



**Ngeny v National Bank Of Kenya Ltd (Environment & Land Case
34 of 2014) [2022] KEELC 2277 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2277 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 34 OF 2014**

MC OUNDO, J

JULY 7, 2022

BETWEEN

ALICE CHELANGAT NGENY APPLICANT

AND

NATIONAL BANK OF KENYA LTD RESPONDENT

RULING

1. Via an application dated the 28th February 2022, brought pursuant to the provisions of Section 3A of the *Civil Procedure Act*, Section 19(1) & (2) of the *Limitation of Actions Act* and all enabling provisions of the law, the Applicant herein seeks that the Charge dated 15th August 1980 over LR No. Kericho/Chesoan/561 to be removed as the same had been affected by the statute of limitation and is no longer legally valid for all purposes. The application was supported by the grounds therein as well as the Supporting Affidavit sworn by the Applicant on 28th February 2022.
2. Despite the application having been served upon the Respondent, there was no response.
3. The application was disposed of by way of written submissions to which the Applicant submitted that the legal Charge dated 15th August 1980 over LR No. Kericho/Chesoan/561 was granted by the Respondent to the late Applicant's husband on a loan of Ksh 30.000/=.
4. That the Defendant/Respondent intended to exercise their statutory power of sale over the suit land on the 10th of June 2009. The Applicant's position was that the power of sale had been extinguished by the statute of limitation and therefore the Respondent had no power to sell the property since the Charge had become null and void. That the loan had been cleared whereby the Respondent had acknowledged repayment but was still bent on insisting on a balance of Ksh 826,065/= which they thought was still owing.
5. The Applicant framed her issues for determination as follows ;



- i. Whether or not the legal Charge dated 15th May (sic) 1980 over land parcel No. Kericho/Chesoan/561 has been extinguished by the statute of limitation and the Defendant cannot exercise statutory power of sale.
 - ii. Whether or not the Charge the over No. Kericho/Chesoan/561 should be ordered removed.
 - iii. Who is to pay costs.
6. On the first issue for determination, the Applicant relied on the provisions of Section 19(1) and (2) of the Limitation of Actions Act to submit that the Charge to secure the loan of Ksh 30,000/= was dated 15th of August 1980 and 12 years had lapsed on 15th of August 1992 and 22 years at the time of filing suit.
 7. That the Applicant cleared the debt and the estate does not owe any money to the Respondent hence the absence of an acknowledgement of debt meant that there was no fresh accrual of the right of action. The Charge was therefore no longer enforceable in law and it became a nullity or void. The power of statutory sale has been distinguished by limitation. Reliance was placed on the decided case in Malakwen Arap Maswai vs Kosgei [2004]eKLR.
 8. On the second issue for determination, the Applicant submitted that once a Charge was found to be void due to the Limitation of Actions Act, there ought to be an order directing the removal of the same as it was no longer enforceable in law.
 9. The Applicant further sought for costs to be borne by the Respondent.

Determination.

10. I have considered the Applicant's application as well as the submissions and the authorities herein. To begin with, it is not in contention that the Plaintiff/Applicant filed suit dated 18th July 2014 against the Defendant/Respondent seeking a declaration that the Defendant's statutory power of sale had been extinguished by the statute of limitation, and in the alternative there be an order for taking accounts to ascertain the loan amount paid and the principal owing when the loan became nonperforming, for purposes of limiting the interest payable.
11. The Applicant's contention is that her late husband Charged suit property herein being LR No. Kericho/Chesoan/561 over a loan of Ksh 30,000/= via a Charge dated 15th August 1980 which was granted by the Respondent. That she cleared the debt and the estate does not owe any money to the Respondent hence the absence of an acknowledgement of debt meant that there was no fresh accrual of the right of action. That since the Charge was dated 15th of August 1980 and 12 years had lapsed on 15th of August 1992 and 22 years at the time of filing suit, the said Charge had thus been caught up by the limitation of action and therefore no longer enforceable in law. She sought for the same to be removed. From the Applicant's submission, the ultimate issue that I must determine is:-
 - i. Whether the Charge herein should be disCharged.
12. It is not in contestation that the Applicant's deceased husband was the proprietor of LR No. Kericho/Chesoan/561 and that a Legal Charge dated 15th of August 1980 was registered upon the suit property in favour of the Defendant/Respondent, which Legal Charge has not been discharged. That the Applicant then filed suit as herein above stated, on the 18th July 2014 about 34 years later.
13. The Applicant's view is that the Defendant had been in slumber for over 12 years and therefore by virtue of Section 19 (1)&(2) of the Limitation of Action's Act, the Bank's cause of action has been extinguished.



14. I find that the Charge herein is still subsisting on the suit property. In my considered opinion, as long as the Charge is subsisting and has not been discharged, the cause of action consisting in a discharge of Charge is unaffected. Similarly, unless there exist circumstances to the contrary, as long as the debt for which such Charge was given as security or guarantee remains unpaid, the cause of action to recover the debt through lawful realization of the security or enforcement of the guarantee thereof is also alive
15. In my view, the law on *Limitation of Actions Act* applies to suits and not to holding of security in land or disposing of such security. The statute of limitation cannot therefore be used to compel a discharge of Charge. The Charge in question was a continuing Charge and therefore, enforceable. As such, a cause of action in a continuing Charge does not lapse or die. The Bank must show fidelity to the law in pursuing the remedies available to it as this Court favors a decision that ensures that both sides meet their obligations under the loan contract and the law. The Plaintiff's application lacks merit and the same is herein dismissed with no costs.
16. Parties to comply with the provisions of Order 11 of the Civil Procedure Rules within 21 days so that the matter can be disposed of expeditiously.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 7TH DAY OF JULY 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

