



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**ELC NO. 541 OF 2012**

**JONAH OKUTOI.....1<sup>ST</sup> PLAINTIFF**

**PEGGY CHRISTINE OKUTOI.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**NAJIB JIWA.....1<sup>ST</sup> DEFENDANT**

**STANDARD CHARTERED BANK (K) LIMITED.....2<sup>ND</sup> DEFENDANT**

**S. MBUTHIA T/A PRIME AUCTIONEERS.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of Notice of Motion dated 27/6/2021 in which the Plaintiffs/Applicants seek the following orders:-

a. Spent

b. The Honourable court be pleased to make an order for specific performance against the 2<sup>nd</sup> Defendant/Respondent to prepare and execute a discharge of charge in respect of property Kitale Municipality Block 4/462 and release the certificate of lease to the Applicant.

c. Pending discharge of the said charges, the 2<sup>nd</sup> Defendant by itself, its servants or agents be restrained from offering for sale, selling, or transferring, charging or howsoever disposing of plaintiffs' title to property Kitale Municipality Block 4/462 or its charge therein to 3<sup>rd</sup> parties.

d. General damages for wrongful detention of the title deed.

e. Costs of this application be in the cause.

2. The Applicants are registered owners of LR No Kitale Municipality Block 4/462 (Suit Property). The Applicants took a loan from the 2<sup>nd</sup> Defendant/Respondent and offered title to the suit property as security. The Applicants defaulted in the loan repayment which prompted the 2<sup>nd</sup> Respondent to instruct the 3<sup>rd</sup> Defendant/Respondent to auction the suit property.

3. On 28/12/2007, the Applicants received a letter from the lawyers of the 1<sup>st</sup> Respondent informing them that the 1<sup>st</sup> Defendant/Respondent had purchased the suit property in a public auction conducted in 1998. This prompted the Applicants to file a suit against the three Respondents in which they sought among other orders that the auction of the suit property which was conducted on 12/8/1998 was null and void. The Applicants also sought a temporary injunction restraining the 1<sup>st</sup> Respondent from having the suit property registered in his name.

4. The suit was fully heard and in a judgment delivered on 23/7/2014, the auction which was conducted on 12/8/1998 was declared null and void for want of statutory notice. The other relief which was granted in favour of the Applicants was that the 2<sup>nd</sup> Respondent was to give credit to the Applicants for any monies debited into the Applicants' account arising from the auction held on 12/8/1998.

5. In a bid to execute the decree in their favour, the Applicants filed a Notice of Motion dated 21/6/2017 in which they sought orders

compelling the 2<sup>nd</sup> Respondent to give credit to them for money debited into their account from the auction which was conducted on 12/8/1998. The Applicants also sought an order against the 2<sup>nd</sup> Respondent ordering it to give them bank statements to enable them verify compliance with the order directing the 2<sup>nd</sup> Respondent to give them credit for monies realized out of the auction of 12/8/1998.

6. In a ruling delivered on 3/7/2017, the court allowed the Applicants' application dated 21/6/2017. The 2<sup>nd</sup> Respondent delayed in complying with the court order of 3/7/2017. This forced the Applicants to file an application seeking to commit the officials of the 2<sup>nd</sup> Respondent for contempt of court. This application is the one which prompted the 2<sup>nd</sup> Respondent to give statement of account for the Applicants.

7. The Applicants contend that on 2/10/2018, they received a statement through the Counsel for the 2<sup>nd</sup> Respondent. The statement showed that the Applicants did not owe any monies to the 2<sup>nd</sup> Respondent. On 24/10/2019 the Applicants' Advocates wrote to the 2<sup>nd</sup> Respondent demanding release of title to the suit property and discharge of charge.

8. On 17/12/2019 the Applicants' Advocate received a letter indicating that the Applicants still owed the 2<sup>nd</sup> Respondent arrears in excess of Kshs 8,000,000/=. The letter also intimated that the 2<sup>nd</sup> Respondent was in the process of issuing fresh statutory notices in respect of the suit property.

9. On 17/9/2020, the Applicants' Advocate wrote to the 2<sup>nd</sup> Respondent's Advocate asking for a breakdown of the amount owed but there was no response received. The Applicants therefore contend that the 2<sup>nd</sup> Respondent is infringing on their property rights by refusing to release the title and discharge the charge documents. The Applicants further argue that they will suffer substantial loss if the 2<sup>nd</sup> Respondent was to exercise its statutory power of sale over the suit property. It is on this basis that the Applicants seek that the 2<sup>nd</sup> Respondent be compelled to release title to the suit property and discharge the charge document.

10. The 2<sup>nd</sup> Respondent opposed the Applicants' application based on a replying affidavit sworn on 26/7/2021. The 2<sup>nd</sup> Respondent contends that the Applicants' application is an abuse of the court process and is incompetent coming after the court determined the parties rights through a judgment. The 2<sup>nd</sup> Respondent argues that the prayers sought in the application are outside the decree and cannot be granted separately.

11. The 2<sup>nd</sup> Respondent further contends that this court is functus officio as the issues being raised are before the Court of Appeal where the appeal is pending determination. All other matters including taxation and costs have been exhausted. The 2<sup>nd</sup> Respondent further argues that the prayers which the Applicants are seeking were never sought in the main claim and granting them in an application would amount to granting a review of the judgment.

12. The 2<sup>nd</sup> Respondent stated that the judgment of the court was clear that the Applicants owed it money. The only bone of contention was that there was no statutory notice issued. The Applicants have never paid any amount following the judgment and they cannot argue that they do not owe the 2<sup>nd</sup> Respondent any monies. The statement which showed that the Applicants had nil balance was in compliance with Central Bank Regulations and did not mean that the Applicants had repaid the entire loan balance.

13. The 2<sup>nd</sup> Respondent takes issues with the manner in which the Applicants claim that they had cleared the balance of the loan amount yet their Advocates vide letter dated 21/10/2020 sought audience with the 2<sup>nd</sup> Respondent with a view to discussing on how to clear the balance. The 2<sup>nd</sup> Respondent's Advocate communicated their willingness to meet but the meeting could not materialize due to the Covid 19 pandemic. This goes to demonstrate that the current application is an abuse of the process of the court.

14. The parties were directed to file written submissions. The Applicants filed their submissions dated 19/8/2021. The 2<sup>nd</sup> Respondent filed submissions dated 22/9/2021. I have considered the Applicants' application as well as the opposition to the same by the 2<sup>nd</sup> Respondent. I have also considered the submissions by the parties. There are three issues for determination. The 1<sup>st</sup> is whether the court should compel the 2<sup>nd</sup> Respondent to order release of the title to the suit property and discharge the charge documents. The second is whether the court should injunct the 2<sup>nd</sup> Respondent from ever offering the suit property for sale. The third is whether the Applicants are entitled to general damages for unlawful detention of title.

15. Before I move to address the issues set out hereinabove, it is important to address the issue of jurisdiction. In other words, I have to address the issue of this court being functus officio. In the case of **Telkom Kenya Ltd -Vs- John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Ltd [2014] eKLR**, the Court of Appeal stated as follows:-

**“Functus officio is an enduring principle of law that prevents the reopening of a matter before a court that rendered the final decision thereon”.**

16. The Court of Appeal in the Telkom Kenya Ltd case (Supra) went on to state as follows:-

**“The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in Jersey Evening Post Ltd -Vs- AI Thani [2002] JLR 542 at 550, cited and applied by the Supreme Court; “ A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent judicial change of mind even when a decision has been communicated to the parties. Proceedings are only**

**fully concluded, and court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available".** (emphasis added)

17. In the instant case, the Judge who delivered the judgment that is Justice Munyao Sila was alive to the fact that the judgment he delivered was not final. That is why he granted liberty to any party to apply so as to enforce the orders given in the judgement. It is therefore clear that this court is not functus officio. I now proceed to determine the issues framed hereinabove.

18. On the first issue as to whether this court ought to order release of title to the Applicants and discharge the charge documents, it is important to note that the judgment delivered on 23/7/2014 was clear that the Applicants owed the 2<sup>nd</sup> Respondent money. The auction of 12/8/1998 was set aside because the court found that there was no issuance of statutory notice prior to the auction.

19. The court clearly made an order that the suit property remained charged to the 2<sup>nd</sup> Respondent to secure the sums that were due at the time of the auction of 12/8/1998. There is no evidence that the Applicants ever paid any sums towards clearing the loan balance owing to the 2<sup>nd</sup> Respondent. Indeed, as late as the year 2020, the Applicants' lawyers were acknowledging that the 2<sup>nd</sup> Respondent was owed money by the Applicants. They were calling for a meeting to agree on what was owing and how it was to be repaid. The Applicants cannot therefore rely on the statement with nil balance which was given to them as a basis for claiming that they had cleared the loan. The nil balance has been explained by the 2<sup>nd</sup> Respondent. This was in compliance with Central Bank of Kenya requirements.

20. It is therefore clear that there is no basis upon which the court can order release of title to the Applicants and make orders compelling the 2<sup>nd</sup> Respondent to discharge the charge document when the Applicants are yet to clear the outstanding loan. The 2<sup>nd</sup> Respondent is lawfully holding on to the title document because it is owed money by the Applicants.

21. On the 2<sup>nd</sup> issue, it is clear that no injunction can be granted to prohibit the 2<sup>nd</sup> Respondent from offering for sale the Suit Property through public auction. As long as the 2<sup>nd</sup> Respondent is owed money by the Applicants, the 2<sup>nd</sup> Respondent is at liberty to issue statutory notices and proceed to auction the suit property to recover the outstanding loan.

22. On the third issue, I have already demonstrated herein that the 2<sup>nd</sup> Respondent is lawfully holding on to the title to the suit property as security for the outstanding loan. This being the case, there can be no payment of general damages for unlawful detention of the Applicants' title.

23. All in all, I can say that this application is clearly an abuse of the process of the court. The Applicants were trying to take advantage of a statement which they were given which showed a nil balance when in actual sense they knew that they owed the bank money. I proceed to dismiss the Applicants' application with costs to the 2<sup>nd</sup> Respondent.

It is so ordered

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 3RD DAY OF FEBRUARY 2022.**

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**E. OBAGA**

**JUDGE**

In the virtual presence of:

Court Assistant – Mercy

M/s. Aoko for Mr. Muriithi for 2<sup>nd</sup> Respondent.

M/s Kiptoo for Plaintiff.

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**E. OBAGA**

**JUDGE**

3/2/2022