



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kaniu v Nganga (Environment & Land Case 17 of 2021)
[2022] KEELC 2259 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2259 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 17 OF 2021**

JM MUTUNGI, J

JUNE 30, 2022

BETWEEN

JACKSON MAINA KANIU APPLICANT

AND

CHARLES NGANGA RESPONDENT

JUDGMENT

1. The applicant by way of an originating summons dated 20th September, 2021 filed on 5th October 2021 instituted the present suit praying for the following orders: -
 1. That there be declaration that the respondent holds half share of LR 10299/1 in trust for the applicant.
 2. That the honourable court be pleased to issue a vesting order in respect of LR 10299/1 in the applicant's favour and order that the whole of it be registered in the applicant name.
 3. That the honourable court be pleased to order the Deputy Registrar to execute the discharge of charge, application for land control board consent, transfer of land forms and any other necessary document to facilitate transfer of LR 10299/1 to the applicant.
 4. That such further orders be made as may be just and expedient.
 5. That the respondent be ordered to pay the cost of this originating summons to the applicant.
2. The originating summons was supported on the grounds set out in the supporting affidavit dated 20th September 2021 sworn by Jackson Maina Kaniu the applicant herein. The applicant deponed that he and the respondent were business partners and were carrying on business under the name Giant Spares and Hardware Limited and as such business partners were advanced money by Co-operative Bank Ltd to purchase the following properties:-



- a. Naivasha/Maraigushu Block8/431(Mwega)
 - b. Naivasha /Maraigushu Block 8/435 (Mwega)
 - c. Land Situated North Kijabe Township in Naivasha – certificate of title No. LR 10299/1.
3. The defendant stated that the bank paid a sum of Kshs.3.5 million for the parcels of land which he and the respondent were to repay equally to the Bank. He further stated the respondent did not pay part of his liability and that following renegotiation with the Bank, the bank vide its letter of 15th January 2002 (“JMKI”) agreed to restructure the existing liabilities of Giant Spares & Hardware Ltd of Kshs.66,200,000 into a long term facility. The bank apportioned the liability between the business partners such that the deponent was required to pay Kshs.33,100,000/=. The deponent explained that he was able to pay his part of the loan to the bank but the respondent did not, prompting the bank to sell the respondent’s properties which he had given as security for his portion of the loan. The contents of paragraphs 6, 7 and 8 of the supporting affidavit which I reproduce hereunder outline the sequence of event:-
6. That the respondent likewise renegotiated with the bank and gave his property as security for half of Kshs66,200,000 which properties were sold by the bank for failure to liquidate his part of the loan.
 7. That after I cleared my share of the loan with the Cooperative bank we agreed with the respondent that he should relinquish his interest in parcel No.
 - (i) Naivasha/Maraigushu Block 8/431 (Mwega).
 - (ii) Naivasha /Maraigushu8/435/(Mwega)
 - (iii) Land situated North Kijabe Township in Naivasha District certificate of title No.LR 10299/11 since he did not pay any money for them and he signed transfer from to Naivasha / Maraigushu Block8/431 (Mwega) and Naivasha /Maraigushu8/435/(Mwega) to me but by some unexplained omission he did not execute the discharge and transfer forms for parcel No.LR10299/1 and when I proceeded to register them they could not be registered due to the non-execution of the same.
 8. That LR 10299/1 is still charged to Cooperative bank to date and still under our both name, annexed herewith kindly find the search certificate for LR 10299/1 and the discharge of charge both marked KML iv & v.
4. The deponent stated that the respondent agreed to have all the three properties set out earlier in this judgment transferred to him and that the respondent signed the transfers but omitted to sign the Transfer in respect of LR No.10299/1. The explanation the deponent gives for seeking that the court issues a vesting order is that the respondent had not paid any money for the redemption of the properties. This explanation however appears to contradict what the applicant deponed under paragraphs 6 of the supporting affidavit that the respondent’s properties were sold by the bank for failure to liquidate his part of the loan. The applicant deponed that he had made all efforts to trace the respondent but had been unable to trace him and that prompted him to make an application for leave to serve him with court process by way of substituted service.
5. The court granted the applicant leave to effect service of the originating summons upon the respondent by way of substituted service on 21st October 2021. The respondent was duly served through an advertisement in the Daily Nation Newspaper of 2nd November, 2021. The respondent did not appear and/or file nay response to the originating summons. The court on 31st January 2022 gave



directions that the Originating Summons be heard and determined on the basis of affidavit evidence and submissions.

6. The applicant filed brief submissions dated 1st March 2022 on the March 2022 where the applicant reiterated the contents of his supporting affidavit. The court has reviewed the application and the affidavit sworn in support and has considered the submissions filed on behalf of the applicant. The issue for determination is whether the applicant has made out a case for grant of the orders he seeks.
7. The applicant's application is premised on the fact that he paid his apportioned portion of the loan owing to the Bank which had been renegotiated and agreed with the bank at Kshs.33,100,000/=. The respondent correspondingly was to pay a similar amount. As per the bank's letter dated 15th January 2002 which recorded the renegotiated position, the applicant's and the respondent's company Giant Spares & Hardware Ltd owned the bank Kshs.66,200,000/= which was restructured into a long-term loan facility with each party being apportioned to pay Kshs.33,100,000/=. It would appear each partner was required to separately secure the portion of the loan apportioned to him. As security the applicant in addition to the suit properties had charged LR No.1870/VII/35 Spring Valley which was in his name. The facility letter from the bank in favour of the respondent was not availed and hence the particulars of the security he had offered are not available to the court.
8. The applicant as per the bank letters of 27th October 2005 and 29th March 2010 further renegotiated the apportionment of his liability to the bank which was reduced from 32,800,000 to Kshs,15,000,000/= which he was required to pay as the portion of his liability to the bank. The letter from the bank to the applicant dated 29th March 2010 summed the position thus:-

Dear sir,

Re- Outstanding Liabilities- Giant Spares Hardware Limited

We refer to your letter dated 3rd March 2010 and the various discussions between yourself and Anestine on the above.

Please find a breakdown of events and payments made by yourself towards the facilities of Giant Spares Hardware Limited:-

1. The debt was split equally between yourself and your co-director in October 2002. Your portion of the debt stood at Kshs.32,800,000 (see enclosed statement of accounts).
2. In the period between October 2002 and September 2005, you made total payments of Kshs.2,700,000.
3. In October 2005 you renegotiated your portion of the debt; Kshs.29,965,000 to a full and final settlement figure of Kshs.15,000,000. The waiver of the balance was to be effected upon full payment of the agreed figure.
4. You have liquidated the discounted debt of Kshs.15 million in full and the Bank has since discharged all securities securing your portion

Accordingly, we hereby confirm that you have been released from any liabilities in the Bank in respect of this particular debt.

We thank you for your co-operation

Yours faithfully,

Anestine Gatakaa Susan K Kitavi



9. On the basis of the contents of the letters from the bank, it is evident the applicant was apportioned his liability by the bank and that is what he settled and not the entire debt owed by Giant Spares Hardware Limited. As per the letter from the bank reproduced above the bank only discharged the securities securing the portion of the applicant's liability. The applicant under paragraph 6 of the supporting affidavit clearly admitted that the respondent equally renegotiated with the bank and offered his property as security for his apportioned liability which property was sold by the bank when he failed to pay his apportioned liability. We do not know when the property was sold and for how much. However, what is evident is that the respondent did also pay and/or contribute to payment of his apportioned liability from the proceeds of his property that was sold by the bank. It cannot therefore be correct to say the respondent never paid anything towards the purchase of the properties.
10. The applicant has alluded to an agreement they had reached with the respondent to have all the three properties itemized hereinabove transferred wholly to his name. No such an agreement has been exhibited by the applicant and neither are the terms of the agreement explicit and/or clear. Such an agreement would be such as would entail and/or involve a disposition of an interest in land and would in terms of section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya have required to be in writing for the same to be enforceable. Section 3(3) of the Law of Contract Act provides as follows:-
 - (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
 - (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
 - (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
 - (i) (i) is in writing;
 - (ii) is signed by all the parties thereto; and
11. The agreement pleaded by the applicant under paragraph 7 of the supporting affidavit is such as required to comply with section 3(3) of the Law of Contract Act to be valid and enforceable. To the extent that it did not, it is a void contract and cannot be enforced.
12. The upshot is that I find the applicant has failed to prove his case on a balance of probabilities. The originating summons is ordered dismissed with no orders as to costs.



**JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY
OF JUNE 2022.**

J M MUTUNGI

JUDGE

