



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1080 OF 1977

**JOSEPH KIHUGU MWENJA (Suing as a personal representative of
WAWERU KIHUGU).....PLAINTIFF**

VERSUS

**JOSEPH MWANGI (Acting as a personal representative of
ESTON MBOGO).....1ST DEFENDANT**

THE DISTRICT LAND

REGISTRAR.....2ND DEFENDANT/RESPONDENT

AND

FREDRICK KAMAU SIMON.....INTERESTED PARTY

RULING

What is before the court is a Notice of Motion application dated 21st November, 2019 brought by the plaintiff seeking the following orders;

1. That the plaintiff, Joseph Kihugu Mwenja be substituted with Paul Thuo Waweru.
2. That the orders issued herein on 5th April, 1984 or 10th April, 1986 and/or 30th October, 1984 be rectified by the cancellation of the name of Kenya Commercial Finance Company Limited wherever it appears and inserting the name Kenya Commercial Bank Limited in place thereof and the Charge registered and entered in the Green Card for the parcel of land known as Loc. 2/Mairi/2 (hereinafter referred to as the "the suit property") on 30th May, 1997 be cancelled forthwith.
3. That the charge registered on 30th May, 1997 in favour of Kenya Commercial Finance Company Limited and/or Kenya Commercial Bank Limited be cancelled and the Green Card in respect of the suit property be rectified forthwith in accordance with the orders that were issued on 5th April, 1984 and a new title be issued in favour of the plaintiff.
4. That the charge registered on 30th May, 1997 against the title of the suit property be deemed as a nullity in law in accordance with the orders that were issued herein on 5th April, 1984 and/or other consequent orders of the court.
5. That the orders given on 5th April, 1984 be effected by the cancellation of the name of Fredrick Kamau Simon and inserting the name of Waweru Kihugu or the legal representatives or administrators of the estate of Waweru Kihugu.
6. That the Land Registrar Muranga do issue a new title in respect of the suit property in the name of Joseph Kihugu Mwenja the personal representative of Waweru Kihugu and/or the plaintiff.
7. That the court does issue immediate orders as deemed fit and expedient on its own motion.
8. That both the names of Kenya Commercial Finance Company Limited and/or Kenya and/or Kenya Commercial Finance Company Limited be cancelled from the Green Card for the suit property.

The plaintiff's application that was supported by the affidavit of Paul Thuo Waweru sworn on 21st November, 2019 was brought on the following grounds: The plaintiff was the registered proprietor of the suit property. The court had given orders directing the 2nd defendant to give effect to the orders that were given by the court on 5th April, 1984. Despite service of the said orders upon the 2nd defendant, the 2nd defendant had failed to comply with the same. The plaintiff had suffered a lot of inconvenience as a result of the 2nd defendant's failure to comply with the said orders. The plaintiff was deceased and that both the plaintiff and Paul Thuo Waweru, the applicant herein were both administrators of the estate of Waweru Kihugu Mwenja.

The plaintiff's application was not opposed. When the application came up for hearing on 23rd March, 2021, the interested party's advocate told the court that he no longer had instructions to act for the interested party. On her part, the advocate for Kenya Commercial Bank Limited told the court that as far as the bank was concerned, the charge in its favour had been cancelled. The plaintiff's advocate relied entirely on the affidavit filed in support of the application and urged the court to allow the same as prayed. I had given the history of this suit in my ruling of 20th September, 2018. This suit was brought by Waweru Kihugu, deceased against Eston Mbogo, deceased on 28th May, 1977 seeking a declaration that Eston Mbogo held the suit property in trust for him and an order compelling Eston Mbogo to transfer the property to him. Eston Mbogo died on 5th February, 1979 during the pendency of the suit and was substituted by his son and legal representative Joseph Mwangi (hereinafter referred to only as "the 1st defendant"). The 1st defendant was registered as the owner of the suit property on 24th September, 1979. The suit went to trial and a judgment was entered in favour of Waweru Kihugu, deceased against the 1st defendant on 12th August, 1980. In the said judgment, the court made a finding that Eston Mbogo held the suit property in trust for Waweru Kihugu, deceased and ordered the 1st defendant to transfer the suit property to Waweru Kihugu, deceased. The said judgment was neither set aside nor varied. With the full knowledge of that judgment, the 1st defendant purported to sell and transfer the suit property to the interested party on 15th March, 1982 who proceeded thereafter to charge the property to Kenya Commercial Finance Company Ltd. on 25th August, 1982. Following the judgment aforesaid in favour of Waweru Kihugu, the Deputy Registrar executed an instrument of transfer of land on 11th January, 1983 in favour of Waweru Kihugu in respect of the suit property and on 6th April, 1984 and 30th October, 1984, the court ordered that the register of the suit property be rectified by the cancellation of the name of the interested party as the owner of the suit property and registration of the suit property in the name of Waweru Kihugu as the owner thereof. The court also declared the purported charge of the suit property to Kenya Commercial Finance Company Ltd. as fraudulent and ordered it cancelled. The said orders made by the court on 6th April, 1984 and 30th April, 1984 have neither been set aside nor vacated. The suit property was however not registered in the name of Waweru Kihugu the said orders notwithstanding. Waweru Kihugu died before the suit property was transferred to him and was substituted herein by one of his personal representatives, Joseph Kihugu Mwenja (hereinafter referred to only as "the plaintiff"). With the full knowledge of the plaintiff's interest in the suit property, the interested party once again purported to charge the suit property to Kenya Commercial Bank Limited on 30th May, 1997 to secure further advances that were made to him.

On 7th August, 2000, the plaintiff out of apprehension that the suit property could be sold by the interested party filed an application dated 1st August, 2000 seeking an order of inhibition inhibiting any dealing with the suit property until further orders by the court and an order compelling the 2nd defendant to register the suit property to the name of Waweru Kihugu, deceased. The plaintiff's application was heard ex-parte by Amin J. on 8th August, 2000 who granted an order of inhibition pending the hearing of the application inter-partes. The said order of inhibition was registered against the title of the suit property on 21st August, 2000. When the application came up for inter-partes hearing on 5th September, 2000, Rawal J. granted an order compelling the 2nd defendant to register Waweru Kihugu, deceased as the owner of the suit property. The court did not deal with the issue of inhibition because it was spent. The order made by Rawal J. on 5th September, 2000 has not been varied or set aside.

Neither the plaintiff nor his father, Waweru Kihugu deceased has to date been registered as the owner of the suit property despite the various orders that I have referred to above. On 20th September, 2018, the court for reasons I have given above dismissed the interested party's application for the lifting of the order of inhibition aforesaid that was registered against the title of the suit property on 21st August, 2000 pursuant to the order that was given by Amin J.

On 17th October, 2001, the plaintiff filed an application seeking an order that the District Land Registrar, Muranga be committed to civil jail for a period of 6 months for disobeying the court order that was made on 5th September, 2000 by Rawal J. and issued on 22nd September, 2000 directing the said Land Registrar to cancel the name of the interested party from the register of the suit property and to register Waweru Kihugu as the owner of the property. Following the dismissal of the interested party's application seeking the lifting of the said inhibition on 20th September, 2018, the plaintiff listed the said contempt application for hearing. Pursuant to the said application, the court made an order on 26th October, 2019 summoning the District Land Registrar, Muranga to appear in court on 17th July, 2019 to show cause why he should not be committed to jail for disobeying this court's orders aforesaid.

On 17th July, 2019, one, Alice Mutitu, the District Land Registrar, Muranga, appeared in court pursuant to the said Notice to Show Cause. She told the court that the 2nd defendant had not complied with the said court orders because there was a charge that was registered against the title of the suit property on 30th May, 1997 in favour of Kenya Commercial Bank Limited that was still in place. The court after considering the reasons that were given by the said Land Registrar ordered the plaintiff to move the court appropriately on the issue of the said charge that had prevented the enforcement of the various orders given by the court.

It is pursuant to the said direction that the present application has been brought. On 21st September, 2019, the court directed the plaintiff to serve the application upon the defendant, the interested party and Kenya Commercial Bank Limited which is the owner of the charge registered against the suit property. The application was duly served.

I have considered the plaintiff's application. In my view, the application raises nothing new. Most of the orders sought save for the substitution of the plaintiff and the lifting of the charge in favour of Kenya Commercial Bank Limited had been granted by the court. With regard to the order seeking the substitution of the plaintiff with Paul Thuo Waweru, I am satisfied that the order is merited. From the certificate of confirmation of grant in respect of the estate of Waweru Kihugu dated 30th March, 2007, the deceased had two administrators

namely, Joseph Kihugu Mwenja, the current plaintiff and the applicant, Paul Thuo Waweru. There is evidence on record that the current plaintiff died on 24th August, 2015. Since Joseph Kihugu Mwenja, the current plaintiff is deceased and the applicant, Paul Thuo Waweru is the surviving administrator of the estate of Waweru Kihugu, he is competent to be substituted in this suit to protect the interest of Waweru Kihugu. With regard to the application seeking the cancellation of the charge registered against the title of the suit property in favour of Kenya Commercial Bank Limited(KCB) on 30th May, 1997, again, I find merit in the application. As at the time the interested party charged the suit property in favour of KCB, an order had already been made by this court on 5th April, 1984 cancelling his title to the suit property. An earlier charge he had created in favour of Kenya Commercial Finance Company Ltd. on 25th August, 1982 had also been declared by the court as fraudulent on 30th October, 1984. It follows therefore that the interested party had no interest in the suit property that he could charge to KCB. The charge in favour of KCB was therefore illegal, null and void. As I have stated earlier, the advocate for Kenya Commercial Bank Limited told the court that as far as the bank was concerned, the charge in its favour had been cancelled. This is however not reflected in the register of the suit property. The plaintiff is in the circumstances entitled to have the said charge cancelled as it is impeding the enforcement of the decree that was issued herein in favour of Waweru Kihugu on 12th August, 1980 and the subsequent orders by the court made in aid of the enforcement of the said decree.

In the final analysis and for the foregoing reasons, I find merit in the plaintiff's application dated 21st November, 2019. The application is allowed on the following terms;

1. Paul Thuo Waweru in his capacity as a personal representative of the estate of Waweru Kihugu is substituted as plaintiff in this suit in place of Joseph Kihugu Mwenja.
2. The Charge registered in favour of Kenya Commercial Bank Limited on 30th May, 1997 as entry No. 3 in the encumbrance section of the register of the parcel of land known as LOC.2/ Mairi/2 is hereby cancelled.
3. The Land Registrar in charge of Muranga shall forthwith cancel the name of the interested party, Fredrick Kamau Simon (also known as Frederick Kamau Simon) in the register of the parcel of land known as LOC.2/ Mairi/2 together with the land certificate that was issued to him as the proprietor thereof and shall register the property in the name of Paul Thuo Waweru as legal representative of Waweru Kihugu as the proprietor of the said parcel of land.
4. The Land Registrar in charge of Muranga shall issue a new land certificate or title deed as the case may be in respect of the parcel of land known as LOC.2/ Mairi/2 in favor of Paul Thuo Waweru as legal representative of Waweru Kihugu.
5. The costs of the application to be in the cause.

DELIVERED AND DATED AT NAIROBI THIS 25TH DAY OF MARCH 2021

S. OKONG'O

JUDGE.

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Mr. Kahuthu for the Plaintiff

N/A for 1st Defendant

N/A for the 2nd Defendant

N/A for KCB

Mr. Gatitu for the Interested Party

Ms. C. Nyokabi-Court Assistant