



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT THIKA**

**ELC NO. 222 of 2018 (OS)**

**DAYKIO PLANTATIONS LIMITED .....APPLICANT**

**VS**

**NATIONAL BANK OF KENYA LIMITED...1<sup>ST</sup> RESPONDENT**

**ALFRED MABALI KILONZO.....2<sup>ND</sup> RESPONDENT**

**JOSEPH NJOROGE NDUNGU .....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The application is filed under section 85 and 102 of the Land Act, Order 37 Rule 1 of the Civil Procedure Rules and all the enabling provisions of the law.
2. The Applicant sought the singular order that the property known as Land Reference Number 13673/19 (IR 43940) (suit land) be discharged from the encumbrance registered in favour of the 1<sup>st</sup> Respondent.
3. The application is supported by the grounds annexed thereto and the affidavit of Sheila Kahaki Muya sworn on the 30/7/2017. The deponent stated that the Applicant is the beneficial owner of the suit land. That the suit land is registered in the name of the 2<sup>nd</sup> Respondent. That the property was charged to the 1<sup>st</sup> Respondent on various dates as shown on the copy of the certificate of title marked DPL1. She averred that the 1<sup>st</sup> Respondent has no records of the charges and as such bit is not entitled to claim any interest in the property. That despite constant reminders and requests from the 2<sup>nd</sup> Respondent, the 1st Respondent has declined to discharge the property notwithstanding that the loans have been fully repaid.
4. Further she deponed that the Applicant sold the suit land to the 3<sup>rd</sup> Respondent via an agreement dated the 9/4/2009 and the 2<sup>nd</sup> Respondent is desirous of transferring the land to the 3<sup>rd</sup> Respondent.
5. The 1<sup>st</sup> Respondent opposed the application vide its Replying Affidavit sworn by Daniel Gichuru on the 19/7/2021. He stated that he is the head of Securities and Documentation at the bank and that the 1<sup>st</sup> Respondent is a stranger to the 2<sup>nd</sup> Respondent as the bank does not have in its custody any details about the said 2<sup>nd</sup> Respondent and that there is a need to look through its archived records. That the 2<sup>nd</sup> Respondent has not availed any documentation to show that he indeed was the bank's customer save for the copy of the title which indicates that there was a charge registered in favour of the 1<sup>st</sup> Respondent way back on the 19/11/1992. He blamed the 2<sup>nd</sup> Respondent for failing to produce documents in support of the borrowing nor any statement of accounts evidencing repayment of the loan.
6. The 1<sup>st</sup> Respondent questioned the basis of the beneficial interest of the Applicant. Lastly the bank stated that due to the age of the transaction, it has not been able to trace and or retrieve the title documents from its registry.
7. On the 12/10/2021 the Applicant and the 1<sup>st</sup> Respondent agreed to canvass the application by way of written submissions. At the time of writing the Judgment none of the parties had filed written submissions. I shall therefore be guided by the pleadings on record.
8. I have perused the record and I find no evidence of service of summons upon the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. However, the 3<sup>rd</sup> Respondent entered appearance through the firm of Abdirazak & Company Advocates on the 23/8/2018 but failed to file a defence.
9. The 2<sup>nd</sup> Respondent did not oppose the application.
10. The key issue for determination is whether the Applicant is deserving of the orders with respect to the discharge of the suit land.

11. The Applicant sought orders to have the title to the suit land discharged by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent in turn challenged the basis of this prayer by the Applicant on grounds that it does not own the suit land.

12. I have perused the record and more specifically the title of the suit land dated the 25/3/1988 issued in the name of the 2<sup>nd</sup> Respondent. Entry No 2 indicates that there is a charge dated 6/9/1988 in favour of the 1<sup>st</sup> Respondent. A further charge in favour of the 1<sup>st</sup> Respondent was registered on the 19/11/98 and a second further charge to the said bank was registered on the 17/10/1995.

13. Section 85 of the Land Act requires the bank, to upon payment of all the monies secured by the charge and the performance of all other conditions and obligations of the charge, be entitled to discharge the charge at any time before the charged land has been sold by the chargee or a receiver under the power of sale.

14. I concur with the 1<sup>st</sup> Respondent that the right party to seek a discharge in view of the contents of paragraph 12, is the 2<sup>nd</sup> Respondent, the registered owner of the land. In the absence of any evidence to the contrary, the orders being sought by the Applicant cannot be founded. It is noteworthy that the registered owner of the land was not served with the summons in this case. No explanation has been tendered by the Applicant.

15. In the circumstances it is the finding of the Court that the application is misplaced and I hereby dismissed it with costs to the Respondents.

16. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS DAY OF 9<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**J. G. KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Jimmi Maina holding brief for Derek Juma for Applicant

Ms. Kosgei for the 1<sup>st</sup> Respondent

2<sup>nd</sup> Respondent – absent

3<sup>rd</sup> Respondent – absent

Ms. Phyllis – Court Assistant