



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 455 of 2005**

**PRIXITKUMAR MEGHJI SHAH and**

**SUDHABEN CHANDRAKANT SHAH (the**

**Executor and Executrix of the estate of**

**MEGHJI DEVJI SHAH ..... PLAINTIFFS**

**VERSUS**

**CHANDUBHAI JETHABHAI PATEL ..... 1<sup>ST</sup> DEFENDANT**

**ZAVERCHAND SOJPAL JETHA ..... 2<sup>ND</sup> DEFENDANT**

**CHIMANLAL AMBALALA PATEL ..... 3<sup>RD</sup> DEFENDANT**

**THE MAIDA LIMITED CHARITABLE TRUST ..... 4<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

The plaintiffs took out the originating summons under order XXXVI rule 3(a) of the Civil Procedure Rules seeking for determination of the following questions:-

- 1. Whether the plaintiffs are entitled to a Discharge of the Charge registered as Number I.R. 3323/10 against Land Reference Number 209/2081, Nairobi and if yes, an order directing the defendants to execute the instrument of Discharge freeing the above property from the Charge aforesaid and in default, the Registrar of the High Court be authorized to execute such deed of Discharge as may be presented to him/her by the plaintiff.**
- 2. Whether the plaintiffs are entitled to the costs of this suit.**

The summons is supported by the affidavit of **PRIXITKUMAR MEGHJI SHAH** who is the co executor of the estate of his late father **MEGHJI DEVJI SHAH**. The deceased is the registered proprietor of all that parcel of land known as **L.R.209/2081** herein referred to as the property situated in Parklands area in Nairobi.

According to P.M. Shah, his late father had borrowed some advances amounting to Ksh.100,000/- from the defendants in August 1971. The deceased indicated to the applicant that he paid the loan before he passed away in August 1978. However the deceased did not obtain the title documents from the defendants together with the discharge of charge. The defendants did not execute a Discharge of Charge over the premises. The lease over the premises expired and the Commissioner of Lands extended it for a further term of fifty years on condition that the Discharge of Charge would be obtained to enable the premises be transferred to the applicant by way of transmission of the estate to the beneficiaries under the deceased will.

That is when the applicant discovered the Discharge of Charge has not been availed, he requested his advocate to attend to the recovery of the documents. All the efforts made to obtain the Discharge of Charge from the defendants and the title documents were ignored thus the present suit. The applicant annexed a copy to this application to show that the loan taken by his late father was paid according to correspondences exchanged as the defendants have never laid any claim over the suit premises.

This application was served upon the defendants by advertisement in the local newspapers pursuant to the leave granted on 6<sup>th</sup> October 2006 by Kasango J. Directions were given on 15<sup>th</sup> May 2009 that this matter does proceed for hearing by way of affidavits on record and submissions.

I have considered the application as well as the annexed documents in support of the application. There is no objection despite the application having been served by advertisement in the East African Standard Newspaper of 3<sup>rd</sup> August 2009. The evidence by the applicant is not controverted. Accordingly the matters contained in the application and the supporting affidavit is not contested.

I hereby order that the plaintiffs are entitled to a Discharge of Charge registered as No. I.R. 3323/10 against land Reference No. 209/2081 Nairobi. The defendants are hereby directed to execute the instruments of Discharge of Charge over the above property within thirty (30) days from the date herein. In default the Deputy Registrar of this court is hereby authorized to execute the deed of the discharge as will be presented by the plaintiffs.

The plaintiffs will have the costs of this application.

JUDGEMENT READ AND SIGNED ON 29<sup>TH</sup> OCTOBER 2009 AT NAIROBI.

M.K. KOOME

JUDGE