



Equity (Kenya) Limited v Taibjee and Bhalla Advocates & another (Environment & Land Miscellaneous Case 253 of 2017) [2023] KEELC 314 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 314 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE 253 OF 2017
OA ANGOTE, J
JANUARY 26, 2023**

BETWEEN

EQUITY (KENYA) LIMITED INTERESTED PARTY

AND

TAIBJEE AND BHALLA ADVOCATES 1ST RESPONDENT

LIMURU HILLS LIMITED 2ND RESPONDENT

RULING

1. The interested party/ applicant has filed an application dated October 13, 2022, in which it seeks the following reliefs:
 - i. That the prohibitory order dated June 25, 2021 (sic) as against the 2nd respondent's property LR No 4967/37 and LR No 4967/38 Nairobi prohibiting charging, transfer, sale and dealings in fulfillment of taxation certificate of May 17, 2019 for attachment and sale/ for sale without attachment in favour of the 1st respondent be reviewed, vacated, set aside and/ or lifted.
 - ii. That upon grant of prayer 2 hereinabove Land Registrar be ordered to lift the prohibitory order issued on July 10, 2020 and dated June 25, 2021 in respect of the 2nd respondent's property LR No 4967/37 and LR No 4967/38 Nairobi prohibiting charging, transfer, sale and dealings in fulfillment or taxation certificate of May 17, 2019 for attachment and sale/ for sale without attachment in favour of the 1st respondent against the 2nd respondent.
 - iii. That the costs of this application be provided for.



2. This application is supported by the supporting affidavit sworn by Kariuki Kingori, the applicant's Legal Manager, who deponed that the 2nd respondent is the bona-fide registered proprietor of LR Nos 4967/37 and LR 4967/38 Nairobi (the suit properties); that the 2nd respondent secured three banking facilities from the applicant, for USD 19,315,000 and Kshs 250,000,000, and that the 2nd respondent charged the suit properties as security.
3. According to the applicant, the 2nd respondent has since defaulted on the said facilities obligating the applicant to exercise its statutory power of sale as the loan balance stands at USD 22,000,000 and that without the interested party's/applicant's knowledge, a prohibitory order was issued herein on July 10, 2020 and dated June 25, 2021 against the suit properties.
4. It was deponed that the prohibitory order prohibits the charging, transfer, sale and dealings in fulfillment of a tax certificate of May 17, 2019 for attachment and sale/ for sale without attachment in favor of the 1st respondent against the 2nd respondent and that the order was obtained through non-disclosure of material facts to this court of the existence of registered charges in favor of the interested party whose charge ranks in superiority to the 1st respondent's rights.
5. According to the interested party/applicant, the applicant's statutory right takes priority and cannot be inhibited by a prohibitory order it was not privy to; that the applicant risks losing its security in the facilities advanced should the prohibitory order not be reviewed or lifted and that there is an error apparent on the face of the record necessitating the order issued to be reviewed, vacated or lifted.
6. The 1st respondent opposed the application vide a replying affidavit dated November 4, 2022 sworn by Azim Taibjee who deponed that the 1st respondent offered legal services to the 2nd respondent with respect to the suit land; that the 2nd respondent however failed to settle legal fees on the success of registration of the charge and the bill of costs was taxed at Kshs 3 million and that the applicant is a beneficiary of the 1st respondent's services.
7. The 1st respondent deponed that upon the 2nd respondent's failure to pay, the 1st respondent sought the applicant's consent to register the prohibition order to secure its payment arising from the taxation order herein and obtained a gentleman's understanding; that the 1st respondent's interest for payment based on the title is not new to the interested party as the title was held as an advocate's lien and that through the gentleman's understanding that they would be paid, they agreed to release the title to the applicant for their registration.
8. The 1st respondent further deponed that the 1st respondent's interest in the suit property is limited to recovery of Kshs 3 million and that the applicant is at liberty to defray the said amount and proceed to exercise its undisputed statutory powers as the registered chargee, as the prohibition was necessary to protect the firm's advocates' interest.
9. According to the 1st respondent, a prohibitory order is superior in ranking to any registrations on title, provided it is procured in full disclosure of all material facts; that the applicant was indolent to the extent that neither law nor equity can afford it a remedy as the prohibition was recorded after the 2nd respondent started defaulting on payments and that the applicant ought to have auctioned the property and the 1st respondent's fees would have been easily recovered from proceeds of the sale.
10. The 1st respondent finally deponed that he is apprehensive of an invisible ploy between the applicant and the 2nd respondent and that it is customary that where a party fails to pay, the financier usually pays on its behalf and recovers from the 2nd respondent; that the 2nd respondent should offer an undertaking to pay on demand the sums owed and that the allegations of non-disclosure of material facts are baseless



and untrue as the existence of a registered charge is a fact apparent on the encumbrance part of the title document and could not be concealed.

Analysis and Determination

11. Having considered the interested party's application and the 1st respondent's response, the issue for determination by this court is whether the prohibitory order dated July 25, 2020 should be reviewed or set aside.
12. The applicant herein has sought a review of this court's prohibitory order dated June 25, 2021, wherein this court prohibited the charging, transfer, sale and dealings in the 2nd respondent's properties, LR No 4967/37 and LR No 4967/38, for purposes of fulfillment of the taxation certificate of May 17, 2019 for attachment and sale/ for sale without attachment in favour of the 1st respondent.
13. The facts in this matter are that this is a taxation suit that arose out of the client-advocate relationship of Taibjee and Bhalla Advocates, the 1st respondent and Limuru Hills Limited, the 2nd respondent. Contrary to the 1st respondent's averments in its replying affidavit, the advocate/client bill of costs was taxed at Kshs 1,400,600 and not Kshs 3 million as claimed.
14. Pursuant to the certificate of taxation for Kshs 1,400,600, this court issued Prohibitory Orders on June 25, 2020, and not June 25, 2021 as asserted by the applicant. These orders were issued against the 2nd respondent's properties LR No 4967/37 and 4967/38 Nairobi, forbidding any transferring or charging of the property to protect the applicant's interest as a decree holder.
15. The court also issued alternative orders for attachment and sale of such property or of sale without attachment of the said property and ordered the Land Registrar to effect the registration of the prohibitory orders against the titles of the suit land.
16. The interested party herein has asserted that they hold the suit properties as security for the 2nd respondent's loan facilities, and that the 2nd respondent has defaulted on the payment of such loans with a balance of USD 22 million, obligating the applicant to exercise its statutory power of sale.
17. According to the applicant, it is unable to exercise its statutory power of sale due to the prohibitory orders in place. They urge that such orders were obtained through non-disclosure of facts and need to be reviewed or lifted, as they risk losing their security.
18. Indeed, review is a remedy provided under section 80 of the *Civil Procedure Act*, whereby any person who considers themselves aggrieved by a decree or order from which an appeal is allowed by this *Act*, but from which no appeal has been preferred; or 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.
19. Order 45 rule 1 of the *Civil Procedure Rules* expounds on the grounds for review and provides as follows:
 - “ 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.”

20. Subrule (b) above sets out the three grounds upon which a decree or order may be reviewed: where there is discovery of new evidence, mistake/ error apparent on the face of the record or any other sufficient reason. The applicant's case is that there has been non-disclosure of material facts and that there is an error on the face of the record.

21. An error apparent on the face of the record refers to an error on the part of the court that must be clear and evident. This was held by the Court of Appeal in [National Bank of Kenya Limited vs Ndungu Njau](#) (1997)eKLR:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

22. The court in [Nyamogo and Nyamogo vs Kogo](#) [2001] EA 174 as quoted in [James Kiiru Mwangi vs Gibson Kimani Mwangi & Another](#) [2021] eKLR also defined an error on the face of the record as follows:

“There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

23. The applicant has argued that its interest in the suit property, which supersedes that of the applicant has not been taken into account and that such omission was through non-disclosure of material facts.

24. The orders in issue, which are dated June 25, 2020, are prohibitory orders granted under the provisions of order 22 rule 48 of the [Civil Procedure Rules](#) which provides that:

“Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property.”



25. The essence of the prohibition order is to ensure that the property is not transferred, charged or dealt with in any manner until the court issues a further order. This was well stated in the case of *Ogembo Ondieki vs Samuel Bosire Angwenyi & 2 Others* [2020] eKLR:

“A prohibitory order is an order obtained from the court prohibiting a judgment debtor from effecting any dealings in relation to his or her landed properties or interest in land held by him or her. Where judgment is obtained for the payment of money, in the event that a judgment debtor refuses or neglects to comply with the judgment made by the court, the judgment creditor can proceed to obtain a prohibitory order, where the properties of the judgment debtor involves land.”

26. My understanding is that a prohibitory order can only issue in respect to land belong belonging to the judgment debtor, and such land must be free from encumbrances. The applicant's interest in the land is evident from the 1st respondent's application for prohibitory orders dated March 10, 2020, wherein it asserted that the suit property has been charged to several banks.

27. In addition, the 1st respondent attached search certificates of the suit properties, which both list a charge to Equity Bank of USD 13,015,000 million as an encumbrance to both properties. It is therefore obvious that as at the time the 1st respondent was applying for the prohibitory order, he was aware that the property was already charged in favour of the applicant, and was not free from encumbrances.

28. To the extent that the 1st respondent did not bring to the attention of the Deputy Registrar the fact that the suit property was already charged in favour of the interested party, and therefore out of reach of the parties, and considering that the interested party was not joined in the proceedings, it is the finding of this court that there was no material disclosure by the 1st respondent, leading to an error on the face of the record.

29. Indeed, as correctly argued by the interested party, the statutory right of sale of the chargee takes priority and cannot be inhibited by a prohibitory order, unless the order is in furtherance of the charge.

30. For those reasons, the application dated October 13, 2022 is allowed as follows:

- a. The prohibitory order dated June 24, 2020 as against the 2nd respondent's property LR No 4967/37 and LR No 4967/38 Nairobi prohibiting charging, transfer, sale and dealings in fulfillment of taxation certificate of May 17, 2019 for attachment and sale/ for sale without attachment in favour of the 1st respondent be and is hereby set aside.
- b. The Land Registrar be and is hereby ordered to lift the prohibitory order dated June 24, 2020 in respect of the 2nd respondent's property LR No 4967/37 and LR No 4967/38 Nairobi prohibiting charging, transfer, sale and dealings in fulfillment or taxation certificate of May 17, 2019 for attachment and sale/ for sale without attachment in favour of the 1st respondent against the 2nd respondent.
- c. Each party to pay his/its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF JANUARY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;



Mr. Njuguna for applicant/interested party

Mr. Clapton for 1st respondent/applicant

Court Assistant - Valentine

