



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**MISCELLANEOUS CAUSE NO. 124 OF 2010 (O.S.)**

**PAUL WANDATI MBOCHI ..... APPLICANT**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED ..... RESPONDENT**

**J U D G E M E N T**

1. What is before this Court is the Applicant's Originating Summons dated 8th February 2010 brought under the provisions of the old Civil Procedure Rules, **Order XXXVI rules 3A and 3F** as well as **section 72** of the *Registered Land Act*. The same seeks Orders from this Court that the Respondent be directed to discharge its Charge registered against land parcel Limuru/Ngecha/2153 (hereinafter "the suit property") in favour of the Applicant. The Respondent should be further ordered to release the Applicant's Title Deed in respect of the suit property. The Grounds in support of the Application detailed that the Applicant had charged the suit property to the Respondent in February 2009 to secure a loan in the amount of Shs. 400,000/-. On 17th November 2009, the Applicant paid off the entire loan balance together with interest and requested the Respondent to release his Title Deeds and to discharge the Respondent's Charge over the suit property. The Applicant maintained that despite repeated requests both by him and his counsel, the Respondent had failed to either release the Title Deeds or discharge the Charge. The Affidavit in support of the Application did not go into much further detail than as was stated in the Grounds of the Application. However, the Applicant noted that he had paid the remaining balance on his loan account No. 01130-508283-00 amounting to Shs. 380,765.70 on 17th November 2009 and attached a copy of his bank statement in that connection.
2. The Respondent filed a Replying Affidavit sworn by its Legal Services Manager Mr. D. W. Gitonga and dated 1st July 2010. The deponent noted that on or about the 28th December 2006, the Respondent had granted the Applicant a loan facility in the amount of Shs. 400,000/- secured by a Charge in the Respondent's favour over the suit property. Almost immediately, the Applicant had got into arrears in servicing the loan facility despite letters of demand dated 19th June 2007 and 13th July 2007. Finally on 14th August 2007, the Respondent issued and served upon the Applicant a first Statutory Notice seeking to recover Shs. 416,002 .10. It issued and served a second Statutory Notice dated 13th February 2008 seeking to recover Shs. 389,882.95. The deponent went on to say that there had been a proposal from the Applicant to repay the loan facility in May 2009 at the rate of Shs. 10,000/-per month for the period from June 2009 to August 2009. Such had been accepted by the Respondent on condition that the entire loan should be

- repaid on or before the expiry of the 90 days from 18th May 2009.
3. Again, the Applicant had failed to honour its commitment and on 7th October 2009, the Respondent had issued a demand for the full balance of the outstanding loan amounting to Shs. 390,765.70. Thereafter, the Respondent said that it had instructed Messrs. Pinnacle to revalue the suit property and the auctioneers, Messrs. Sportlight Intercepts Kenya Ltd to proceed to issue the relevant notices and thereafter sell the suit property. The said valuers inspected the suit property on 17th November 2009. Immediately thereafter, the Applicant had settled the outstanding loan balance. The deponent went on to say that on 19th November 2009, the Respondent had cancelled the sale instructions given to the Auctioneers. Upon being requested by the Applicant to hand over the Title Deeds of the suit property and discharge the Charge thereon, the Respondent had advised the Applicant that the same could only be done upon settlement of the valuers' and auctioneers' fees and charges. He noted that the Applicant had disputed such fees and charges claiming that no such services had been rendered. Mr. Gitonga concluded his said Affidavit by noting that an order to allow the release of the original Title Deed for the suit property as well as a Discharge of Charge to the Applicant would be injurious to the Respondent since he had not fulfilled his contractual obligation of reimbursing the Respondent for the costs, charges and fees pertaining to the grant and recovery of the said loan facilities. Further, that an order for compensatory damages would be punitive for the Respondent as the Applicant had always been in breach of his contractual obligations.
  4. The Applicant's submissions set out the orders sought by the Application and noted that the Replying Affidavit referred to the fact that the Title Deeds to the suit property and the Discharge of the Respondent's Charge there over could not be achieved until the Applicant had settled the valuers' and auctioneers' charges which amounts had not been specified to the Applicant. The submissions went on to say that the Respondent claimed to have instructed an auctioneer and valuer on the same date that the Applicant paid the outstanding loan. However, the Respondent was maintaining that the Applicant pre-empted the sale by repaying the loan. In the Applicant's opinion this amounted to mere guesswork on the part of the Respondent. It was the Applicant's submission that the valuers and auctioneers fees and charges were not payable by him as he had not been served with the process of realising the security. Shortly after the filing of his preliminary submissions, the Applicant filed a Notice to Act in Person and put in Supplementary Submissions both being dated 3rd March 2013. Such Supplementary Submissions attached further documentation in respect of this suit, which more properly should have been put in by way of further Affidavit. Whichever way, the same were filed without leave of this Court and consequently cannot be considered in reference to the Application.
  5. The Respondent's submissions were filed herein on 8 March 2013. They commenced by setting out the facts as demonstrated by the Respondent's Legal Services Manager in the Replying Affidavit detailing the same as follows:

**“a) The Plaintiff/Applicant on 28<sup>th</sup> December 2006 was granted by the Respondent a loan of Kshs. 400,000/= secured inter alia by a charge over title No. Limuru/Ngecha/2153.**

**b) In breach of our Agreement the Plaintiff/Applicant failed to deposit installments in his account to cater for the monthly installments.**

**c) As a consequence the Plaintiff/applicant was served with two Statutory Notices dated 14<sup>th</sup> August 2007 and 13<sup>th</sup> February 2008 respectively.**

**d) As result of the breach of Agreement the Respondent instructed M/s Pinnacle valuers to revalue the suit property and the auctioneers M/s Sportlight intercepts to proceed and issue the relevant notices and thereafter sell the suit property.**

**e) Upon inspection the Applicant settled the outstanding loan arrears on 17<sup>th</sup> November 2009 and on 19<sup>th</sup> November 2009, the Respondent cancelled the sale instructions given to the auctioneers as settlement of the loan had been**

made.

f) **The applicant requested for the discharge and release of his Title Deed, however, the Applicant advised that the same could only be done upon settlement of the valuers and auctioneers fees which the applicant was in dispute of.**

g) **The Respondent later learnt that the Applicant had on 9<sup>th</sup> December 2009 written to the KACA to investigate his loan account with the Respondent on fraud allegations. The Respondent advised the Applicant that they had no objections to their demand for the Original title Deed and the Discharge of Charge. However, the Respondent stated that it needed to await the outcome of the ongoing investigation by the KACA.**

h) **The Applicant instead opted to file this particular suit”.**

As regards the conduct of the Respondent, it submitted that it was simply exercising its Right of Lien by holding onto the Title Deeds of the suit property until payment was made by the Applicant of the valuers and auctioneers of their fees incurred during the aborted recovery.

6. As regards the right of Lien, the Respondent referred this Court to the case of **Unibilt Kenya Ltd (Under Receivership) v Mukhi & Sons Ltd (2004) 2 EA 340** as referred to in my learned brother **Odunga J's Digest on Civil Case Law and Procedure P. 2595**. Therein there was reference to **Halsbury's Laws of England, 4th Edition Para 502**. In fact, the Respondent attached to its submissions a copy of **Halsbury's Laws of England, 4th Edition, Vol. 3 Para 78**. The Applicant had claimed in his submissions that there was no evidence that he was aware of the sale or that the auctioneer had served him with any notices to that effect. The Respondent then attached to its submissions a copy of an alleged 45 day notice supposedly issued by Sportlight Intercepts dated 17th November 2009. This practice must desist although, luckily for the Respondent, a copy of such Notice, although not contained or exhibited to the Replying Affidavit, the same was attached as an exhibit to the Supporting Affidavit of the Applicant.
7. Where a chargee wishes to hold a chargor responsible for collection charges in relation to an outstanding loan or financial facility, it could only do so where such has been contractually agreed between the two parties. I have perused the Letter of Offer dated 28th December 2006 addressed to the Applicant by the Respondent bank's Limuru Branch exhibited as "DWG 1" to the Replying Affidavit. Nowhere therein does it say anything about collection charges and/or valuers' and auctioneers' fees and charges. The deponent of the Replying Affidavit has not chosen, nor indeed has the Applicant, to exhibit a copy of the Charge document as registered against the title to the suit property. It is usual for such Charge documentation to contain a clause in relation to the Applicant having to pay for collection charges in the event of foreclosure. What is even more surprising in this matter is that the Respondent would not seem to have notified the Applicant as to the extent of the fees and charges of the valuers and the auctioneers. How can the Applicant be expected to pay such sums, without knowing the extent thereof?
8. **Paragraph 78 of Halsbury's Laws of England, 4th Edition** (to which I was referred by the Respondent) under the heading Banker's Lien details the same as follows:

**“The general lien of bankers is part of the law merchant as judicially recognized; it connotes the right of a banker to retain the subject matter of the lien until an indebtedness of the customer is paid or discharged. It attaches to all securities deposited with a banker as a banker by a customer, or by a third party on a customer's account, to instruments paid in for collection, and to money held to the account of a customer, unless there is an express or implied contract between the banker and the customer which is inconsistent with the lien. In the case of money, the banker's right is often a right of set-off; it arises only in relation to the customer's money and does not apply to money paid in under a mistake of fact.**

**Where there is a contract inconsistent with the lien, it determines when the relationship of bankers and customer ends, as on the liquidation of a company which is a customer. The lien is not limited to fully negotiable securities, but has been held to cover share certificates, an order to pay a particular person a sum of money, and an insurance policy”.**

It seems from the above paragraph that the Letter of Offer dated 28th December 2006 is inconsistent with the Lien in that the Respondent claims for the payment of monies for the Valuers' and Auctioneers' fees and charges. In my opinion, the Respondent has provided scant evidence as to why the Applicant should pay such monies. The Notification of Sale supposedly issued by the Auctioneers, Sportlight Intercepts Kenya Ltd, together with its letter addressed to the Applicant dated 17 November, 2009 is really the only evidence to show that Auctioneers were in fact appointed by the Respondent for the sale of the suit property. The Report and Valuation of Pinnacle Valuers Ltd dated 17th November 2009 is more persuasive as evidence but still, there is no fee note exhibited as to the extent of the valuation fees.

9. In light of the above, I do not believe that the Respondent herein is in any position to be exercising its so-called Banker's Lien. The "contract" as between it and the Applicant is silent on the subject. As a result, I allow the Applicant's Originating Summons dated 8th February 2010. I direct that the Respondent will release to the Applicant, within 7 days of the date hereof, the latter's Title Deeds to the suit property. I further direct that the Respondent, within 7 days of service upon it of a Discharge of its Charge over the suit property, will execute and deliver the same to the Applicant. As there has been no prayer in relation to the costs of the Originating Summons, I make no order in that connection.

**DATED and delivered at Nairobi this 31<sup>st</sup> day of July, 2013.**

**J. B. HAVELOCK**

**JUDGE**