



**Mutuma (Suing as the Chairman of EAPC Kaithe Church) & another v M'ambutu
(Environment & Land Case 55 of 2015) [2023] KEELC 16022 (KLR) (1 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16022 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 55 OF 2015**

**CK NZILI, J
MARCH 1, 2023**

BETWEEN

**SAMUEL MUTUMA (SUING AS THE CHAIRMAN OF EAPC KAITHE
CHURCH) 1ST PLAINTIFF**

EAST AFRICAN PENTECOSTAL CHURCHES 2ND PLAINTIFF

AND

CORNELIUS MWORIA M'AMBUTU DEFENDANT

RULING

1. The application dated January 26, 2023 seeks to correct a typing error in paragraph 73 of the judgment delivered on November 30, 2022 where the suit property is referred to as LR No Nyaki/Kithoka/3940 instead of 3942. The 2nd request is for the court to discharge the restrictions on the title to the suitland registered by Kenya Industrial Estate Limited. The application is supported by an affidavit of Samuel Mutuma sworn on January 26, 2023 where he has attached the official search as an annexure marked SM "3".
2. The application was served upon the defendant-respondent as well as the Kenya Industrial Estates Ltd and a return of service filed on February 7, 2023, sworn by Paul Irungu Mwangi on February 2, 2023.
3. In his replying affidavit sworn on February 3, 2023 Cornelius Mworira M'Ambutu, the defendant admitted that he borrowed a loan facility from the Kenya Industries Estates Limited using the title to LR No Nyaki/Kithoka/3942 which is yet to be discharged. He averred that the company ought to have been joined as a party to the suit.
4. The duty to prepare and execute a discharge upon repayment of a loan rests on the borrower's lawyers under Part II of the *Advocates Remuneration Order* as read together with the *Advocates Act*. In this case, the burden to prove any outstanding loan or the reason for non-discharge of the charge was on both the defendant and the company under Section 107 of the *Evidence Act*. After they were served



with this application. The defendant in his pleadings never raised the issue of the title deed as held by the said third party.

5. Section 85 of the Land Act provides that a chargee shall upon payment of all money secured by a charge and the performance of all other conditions and obligations under the charge is entitled to discharge of the charge under Section 102 thereof See Wais Capital Ltd vs Dhadho Gaddae Godhana (2019) eKLR.
6. In Re Tabitha Munyao Muanku (2018) eKLR, the applicant whose husband had charged the property with a company that could not be traced had sought from the court to discharge the charge. The court allowed for the same since the chargee had ceased to operate business or not be traced.
7. In the case of KCB vs Kipngeno Arap Ngeny CA No 10 of 2001 Nairobi the court resorted to equitable jurisdiction to set aside what it termed as a harsh, unconscionable, or an oppressive bargain. After this application was served upon the defendant, he did not attach any demand letter from the third party for any outstanding loan arrears or the reason why the restriction should not be lifted. No periodic statement of account was filed for any outstanding amount from the defendant.
8. In the case of Rajnikantkhetshi Shah vs Habib Bank AG Zurich (2016) eKLR, the court took the view that a waiver of a right or relief in law may be express or implied. The court found the conduct inconsistent with the very right of the bank under the charge to realize the security given in the charge. The court found the conduct by the bank as tantamount to indolence, inordinate delay of 33 years, acquiescence, and estoppel against it to enforce its rights. The court declared the continued holding of the legal charge as unlawful, inequitable, and unconscionable.
9. Looking at the facts in this matter, the plaintiff has been occupying the suit property for a long time. The chargee has never bothered the occupation by the plaintiff nor raised any rights to redeem the property, if at all there was any outstanding debt. Even after being notified of this application, no affidavit has been filed to oppose the application.
10. Consequently, my finding is that the application has merits. The amendment to the judgment is allowed. The defendant shall not later than 7 days from the date hereof, execute and hand over to the plaintiff a discharge of charge on LR No Nyaki/Kithoka/3942. In default the Deputy Registrar of the court to execute the same in favour of the plaintiff.
11. Costs to the applicant.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 1ST DAY OF MARCH, 2023

In presence of:

C/A: Kananu

Karunja for plaintiff/applicant

HON. C.K. NZILI

ELC JUDGE

