



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA

E.L.C CASE NO. 799 OF 2013

BENINA WAIRIMU KABUI.....PLAINTIFF/APPLICANT

VERSUS

JOHN KINYUA KABUI.....1ST DEFENDANT/RESPONDENT

FRANVIS MURIITHI KABUI.....2ND DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant filed a Notice of Motion dated 15th November, 2021 on 16th November, 2021 whereby she is seeking the following orders: -

a. That the Honourable Court do issue summons for the attendance in court of the Chief Executive Officer Fortune Sacco Society Limited (formerly Kirinyaga District Farmers Sacco) for purposes of tendering evidence on the loan status for the title numbers Mutira/Kaguyu/608 in respect of the 1st Defendant, JOHN KINYUA KIBUI ID/NO. xxxx and or alternatively that the Honourable Court do order the Chief Executive Officer Fortune Sacco Society Limited (formerly Kirinyaga District Farmers Sacco) to issue a loan status statement and or discharge of charge in respect to title number Mutira/Kaguyu/608 in the names of the 1st Defendant, JOHN KINYUA KIBUI ID/NO. xxxx and or alternatively the 1st Defendant do deliver the certified loan status statement in respect to the suit property within the next 7 days from the date hereof.

b. That the Honourable Court do issue summons for the attendance of the County Secretary – County Government of Mombasa for purposes of tendering evidence on the loan status for the title number Mutira/Kaguyu/609 in respect of the 2nd Defendant, FRANCIS MURIITHI ID/NO. xxxx with regard to MOMBASA MUNICIPALITY TRADE JOINT LOAN BOARD and/or alternatively that the Honourable Court do order the County Secretary – County Government of Mombasa to issue a loan status statement and/or discharge of charge in respect to title number Mutira/Kaguyu/609 in the names of 2nd Defendant do deliver the certified loan status statement in respect to the suit property within the next 7 days from the date thereof.

c. That the Court do grant other or further relief the Honourable Court may deem fit to grant.

d. That the costs of this application be provided for.

APPLICANT'S CASE

2. The Applicant's application is based on grounds shown on the face thereof and a Supporting Affidavit sworn on 15th November, 2021.
3. The applicant's case is that on 12th July, 2019 judgment was entered in her favour. However, she has had difficulties in executing the resultant decree in view of the charges noted on the encumbrance section of title numbers Mutira/Kaguyu/608 and 609.
4. She stated that the Defendants, Fortune Sacco Society Limited and the County Government of Mombasa have failed to deliver the discharge of charge and/or loan statement/s in respect to the said title numbers, hence necessitating the filing of the application.
5. She further stated that she is sickly and being the successful party, she ought to be allowed to enjoy the fruits of the said judgment.

RESPONDENTS' CASE

6. The Respondents opposed the instant application vide the 2nd Respondent's Replying Affidavit sworn on 24th November, 2021 and filed on 29th November, 2021.
7. The Respondents case is that it is true that they had charged the suit lands before judgment herein was entered and thus, they act as security for the financial facility advanced.
8. He stated that the orders sought will directly affect parties who have never been parties to this suit and any request for disclosure would amount to breach of customer confidentiality.
9. He further stated that the application amounted to intimidation and goes against the rules governing lending to clients and security thereto.
10. He also stated that the application has been brought in bad faith as the orders sought serve as a fishing expedition.
11. He prayed that the application be dismissed with costs as it lacks merit and is an abuse of the court process.

ANALYSIS

12. I have considered the application, grounds in support, supporting affidavit as well as the Replying Affidavit in opposition thereto.
13. I have also perused the judgment delivered by this Honourable Court on 12th July, 2019 as well as the resultant decree which was issued on 19th August, 2019.
14. Indeed, the same was delivered in favour of the Plaintiff to the effect that the suit lands are held by the Respondents in trust for themselves and their family members.
15. The Defendants were further ordered to subdivide the suit lands into equal portions and transfer the same to the Plaintiff and the other family members.
16. The Plaintiff has been unable to enjoy the fruits of the said judgment due to the charges noted in the encumbrance section of the said titles as evidenced by the certificates of official search which are annexed as **BWK 2(a)** and **BWK 2(b)** in the supporting affidavit.
17. The Plaintiff has stated that her efforts to get information on the status of the said charges from the Defendants, Fortune Sacco Society Limited and the County Government of Mombasa have been futile.
18. This has been admitted by the 2nd Defendant in his Replying Affidavit who states that the disclosure would amount to breach of customer confidentiality.
19. I am of the view that in light of the judgment aforementioned, the Plaintiff accrued a right to the suit lands which is protected under **Article 40 (1) of the Constitution of Kenya** which provides that: -

“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property –

(a) Of any description; and

(b) In any part of Kenya.”

20. It thus follows that failure to discharge the properties and or grant the Plaintiff access to the information pertaining to the said encumbrances is a threat to the Plaintiff's right to property as provided above.
21. **Article 35 (1) of the Constitution** of Kenya further provides that: -

“Every citizen has the right of access to –

(a) Information held by the state; and

(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom”

22. Further **Section 4 of the Access to Information Act** provides that: -

(1) Subject to this Act and any other written law, every citizen has the right of access to information held by — (a) the State; and (b) another person and where that information is required for the exercise or protection of any right or fundamental freedom. (2) Subject to this Act, every citizen's right to access information is not affected by — (a) any reason the person gives for seeking access; or (b) the public entity's belief as to what are the person's reasons for seeking access. (3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.

23. From the above provision, I find that the Applicant has exhausted the available administrative mechanisms by applying in writing for the information on the encumbrances above stated vide the letter dated 25th October, 2021 annexed as **BWK3**.

24. I also find that the information sought by the applicant is crucial in order to exercise and protect her right to the suit lands and thus the respondent's argument that the same will amount to customer confidentiality is untenable.

CONCLUSION

25. From the foregoing , I find that the said application is merited and the same is allowed as follows:-

a. The 1st Defendant be and is hereby ordered to deliver a certified loan status statement in respect to the title number MUTIRA/KAGUYU/608 within the next 7 days from the date hereof.

b. In default of (a) above, the Chief Executive Officer Fortune Sacco Society Limited (formerly Kirinyaga District Farmers Sacco) be and is hereby ordered to issue a loan status statement in respect to title number MUTIRA/KAGUYU/608 registered in the names of the 1st Defendant, JOHN KINYUA KIBUI - ID/NO. xxxx and a discharge of charge in the event that there is no outstanding loan.

c. The 1st Defendant be and is hereby ordered to deliver the certified loan status statement in respect to the title number MUTIRA/KAGUYU/609 within the next 7 days from the date hereof.

d. In default to (c) above, the County Secretary – County Government of Mombasa be and is hereby ordered to issue a loan status statement in respect to title number MUTIRA/KAGUYU/609 in respect of the 2nd Defendant, FRANCIS MURIITHI - ID/NO. xxxx with regard to MOMBASA MUNICIPALITY TRADE JOINT LOAN BOARD and discharge of charge in the event there is no outstanding loan.

e. Costs be and is hereby awarded to the Plaintiff/Applicant to be paid by the Respondents jointly and severally.

RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 4TH DAY OF FEBRUARY, 2022.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of:-

1. *Ms Kimata holding brief for Mr. Ombachi for Defendant*
2. *Plaintiff/Advocate – absent*
3. *Kabuta – Court clerk.*