



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

MISC APPLICATION CASE NO. 15 OF 2019

FRANCIS OLOO OMBOGO

SILAS ABONDO OMBOGO.....PLAINTIFFS

Versus

ZILPA ATIENO ODAK.....DEFENDANT

THE NATIONAL BANK OF KENYA LTD.....INTERESTED PARTY

RULING

1. This ruling is in respect of an application by way of Notice of Motion dated 22nd August 2019 and filed in court on 23rd August 2019 pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya. (The application herein). The 1st and 2nd Applicants, **Francis Oloo Ombogo and Silas Abondo Ombogo** respectively through **M/s Ngala Awino and Company Advocates** are seeking orders infra:

a) That this Honourable Court be pleased to order the respondent and the interested party herein to discharge the charge entry entered on 25/07/1991 in favour of the interested party herein in respect to land parcel No. Central Kasipul / Kamuma/1047 (The suit land) and to execute all necessary documents pursuant thereto and in the event of default by either of the parties, the executive officer be ordered to execute the said documents on their behalf.

b) That upon grant of prayer 1 above, this Honourable Court be pleased to grant an order compelling the registrar to register the discharge of the said charge in respect to the suit land in the official register of land.

2. The application is anchored on a 12 paragraphed affidavit jointly sworn by the applicants on even date together with a copy of a decree pursuant to judgment of this court delivered on 31st May 2018 marked as “DOO-1” and a copy of a letter dated 8th November 2018 by learned counsel for the applicants addressed to the interested party, National Bank of Kenya Ltd on the issue and marked as “DOO-2” annexed thereto. The application is also anchored on grounds (a) to (g) set out in its face which I find superfluous to reproduce herein.

3. Briefly, the applicants lament that they originated a suit, Migori Environment and Land Case number 306 of 2017 against the respondent **Zilpa Atieno Odak**. That judgment thereof was rendered in favour of them as per the decree marked as “DOO-1” but execution has been hampered by a subsisting charge on the suit land, LR NO. Central Kasipul / Kamuma / 1047. That the interested party has been silent on the inquiry made by the applicants as per letter marked as “DOO-2” yet there is intimation by the respondent that the loan facility in regard to the charge had been cleared long time thus precipitating this application.

4. The respondent and the interested party were duly served as revealed in the affidavits of service sworn on 11th November 2019, 19th September 2019 and 26th November 2019 by **Julius Otieno Raminya, Denis Anyira** as well as **George Ngala Awino**, the applicants’ counsel respectively. By a Notice of appointment of Advocates dated 2nd December 2019 filed on even date, **M/s Odingo and Company Advocates** are on record for the Respondent while **M/s Nyachae & Ashitiva Advocates** appear for the interested party as per Notice of Appointment of Advocates dated 16th December 2019 and filed in court on 19th December, 2019.

5. Be that as it may, the respondent and the interested party failed to react to the application.

However, none of the parties complied thus, precipitating this ruling; See Order 51 Rule 16 of the Civil Procedure Rules, 2010.

6. On 5th November 2020, this court ordered and directed that the application be argued by way of written submissions further to Order 51 Rule 16 of the Civil Procedure Rules, 2010; see also Practice Direction number 33 of the Environment and Land Court Practice Directions, 2014.

7. Accordingly, on 12th November 2020, the applicants' counsel filed three (3) paged submissions dated 10th November 2020 and identified a single issue for determination namely whether the charge should be discharged. Counsel relied on Section 85 of the Land Act, 2016 (2012) on the right to discharge and Section 19 of the Limitations of Actions Act Chapter 22 Laws of Kenya relating to actions to recover mortgage money or proceedings of sale of land. Counsel termed the application meritorious and urged the court to allow the same.

8. On the other hand, learned counsel for the respondent and learned counsel for the interested party failed to file submissions in this application

9. I have duly considered the application in its entirety, the applicant's submissions and the fact that the application is not opposed. The only point for determination is whether the charge in respect of the suit land should be discharged. So, I approve the issue as framed in the applicant's submissions accordingly.

10. At the outset, it must be observed that in the **Black's Law Dictionary 10th Edition at page 282**, the term "Charge" means; "**An encumbrance, loan or claim**".

11. It is indicative from the document marked as "DOO2" that there is a subsisting charge over the whole of the suit land registered on 25th July 1991. That the charge has not been discharged.

12. I take into account the entire decree (DOO-1) which is in favour of the applicants. Their joint supporting affidavit and grounds (b) (c) and (d) of the application show that the decree cannot be executed due to the subsisting charge.

13. A party has a vested right to the judgments which ought to be effected, see **Shahmad vs Shamji Bros & Another (1957)EA 438**.

14. I am guided by Section 85 and 19 (1) (supra) cited in the applicants' submissions. Section 13 (2) (d) of the Environment and Land Court Act, 2015 (2012) gives this court power to deal with instruments granting enforceable interests in land. I think, a charge is one of such instruments.

14. In the Black's Law Dictionary (supra) at page 918, the term "instrument" is defined thus:

"A written legal document that defines rights, duties, entitlements, or liabilities, such as a statute, contract, will, promissory note, or share certificate. Also termed legal document."

15. It is quite clear that the applicants have a judgment and decree which ought to be effectual as per **Shahmad case (supra)**. In that regard, the same was to be expedited in the spirit of Article 159 (2) (b) of the Constitution of Kenya, 2010, stipulates:- **"Justice shall not be delayed"**

16. To that end, I find the application cogent, unopposed and meritorious. I proceed to allow the same in terms of Orders 1 and 2 sought therein.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 20th day of January, 2021

G.M.A. ONGONDO

JUDGE

In presence of :-

Tom Maurice - Court assistant

Mr. Mulisa holding brief for Ngala Awino for the applicant