



**Oduor v Cannon Assurance (K) Ltd (Civil Suit 174 of 2007)  
[2023] KEHC 17284 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17284 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 174 OF 2007**

**A MABEYA, J**

**MAY 12, 2023**

**BETWEEN**

**GEORGE LALLA ODUOR ..... PLAINTIFF**

**AND**

**CANNON ASSURANCE (K) LTD ..... DEFENDANT**

**RULING**

1. Before Court is the application dated July 13, 2022. It was brought under section 1A, 1B,3, 3A& 63E of the *Civil Procedure Act* and Order 51 rule 3 of the *Civil Procedure Rules*.
2. The application sought for orders to discharge and release the applicants original title no LR No Nairobi/block 76/813 (“the suit property”).
3. The Motion was based on the grounds on its face and supported by the affidavit sworn by George Lalla Oduor. It was the applicant’s case that on October 11, 2019, the Court of Appeal issued a permanent injunction restraining the respondents from selling or transferring the suit property and gave a declaration that the charge registered against the said property was unenforceable.
4. That the court stated that the recourse for any outstanding debt between the parties was by an ordinary civil debt. It was contended that despite writing to the respondent to discharge the same, the respondent had refused to comply.
5. In opposition to the application, the respondent filed a replying affidavit dated September 15, 2022 sworn by Martha Mutoro. It was contended that the respondent had advanced money to the applicant totaling to Kshs 1,500,000/- and the suit property was used as security for the sums advanced.
6. That the applicant defaulted in paying the monthly installments and on April 4, 2007 the applicant instituted a suit against the respondent stating that the charge was defective. That the Court of Appeal



rendered its decision on October 11, 2019 stating that the charge registered against the suit property was unenforceable and the outstanding debt could be recoverable as a civil debt.

7. It was admitted that the Court of Appeal gave a permanent injunction restraining the respondent from disposing the suit property. It was the respondent's case that the decision of the Court of Appeal did not require the respondent to release the title document to the suit property. That granting the discharge would amount to cancelling the mortgage agreement. That the debt had not been denied by the applicant and no alternative security had been offered for the due performance of the obligations under the mortgage agreement.
8. It was the respondent's contention that it would suffer substantial loss as the suit property was the only security offered by the applicant.
9. The application was canvassed by written submissions which I have considered.
10. The applicant submitted that there was no debt owed to the defendant and its counterclaim was dismissed by the Court. Counsel submitted that the amount claimed by the defendant was based on interest on the charge which had been found unenforceable. It was submitted that no reasons had been given by the defendant to show why it should continue to hold the title.
11. The respondent submitted that the Court of Appeal did not obligate the respondent to release the applicant's title deed. Counsel submitted that there exists a contract between the parties which the applicant entered willingly and was therefore obligated to discharge the duties thereunder. It was further submitted that the collateral that was provided by the applicant ought to remain intact to mitigate the risk in the event of default. That the defendant had a right of lien over the suit property having possession of the title deed. It was submitted that the application was a scheme for the applicant to evade performing his obligations under the contract.
12. I have considered the application, the response and the submissions on record. The issue for determination is whether the applicant has made out a case for the discharge and release the title to the suit property.
13. It is not disputed that Court of Appeal has held in favour of the applicant that the charge registered against the suit property is unenforceable in realizing the suit property. It is also not in dispute that that Court also issued a permanent injunction restraining the defendant from disposing off the suit property in exercise of its perceived statutory power of sale.
14. The respondent's contention is that the Court of Appeal did not direct that the respondent do release the title documents. That since the applicant does not deny the debt discharging the charge would leave the respondent exposed to risk. That to grant the orders sought would amount to cancelling the mortgage agreement between the parties who are entitled to keep their end of the bargain.
15. I have considered the record. In its decision of October 11, 2019, the Court of Appeal held that the mortgage transaction fell short of the mandatory statutory requirement where the respondent ought to have been licensed before engaging in mortgage transaction. The court proceeded to hold that the rights of the respondent could only revert to the status of civil rights and claims where the debt could be recovered as a civil debt.
16. From the foregoing, the charge having been found to be unenforceable, it amounts to nothing. It cannot be a security over the suit property. The suitability of a charge over a property is its conferment of the right over the property offered as security. Once the statutory right of sale in the charge cannot be exercised for any reason, the charge/mortgage becomes worthless and of no value as far as the property offered as security is concerned. It ceases to be a security over the monies lent.



17. In the present case, the Court of Appeal has declared the charge unenforceable. It has also issued a permanent injunction against the defendant not to sell the suit property on the basis of the impugned charge. It follows that the respondent cannot purport to use the said charge as security for the monies advanced. It cannot purport to enforce the same. It is no longer a security over the suit property.
18. In Law of Contracts by Cheshire, Fifoot and Furmston, 8th edition at page 334, the learned writers observe that: -

“No person can claim any right or remedy whatsoever under an illegal transaction in which it has participated. The court is bound to veto the enforcement of a contract once it knows that it is illegal, whether knowledge comes from the statement of the guilty party or from outside sources”.
19. Consequently, the title documents having been surrendered to the respondent on the basis of the impugned charge, it is no longer tenable to continue holding the same. No right of lien can arise in the circumstances of this case.
20. My take is that the respondent has a recourse under a civil suit and therefore under an obligation to discharge the applicant’s property. It cannot continue to hold into the title documents as that will infringe on the applicant’s Constitutional right to property.
21. Accordingly, I find merit in the application and the same is allowed as prayed.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF MAY, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

