



REPUBLIC OF KENYA



Makori & another v Cooperative Merchant Bank Limited & another (Environment & Land Case 686 of 2016) [2023] KEELC 16252 (KLR) (9 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16252 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 686 OF 2016**

M SILA, J

MARCH 9, 2023

BETWEEN

BENARD GESORA MAKORI 1ST PLAINTIFF

KEPHA ONDUKO MAKORI 2ND PLAINTIFF

AND

THE COOPERATIVE MERCHANT BANK LIMITED 1ST DEFENDANT

EMERG INVESTMENTS LIMITED 2ND DEFENDANT

RULING

1. The application before me is that dated 17 March 2022 filed by the 2nd defendant. The application seeks an order directing the Chief Land Registrar to discharge the order registered as entry No. 24 in the title to LR No. 631/60/IV, IR No. 9454/17 (the suit property). The application is opposed.
2. To put matters into context, the 1st plaintiff was previously the owner of the suit property. He charged the title to the 1st defendant to secure some financial accommodation. The facility was not repaid as scheduled which prompted the 1st defendant to exercise its statutory power of sale. Initially the 1st defendant entered into a private treaty agreement, dated 1 July 2004, with the 2nd plaintiff to dispose of the suit property. The agreement was not performed and the 1st defendant subsequently sold the property to the 2nd defendant vide an agreement dated 6 October 2005. The transfer to the 2nd defendant was eventually registered on 27 April 2006. The 2nd plaintiff contested this sale claiming that the 1st defendant fraudulently sold the suit property to the 2nd defendant. In this suit, the plaintiffs sought orders inter alia of specific performance on the agreement dated 1 July 2004 between the 2nd plaintiff and the 1st defendant and cancellation of the title of the 2nd defendant. The case was heard by Mutungi J who delivered judgment on 10 November 2017. The suit of the plaintiffs was dismissed. Aggrieved, the plaintiffs lodged an appeal to the Court of Appeal, being Kisumu Civil Appeal No. 37 of 2018, Benard Gesora Makori & Kepha Onduko Makori vs The Cooperative Merchant Bank



Limited and Emerg Investment Limited. The appeal was heard and judgment delivered on 18 June 2021. The appeal was dismissed with costs.

3. In the supporting affidavit to this application, sworn by Stephen Kipkorir Bundotich, who is also counsel on record for the applicant, it is deposed that prior to the determination of the suit, the plaintiffs had caused an encumbrance to be registered as entry No. 24 in the title of the suit property. He has deposed that the honorable court held that the suit within which the encumbrance was registered had abated. He avers that there is no legal basis for the encumbrance to continue subsisting and it should be discharged. He has annexed copies of the judgment of this court and of the court of appeal and a copy of the title and entry in question.
4. The application is opposed by the replying affidavit of Benard Gesora Makori, the 1st plaintiff herein. He contends that the application is made in bad faith for reason that the applicant is aware that there is a pending application before the Court of Appeal for review of its judgment. He has annexed a copy of the application. He believes that his application has high chances of success, and if successful, it will lead to embarrassment of this court. He believes that this application should be stayed pending the hearing of the review application. Nothing was filed by the 2nd plaintiff or the 1st defendant.
5. I have considered the matter alongside the submissions of counsel.
6. The applicant seeks this court to order the Chief Land Registrar to remove entry No. 24 in the title. I have looked at this entry. The photocopy before me is not very clear despite me allowing the applicant to file a supplementary affidavit to annex a clear copy. What I can read is as follows: Court order Civil Case No. 1534 of 2005 restraining any dealing with the within written land. This is registered on 22 May 2006. It is apparent from the above that the order sought to be lifted was granted, not by this court and not in this suit, but by another court in another suit. The order was not annexed to this application. It was said that the suit where the order was given was marked abated. I have seen no order of abatement annexed. But whatever the case, my view is that such application needs to be filed within the suit where the order was issued. Even assuming that the suit has abated, nothing stops an application from being filed, so as to lift an order that had been issued therein. It will not be wise for this court to proceed to order the lifting of an order issued in another file forget for a moment that the said order is not even annexed.
7. Apart from the above, I am also a bit puzzled why the applicant himself did not swear this affidavit. You would expect that since it is the applicant who owns the suit property, then the application would be supported by his affidavit, giving reasons why he thinks that the entry should be lifted. For reasons I am unable to comprehend, the supporting affidavit is sworn by counsel. It has been said time without number that counsel need to restrain themselves from swearing affidavits which ought to be sworn by their clients. The advocate has no stake in the title and I am at a loss as to why it is him, and not his client, who has sworn the affidavit.
8. For the above reasons, I am not persuaded to allow this application. As I have mentioned, the application, in my view, needs to be made in the file where the order was issued.
9. This application is hereby dismissed with costs to the plaintiffs.
10. Orders accordingly.

DATED AND DELIVERED THIS 9 DAY OF MARCH 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT



AT KISII

