



Curlew Limited v Metropolitan Cannon General Insurance Limited & another (Civil Case E054 of 2021) [2022] KEHC 16571 (KLR) (16 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16571 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE E054 OF 2021
OA SEWE, J
DECEMBER 16, 2022**

BETWEEN

CURLEW LIMITED APPLICANT

AND

**METROPOLITAN CANNON GENERAL INSURANCE LIMITED 1ST
RESPONDENT**

**METROPOLITAN CANNON LIFE INSURANCE (K) LIMITED 2ND
RESPONDENT**

JUDGMENT

[1] This suit was commenced by way of originating summons on May 24, 2021 by Curlew Limited, the applicant. It was filed pursuant to sections 43, 44(1), (2) and (3), 56 of the [Land Registration Act](#), 2012, and order 37 rule 4 of the [Civil Procedure Rules](#), as well as section 3 of the [Civil Procedure Act](#), chapter 21 of the Laws of Kenya for the following orders:

- [a] That the respondents do attend court and show cause why the discharge arising from a charge over property known as subdivision no 1430 (CR 13969/1), section number 1, mainland north has not been executed.
- [b] That the respondents do attend court and tender true and certified copies of the applicant's account showing all payments made in settlement of the secured amount of kshs 5,000,000/= and the current balance (if any).
- [c] That the respondents' continued holding of a legal charge over proper known as subdivision no 1430 (CR 13969/1), section number i, mainland north is unlawful.



- [d] That the respondents do forthwith execute and hand over to the applicant an instrument of discharge of charge over property known as subdivision no 1430 (CR 13969/1), section number 1, mainland north.
- [e] That in default of execution of an instrument of discharge of charge by the respondents, the deputy registrar, Mombasa, do execute one in favour of the applicant.
- [f] That costs of the application be provided for.
- [g] That any other or further order be made as suits the circumstances of this case.
- [2] The originating summons was predicated on the averments set out in the affidavit of one of the directors of the applicant, Farhat Mahmud Yu, sworn on October 28, 2020. Mr Yu explained that in July 1991, the applicant obtained banking facilities for the sum of kshs 5,000,000/= from the respondents, currently known as Cannon Assurance (K) Limited. The facility was secured by a legal charge over the piece of land known as subdivision number 1430 (CR 13969/1), section number i, mainland north.
- [3] At paragraphs 3 and 4 of the supporting affidavit, Mr Yu deposed that, in fulfilment of its legal obligations as outlined in the charge, the applicant made all the payments due and thus fully repaid the sums advanced to it. It thereafter instructed the firm of CM Advocates to commence the process of discharge of the charge, and a letter to that effect was written by the applicant's lawyers requiring the respondent to sign the discharge of charge. At paragraphs 5 to 8 of the supporting affidavit, Mr Yu deposed that two years down the line, the respondent was yet to sign the discharge of charge or assign any reason for the delay.
- [4] Thus, the applicant averred that the prolonged delay on the part of the respondent in executing the discharge of charge can only be interpreted to be a deliberate, contrived and malicious act, intended to oppress the applicant. It was on that basis that the applicant filed the instant suit.
- [5] Upon being served with the originating summons and its supporting affidavit, the respondent instructed the law firm of M/s Mogaka Omwenga & Mabeya Advocates to act for it in the matter. Accordingly, counsel filed a notice of appointment of advocates on June 2, 2021 and was granted time to file and serve a response to the originating summons. A perusal of the court record shows that no response has been filed to date. It further shows that sufficient time was granted by the court, at the instance of counsel for the respondent, for the parties to negotiate the matter out of court with a view of an amicable settlement; and that as of November 17, 2022, no settlement had been reached. Accordingly, the suit was fixed for hearing on June 27, 2022. That hearing date was taken in the presence of counsel for both the applicant and respondent. Thus, there being no reason why Mr Omwenga for the respondent did not attend court on June 27, 2022, hearing proceeded ex parte in accordance with order 12 rule 2 (a) of the *Civil Procedure Rules*.
- [6] The applicant opted to rely on the supporting affidavit and the documents annexed thereto. The documents include a copy of the charge dated July 26, 1991 (annexure "FMI-2") and copies of correspondence between the applicant's advocates and a representative of the respondent in connection with the applicant's request for the signing of the discharge of charge. The applicant also annexed a copy of a certificate of search (annexure "FMI-5") as well as a copy of the provisional certificate in respect of the suit property (annexure "FM-6"), which confirm that, as at March 7, 2018, the title to the suit property was still encumbered by the charge to Cannon Assurance Kenya Limited.
- [7] Order 37 rule 4 of the *Civil Procedure Rules* pursuant to which the application was brought provides that:



Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable before the judge in chambers, for such relief of the nature or kind following as may be by the summons specified, and as the circumstances of the case may require; that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee.

[8] The applicant has presented uncontroverted evidence to the effect that it has fully satisfied its obligation under the charge; and that although the respondent has returned the title, it is yet to sign the discharge of charge in spite of several reminders. The documents marked annexure “FMI-3” and “FMI-4” are explicit in this respect. I therefore find merit in the suit. The same is hereby allowed and orders granted as hereunder:

[a] That the respondents’ continued holding of a legal charge over property known as subdivision no 1430 (CR 13969/1), section number 1, mainland north is without any reasonable justification.

[b] That the respondents do forthwith execute and hand over to the applicant of discharge of charge over property known as subdivision no 1430 (CR 13969/1), section number 1, mainland north within 14 days from the date hereof, failing which the deputy registrar of this court is hereby authorized to execute the same in favour of the applicant.

[c] That costs of the application to be borne by the respondent.

It is so ordered.

[9] **DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 16TH DAY OF DECEMBER 2022.**

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OLGA SEWE
JUDGE

