



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO.649 OF 2008

CITY COUNCIL OF NAIROBI.....PLAINTIFF

VERSUS

JOKAMU HOLDINGS LIMITED.....1ST DEFENDANT

STANDARD CHARTERED BANK (K) LTD...2ND DEFENDANT

JUDGMENT

1. **City Council of Nairobi**, the Plaintiff was a predecessor of the Nairobi County. The Plaintiff was a local authority constituted under the provisions of the **Local Government Act** (Now repealed). The Plaintiff filed this suit against two Defendants but the 1st Defendant, **Jokamu Holdings Limited**, did not participate in the suit. The 2nd Defendant, **Standard Chartered Bank Ltd**, did participate. The 2nd Defendant is a body corporate licensed under the Banking Act.

2. This Litigation arose over the dispute of ownership of land. The Plaintiff by its pleading stated that it acquired an interest/ownership of the property known as **L. R. No. 17338** on **1st May 1998** from the Commissioner of Land. The Plaintiff acquired the property for the purpose of constructing a health facility and residential houses for its employees working at that health facility.

3. On acquiring that Property the Plaintiff stated that it was in continuous and exclusive occupation and provides quality health care to members of the public thereof. It also houses its employees of that health facility on that land.

4. That on **11th November 1999**, the 1st Defendant purported to lay a claim of absolute ownership of that Land. That the 1st Defendant sought to obtain possession of that land by seeking to evict the Plaintiff's employees therefrom. The transfer of the land obtained by the 1st Defendant was irregular, void and vitiated by fraud.

5. The Plaintiff later realised that the 1st Defendant had charged the said land to the 2nd Defendant. That on charging the land to the 1st Defendant failed to pay the loan granted and the 2nd Defendant threatened to auction the property. According to the Plaintiff the 2nd Defendant had no right to sell, by auction, the property because the property is a public utility land and the 1st Defendant obtained the title fraudulently.

6. The Plaintiff prayed for the following orders:-

a) A declaration that the Plaintiff is the lawful proprietor of L. R. No. 17338;

b) An order directed to the Registrar of Titles for the cancellation of the grant of L. R. No. 17338 in the name of the 1st Defendant and registration or upholding of the same in favour of the Plaintiff;

c) A permanent injunction restraining the 1st and 2nd Defendants jointly and/or severally whether by themselves or their servants, agents, employees or any other manner whatsoever from interfering with the Plaintiff's ownership and control of L.R. No. 17338;

d) Costs of the suit and interest;

e) Any other further relief that this honourable Court may deem fit and just to grant.

7. The 2nd Defendant pleaded in its defence that the property was offered as security by the 1st defendant for a loan facility granted by it to a company called ***Circular Distributors Limited***.

8. That the 2nd Defendant proceeded to charge the property to secure that facility.

9. The 2nd Defendant denied that the charge over the property was fraudulent because the 1st Defendant availed to it documents which proved that the property was owned by the 1st Defendant.

10. This case was fully heard by ***Justice F. Ochieng*** and when the said learned Judge was transferred from the commercial & Tax Division of Milimani Law Courts the responsibility of writing the Judgement fell upon me.

11. The 2nd Defendant by its final submissions submitted that this Court, being the High Court, had no jurisdiction to hear this matter & that jurisdiction of this matter belonged to the Environment and Land Court (***ELC***). The 2nd Defendant in making that submission referred to **section 13** of the Environment and Land Court Act which provides on jurisdiction of ELC as follows;

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes”

a) Relating to environmental planning and protection, climate issues, land use planning, title tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b) Relating to compulsory acquisition of land;

c) Relating to land administration and management;

d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e) Any other dispute relating to environment and land.

12. The 2nd Defendant referred to the case; ***Suzanne Achieng Butler & 4 others –vs- Redhill Heights Investments Limited & another [2016] eKLR*** as follows;

“When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the pre-dominant purpose test: in a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has Jurisdiction if the transaction is predominantly for the provision of goods, construction, or works”.

DETERMINATION ON JURISDICTION

13. **Article 162 (2)** of the Constitution created specialized Court of equal status to the High Court. Those specialized Courts hear Employment and Labour Relation matters and Environment and use and occupation and title to land. **Articles 165 (5) (b)** provides that the High Court shall not have jurisdiction in respect of matter dealt with in those specialized Court. It is because of those provisions in the Constitutions that the 2nd Defendant raised an objection to this matter being heard by this Court, the High Court.

14. Jurisdiction is everything and without it the Court can do nothing else but must down tools. See Owners of the ***Motor Vessel M. V. Lilian S. – vs- Caltex oil (K) Limited (1989)***.

15. The law is clear, the High Court does not have jurisdiction on matter of environment, use and occupation of and title of land.

16. The dispute between the Plaintiff and the 2nd Defendant relates to the validity or otherwise of the legal charge over the land. That is the case this Court is called upon to determine. The Court of Appeal has held that claim relating to a legal charge over the land belong to the High Court. That is the case this Court is called upon to determine. The Court of appeal has held that claim relating to a legal charge should be heard by the High Court. This was stated in the case; ***Co-operative Bank of Kenya Limited –vs-Patrick KagetheNjuguna& 5 others [2017] eKLR***, where the Court of Appeal held thus:

“By definition, a charge is an interest in land securing the payment of money or money’s worth or the fulfilment of any condition (see Section 2 of the Land Act). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money’s worth. The rights so acquired are limited to the realization of the security so advanced (see Section 80 of the Land Act). The creation of that relationship therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor.

37. Further, Section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use. The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be ‘using’ his land simply by virtue of having a floating charge/disposition over the property.

38. Consequently, the assertion that a charge constitutes use of land within the meaning of Article 162 of the Constitution fails. while exclusive, the jurisdiction of the ELC is limited to the areas specified under Article 162 of the Constitution , Section 13 of the ELC Act, and Section 150 of the Land Act; none of which concern the determination of accounting matters is without doubt, for under Article 165 (3) of the Constitution provides *inter alia*, that;

1. subject to clause (5), the High Court shall have –

a) unlimited original Jurisdiction in criminal and civil matters.

For the above reasons, the appellant’s objection on jurisdiction was rightly dismissed”

17. With the above in mind it follows that the issue of the dispute about the legal charge between the Plaintiff and the 2nd Defendant can be entertained before this Court.

18. Having found that this Court has jurisdiction to hear and determine the dispute between the Plaintiff and the 2nd Defendant the following issues are present for determination:-

a) **Considering the evidence tendered what is the status of the legal charge over L. R. 17338;**

b) **What orders should the Court make;**

c) **Who pays the costs.**

19. The evidence adduced by the Plaintiff is that it was the registered owner of the land. The land was used by the plaintiff, whereby a Public Health Centre was run and where members of staff of that health centre resided. As correctly stated by the Plaintiff’s learned Counsel, and it was support in the documents before Court, the 1st Defendant although it was registered as the owner of the land on **11th November 1999** it never obtained possession of that land. This is because the on the land was a public health centre and residential houses of the staff.

20. The 1st Defendant filed a suit being **HCC No. 114 of 2001** where by interlocutory Application it sought mandatory injunction to have the members of Plaintiff’s staff removed from the land. The affidavit of Francis MbauMurigisworn on **24th January 2001**, clearly shows that 1st Defendant did not have possession of the Land. It is important to reproduce some parts of that affidavit for better understanding of status of the land. In that affidavit where reference is made to the Plaintiff it means the 1st Defendant in this case and reference the 1st Defendant refers to the Plaintiff in this case. Part of the affidavit states as follows:-

“ SUPPORTING AFFIDAVIT

I Francis MbauMurigi, a male adult resident at Nairobi and of Post office Box Number 74050 Nairobi in the Republic of Kenya MAKE OATH and say as follows:-

1. **THAT** I am the Managing Director of the Plaintiff Company and I and therefore competent and duly authorised to make tis affidavit.
2. **THAT** on or about the 15th May 1996, the 1st Defendant allocated the piece of land known as Land Reference No. 17338 situated at Muthaiga, Nairobi to leading Tower Investment Limited (The said piece of land together with the developments thereon are collectively hereinafter referred to as “the suit property”).
3. **THAT** in November of the year 1997, the said leading Tower Investment Limited offered the suit property to the plaintiff for a consideration of Kshs 4,000,000/- and the Plaintiff duly paid the entire consideration.
4. **THAT** the 1st Defendant was not in possession of the Grant in respect of the suit property both as at the time it made the allocation to the said Leading Tower Investment Limited and also at the time the Plaintiff purchased the suit property. Accordingly, the 1st Defendant informed the Plaintiff that it would obtain the Grant from the Commissioner of Lands and have a transfer directly made from the 1st Defendant to the Plaintiff.
5. **THAT** on or about the year 1999, I paid on the Plaintiff’s behalf the sum of Kshs 300,000/- to the 1st Defendant as stand premium, and on the 22nd January 1999, the Mayor and Town Clerk of the 1st Defendant executed a transfer in the

Plaintiff's favour and the transfer was duly registered in the land Titles Registry on the 11th November 1999 as **No. L.R. 77214/2**. The Plaintiff was subsequently issued with a Grant (namely Grant No.77214) as the owner of the suit property for the term of 99 years from the 1st May 1998.

6. THAT in or about **May 2000**, the Public Health Department of the 1st Defendant claimed that the Plaintiff was permitting the occupation of premises condemned as unfit for human habitation and gave the Plaintiff two weeks within which to restore the suit property into a state fit for habitation, failing which criminal action would be taken. I therefore visited the suit property shortly after receiving the notice when I demanded that the 2nd, 3rd, 4th and 5th Defendants (who were occupying the suit property) to give vacant possession to enable me commence the necessary restoration works. The said Defendants refused to vacate the suit [property but instead engaged in acts of hostility against me, including chasing me away from the suit property. As a result, I was unable to commence the said works on time and on the 9th June 2000, I was charged with failing to abate a nuisance as a Director of the Plaintiff Company. The Criminal case against me is still pending in the First Class District Magistrate's Court at City Hall Nairobi (vide Criminal Case No. M4517 OF 2000) and the court file has mysteriously disappeared, leaving my fate in limbo.

7. THAT contemporaneously with the notice to abate a nuisance and the subsequent criminal action, a false and malicious report appeared in the daily newspaper alleging that the Plaintiff had "grabbed" the land on which Karura Health Centre and its staff quarters are/erected. The newspaper reports quoted the mayor, deputy Mayor, chairman of the Public Health Committee and the Medical Officer of health of the 1st Defendant as saying that the matter of the alleged irregularity would be referred to a meeting of the council of the 1st Defendant. I verily believe that the false report alleging "grabbing" and the criminal proceedings instituted were instigated by the Defendants and were aimed at influencing the Plaintiff to relinquish ownership or otherwise dispose of the suit property.

8. THAT on or about the 14th June 2000, the matter regarding the alleged allocation of Karua Health Centre was referred to a meeting of the 1st Defendant's council and subsequently investigated. It is within my personal knowledge that on or about the 2nd August 2000, the 1st Defendant's General Purposes committee established that the Health Centre, which is on a plot adjacent to the suit property, had not been sold. I thereupon had reasonable grounds to believe that I was at liberty to deal with the suit property as I deemed fit without expecting any interference from any of the Defendants.

9. THAT on the 23rd August 2000, I therefore instructed the Plaintiff's property agents Messrs. Manclem Management and Valuers Limited to contact the 2nd, 3rd, 4th and 5th Defendants and call them for a meeting with a view to regularising their occupation of the suit property. To this end the said Defendants were invited to our agents' offices on the 1st September 2000 but they failed to attend. As a consequence thereof, our agents wrote to them on the 13th September 2000 and required that they pay a monthly rent of Kshs 15,000/- effective from the 1st September 2000. I have been informed by our agents and verily believe that the said Defendants have not paid the rent demanded or nay part thereof todate.

10. THAT on or about the 28th September 2000, the 1st Defendant wrote to our agents and claimed that the suit property belonged to the 1st Defendant and warned the Plaintiff against interfering with the occupation of the property by the 2nd, 3rd, 4th and 5th Defendants. The 1st Defendant further threatened court action unless the Plaintiff desisted from the alleged harassment of the said Defendants. The 1st Defendant further asked our agents to produce evidence of ownership of the suit property. Despite such production clearly showing that the Plaintiff is the registered owner of the suit property, the 1st Defendant (which itself sold the suit property to the Plaintiff) has refused to recognise the Plaintiff's ownership of the property but has instead encouraged its officers, servants and or agents to defeat the Plaintiff's title thereto. I verily believe that the letter threatening court action and asking the Plaintiff and its agents to desist from the alleged harassment of the 2nd, 3rd, 4th, and 5th Defendants was instigated by the said Defendants in collusion with of the 1st Defendant and is yet another instance of influencing the Plaintiff to relinquish ownership or otherwise dispose of the suit property.

11. THAT on the 20th December 2000, I started making arrangements for the development of the suit property and to this end. I went to the site together with survey personnel in order to re-establish the beacons. I returned to the suit property with several workers on the 23rd and 24th December 2000 in order to oversee the fencing of the property but our presence was met with hostility from the 2nd, 3rd, 4th and 5th Defendants who tried to stop the fencing. The said Defendants being unable to stop the fencing, went away and returned to the suit property with askaris of the 1st Defendant and ultimately with police officers from Muthaiga Police station who asked me to provide proof of ownership of the suit property by the Plaintiff. Both the said Defendants; myself and the workers, were also asked to record statements with the police on the 27th December 2000."

21. The Plaintiff in this case became an owner of the property on **3rd August 1998**. It therefore cannot be correct to state that the Plaintiff allocated the Property to a company known as Leading Tower Investment Ltd in 1996. There is no documentary evidence of such an allocation.

22. The 2nd Defendant, through its witness, evidence in chief stated that the 2nd Defendant carried out all due diligence before accepting the property as security. That witness failed to inform the Court what exactly the due diligence exercise entailed. All he said was that the 2nd Defendant confirm the 1st Plaintiff was the registered owner and that it had receipts representing its payments for rates, land rent and clearance certificate.

23. As it will be seen from the affidavit reproduced above there were people in occupation of the property. It follows that had the 2nd Defendant carried a visit on the land, it would have confirmed that there was a dispute over the ownership of the very land that 1st Defendant

offered as security. The fact that the 2nd Defendant did not find out that there was any such dispute would suggest that it did not even carry out a valuation to confirm that the property was worth the money loaned. If such a valuation would have been carried out, again, it would have revealed the deep seated dispute over the alleged ownership of the property by the 1st Defendant.

24. On consideration of the entire evidence adduced it becomes very clear that the 2nd Defendant, although in its defence pleaded that it is a responsible corporate citizen, on this occasion it failed the test miserably. How else can the 2nd Defendant explain having received a title, as security over a property where a public health centre is run and members of its staff reside? The 2nd Defendant will, in this case, have to pay the consequences of its failure by having the charge declared null and void.

25. Having found that the charge shall be declared null and void the only other order that this Court can make is to order there be a discharge.

26. Although the 2nd Defendant pleaded in its defence that the Plaintiff was not entitled to the costs of this suit because it failed to give notice of intention to sue, the 2nd Defendant did not lead evidence in that regard. Accordingly the costs will follow the event that is they shall be awarded to the Plaintiff.

27. Before concluding this matter, I need to state that the 2nd Defendant did not prove it had served the 1st Defendant with the Notice of Indemnity or contribution. 2nd Defendant did not also lead evidence on that Notice. No orders will therefore be granted in that regard.

28. In the end there shall be Judgement in the following terms:

*a) A permanent injunction is hereby issued restraining the standard Chartered Bank Kenya Limited from selling or interfering in any way with **L.R. No.17338**;*

*b) The legal charge for Kshs 5 Million in favour of Standard Chartered Bank Kenya Limited registered on **24th February 2000** under the title L. R. No. 17338 is hereby declared to be null and void;*

*c) Standard Chartered Bank Kenya Limited shall within 30 days from today's date register a discharge of charge over **L. R. No. 17338**;*

d) The standard Chartered Bank Kenya Limited shall pay the costs of this suit to the Plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of November, 2018.

MARY KASANGO

JUDGE

Judgment read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendants

MARY KASANGO

JUDGE