



**Ondabu v Bosire; Jamii Bora Bank Limited (Interested Party) (Environment & Land Case 108 of 2017) [2024] KEELC 6107 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6107 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 108 OF 2017  
M SILA, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**WILFRED MASENGE MIGIRO ONDABU ..... APPLICANT**

**AND**

**SUSAN MORAA BOSIRE ..... RESPONDENT**

**AND**

**JAMII BORA BANK LIMITED ..... INTERESTED PARTY**

**RULING**

1. The application before me is that dated 13 December 2022 filed by the plaintiff/decree holder. The applicant seeks the following orders (slightly paraphrased):
  - a. That this Honourable Court be pleased to join Jamii Bora Bank Ltd in this instant application only.
  - b. That this Honourable Court be pleased to issue a declaration that the charging of the title of the suit property to Jamii Bora Bank Limited by the respondent for the purposes of obtaining a loan facility of Kshs. 3,500,000/= during the pendency of the instant suit was null and void and for issuance of an order of discharge of charge.
  - c. That the costs of the application be borne by the defendant/respondent.
2. The application is opposed.
3. To put matters into context, the applicant commenced this suit through an Originating Summons filed on 9 May 2017. In it he asked the court to declare that he has acquired title, by way of adverse possession, to the land parcel Wanjare/Bogiakumu/8029. The said land was and still is registered in the name of Susan Moraa Bosire who was the defendant in the suit. The suit was opposed culminating



- in a judgment in favour of the applicant which judgment was delivered on 5 October 2021 by my predecessor Onyango J. It would appear that the applicant moved to have himself registered as proprietor of the suit land pursuant to the judgment but found that the land is charged to Jamii Bora Bank Limited, named as interested party in this application.
4. The application is based on grounds that the charge was registered on 7 July 2018 when this suit was still pending; that the decree cannot be implemented as the title is encumbered by the charge; that the interested party is bound by the judgment/decree since the charge was borne out of an illegality hence null and void; that the interested party will not be prejudiced as it cannot gain from an illegality; that unless the orders are granted the applicant will be denied his rights over the suit property.
  5. The application is supported by the affidavit of the applicant. He has deposed that he filed his Originating Summons on 9 May 2017; that alongside the Originating Summons he filed an application dated 8 May 2017 which application was allowed on 31 May 2017; that the order was served upon the respondent on 15 June 2017; that sometimes on 13 September 2019 the respondent filed a replying affidavit to the Originating Summons; that the suit was thereafter concluded on 5 October 2021 allowing his claim; that no appeal has been filed against the judgment; that in a bid to execute the judgment the applicant obtained a Green Card which showed that there is a charge registered on 7 February 2018 to secure the sum of Kshs. 3,500,000/=; that the action of charging was against the doctrine of list pendens and must have been done by the respondent maliciously; that the charge should be cancelled; that in order to effect the same Jamii Bora Bank Limited be joined for purposes of hearing the application; that unless the orders are granted the applicant will not realize the fruits of the judgment.
  6. The interested party filed a preliminary objection and a replying affidavit. The preliminary objection is more or less to the effect that the applicant is seeking substantive orders in a post judgment application against the provisions of Order 3 Rule 1 and that what he needs to do is file a substantive suit. This is also echoed in the replying affidavit. It is added that on 15 August 2017 the respondent approached the interested party and applied for an overdraft of Kshs. 3,500,000/= and the same was granted with the suit land as security. It is averred that there was no encumbrance registered against the title. It is further averred that there was default and the respondent filed the suit Kisii CMCC No. E065 of 2022 against the bank and within that suit also asked for an order of injunction to stop the bank from selling the property which application was dismissed on 24 January 2023. It is deposed that the respondent never disclosed to the bank the existence of this suit and was not aware of any interest by the applicant as none was registered. It is added that the applicant was indolent in failing to protect his interests by registering a caution, caveat or any other inhibition and failed to register the order issued on 9 June 2017. It is deposed that the bank is owed Kshs. 5,288,022.15/= and that if this is paid the interested party is ready to discharge the title and release it as may be directed by court. It is further deposed that the respondent did not file a replying affidavit to the Originating Summons and he believes that there is collusion between the applicant and respondent to defraud the bank.
  7. I have not seen any reply filed by the respondent. I directed that the application be canvassed by way of written submissions and although Mr. Soire and Mr. Begi, respectively on record for the applicant and respondent, did state that they have filed submissions, I have seen none in the portal. The only submissions I have seen is those filed by counsel for the interested party which I have taken into account before arriving at my decision.
  8. It will be seen that the applicant filed suit against the respondent asking for the title to the suit land through the doctrine of adverse possession. He was successful in his quest pursuant to the judgment delivered on 5 October 2021. He now wishes to execute the decree but he has hit a roadblock because the title is charged to the interested party. This charge was effected on 7 February 2018 while this case



is pending. Through this application, he now wants the charge discharged and he be allowed to cause himself to be registered as proprietor of the suit land without an encumbered title.

9. I will agree with the interested party that what the applicant has brought to court is a new cause of action which is not related to the original cause of action. The original cause of action was a suit for adverse possession and what the applicant is now bringing forth is a completely different action. What the applicant now wants is to have the charge obliterated which in my view has absolutely no relation to the suit for adverse possession that has already been determined. If I am to allow the applicant to pursue the path that he has taken that will be tantamount to hearing a fresh case after the original suit has already been determined and without the requisite pleadings. It is trite that one needs to originate a suit through a plaint or other acceptable process. One cannot launch a fresh cause of action through an application filed in a suit that has already been determined. Moreover, a party to such suit needs to be allowed opportunity to defend it and call evidence which cannot be done through an application such as this.
10. I do not really see the need of saying much more. In short, the applicant needs to file a fresh suit for his prayers to be considered. He cannot do that through this application which has been filed after judgment as this is a new cause of action.
11. For the reasons above I do not find merit in this application and it is dismissed with costs to the interested party.
12. Orders accordingly.

**DATED AND DELIVERED THIS 26 DAY OF SEPTEMBER 2024**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

Delivered in the presence of:-

Mr. Soire present for the plaintiff/applicant

Mr. Begi for the defendant – Absent

Ms. Mbogaa h/b for Mr. Omwenga for interested party

Court Assistant – David Ochieng'

