



**Mastro Holdings Limited v Njenga & 5 others (Civil Appeal (Application)
632 of 2019) [2022] KECA 1337 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1337 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 632 OF 2019
MSA MAKHANDIA, K M'INOTI & HA OMONDI, JJA
DECEMBER 2, 2022**

BETWEEN

MASTRO HOLDINGS LIMITED APPELLANT

AND

JUDITH WANJIRU NJENGA 1ST RESPONDENT

P. M NG'ANG'A 2ND RESPONDENT

CHIEF LAND REGISTRAR 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

NATIONAL LANDS COMMISSION 5TH RESPONDENT

AND

**CO-OPERATIVE BANK OF KENYA LIMITED PROPOSED INTERESTED
PARTY**

*(Being an application for joinder of the proposed interested party/applicant
in the Appeal from the judgment and decree of the Environment and Land
Court (Bor. J) dated 8th August, 2019 in Nairobi ELC Case No. 226 of 2016)*

RULING

1. The dispute, which has given rise to this application, is a claim that was lodged by the appellant being ELC Suit 226 of 2016 - Mastro Holdings Limited vs Judith Njenga & Others which suit sought to cancel the title deed held by the 1st respondent in respect of all that parcel of land known as LR 2XXXXXX1 'the suit property'. Consequent upon such cancellation, an order of rectification of the land register in respect of the suit property do issue. The appellant also sought for an order



- of permanent injunction to restrain the 1st respondent from dealing with the suit property and her eviction therefrom.
2. The basis of the claim was that the late Andrew Njenga, the husband of the 1st respondent, charged the suit property to Co-operative Merchant Bank Limited to secure the repayment of a loan of Kshs 10,000,000. The bank realized the security in the exercise of its statutory power of sale after the chargor was unable to repay the loan on the terms agreed. The appellant claimed that it bought the suit property at the auction. However, when it presented the transfer documents for registration at the lands office, the 3rd respondent refused to register the appellant as the owner of the suit property claiming that the suit property had already been registered in the name of the 1st respondent either by way of transmission following the death of her husband or by joint purchase by the 1st respondent and her late husband. To the appellant all these activities were fraudulent and irregular, hence the suit.
 3. In retaliation, the 1st respondent filed a defence and counterclaim. She in particular denied that her late husband took the loan, or that he defaulted in the repayment schedule, and finally, that there was a public auction in which the appellant bought the suit property. As a parting shot, she claimed that the suit property was jointly purchased by her and her husband on which they put up the matrimonial home. Upon his demise, the suit property passed to her by way of transmission. By way of counterclaim, she once again challenged the existence of a loan facility; questioned the registration of the charge; the conduct of the auction process; and lastly, whether the appellant had bought the suit property at the auction and the legality of the discharge of the same. She therefore sought for a permanent injunction to restrain the appellant from dealing with the suit property in any manner.
 4. After hearing the case, Bor, J found that the appellant had not proved its case and dismissed the same whilst allowing the counter-claim. The appeal challenging that decision is pending hearing in this court.
 5. What we now have before us is an application dated July 27, 2020 brought under article 10,20(3), 25(c), 40, 48, 50, 60(1)(b)(d), 159(2)(a)(d), 163(4) (b) and 259(1) of the Constitution, sections 3A and 3B of the Appellate Jurisdiction Act and rules 1(2), 29(1) & (2),42,43 and 77(1) of the Court of Appeal Rules by the applicant seeking to be enjoined as an interested party in the appeal. Should the prayer be granted, it seeks a further order that this court be pleased to take or admit additional evidence in the form of supporting affidavit of Sisto Macharia and the annexures thereto specifically being letters dated 26th March, 6th June, and 4th June, all of 2001; statements of accounts; chamber summons application dated September 24, 2002 and the replying affidavit; letters dated 29th November, 2001; 2nd September, 2003; memorandum of sale of the charged property; copy of the Bankers Cheque No 4XXXXX paid to Wagly Auctioneers; the payment receipt issued by Wagly auctioneers dated February 10, 2004; cheque deposit slip and the application for registration.
 6. According to the applicant, the judgment effectively dismissed the existence of a loan between the applicant and one, Andrew Washington Njenga, thus disregarding the applicant's rights as a chargee and in the process nullified the entire auction process through which the appellant had acquired the suit property without giving the applicant a chance to present its case. That the judgment and decree was therefore adverse to the applicant yet it did not participate in the proceedings. That the overall impact of the judgment and decree is that the applicant did not pass a good title to the appellant which will expose it to claims for indemnity and or recovery for the loss of the suit property by the appellant. That a closer look at the suit as filed before the trial court, shows that the joinder of the applicant was absolutely necessary as it was a chargee thus its involvement in the suit was critical in determining the main issues in dispute and further given the constitutional prerequisite of the right to be heard.



7. The motion was further supported by the affidavit of Sisto Macharia dated July 27, 2020 which apart from reiterating the above grounds deposes that the deceased, Andrew Washington Njenga had been granted a loan facility of Kshs 10,000,000.00 by the applicant which was secured by a legal charge over the suit property and that when there was default in repayment, the suit property was sold by public auction on February 10, 2004 to the appellant. That the applicant transferred the suit property to the appellant after the auction was successful. Thus, any question as to the authenticity of the title held by the appellant can only be answered by the applicant. That by the appellant serving the applicant with relevant court papers in the appeal, it was an acknowledgment and manifestation that the applicant had an interest in the determination of the issues raised in the appeal and the judgment and decree of the trial court. Further, that the trial court during the hearing of the suit did not have the opportunity to peruse and consider the documents sought to be relied on by the applicant as the applicant was not a party to that suit.
8. In response, the 1st respondent stated that allowing the application would only legitimize a fraudulent transaction and would convolute documents and evidence that has not been tried or tested in the trial court. That the application was being made one year after the judgment and decree of the trial court. That by dint of rule 77 of the Court of Appeal Rules, the appellant was enjoined to serve copies of the notice of appeal on all persons affected by the appeal within seven (7) days of filing yet this was done after 12 months. In the premises, there was non-compliance on the part of the appellant with the above rule. That a joinder of a party ought only to be allowed if the same would not occasion injustice or prejudice to another party. That the joinder of the applicant was necessary only if it had been raised in the trial court. The joinder sought in this appeal would prejudice the 1st respondent as it seeks to further introduce additional evidence which the maker of the affidavit will not be questioned on the source, its origin or authenticity.
9. The appellant's submissions on the application are dated December 2, 2020. Its position is that it supports the application since the applicant had demonstrated that its interest in the appeal lies in protecting the sanctity of the title deed which it had passed to the appellant and will allay the unfounded claim by the 1st respondent of ownership of the suit property. That the applicant will suffer great prejudice if not allowed to present its case as it will be denied the opportunity to present evidence before this court showing that the 1st respondent's late husband charged the suit property to the applicant and when he defaulted, the applicant exercised its statutory power of sale and the appellant bought the suit property at a public auction lawfully conducted. The documents were crucial and had they been placed before the trial court it would have led to a different outcome as it would have helped the trial court to determine whether the title deed held by the appellant was a good title deed compared to that of the 1st respondent.
10. The applicant filed submissions dated November 30, 2020 in which it submits that it has a case warranting joinder as an interested party. That the applicant was not a party to the suit from which the judgment and decree appealed against arises and that it was the chargee who exercised its statutory power of sale over the suit property through an auction held on February 10, 2004. That the trial court had dismissed the fact that there was a loan advanced to Andrew Washington Njenga, thus disregarding the applicant's rights as a chargee and nullified the entire auction process, which finding will expose the applicant to a suit for recovery for the loss of the suit property. That the joinder of the applicant will help the court resolve all the contestations in issue once and for all. It relies on the case of [*John Kiplangat Barbaret & 8 Others vs Isaiah Kiplagat Arap Cheluget \[2016\] eKLR*](#) which case laid down the principles to be considered in an application of this nature.



11. The applicant further submits that under rule 29 of this court's rules, it is entitled to adduce additional evidence. That the evidence sought to be adduced is in the possession of the 1st respondent and that it is unlikely that the applicant who was not aware of the suit could have produced the said evidence during the trial. That if the evidence to be adduced is accepted, it will impact on the overall determination of the issues in dispute between the parties in this appeal.
12. We have considered the application, the affidavits in support and in opposition thereto, the respective submissions, authorities cited and the law. The issues for determination in this application are whether the applicant is a person directly affected by the judgment and decree of the ELC and should therefore be heard in this appeal, and whether it should be allowed to adduce additional evidence.
13. Rule 77 of the Court of Appeal, under which this application is brought provides:

' An intended appellant shall, before or within seven days after lodging a notice of appeal, serve copies thereof on all persons directly affected by the appeal:

Provided that the court may on application, which may be made ex- parte, within seven days of lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court.'
14. This rule does not define the term 'affected'. This court has, however, defined that term in the *Centre for Rights Education and Awareness & Another v John Harun Mwau & 5 Others, CA No 74 of 2014 (CA)*. Referring to the cases of *Kamlesh Pattni vs Starwood Hotels and Resorts World Wide Inc & 7 Others Civil Application No NAI 330 of 2001 (UR 176/2001)* and *Commercial Bank of Africa Limited vs Isaac Kamau Ndirangu, Civil Appeal No 157 of 1991, (CA); [1992] eKLR*, this court held that the person referred to in the rule is, at least, one whose property rights are affected by the judgment and decree appealed from and that he need not have been party to the case in the lower court to be served and allowed to participate in the appeal. In the Pattni case, a foreign judgment, which had been registered in Kenya, affected the property rights of the applicant. He was allowed to challenge the foreign judgment in the Court of Appeal. In the case of Commercial Bank of Africa, [supra] an auction in exercise of a statutory power of sale under a charge was set aside in proceedings that excluded the purchaser at the auction. On appeal, the Court of Appeal, suo motu, allowed the purchaser to be heard in that appeal.
15. At the centre of this dispute is the ownership of the suit property between the appellant and the 1st respondent. Each separately claim, one being the original owner and another through sale by public auction. As stated, the ELC had in the absence of the applicant who was not party to the suit before it, heard the appellant's and the 1st respondent's rival claims over the suit property and determined the dispute in favour of the 1st respondent. The appellant has since appealed that decision as already stated.
16. We agree with the applicant that whatever the outcome of the appeal, if the applicant is not joined in this appeal, it will be deprived of an opportunity to be heard and will definitely be faced with indemnity suits for refund of the monies paid by the appellant for the purchase of the suit property. Denying them a chance to be heard will of course be unconstitutional and against the tenets of the rules of natural justice. We think that the applicant's role in the transaction was key to the resolution of the issues in contention. It was a determinant as to whether it advanced a loan that informed its eventual exercise of the statutory power of sale, and whether that exercise was properly and legally undertaken as to avoid the impeachment of the appellant's title to the suit property. In the circumstances, we allow this application to the extent that the Co-operative Bank of Kenya Limited is hereby joined in this appeal as an interested party. The issue of non-compliance with rule 29 of this court's rules cannot be blamed on the applicant so as to deny it joinder, if it is true that the appellant violated that rule by not serving



the notice of appeal within the prescribed period. However, that is a matter that the 1st respondent can take up elsewhere with the appellant.

17. On the second issue, the applicant seeks to be allowed to adduce additional evidence which is contained in the affidavit of Sisto Macharia and its annexures.
18. In *Wanjie & Others vs Sakwa & Others (1984) KLR 275* this court considered at length the rationale for the obvious restriction of reception of additional evidence in rule 29 of the Court of Appeal Rules. Chesoni, JA observed at page 280 that:

' this rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence. '

The court further said as per Hancox JA that:

' the requirement for reasonable diligence is meant to discourage litigants from leaving until the appeal stage all sorts of material which should properly have been considered by the trial court.'

19. This court further, in the case of *Walter Joe Mburu vs Abdul Shakoore Sheikh & 3 Others Civil Appeal No 195 of 2002 [2015] eKLR* stated:

' Having considered the application, the various affidavits for and against it, as well as the submissions made and authorities cited, we come to the inescapable conclusion that this application for the taking of additional evidence is wholly devoid of merit. First, the taking of additional evidence lies in the discretion of the court and is intended to aid in the attainment of the ends of justice. Being a plea to the court's discretion, we take the view that the length of time it takes to bring the application, in this case well over a decade, is a relevant consideration that militates against a favorable exercise of our discretion. The delay is inordinate and no attempt was made to explain it. Its timing bears the hallmarks of dilatoriness and is not in keeping with the salutary object of expeditious justice. that the principal rule has been that there must be exceptional circumstances to constitute sufficient reason for receiving fresh evidence at this stage.' (emphasis added)

20. On the other hand, courts have been urged to administer justice by exercising a delicate balance and in exceptional circumstances, new evidence should be allowed after weighing the two interests, that of doing justice and that of avoiding being mired in endless litigation which would occur if parties were allowed to adduce fresh evidence at every turn during and after the trial, without any restrictions. See *General Parts (U) Ltd vs Kunnal Pradit Kariaca No 26 of 2013 UCA*.
21. We note that in the application before us, the applicant was not a party to the suit in the trial court and it therefore follows that the evidence sought to be introduced could not have been availed to court. Given the detailed history of the dispute we have outlined at the beginning of this ruling, we are



indeed surprised that none of the parties saw the central role the applicant played in the transaction and therefore the need to have him on board in the suit. We are also of the considered view that it will serve no purpose having allowed the applicant to be joined as an interested party to fail to allow it to adduce the evidence it wishes to rely on. This is informed by the fact that the applicant is central to the determination of the ownership of the suit property between the parties. We note further that the application has been made without inordinate delay and that the additional evidence is actually in the possession of the 1st respondent so that she cannot claim prejudice.

22. We accordingly allow the application for the adduction of additional evidence to the extent of what is contained in the affidavit of Sisto Macharia and the annexures thereto. The net result is that we allow both prayers in the application.

23. Costs shall however be in the appeal.

Dated and delivered at Nairobi this 2nd day of December, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K M'INOTI

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JUDGE OF APPEAL

HA OMONDI

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

