



Motiga v Victoria Commercial Bank Kenya Limited & 2 others (Environment & Land Case E029(OS) of 2021) [2022] KEELC 13277 (KLR) (30 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13277 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E029(OS) OF 2021
LN MBUGUA, J
SEPTEMBER 30, 2022**

BETWEEN

MARY WANJIKU MOTIGA PLAINTIFF

AND

VICTORIA COMMERCIAL BANK KENYA LIMITED 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

NAIROBI DISTRICT LAND REGISTRAR 3RD DEFENDANT

RULING

1. This suit was instituted by way of an originating summons dated July 12, 2021 whereby the plaintiff claimed that she is the registered and absolute proprietor of the property title No Dagorreti/riruta/582 but she had learnt that the 1st respondent was registered as a chargee of the said land via a charge entry No 12 dated April 8, 1998. The plaintiff contended that she had never offered the property as security and she still has the original title to the suit land.
2. The plaintiff therefore sought orders compelling the 2nd respondent to cancel or revoke the charge in relation to entry No 12 of the suit land.
3. At the infancy stage of the suit, parties expressed a desire to explore amicable settlement hence the court referred the matter for mediation culminating in a mediation report dated April 20, 2022. The parties had signed a partial mediation settlement agreement in the following terms:

“ 1. That the plaintiff shall present to the 1st defendant with the necessary deeds of discharge with respect to the charge entry number 12 registered on 7th november 1988 and the 1st defendant shall execute the said instruments of discharge on or before fourteen (14) days from today that is by March 28, 2022.



- i. The plaintiff shall bear the efforts and costs of undertaking the discharge of charge.
 - ii. This agreement settles the plaintiff's case as regards the discharge of charge.”
4. Following the mediation agreement, the suit was marked as settled by consent on May 9, 2022. However, the issue of costs was not settled hence this ruling.
5. The parties were directed to file and serve their submissions in relation to the issue of costs. The applicant also filed a supplementary affidavit to support their claim on costs.
6. The applicant through the supplementary affidavit has given an account of her engagement with the 1st defendant on the issue of discharge but the latter contended that they could not execute the discharge because applicant was not their client. The applicant avers that given the information relayed to her by 1st respondent, this led her to believe that the said charge was as a result of fraudulent transactions. That it was only after filing this suit that the 1st defendant saw the need to fast track the retrieval of documents appertaining to the suit property.
7. In her submissions the applicant drew the attention of the court to the replying affidavit of 1st defendant where the latter had admitted that plaintiff was indeed their client and the charge was registered in their (1st defendant's) favour on account of a loan which had been advanced to the plaintiff. It is averred that the plaintiff sought to have the property discharged but the 1st defendant turned her away.
8. It was submitted that plaintiff acted reasonably under the circumstances hence the court in exercise of its discretion on matters costs should rule in her favour. It is further submitted that the issue of default of the loan was not an issue pleaded in the suit.
9. The plaintiff has apparently expended much resources in seeking to enforce her rights, hence she ought to be compensated and this could have been avoided had the 1st defendant exercised proper due diligence. Thus plaintiff is entitled to costs.
10. In support of her claim, the plaintiff relied on the case, of *County Government of Tana River & another v Hussein Fumo Hiribae* [2021] eKLR and *DGM v EWG* (2021) eKLR.
11. For the 1st defendant, they made reference to their replying affidavit dated November 9, 2021 where they stated that they had established that plaintiff used to be their client. That years back, plaintiff had taken a loan with the 1st defendant but she failed to service the same. Thus in 1989, the bank elected to write off the loan and returned back the original title. However, plaintiff went quiet for many years thereafter without pursuing the discharge of charge of her title.
12. That it was not until year 2020 that plaintiff resurfaced demanding the discharge. 1st defendant was not immediately able to verify the claim of the plaintiff particularly on the issue of the loan advanced.
13. The 1st defendant was willing to execute any necessary documentation to facilitate the discharge as long as the plaintiff would meet all the attendant costs.
14. The 1st defendant has invoked the maxim “equity aids the vigilant and not those who slumber on their rights”, contending that plaintiff has been indolent in getting the original title discharged and that she only woke up 30 years from her slumber. The 1st defendant avers that it is only fair and just that each party be ordered to bear their own costs.



15. The 1st defendant has relied on the cases of *Cecilia Karuru Njogu v Barclays Bank of Kenya & Another* [2016] eKLR, *Republic v Rosemary Wairimu Munene, Ex parte Applicant v Ibururu Dairy Farmers Cooperative Society Limited* [2014] eKLR, and petition No 466 of 2014 (Re Ubureiri Waisswa Kajuko).
16. For the 2nd & 3rd respondents, the submissions are more or less similar to those of 1st defendants, adding that it was incumbent upon the applicant to take the necessary steps to have the property discharged. Thus the land registrar was not at fault and should not be condemned to pay any costs. reference has been made to the case of *Party of Independent Candidate of Kenya v Mutula Kilonzo & 2 others, Kipchumba Murkomen & another v Jubilee Party & 5 others* [2020] eKLR and *John Njue Nyaga v Nicholas Njiru Nyaga & another* [2013] eKLR.

Determination

17. I have considered all the rival arguments advanced herein. The question for determination relates to costs, noting that the case is settled.
18. All the parties have rightly cited the applicable law which is section 27 of the *Civil Procedure Act*, where it is stipulated that:

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”
19. In the Supreme Court of Kenya case of *Baridi Felix Mbevo v Musee Mati & 2 others* [2021] eKLR, it was stated that;

“It is trite that we have an inherent jurisdiction to make orders on costs. In the Jasbir Singh Rai case at paragraph 11, This court established that costs fall under the inherent powers of the court

Further the exercise of this jurisdiction is an issue of judicial discretion which must be exercised judicially and in accordance with reason and justice.”
20. I have keenly perused the pleadings herein. The plaintiff in the body of the originating summons contends that she has never offered her property as security. But in the supporting affidavit to that pleading, she alludes being aware that the property had been charged in favour of international finance company, but the entry of a charge in favour of 1st respondent was made without her knowledge either through error or mistake.
21. The pleading of the 1st defendant is the replying affidavit of Clement Gitau where they aver that they had advanced a loan facility to the applicant through the business name bonneta enterprises. She did not service the loan and the 1st respondent eventually elected to write off the loan. However plaintiff went quiet and did not pursue discharge of her tittle. 1st defendant contends that documents had since been archived, but it is willing to have the discharge.



22. It is trite law that what is pleaded ought to be proved in evidence. There are accusations and counter accusations made in the platform of submissions by the rival parties. None of the claims advanced by the warring parties have been subjected to the rigours of a trial.
23. Section 107 of the [Evidence Act](#) further states that he who alleges bears the burden of prove. If indeed the plaintiff had never offered her land as security to the 1st defendant, then the logical route to have taken was to subject the dispute to a trial where parties would adduce evidence in the usual manner. However, that now is water under the bridge.
24. What I discern is that the alleged charge of the suit land took place years ago on April 8, 1998 as per the content in the body of the originating summons or November 7, 1988 as per the applicant's affidavit in support of the said originating summons. I am not persuaded by plaintiff's argument that she had never offered her land as a security. Whether the encumbrance was registered in 1988 or 1998, the bottom line is that a period of 24-34 years is a long time for the plaintiff not to have pursued the discharge.
25. The justice and fairness of the dispute at hand dictates that the issue of costs should now be put to rest. Noting that parties have settled the main dispute, I direct that each party bears their own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Opiyo for the Plaintiff

M/s Mwaniki for the 1st Defendant

Fatma Ali for the 2nd & 3rd Defendant

Court Assistant: Joan

