



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC NO. 137 OF 2015**

**DANIEL KIPRUTO METTO.....PLAINTIFF**

**VERSUS**

**CHASE BANK (KENYA) LIMITED.....DEFENDANT**

**JUDGMENT**

By a plaint dated 30<sup>th</sup> April 2015 the s plaintiff herein sued the defendant seeking for the following orders:

- a) A declaration that the Plaintiff is the registered owner of all that parcel of land known as L.R No. Moi's Bridge/Sirikwa Block I(Ziwa) 194 measuring 11.74 acres and that any and all the documents held by the defendant relating to the said parcel of land are fraudulent, illegal, null and void and of no legal consequences and the same should be surrendered to the Plaintiff, the court and/or the Uasin Gishu Land Registrar.
- b) An order of injunction to permanently restrain the defendant, its agents and/or servants from entering, occupying, selling, transferring, encumbering, wasting and/or otherwise interfering with the Plaintiffs quiet possession use, and/or enjoyment of the suit land.
- c) An order of discharge of charge of the Plaintiff's parcel of land namely NO. MOI'S BRIDGE/SIRIKWÁ BLOCK 1 (ZIWA) 194.
- d) An order for payment of exemplary damages for the illegal charging of the property prompting him to engage intervention from the relevant authorities like the police and legal services.
- f) Costs of the suit
- g) Any other relief this Honourable Court may deem fit and just to grant.

The plaintiff filed an application for temporary injunction restraining the defendant from interfering with the suit land under certificate of urgency which was granted and the same fixed for inter partes hearing on 18<sup>th</sup> January 2016. When the matter came up for hearing Counsel agreed by consent to abandon the application and concentrate on the hearing of the main suit.

**Plaintiff's Case**

The Defendant was duly served with all the relevant pleadings and as result entered appearance, filed their Statement of Defence and all other pleadings thereof. That despite being served with a hearing notice severally, the defendant never attended court and as a result the matter proceeded ex parte.

The plaintiff testified that he is the registered owner of all that parcel of land namely L.R No. MOIS BRIDGE/SIRIKWA BLOCK 1 (ZIWA)/194 measuring 11.74 Acre. The plaintiff produced a copy of a title deed as an exhibit before the court. He stated that he did not take any loan from the defendant and that he has never guaranteed anybody to take a loan with his title.

It was further the plaintiff's evidence that his title got lost 3 years ago and only came to learn about the loan when the bank came to demand money from him. The plaintiff also stated that he reported the matter to the police and the persons who purportedly took a loan fraudulently with his title were arrested and charged in court. He produced a copy of the charge sheet in court as an exhibit. The plaintiff further produced a search certificate which indicated that someone had taken a loan with his title without his knowledge or consent.

He denied knowing a company known as Nile Flow Sacco Ltd and that he is not a member of the said Sacco. The plaintiff also testified that he did not sign any documents for the defendant and that he usually thumb prints and not written signature.

It was further the plaintiff's evidence that he never appeared before the Land control Board and that his wife is called Christina Chepkasi Meto and not Rebecca Metto who purportedly signed the spousal consent. It was his evidence that the documents were fraudulently acquired and registered irregularly.

The plaintiff stated that he went to his advocate who wrote a letter to the defendant who replied vide a letter dated 10<sup>th</sup> March 2015 whereby they requested for 28 days to enable them respond adequately to the issues raised in the letter but they never came back to the plaintiff. It was the plaintiff's evidence that he has been staying on the suit land for a period of over 40 years where he has put mud structures and not permanent structures as it had been alleged in the valuation. Report by Metro Cosmo Valuers. He therefore urged the court to order the defendant to release his title plus costs of the suit.

PW2 who is the plaintiff's wife testified and stated that the plaintiff is the registered owner of the suit land and that she did not execute any instrument for any loan or guarantee anyone. She further stated that she does not know Nile Flow Sacco Ltd and that she is not Rebecca Metto. PW2 also stated that she never appeared before the land Control Board and that there is a criminal case in respect of forgery of the title to the suit land at Eldoret Chief Magistrate's court. She corroborated the plaintiff's evidence that his title was fraudulently charged without his consent.

PW3 a son of the plaintiff also testified and confirmed that the suit land belongs to the plaintiff and that the father has never taken any loan or charged the property. He stated that upon carrying out an official search, they were shocked to find that the plaintiff's land had been charged in favour of a third party for a credit facility to the tune of Kshs. 4,000,000/= That the Plaintiff immediately reported the matter to the police and upon investigation several charges were preferred upon those who were involved. The charges include:-

a) Stealing contrary to Section 268(1) as read with Section 275 of the Penal Code whose particulars are : COUNT 1

"On diverse dates between 1<sup>st</sup> April, 2014 and 4<sup>th</sup> July 2014 at Ziwa Machine Area in Eldoret West District within Uasin Gishu County jointly with others not before court stole one title deed for parcel of land number Moi's bridge/Sirikwa Block 1 (ZIWA) / 194 measuring 11.74 Acres valued at Kshs. 11,000/= the property of Daniel Kipruto Meto"

b) Forgery contrary to Section 350 of the Penal code whose particulars are COUNT 11

"On the 17<sup>th</sup> September, 2014 at the chambers of Gumbo and Associates in K.V.D.A Plaza within Eldoret West in Uasin Gishu County jointly with others not before court with intent to defraud forged a certain document namely authority to charge property title number Moi's Bridge/Sirikwa Block 1 (Ziwa)/194 purporting it to be an authority to charge proper signed by one DANIEL KIPRUTO METO".

Forgery contrary to Section 350 of the Penal Code

#### COUNT 111

"On the 17<sup>th</sup> September, 2014 at the chambers of Gumbo and Associates in K.V.D.A Plaza within Eldoret West in Uasin Gishu County jointly with others not before court with intent to defraud forged a certain document namely authority to charge property title number Moi's Bridge/Sirikwa Block 1 (Ziwa)/194 spousal consent purporting it to be an authority to charge property signed by SOTE REBECCA METO"

Forgery contrary to Section 350 of the Penal code

#### COUNT IV

"On the 16<sup>th</sup> October, 2014 at Eldoret West District Commissioners office within Eldoret District in Uasin Gishu County jointly with others not before court with intent to defraud forged a document namely Application for consent of land Control Board purporting the said application to have been made and signed by one Daniel Kipruto Meto".

PW3 therefore urged the court to order for the discharge of the title and the same be returned to the plaintiff plus costs of the suit. The plaintiff therefore closed his case.

Counsel filed the following issues for determination by the court.

- a) Whether the Plaintiff is the owner of L.R NO. MOI'S BRIDGE/SIRIKWA BLOCK 1 (ZIWA) 194
- b) Whether the Plaintiff ever appeared before the Defendant bank officials
- c) Whether the Plaintiff executed any instrument in favour of Nile flow Savings and Credit Co-operative Society limited while charging the suit property
- d) Whether spousal consent was obtained in respect of the suit property
- e) Whether the Plaintiff appeared before the Land Control Board and law firm which executed the charge document

f) Whether the Defendant carried out due diligence before charging the suit property

On the issue as to **whether the owner of L.R NO. MOI'S BRIDGE/SIRIKWA BLOCK 1 (ZIWA) 194**, Counsel submitted that it is not in dispute that the Plaintiff is the owner of the suit property and that the plaintiff produced a copy of the Title deed that was issued on 11<sup>th</sup> September 1995. He stated that this evidence was uncontroverted by the Defendants and the Plaintiff being the registered owner has indefeasible title with all rights appertaining thereto and thus subject to protection by this Honourable court. Therefore is deserving of protection under Article 40 of the Constitution of Kenya 2010 and Section 26 of the Land Registration Act 2012.

On the issue as to **whether the Plaintiff executed an instrument guaranteeing the suit property in favour of any party**, Counsel submitted that the Plaintiff testified that he does not know how to write. That he executes his signatures only by way of thumb print. That if indeed it is the Plaintiff who executed the Declaration of Marital Status and presented the information held by the Defendant albeit denied, how could he possibly present the wrong names and/or identification of his wife? Counsel stated that PW2 who is the plaintiff's wife confirmed that her name is Christine Chepkasi Metto I.D NO [particulars withheld] whereas the document indicated the name as Sote Rebecca Metto ID No. [particulars withheld] Further that the identity card had discrepancies. Counsel therefore submitted that the defendant should be held liable for wrongful acts of its servants, agents and/or employees.

On the issue as to **whether the Defendant carried out due diligence before charging the suit property**, Counsel submitted that it is evident that the Defendant never did even the basic and/or minimum requirement of what can be considered as due diligence. Due diligence should not stop at a search which even as per their list of documents is not clear whether it was conducted or not. That the Defendant being the beneficiary of the charged property, was under an obligation to carry out a background check on the owner of the suit property, visit the property, enquire from neighbors and/or even establish a history of the land. Further, they would have realized that the structures situate in the suit property are mud houses and not permanent houses as described by the Valuation Report allegedly prepared by Metro Cosmo Limited Valuers.

Counsel finally submitted that the whole transaction was marred with illegalities or fraud as:-

- a) The Plaintiff never appeared before the legal practitioners (M/S Gumbo & Co. Advocates and KTK Advocates) acting on behalf of the defendant.
- b) The legal practitioners did not conduct due diligence to affirm that the Plaintiff was aware and/or consents to guaranteeing the purported company.
- c) That Metro Cosmo Limited Valuers (Agent appointed by the Defendant) themselves made a false report as the description of the property does not tally with what was on the ground.
- d) The history of the land was never conducted (they have never even seen the land)

Counsel cited the case of Esther Ndegi Niiru & Another —vs Leonard Gatei (2014) eKLR where Mutungi J held that;

'...the rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners involving title to land to carry out due diligence that goes beyond merely obtaining certificate of official search.. Section 26(1)(a) and (b) of the Land Registration Act in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as 'grabbed lands' it is essential to endeavor to ascertain the history and/or root of the Title. '

Counsel therefore urged the court to find that the plaintiff has proved his case on a balance of probabilities and that the defendant should pay the Plaintiff Kshs. 3,000,000/= which amount ought to be calculated as per the amount charged in respect to the Plaintiff's parcel of land plus costs of the suit. Counsel relied on the case of the case of Otieno Omuga & Ouma Advocates —vs- CFC Stanbic Bank Limited (2015) eKLR

### **Analysis and determination**

The issues for determination in this case by the court are:

- a) Whether the Plaintiff is the owner of L.R NO. MOI'S BRIDGE/SIRIKWA BLOCK 1 (ZIWA) 194.
- b) Whether the Plaintiff executed any instrument in favour of Nile flow Savings and Credit Co-operative Society limited while charging the suit property
- c) Whether spousal consent was obtained in respect of the suit property
- d) Whether the Plaintiff appeared before the Land Control Board and law firm which executed the charge document
- e) Whether the Defendant carried out due diligence before charging the suit property.
- f) Whether the plaintiff is entitled to exemplary damages and costs of the suit.

This is a very unfortunate case where a party's title is purportedly used as a collateral without his knowledge or consent. The issue as to

whether the plaintiff is the registered owner of the suit land is not in doubt because he produced a copy of a title deed registered in his name. The defendant also did not dispute that the plaintiff is the owner of the suit plot and that is why they were pursuing the purported loan amount advanced to the plaintiff.

Section 26 (1) of the Land Registration Act states as follows:

*“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –*

*a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”*

The above section gives the court powers to presume that a certificate issued by the Registrar to be prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner. It further gives an exception where the title has been fraudulently or procured illegally or unprocedurally then the same can be cancelled. In the current case there is no proof that the plaintiff's title was acquired procedurally.

From the evidence on record, it is clear that what was done fraudulently and illegally was the charging of the plaintiff's property without his knowledge or consent. The demeanor of the plaintiff who is an old man and from observation on how he gave evidence indicated that he was a truthful witness. The plaintiff's evidence was corroborated by his witnesses who stated that the land belonged to him and that he has never taken any loan or guaranteed any third party to take a loan with his title.

The plaintiff testified and stated that his title deed got lost and he was shocked to find out that someone had taken a loan with his title. He only became aware when the defendant bank came to demand the amount from him. This prompted him to report the matter to the police and some people were arrested and charged with the offence of forgery and stealing of title. This shows that the plaintiff was not aware of the forgery that took place.

It was his evidence that he did not execute any documents for the defendant to advance him the loan. This is apparent from the discrepancies on the signature and the identification. The plaintiff stated that he thumb prints and does not know how to write. The name and identification card number of the wife was also different. The wife's name was indicated as Rebecca Sote Metto ID No. 11350210 while the plaintiff's wife is Christine Chepkasi Metto ID No. 6856218. The plaintiff and the wife PW2 also denied having appeared before the land Control Board to obtain the requisite consent to charge the property. Why would someone impersonate a husband and wife to take their property away by taking a loan with no intention of repaying?

The defendant should have done due diligence and get the history of the land not just from the lands registry but also from the neighbours. The plaintiff and his witnesses indicated that they have mud structures and not permanent structures as was put in the valuation report by Metro Cosmo Valuers. The parties who engaged in this act must have been a cartel that has been fleecing people of their hard earned money or property. The defendant should therefore be held vicariously liable for the wrongful acts of its agents.

With the digital age, where people are developing software day in day out, banks should be ahead in innovative ways to curb any unforeseen and foreseeable compromise to their systems. Banks must be extra diligent when dealing with properties to be charged or mortgaged.

On the issue of as to whether the plaintiff is entitled to exemplary damages, the same was pleaded but no evidence was tendered in respect of the same. It is important to understand the meaning of exemplary damages in law. These are damages requested and/or awarded in a lawsuit when the defendant's willful acts were malicious, violent, oppressive, fraudulent, wanton or grossly reckless. Although often requested, exemplary damages are seldom awarded.

As per *Halsbury's Laws of England 4<sup>th</sup> Edition Volume 12 Para. 1190 at page 474*, exemplary damages may only be awarded in actions for torts. Exemplary damages may not be awarded in actions for breach of contracts as was held in *Kenny-v-Preen [1962] 3 All ER 814, CA*. In *Rookes v Barnard [1964] AC 1129; [1964] 1 ALL ER 367*, the House of Lords held that *except where is specifically authorized by a statute* exemplary damages should only be awarded in two categories of cases. The two categories are 1. against oppressive, arbitrary or unconstitutional action by government servant and 2. tort calculated by Defendant to yield profit.

From the description of exemplary damages above, the current case does not fall under the 2 categories where exemplary damages can be awarded. The defendant is not a government servant and the tort by the defendant was not calculated to yield profit. I therefore find that the plaintiff is not entitled to exemplary damages. I however order that the defendant do pay the plaintiff a token sum of Kenya shillings 300,000/ for illegal charging of his property without conducting due diligence therefore causing him untold suffering and loss.

The defendant was given an opportunity to defend itself but did not appear in court therefore the matter proceeded ex parte. The plaintiff's evidence is uncontroverted. I have considered the pleadings, the exhibits produced, the evidence of the plaintiff and his witnesses and the submissions of Counsel and I come to the conclusion that the plaintiff has proved his case on a balance of probabilities. I therefore enter judgement in favour of the plaintiff against the defendant in the following terms:

a) It is hereby declared that the Plaintiff is the registered owner of all that parcel of land known as L.R No. Moi's Bridge/Sirikwa Block I(Ziwa) 194 measuring 11.74 acres and that any and all the documents held by the defendant relating to the said parcel of land are fraudulent, illegal, null and void and of no legal consequences and the same should be surrendered to the Plaintiff, the court and/or the Uasin Gishu Land Registrar within 30 days from the date of this judgment.

b) An order of permanent injunction is hereby issued restraining the defendant, its agents and/or servants from entering, occupying, selling, transferring, encumbering, wasting and/or otherwise interfering with the Plaintiffs quiet possession use, and/or enjoyment of the suit land.

c) An order of discharge of charge of the Plaintiff's parcel of land namely NO. MOI'S BRIDGE/SIRIKWÁ BLOCK 1 (ZIWA) 194.

d) General damages of Kshs. 300,000/

e) Defendant to pay costs of this suit.

**Dated and delivered at Eldoret this 2<sup>nd</sup> day of October, 2018.**

**M.A ODENY**

**JUDGE**

Judgment read in open court in the presence of Miss Kibichy for Plaintiff and in the absence of advocates for the defendant.

Mr. Koech: Court Assistant.