



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 125 OF 2018

JAMES MOGUNDE MOGUNDE (Suing on Behalf of and as Donee of Power of

Attorney From Edward Sakawa Nyasaka).....**APPLICANT**

VERSUS

FAULU MICRO FINANCE BANK LIMITED.....RESPONDENT

JUDGMENT

(Suit by plaintiff claiming that a fraudulent charge was registered over his title; evidence showing that plaintiff is owner of suit land; plaintiff living in the USA; charge executed and registered while he was abroad; title deed used to register charge not being the genuine title deed; fake identity card used purporting it to be of the plaintiff; clear that a fraudulent person used the plaintiff's land to obtain a loan from the defendant; defendant not contesting the suit; judgment entered for the plaintiff; charge to be deleted from the register)

1. This suit was commenced through a plaint which was filed on 26 March 2018. The plaintiff, suing through the holder of his power of attorney, has averred that he is the owner of the land parcel Kiambogo/Kiambogo Block 2/15863 (the suit land) which he mentioned that he purchased on 23 September 2006. In the year 2016, he constructed sixteen family units of two bedrooms each at approximately Kshs.30,000,000/=. In the month of October 2017, some persons came to the suit land wishing to value the property on the claim that the said property was used to secure a loan. The plaintiff then carried out a search which showed that a charge dated 31 April 2017 was registered against the title on 5 April 2017 to secure a loan of Kshs.10,000,000/= with one Esther Njeri Ngigi as the borrower. It is the plaintiff's case that this charge is fraudulent inter alia because the plaintiff's signatures were forged and that the charge was registered by imposters. In the suit, the plaintiff wishes to have orders declaring the charge as null and void, an order to discharge the charge, a permanent injunction against the defendant to stop the defendant from dealing with the suit land, general damages, costs and interest.

2. Despite being served, the defendant did not enter appearance nor file any defence. Neither did the defendant appear during the hearing of the case.

3. PW-1 was James Mugunde Mugunde, who holds a general power of attorney donated by the plaintiff. He testified inter alia that the plaintiff is his brother-in-law and that he lives in the United States of America (USA) with his family. He testified that he knows the property well, since it was him who helped the plaintiff acquire it in the year 2006, after which it became registered in his (plaintiff's) name. He stated that he is the one who has been keeping the original title deed and he produced it as an exhibit. He is also the one who assisted the plaintiff develop the property. He testified that in October 2017, some people, sent by the defendant, came to value the property and they mentioned that the property had been used to secure a loan of Kshs. 10,000,000/=. He followed up on this information and found out that indeed a loan had been taken from the defendant bank by one Esther Njeri Ngugi from the defendant's Naivasha branch. He reported the matter to the police who proceeded to the bank and collected the documents for the transaction. Among these, were what were said to be an identity card of the plaintiff but the witness stated that this was a fake identity card for the photograph therein is not of the plaintiff. He produced the genuine identity card of the plaintiff. There was also collected a title deed, which the witness contended to be fraudulent, since he still held the original title deed. He was given a copy of the charge which was dated 31 March 2017 which instrument was purportedly signed by the plaintiff. The same was accompanied by what was purported to be a spousal consent to charge, which document stated that the plaintiff was unmarried, but which the witness stated was not true. He testified that when the property was being charged, the plaintiff was away in the USA. He produced a copy of the plaintiff's passport as an exhibit to buttress his statement. The same shows that the plaintiff came into the country on 11 December 2016 and exited on 13 January 2017, and he has not been back since. He stated that the defendant had embarked on selling the property in exercise of the chargee's statutory right of sale. He sought assistance through his advocates who wrote to the defendant but the defendant ignored the letter.

4. I have considered the pleadings and the evidence. As I had mentioned earlier, the defendant did not file any defence in this matter and therefore the averments of the plaintiff are not controverted. I have also looked at the documents tendered in evidence. I am satisfied that the plaintiff is the registered proprietor of the suit land, and this is proven by the Certificate of Official Search produced by PW-1, which shows that he became registered as proprietor on 25 May 2006, on which date he was also issued with a title deed. That title deed is still available,

for PW-1 produced the original of it as an exhibit. I have seen that the title deed that was used to charge the suit property is one that bears the date 7 November 2006, which clearly conflicts with what the official search reflects. It is thus apparent that the title deed used to charge the suit land was a fraudulent title deed, probably prepared at a backstreet corner. I have also seen the charge instrument which is dated 31 March 2017 and is purported to have been executed by the plaintiff on the same day. This cannot be true because the plaintiff's witness has displayed the plaintiff's passport which shows that the plaintiff was not in the country at this time. There is also the issue of a non-genuine identity card purporting to be that of the plaintiff being used in the transaction.

5. Taking all the above evidence into consideration, the only inescapable conclusion I can reach, is that the charge created in favour of the defendant was never created by the rightful proprietor of the suit land and it was never created using the genuine documents of the suit land. A rogue must have come up with the idea of using the plaintiff's property in order to obtain, by crooked means, some money from the defendant. He caused the preparation of a parallel but fake title deed, prepared a fake identity card of the plaintiff, and managed to get some money from the defendant. I do not see how the defendant's employees or agents can be said to have done keen due diligence, for if one looked at date in the title deed that was used to secure the loan, and compared it with the date in the search, one would have noted an anomaly. I also doubt if they ever went to make inquiries at the suit land, for if they did so, they would have found the plaintiff's witness who would have informed them that the plaintiff is not within the country.

6. I am persuaded that the charge is fraudulent, and being fraudulent, the same is null and void and the entry thereof must be cancelled. I hereby order that the Land Registrar, Nakuru, to forthwith cancel the entry of the charge in favour of the defendant and revert the register to the way that it was before the charge was registered. It should be considered that no charge was ever registered against the title of the plaintiff, and that being the case, the defendant cannot be considered as chargee, and neither can the defendant purport to benefit from any rights granted to a chargee, including the right to sell the suit land upon default of the loan.

7. I am not persuaded that the defendant and/or its servants/agents were not negligent, and it is highly probable that an insider was involved in the fraud. Neither did the defendant take any steps to make amends to the plaintiff despite being duly notified of the fraud. It chose to ignore the plaintiff and also chose not to come to court to demonstrate its innocence. For these reasons, the defendant will bear the costs of this suit.

8. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 1st day of October 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Ms. Kahono present for the plaintiff.

Defendant not entered appearance – absent.

Court Assistants: Nancy Bors & Alfred Cheronon

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU