

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

HCCC NO.28 OF 2007

AMINA MOHAMED HARITH

substituted for Harith Ali El-Busaidy (Deceased)**PLAINTIFF**

VRS

KENYA COMMERCIAL BANK LIMITED **DEFENDANT**

RULING

The Notice of Motion dated 16/3/2015 seeks the following main prayer:

1. That in order to give full effect to the order of the Court of Appeal in Civil Appeal No.94 of 2010; the Defendant do effect a discharge of the charge registered against L. R. Number 2645 – Malindi and consequently release the title document and discharge of charge to the plaintiff.

The application is supported by the affidavit of the applicant sworn on the same date. The respondent filed grounds of opposition on 15/5/2015. Parties agreed to determine the application by way of written submissions.

The main issues raised by counsel for the applicant is that the applicant herein filed the suit seeking to have the charge on plot L. R.No.2645, Malindi discharged. On their part, the respondent filed a counterclaim seeking Ksh.11,789, 390.45/-. The High Court dismissed the applicant's claim for the discharge of the property but allowed the counterclaim. The applicant filed Civil Appeal No.94 of 2010 before the Court of Appeal and the counterclaim was dismissed. It is the applicant's position that in view of the decision of the Court of Appeal, the property ought to be discharged. That is why the applicant is seeking enforcement of the Court of Appeal decision by this court.

Counsel for the respondent maintains that the decision of the court of appeal only allowed the appeal on the counterclaim. There was no appeal in relation to the dismissal of the applicant's suit. In essence therefore, the decision of this court dismissing the applicant's claim to discharge the property still stands. This court is *functus officio* as its decision still stands. The decision of the Court of Appeal was to the effect that the counterclaim was dismissed but that did not give room to the discharge of the property.

I have carefully gone through the documents in this file, there is the judgment of H.A Omondi, J, delivered on 1/3/2010. There is judgment of the Court of Appeal delivered on 1/11/2013. It is clear to me that, each of the two parties is giving the decision of the Court of Appeal an interpretation favouring their own positions. Each party seems to be picking a particular paragraph favouring their case. The status herein has led to a stalemate. The position can also be the subject of different interpretation. Justice Omondi dismissed the applicant's claim to have the suit property discharged. She awarded the respondent the sum of ksh.11,789,390.45/- as claimed in the counterclaim. One can interpret that to mean that the applicant's suit was dismissed because the amount in the counterclaim was due and payable by the appellant. The record shows that the appellant is the administrator of the estate of the late Harith Ali El-Busaidy. The deceased was one of the Directors of Cleopatra Theatre Limited and personally guaranteed a loan of ksh.900,000/-. The suit property was used as security. It is in the names of the deceased but was used to guarantee the loan advanced to Cleopatra Theatre Limited. There is a certificate of confirmation of grant for the property issued in Malindi Succession Cause No.41 of 2009. The appellant and four other beneficiaries are entitled to equal shares.

It can also be interpreted that since the counterclaim was dismissed by the Court of Appeal then the applicant's claim automatically succeeds. I have gone through the judgment of the Court of Appeal and it is not clear whether the decision to allow the appeal in relation to the counterclaim automatically makes the applicant to be a successful party. There is a paragraph in the judgment which states that if the defence in relation to the counterclaim is successful, it does not necessarily mean that the charge over the property should be discharged. The court observed that there were two different cases namely; the applicant's case and the counterclaim. There is the interpretation by the respondent to the effect that since there was no appeal against the dismissal of the applicant's suit, the dismissal of the counterclaim can not change the situation. The fact remains that the applicant's suit was dismissed.

It is therefore clear to me that each party is interpreting the situation to suit their own cause. As of now no money is being paid to service the loan. According to the applicant the counterclaim was dismissed and no money is payable. On its part, the respondent maintains that the applicant's suit was dismissed and the charge over the property can not be discharged. The respondent is holding on to the title but no money is being received. As to how long that situation will continue nobody knows. The Court of Appeal made reference to the amount of interest that accumulated on the loan. The court somehow advised the parties to look into the dispute. Whereas it is true that a judgment of the Court of Appeal can be enforced as if it was a judgment of the High Court under section 4 of the Appellate Jurisdiction Act (Cap.9), the situation here is quite murky. It is not quite clear what the final verdict of the Court of Appeal is. As of now each party is a winner. The applicant lost before the High Court but won at the Court of Appeal. Similarly, the respondent won before the High Court but lost before the Court of Appeal. The tug of war continues.

I do find that the best court that can shade light on the way forward is the Court of Appeal. Parties should go back to the same court for the interpretation of the court judgment as well as for guidance on the way forward. I do find that the current application as it is can not be granted by this court. It is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Malindi this 12th day of November, 2015.

SAID J. CHITEMBWE

JUDGE