> Interested Party, **Peter Mwangi Gacheru**, who is a beneficiary of the Order of the 2<sup>nd</sup> Respondent filed a Replying Affidavit and opposed the intended Judicial Review application. The other parties have not responded to the Exparte Applicant's application.

On **9<sup>th</sup> November 2017**, the 3<sup>rd</sup> Interested Party, **Co-operative Bank of Kenya**, filed a **Notice of Motion application**, premised under Article 159 (2)(a),(b),(d) & (e) of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act, Sections 3, 18(c) and 19 of Environment and Land Court Act and Order 1 Rule 10(2) and Order 2 Rules 15(1)(a) (b) & (c) of the Civil Procedure Rules and sought for the following orders.

- 1) **The name of the 3<sup>rd</sup> Interested Party/Applicant be struck out as a party to these proceedings.**
- 2) **The suit as against the 3<sup>rd</sup> Interested Party/Applicant be dismissed.**
- 3) **The 3<sup>rd</sup> Interested Party/Applicant be awarded the costs of this application and of the suit.**

The said application was premised on various grounds and among them are:-

- i. **On 5<sup>th</sup> September 2012, a Charge was registered in favour of the 3<sup>rd</sup> Interested Party/Applicant (the Bank) as a first legal charge over the title No.Thika Municipality Block 8/184 for the sum of Kshs.14,000,000/=.**
- ii. **Following the determination of review of grants and dispositions of public land by the National Land Commission on 17<sup>th</sup> July 2017, in Gazette Notice No.6862 Serial No.21 the National Land Commission communicated its decision to revoke the title held by Chania SACCO in respect of the suit property and allocate it to Peter Mwangi Gacheru.**
- iii. **On 19<sup>th</sup> October 2017, the Bank received Kshs.2,240,121.75 from Chania SACCO which was applied towards settling the outstanding sums.**
- iv. **There are currently no liabilities owed by Chania SACCO to the Bank therefore the Bank cannot claim protection of any interests as a Chargee.**
- v. **The Bank is therefore not a proper and necessary party to the suit herein.**
- vi. **The continued participation of the Bank as a party to the proceedings herein may prejudice, embarrass and delay the fair trial of the suit.**

Further, the application is supported by the Affidavit of **Debra Ajwang-Ogada**, the **Legal Manager** of the 3<sup>rd</sup> Interested Party/Applicant herein who reiterated most of the contents of the grounds for the application. She further averred that the joinder of the Bank to this suit is not necessary as there is no right or interest to enforce against the parties herein. Therefore the Bank is no longer a proper and necessary party to these proceedings.

She urged the Court to allow the 3<sup>rd</sup> Interested Party's application.

The application was opposed by the Exparte Applicant who filed a **Replying Affidavit** through **John Kiarri Gicheru**, the Chairman of the Applicant herein. He averred that the 3<sup>rd</sup> Interested Party's application is made solely to defeat the course of justice as the 3<sup>rd</sup> Interested Party is a necessary party. Further, that there was no bad faith on the part of the Exparte Applicant in enjoining the 3<sup>rd</sup> Interested Party herein. He also averred that the suit property was validly and properly charged in favour of the 3<sup>rd</sup> Interested Party at the behest of the Exparte Applicant who is the proprietor thereof.

Therefore, the 3<sup>rd</sup> Interested party has identifiable legal claim over the suit property and there is no discharge of charge at the moment. He further averred that the Exparte Applicant would be prejudiced in the event the 3<sup>rd</sup> Interested Party's application is allowed and he further contended that it is proper and just for the 3<sup>rd</sup> Interested Party to remain in the proceedings as their presence will enable the Court to **effectually** and **completely** adjudicate upon and settle all issues and questions involved in the suit herein. He urged the Court to disallow the instant application.

The application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the pleadings in general, the annexures thereto and the relevant provisions of law.

The application herein is anchored under **Sections 1A** and **1B**, of the **Civil Procedure Act** which deal with the overriding objective of the Act and which is to facilitate the **just, proportionate, expeditious** and **affordable resolution** of civil disputes governed by the said Act.

Further, the application is anchored under Section 3A of the same Act which Section donates power to this Court to make any or such necessary orders that would ensure end of justice is met and to prevent abuse of the court process.

The Applicant has sought for orders that the 3<sup>rd</sup> Interested party's name be struck out of the proceedings and the claim against it be dismissed.

Striking out of proceedings is governed by Order 2 Rule 15(1) which provides as follows:-

***“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—***

***(a) it discloses no reasonable cause of action or defence in law;***

***or***

***b) it is scandalous, frivolous or vexatious; or***

***(c) it may prejudice, embarrass or delay the fair trial of the action; or***

***(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.***

The 3<sup>rd</sup> Interested Party has also alleged that the Exparte Applicant has cleared payment of loan facility that had been advanced to it by the 3<sup>rd</sup> Interested party. Further that though the Exparte Applicant had secured the said loan facility using the suit property, **Thika Municipality Block 8/184**, with the full repayment of the said loan, the 3<sup>rd</sup> Interested Party has no further interest over the suit property and therefore it is not a necessary party herein. Therefore the Applicant sought to be removed from these proceedings as the Exparte Applicant has not disclosed any reasonable cause of action against it.

From the above provisions of law, it is evident that the Court has discretion to strike out proceedings on various grounds and among them when the said proceedings discloses no reasonable cause of action. The 3<sup>rd</sup> Interested Party has alleged that the Exparte Applicant has fully repaid the loan facility and therefore it has no beneficial or legal interest over the suit property. If indeed the Exparte Applicant has fully repaid the loan, why should it care about the interest of the 3<sup>rd</sup> Interested Party over the suit property?

**Order 1 Rule 10(2)** of the **Civil Procedure Rules** grants to Court discretion to struck out the name of any person who is improperly joined in the proceedings whether as a Plaintiff or Defendant. It provides as follows:

***“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.***

The 3<sup>rd</sup> Interested Party has also alleged that it is not a necessary party as it is no longer interested in the suit property herein since the loan facility has been fully repaid and its presence herein is not necessary as it would not assist the court in completely and effectually adjudicating the matter herein. The Exparte Applicant has not denied that the loan facility is fully paid. It has only stated that the charge has not been discharged. Failure to discharge the charge does not make the 3<sup>rd</sup> Interested Party herein a necessary party to this proceedings. Discharging of a charge is a matter of procedure and it is the duty of the Chargee to initiate the process. The Chargor cannot be forced into the proceedings by the mere fact that the Chargee has not been discharged even though the loan facility is fully repaid.

A necessary party is a party whose presence is crucial to the determination of the matter. The absence of the 3<sup>rd</sup> Interested Party would not in any way affect the determination of the dispute herein or the intended Judicial Review. In any event the 3<sup>rd</sup> Interested Party herein has a commercial interest over the suit property and it has claimed it is not interested in the outcome of the suit herein. Therefore it ought not to have been added. See the case of **Re: IG Farbenindoutrie AG Agreement(1943) ALL ER 525**, where the Court held that:-

***“A person with only commercial interest in the subject matter of the proceedings shall not be added”***

Equally, the 3<sup>rd</sup> Interested Party herein had only a commercial Interest over the suit property as the said parcel of land was charged to it. It should therefore not have been added as a party to the suit herein.

The Exparte Applicant has sought for Orders of Certiorari and Prohibition and the 3<sup>rd</sup> Interested Party has alleged that its interest as a Chargee over the suit property no longer exist and it is therefore not a necessary party. The Court concurs with the above submissions by the Applicant.

The Court will rely on the case of Jan Bolden...Vs...Herman Philipus Steyn & 2 Others (2012) eKLR, in definition of a necessary party as. The Court held that:-

***“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 ineffective. In this regard, the question that arises is whether the 3<sup>rd</sup> Defendant is a necessary party for purposes of enabling the court to effectually and completely adjudicate upon the matter at hand”.***

The Applicant has alleged that it is not a necessary party as its presence will not assist the court at all. See the case of Amos...Vs...Raphael Tuck & sons Ltd (1956) 1ALL ER 283, where Court held as follows:-

***“The party to be joined 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 evident that the presence of the 3<sup>rd</sup> Intended Party herein is not necessary and retaining it herein would only escalate costs of litigation and also waste 3<sup>rd</sup> Interested Party’s time on an unnecessary litigation against them. See the case of Gidion Mbuvi Kioko...Vs...AG & 6 Others (2012) eKLR, where the Court held that:-

***Joinder of parties imposes costs on parties and at all times the court must be cognizant of its duty to minimize the costs of litigation. Further joinder of unnecessary parties will not only convolute the matter but tend to obscure the real issues and prolong the proceedings thereby undermining the objective of expeditious disposal of cases as envisaged by Article 159”.***

Having now found that the 3<sup>rd</sup> Interested Party is no longer holding any interest over the suit property, then the Court finds that it is not a necessary party and the Exparte Applicant improperly enjoined the Applicant herein as a 3<sup>rd</sup> Interested Party and as empowered by Order 1 Rule 10(2) the Court proceeds to strike out the name of the 3<sup>rd</sup> Interested Party from the proceedings herein and further proceeds to dismiss any claim against it by the Exparte Applicant.

Therefore the ***Court finds that the necessary order*** herein in ensuring that end of justice is met and to prevent abuse of the court process ***is to allow the 3<sup>rd</sup> Interested Party’s Notice of Motion*** dated 9<sup>th</sup> November 2017, ***entirely in terms of prayers No.(a) & (b) with costs to be borne by the Exparte Applicant herein.***

It is so ordered.

***Dated, Signed and Delivered at Thika this 6<sup>th</sup> day of July 2018.***

**L. GACHERU**

**JUDGE**

In the presence of

M/S Njoki holding brief for Mr. Kinyanjui for the Exparte Applicant

No appearance for the 2<sup>nd</sup> Respondent

No appearance for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents

No appearance for the 1<sup>st</sup> Interested Party

No appearance for the 2<sup>nd</sup> Interested Party

Mr. Cheruget for the 3<sup>rd</sup> Interested Party/Applicant

M/S Njoki Gachichi holding brief for Mr. Mathenge for the 4<sup>th</sup> Interested Party

Lucy – Court clerk

**Court** – Ruling read in open court in the presence of the above advocates.

**L. GACHERU**

**JUDGE**

**6/7/2018**