



REPUBLIC OF KENYA



KENYA LAW

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Omokwe & 10 others v Kanyi & another; Premier Bank Limited (Formerly First Community Bank Limited/Applicant) (Intended Interested Party) (Environment & Land Case E003 of 2023) [2024] KEELC 5619 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5619 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E003 OF 2023

NA MATHEKA, J

JULY 25, 2024

BETWEEN

JUSTINE OYAGI OMOKWE 1ST PLAINTIFF
REUBEN KHAKAI INDOSHI 2ND PLAINTIFF
PERIS GATHIGIA GITHINJI 3RD PLAINTIFF
TITUS KITHINJI NTIMBU 4TH PLAINTIFF
MOSES MUKABA NGARI 5TH PLAINTIFF
WILLIAM MOKHA MWADIME 6TH PLAINTIFF
SAMMY NGEUCU 7TH PLAINTIFF
SERAH TALU 8TH PLAINTIFF
JENS MIELKE 9TH PLAINTIFF
BRANDON WHITE 10TH PLAINTIFF
MARGARET MULIJNGI 11TH PLAINTIFF

AND

DAVID MUREITHI KANYI 1ST DEFENDANT
MOMBASA BEACH HOUSES COMPANY LIMITED 2ND DEFENDANT

AND

PREMIER BANK LIMITED (FORMERLY FIRST COMMUNITY BANK LIMITED/APPLICANT) INTENDED INTERESTED PARTY



RULING

1. The application is dated 1st March 2024 and is brought under Article 40 of the Constitution. Section 1A, 1B, and 34 of the Civil Procedure Act & order 22, rule 65, order 51 of the {{> Civil Procedure Rules,2010 seeking the following orders;
 1. That this application be certified urgent and to be heard ex-parte in the first instance.
 2. That Premier Bank Limited (formerly First Community Bank Limited) be joined in this suit as an Interested Party for purposes of the just determination of this matter by the Honourable Court.
 3. That the Honourable Court be pleased to exercise its discretion and grant any further or other orders it may deem fit.
 4. That the costs of this application be provided for.
2. It is supported by the grounds affidavit of Claris Ogombo and grounds that the Intended Interested Party charged property Subdivision Number 351 of Section I Mainland North. which is owned by the 2nd Defendant vide a charge dated 14th February 2012 and duly registered on 17th February 2012. That the 2nd Defendant and another had sued the Intended Interested Party in Mombasa. HCCC No. 32 of 2018-*Mombasa Beach Houses Company Limited & Aayo Investments & Services Co. Limited v First Community Bank Limited & David Mureithi Kanyi (Interested Party)*. That the parties in the aforementioned matter compromised the High Court matter and a settlement consent dated 17th December, 2019 was duly filed and adopted as an order of the Court. That under Clauses 3 and 5 of the settlement consent, the Intended Interested Party was to release the original certificate of title for the Suit Property upon receipt of the duly signed agreement dated August, 2019 and suitable professional undertakings from the and 2nd Defendants' Advocates for purposes of facilitating the intended subdivision of the Suit Property. That under Clause 6 of the settlement agreement, the 1st and 2nd Defendant were to ensure registration of replacement charge over all the subdivisions for the sum of Kshs. 50,000 (Fifty Million only). That the aforesaid subdivision is yet to be completed and the Intended Interested Party therefore has an interest in the suit Property as a Chargee. That the Plaintiffs, who are strangers to the Intended Interested Party, have now filed this suit claiming proprietary interest in the suit property. That it is therefore critical that the Intended Interested Party is joined to this suit as there is a risk of orders affecting it being made in its absence and without their participation and input.
3. The plaintiff states that the Notice of Motion and the Supporting Affidavit dated 1st March, 2024 disclose a different cause of action arising in HCCC No 32 of 2018: *Mombasa Beach Houses Company Limited & Aayo Investments & Services Co. Limited v First Community Bank Limited & David Mureithi Kanyi (Interested Party)*; which arose from a dispute of accounts between the proposed interested Party and third Party - Aayo Investments Limited which dispute relates to accounts falling outside the jurisdiction of this Honourable Court.
4. That as long as HCCC No 32 of 2018 was settled by consent on 17th December, 2019 and no further action has been taken before that Court, then proposed interested party's has failed to establish any interest in the present matter and therefore the application is a waste of judicial time. That joinder of the interested parties will lead to real practical problems of handling the existing cause of action which is seeking specific performance and issuance of title vis a vis the proposed interested parties interest over in charge which was already subject to proceeding in HCCC no 32 of 2018 and therefore there



is a likelihood of this Court applying itself and pronouncing itself to issues already dealt in Mombasa HCCC 32 of 2018 and determined by consent on 17th December, 2019. That the mixed grill of various causes of action will hinder the expedient determination of this matter and raises issues of res judicata.

5. That the application dated 1st March, 2024 does not disclose the proposed interested party's *locus standi* and therefore is unnecessary and will occasion unnecessary costs on the parties of the Suit as the issues intended to be raised by the proposed interested party, are alien to the Plaintiff who are also not privy to the relationship that the intended proposed party has with the Defendants. That in any event, the relationship between the intended proposed party and the defendants has been adequately and can adequately be dealt with in Mombasa HCCC 32 of 2018. That the issues raised by the intended proposed party are incompatible to and are totally different from the existing cause of action as pleaded in the Plaint. That this court has no jurisdiction in matters relating to charges and the jurisdiction lies with the High Court.

6. The preliminary issue to be determined in this application is whether this court has jurisdiction. In the case of *Owners of the Motor Vessel M.V Lillian S. v Caltex Oil (K) Limited* (1989) KLR 1 the court held that without jurisdiction it has to down its tools. The issue of whether the ELC court has jurisdiction on charges or not is not a novel issue. Article 162 (2) & (3) of the *Constitution* requires *inter alia*, that;

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

- a) ...
- b) The environment and the use and occupation of, and title to, land.” Emphasis added.

7. Article 260 of the *Constitution*, states that unless the context requires otherwise, ‘land’ includes-

- a) The surface of the earth and the subsurface rock;
- b) Any body of water on or under the surface;
- c) Marine waters in the territorial sea and exclusive economic zone;
- d) Natural resources completely contained on or under the surface; and
- e) The air space above the surface.”

8. This definition espouses the doctrine of *Cujus est solum, eius est usque ad coelum et ad inferos* (cujus doctrine) which translates to "whoever owns [the] soil, [it] is theirs all the way [up] to Heaven and [down] to Hell". The arguments by the defendant is that this definition does not include formal charges and that the doctrine restricts the definition of land use to necessary and ordinary use and enjoyment of the land and structures upon it as held in Lord *Bernstein of Leigh v Skyviews and General Limited* (1978) QB 479. A charge is an interest in land securing the payment of money or money’s worth or the fulfillment of any condition as defined by section 2 of the *Land Act* cap 280 and the rights so acquired are limited to the realization of the security so advanced as per section 80 of the same statute. Section 150 *Land Act* provides: -

The Environment and Land Court established in the *Environment and Land Court Act* and subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act”



9. The [Land Registration Act](#) under section 101 provides for the court that has jurisdiction as follows: -

The Environment and Land Court established by the [Environment and Land Court Act](#), 2011 (No.19 of 2011) and subordinate courts, have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

10. However, in [Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Ltd & another](#) (2018) eKLR Munyao, J commenting on the application of the above highlighted jurisdiction provisions in the [Land Act](#) and the [Land Registration Act](#) stated thus: -

22. It will thus be seen from the above that it is the ELC and the empowered subordinate courts, which have jurisdiction to hear disputes relating to matters in the [Land Act](#) and [Land Registration Act](#). This jurisdiction will inevitably cover all instruments created within these statutes, which must also encompass charges, and generally all proprietary transactions. The process of sale by chargee, which is what is questioned in this case, is a process that is laid down in the [Land Act](#) and [Land Registration Act](#), (formerly in the Registered [Land Act](#) now repealed) and these statutes provide that the court with jurisdiction is the ELC. You see, the sale of a charged property by chargee, is really no different from a sale by one private individual to another (see the case of [Stephen Kibowen v Agricultural Finance Corporation](#) (2015) eKLR). Both sales involve title and the process of acquisition of title to land. If one argues that the ELC has no jurisdiction to hear a dispute over the process of sale by a chargee, then it can as well be argued that the ELC has no jurisdiction to hear a dispute over a sale of land by one individual to another, which argument, I believe, will sound absurd. Let me reiterate again, that the process of sale of a charged property is governed by the [Land Act](#) and [Land Registration Act](#), and these statutes provide that it is the ELC and the empowered subordinate courts which have jurisdiction.”

11. The constitution under Article 165 (5) ousts the High Court’s jurisdiction in matters where the ELC had jurisdiction as follows: -

The High Court shall not have jurisdiction in respect of matters: -

- a. Reserved for the exclusive jurisdiction of the supreme court under this constitution: - or
- b. Falling within the jurisdiction of the courts contemplated in Article 162 (2).”

12. In this matter it is not disputed that in HCCC No 32 of 2018: [Mombasa Beach Houses Company Limited & Aayo Investments & Services Co. Limited v First Community Bank Limited & David Mureithi Kanji \(Interested Party\)](#) arose from a dispute of accounts between the proposed interested Party and third Party - Aayo Investments Limited which dispute was settled by consent. The instant case is one of specific performance on various sale agreements and a permanent injunction against the defendants. It touches on the ownership of the suit properties and this is the dominant cause of action which fall squarely under the jurisdiction of this court. The plaintiffs were not party to the suit in the High court. I find from the discussion above, that this court has jurisdiction to entertain the matter as it concerns occupation, use and title to land.

13. On joinder of parties to a suit is regulated under order 1 rule 3 of the [Civil Procedure Rules](#). In [Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited & another](#) (2015) eKLR the learned judge held as follows;

In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to



exist, whether jointly, severally; or in the alternative, where if such persons brought separate suits, any common question of law of fact would arise. See also Order 7 Rule 9 of the Civil Procedure Rule.Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties.”

14. The Applicant/Intended Interested Party submitted that they charged property Subdivision Number 351 of Section I Mainland North. which is owned by the 2nd Defendant. *vide* a charge dated 14th February 2012 and duly registered on 17th February 2012. Order 1 Rule 10(2) of the Civil Procedure Rules 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.”

15. The power of a court to order joinder is based on its discretion which must however be exercised judiciously and in accordance with the parameters set out in order 1 rule 10(2) of the Civil Procedure Rules. This was the position held by Angote J. in Civicon Limited v. Kivuwatt Limited and 2 others (2015) eKLR where he held as follows:

16. Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in order i rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

17. Also, in Joseph Njau Kingori v Robert Maina Chege & 3 others (2002) eKLR distilled the guiding principles in considering whether to allow joinder of an intending party as follows;

1. He must be a necessary party.
2. He must be a proper party.
3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.



5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.”
18. I therefore find that the intended interested party has fulfilled all the requirements in the Joseph Njau Kingori case *supra*. The Applicant/Intended Interested party submitted that the 2nd Defendant and another had sued the Intended Interested Party in Mombasa. HCCC No. 32 of 2018-*Mombasa Beach Houses Company Limited & Aayo Investments & Services Co. Limited v First Community Bank Limited & David Mureithi Kanyi (Interested Party)* and a settlement consent dated December 17, 2019 was duly filed and adopted as an order of the Court. That under Clauses 3 and 5 of the settlement consent, the Intended Interested Party was to release the original certificate of title for the Suit Property upon receipt of the duly signed agreement dated August, 2019 and suitable professional undertakings from the and 2nd Defendants' Advocates for purposes of facilitating the intended subdivision of the Suit Property. That under Clause 6 of the settlement agreement, the 1st and 2nd Defendant were to ensure registration of replacement charge over all the subdivisions for the sum of Kshs. 50,000,000 (Fifty Million only). That the aforesaid subdivision is yet to be completed and the Intended Interested Party therefore has an interest in the suit Property as a Chargee. I find the application is merited and I grant prayer 2 therein. The the costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF JULY 2024.

N.A. MATHEKA

JUDGE

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