REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC CIVIL APPLI 1170 OF 2006

In the matter of:*Sections 60 and 100A of the Indian Transfer of Property Act 1882 and the Registration of Titles Act (Cap 281 of the Laws of Kenya)*

In the mater of *Said Mwaniki Hamisi – A registered proprietor of the Properties known as Land Reference Numbers 7495 and 9430*

and

In the matter of:*The (Registered chargee of the Properties known as Land Reference Numbers 7495 and 9340:*

and

In the mater of:*An applicant by Said Mwaniki Hamisi for Orders that the charge of the said properties be discharged*.

RULING

The applicant in this Originating Summons seeks an order for the discharge and release of his title documents L.R. No. 7495 and 9430. The basis of which the applicant seeks discharge is that he has fully settled the outstanding amount owed to the respondent. The applicant has sought by an interlocutory application by way of Notice of Motion dated 27th of October 2005 for the following orders:-

1) That the applicant be allowed to deposit kshs 523, 423. 23 being the sum demand by Respondent in this honorable or in an interest earning account in the joint names of the parties respective advocates.

2) **That upon such deposit of kshs 523.423.23 the Respondent be compelled by this honorable court to release title documents for L.R. Number 7495 and 9430 together with a duly executed discharge of charge to the applicant.**

The applicant has sworn an affidavit in support of that application. He stated that the respondent credited his account with kshs 1, 051, 393. 90. He stated that after that credit the respondent had no legal right to continue holding his aforesaid Titles. His advocate by a letter dated 28th January 1998 made an

offer to pay kshs 350, 000.00 as a basis of settling this matter. The respondent did not reply immediately and indeed it was not until 25th March 2003 that the Respondent advocate wrote to the applicants advocate and thereby informed them that the applicant's loan with the Respondent had been written off. The Respondent Advocate by that letter proposed that this suit be marked as settled on condition that the applicant would pay the respondents legal costs. The applicant advocate responded by a letter dated 27th March 2003 by confirming that the condition for settling this matter was acceptable to the applicant and also requested that they be informed of the costs payable. By a response by a letter dated 1st of April 2003 the respondents advocate said that they were preparing a draft bill of costs. After some lull the respondent advocate by their letter 17th February 2004 enclosed a bill of costs for settlement for applicant. The applicants advocate by their letter dated 7th April. 2004 confirmed that they were holding the amount stated in the bill of costs and requested that that amount be exchanged with the Titles and discharge of charge. Thereafter the applicant advocate wrote several letters and it was not until 10th of June 2004 that the respondent's advocate replied and thereby attached a letter from the Respondent which indicated that after the write-off of the amount in the plaintiff account there was a balance of kshs.523, 423. 23 which was left outstanding. On the 20th of June 2005 the applicant advocate suggested that the amount said to be outstanding in the applicants account be deposited in to the parties' advocate joint account pending the resolution of this matter. There was no response from the respondent to that letter. The applicant deponed that by a sale agreement dated 13th of September 2005 he contracted to sell the properties that are charged to the respondent to Mr. Saleem Esmail. The respondent therefore stated that he requires the properties to be discharged and the titles to be forwarded to him to enable him complete that transaction. As security to the respondent the applicant requested that the court do order the deposit of kshs 523, 423. 23 in the joint names of the party's advocate until the determination of this suit. One would have thought that faced with such an application the respondent would have filed an affidavit in response to assist the court in making a just decision. However against expectations the respondent filed grounds of opposition in the following terms:

1. **That the applicant is misconceived, untenable and an abuse of the court process.**

2. **That the applicant has not fulfilled the requisite conditions under section 60 of the Indian Property Act 1882 to have his property discharged.**

3. **That in any event the applicant is precluded form giving any evidence oral or written which was subject to '*without prejudice*' correspondence.**

In oral submission the respondent advocate said that the court cannot place reliance on the letter written informing the applicants advocate that the applicants account had been written off. The reason he gave is that because the letter is entitled without prejudice. The respondent advocate further stated that the applicant had not complied with section 60 of ITPA and could therefore not obtain the discharge of the properties.

The respondent was 'mum' in respect of the amount alleged to be owed by the applicant. The record clearly shows that at one time the respondent through his advocate had communicated that the applicants account had been written off. Later, the respondent stated that the applicants account after the amount written off was debited had a balance of kshs 523. 432. 32. That was communicated by a letter dated 31st of May 2004. The record clearly shows that despite further communication by the applicants advocate the respondent did not give a response. Even on a suggestion being made by the letter dated 20th June 2005 that the alleged amount outstanding be deposited in the party advocate joint account that suggestion fell on deaf ears. It is not clear to the court why when faced with an application such as the one which is before the court the respondent would fail to show by evidence what if any amount is owed to it by the applicant. The court finds that to be unsatisfactory. For the respondent to quote section 60 of ITPA as being the basis of denying the applicant the prayers that he seeks does not suffice and is not acceptable to the court. In quoting that section it is imperative that the respondent would then say what amounts needed to be paid for the applicant to be in compliance with section 60 of ITPA. Even as the applicant now seeks to deposit the amount stated to be due by the respondent in a joint account they do not respond by saying whether that amount is correct or not. It is a clear position in Law that on all the payments

being made by one who has charged their property they are entitled to have their property discharged and their titles returned. The party that could have assisted the court to know whether that has been fulfilled and yet the respondent failed to do so. What then does the court do? The applicant has found a purchaser. It was stated from the bar that the purchaser has threatened to withdraw from the transaction of that sale if the Titles are not available by 31st January 2007. The applicant is on record on having wished for an early conclusion of this matter. Having failed to obtain a hearing at the Central Registry High Court the applicant through his advocate applied to have matter transferred to this court. In the certificate of urgency in support of the application for the transfer the advocate for the applicant stated that the applicant wished to have an expeditious hearing and disposal of this matter but whenever a date had been given at the Central High Court the matter did not proceed to hearing. The applicant comes out as one who simply wishes to know whether he owes respondent any amount so that this matter can be concluded by return of his Titles and discharge of charge being executed. The respondent on the other hand 'sits back' and even on various enquiries being made by letter fails to respond one way or other. The orders that are sought by the applicant are drastic in that they will leave the respondent without security. But I am of the view that in exercise of the discretion and the inherent power of the court that the just decision of this matter is that an order be made for the applicant to deposit in a joint interest account of the parties advocate an amount of money which is over and above what is offered by the applicant that could secure the respondent. And the respondent in turn should release the Titles to the applicant together with the executed discharge of charge. I am of the firm view that is what the justice of this case cries out for.

I do need to address the issues raised by the respondent in respect of the letter written on without prejudice basis. It is now accepted that even if a document is on without prejudice basis if parties on the basis of such document reach an agreement such a document can be produced as evidence. I therefore do not find an impediment in the use of the respondent letter for it does seem on a prima facie basis to have been accepted to the applicants advocate. I therefore do make the following orders

1. That the applicant do deposit the amount of kshs 1, 000,000 in any Bank acceptable to the parties Advocates into a joint interest account in the names of the parties advocates namely AMOLO & GACHOKA ADVOCATES AND KEMBI – GITURA & COMPANY ADVOCATES until further orders of this court .

2. On the applicant making the deposit in [1] above the respondents are hereby ordered to within 30 days release the document of title in relation to L.R. No. 7495 and 9430 together with the executed discharge of charge in respect of each property.

3. The costs of the Notice of Motion dated 27th of October 2005 shall be in the cause.

Dated and delivered on 30th day of January 2007.

MARY KASANGO

JUDGE