REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

Civil Case 43 of 2007 (OS)

JOHN KIRK NYAGA KAMUNYORI ….....1ST PLAINTIFF/1ST APPLICANT

JOSEPHINE WAWIRA KAMUNYORI ….2ND PLAINTIFF/2ND APPLICANT

VERSUS

CANNON ASSURANCE (K) LIMITED ..…..…DEFENDANT/RESPONDENT

RULING

The applicants **Mr. John Kirk Nyaga Kamunyori** and **Josephine Wawira Kamunyori** are husband and wife. They have charged their property to the respondent for a certain financial accommodation or debt, which has been fully repaid. They have now made the present application to have their property discharged in satisfaction of the repayment of the debt. The property in question is **Flat C8** situate on **L.R. 26439** Nairobi.

It is alleged that the 1st applicant provided legal services to the respondent in various matters and on various dates as a result of rendering legal services an amount of over Kshs 7 million became due in his favour from the respondent. The parties held several meetings in order to resolve the respective debt of each party. On 22nd September, 2006, the debt on mortgage account was Kshs.3,525,906/=, while the 1st applicant was entitled to a sum of Kshs.7,052,613/86 as legal fees.

The parties then agreed to settle their debts and the only way available to the respondent was to set off the mortgage debt from the amounts claimed as legal fees from them. After readjusting the figures the respondent agreed to recover the mortgage debt from the amount due to the 1st applicant in respective legal services rendered. On 22nd September, 2006 after deducting the mortgage debt, the respondent was required to pay to the 1st applicant, a sum of Ksh.2,346,653/86.

The letter dated 22nd September, 2006 was followed by another one written by the financial controller of the respondent who adjusted the final amounts to the 1st applicant. After deducting the mortgage debt, it was agreed that the 1st applicant would be entitled to Kshs.1,039,575/20. the 1st applicant responded to the above letter dated 16th November, 2006 in which he duly agreed with the contents of the letter dated 15th November, 2006 save for an amount of Kshs.10,336/=.

The respondent then replied through a letter dated 27th November, 2006 in which it enclosed a cheque for Kshs.1,049,911/16 in full and final settlement of all the matters indicated in the letter dated 22nd September, 2006 and as adjusted through the letter dated 15th November, 2006. The 1st applicant was requested to acknowledge safe receipt stamping and signing on the duplicate, which he did promptly.

I have considered the application, the affidavit in support and the replying affidavit of **Mr. John Nganga**. I have also taken into consideration the submissions of both Advocates in respect of the matter at hand. I make a finding that a party who has fulfilled his legal obligation in respect of a legal charge is entitled to an absolute discharge of his property. It is not true as contended by the respondent that the applicants have not fulfilled their obligations towards the respondent. **Mr. Thuo** Advocate submitted that the respondent cannot discharge the property because it is registered in the names of two persons. I have

deliberately stated that the applicants are husband and wife. It is also clear that the 1st applicant willingly agreed with the respondent to set off his due legal fees for the amount outstanding in the mortgage account. The agreement is express and gives no room for confession or contradiction.

If one of the debtors has agreed to pay the due debt then, it is not open for the respondent to obstruct the process of redemption. In my view the right of the applicants to redeem or restore the ownership of their property has fully crystallized. The court cannot permit the respondent to clog and/or fetter the right of redemption of the applicants. It is rare to see a borrower urging the court to discharge his property because he has fully paid the debt. The issue raised by the respondent in opposition to the discharge is highly motivated malice. The reasons put forward by the respondent is extraneous to interfere with the right to redemption of one's property. The respondent is entitled to raise whatever objections/defences in each particular case where it feels the 1st applicant is breaching the terms of the earlier agreement. It is not valid reason to refuse to discharge the property when it has deducted/recovered its money from the applicants.

I believe being an Advocate of the High Court of Kenya, the 1st applicant would be ill-advised to breach the terms of the agreement which accorded him substantial benefits. It is alleged that after the agreement, the 1st applicant has reverted to seeking payment of legal fees that had been settled, consents filed in court hence reneging on the proposal to set off all legal fees with outstanding loan amount. If consents were signed and duly filed, then it would be foolish for an Advocate to revisit his earlier agreement especially when he has derived some benefits from that accord. If that were to happen this court would take stern action against the 1st applicant.

It is the contention of the respondent that the 1st applicant has failed to the respondent an unqualified discharge in exchange for the discharge on the mortgage and has subsequently demanded fees for matters already included in the settlement scheme. The 1st applicant can only give an unqualified discharge on all maters covered in the settlement agreement and for which he was duly paid either through the mortgage account or cheques/cash personally received from the respondents. The issue of discharge ought to be limited to the matter which were consensually agreed between the parties and particularly mentioned in the letter dated 22nd September, 2006 and as particularly readjusted in the meeting held between the 1st applicant, the Managing Director and financial controller of the respondent on 14th November, 2006 and indicated in the letter dated 15th November, 2006.

Let me say that the property of the applicants was charged to secure a loan, the balance outstanding on the loan as at 22nd September, 2006 was a sum of Kshs.3,525,906/=, which was deducted from the aggregate fees that was determined between the parties to be due to the 1st applicant. There is no way out of that agreement and the respondent is obliged to observe the terms and conditions of the agreement. It is therefore, my decision that the application is well merited and I order the respondent through its agents, servants and/or employees to execute and deliver to the 1st applicant a discharge of charge of property known as **Flat No. C8** situate on **L.R. No.26439 Nairobi** within the next 14 days. The respondent to ay costs of this application assessed at Kshs.5,000/= and any court fees paid in this matter.

Dated and delivered at Nairobi this 31st day of May, 2007.

M. A. WARSAME

JUDGE