



REPUBLIC OF KENYA



Makori & another v Cooperative Merchant Bank Ltd & another (Civil Case 46 of 2008) [2023] KEHC 18809 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18809 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL CASE 46 OF 2008
JK SERGON, J
JUNE 15, 2023
(FORMERLY NAIROBI HCCC NO. 1534 OF 2005)**

BETWEEN

**BENARD GESORA MAKORI 1ST PLAINTIFF
JOHNSON ONDUKO MAKORI 2ND PLAINTIFF**

AND

**EMERG INVESTMENTS LIMITED 1ST DEFENDANT
COOPERATIVE MERCHANT BANK LTD 2ND DEFENDANT**

RULING

1. The 2nd defendant/applicant filed a notice of motion dated November 21, 2022 under certificate seeking for the following orders:
 - i. Spent.
 - ii. That the honourable court be pleased to issue an order directing the Chief Land Registrar to discharge the Order registered as Entry Number 24 in Grant of Title for LR. No. 631/60/IV IR No. 9454/17 in view of the abatement of the suit herein.
2. The Application is supported by the grounds laid out on its face and the facts stated in the affidavit of Stephen Kipkorir Bondotich, the applicant's Advocate who avers that the court vide a Ruling delivered by Hon. Lady Justice Ang'awa (retired) dated May 25, 2019 found that the suit as filed by the 1st Plaintiff abated and further struck out the application in which the 2nd Plaintiff had sought to be enjoined as a plaintiff.



3. The advocate further avers that the 1st Plaintiff had caused an Order to be registered against the suit property and being that there is no suit subsisting, the order that had been registered has no legs to stand on and the court has powers to grant the powers sought ex debito justitiae.
4. He urged the court to issue an order directing the Chief Land Registrar to forthwith discharge the encumbrance so that the 2nd defendant/applicant can freely deal with the property.
5. In retort the plaintiff/respondent filed grounds of opposition dated April 24, 2023 stating:
 - i. That the said Application is mischievous, incompetent, misconceived, bad in law, untenable and unknown in law.
 - ii. That the application is irregular and bad in law for the reason that the order sought to be lifted and/or discharged from the land register has never been set aside by this court. Consequently, the said order remains valid in the absence of any successful application for its review/setting aside and/or the final determination.
 - iii. That the Applicant seeks a mandatory order against the Chief Land Registrar yet the Applicant has failed to cite, enjoin and serve the Chief Land Registrar, as required by law and the principles of natural justice as enshrined in article 50 of *the Constitution*.
 - iv. That the Application is supported by an affidavit sworn by the 2nd defendant's Advocate on record who depones to evidentiary facts on contentious matters of fact (that the suit abated) and lacks the requisite locus standi to challenge and/or impeach the order in his personal capacity.
 - v. That the applicant has failed to annex a certified copy of the order sought to be discharged, thus rendering the prayer sought incompetent.
 - vi. That the Ruling annexed as "SBK 2" to the affidavit sworn by Stephen Kipkorir Bundotich is not certified as a true copy of the Ruling of the court and without such authentication, it is not of probative assistance to the applicant.
6. The plaintiff further stated that the applicant has failed to demonstrate or discharge its burden for the orders sought and that the suit abated is misconceived and without merit as the suit was composed of two plaintiffs, consequently the cause of action survived and continued to the 2nd plaintiff alone and is thus expressly precluded from abatement by virtue of order 24, rule 2 of the *Civil Procedure Rules* which provides that where the plaintiffs or defendants are more than one, in the event that one dies, the case shall proceed at the instance of surviving plaintiffs against surviving defendant or defendants.
7. The plaintiff contends that by a Consent Order recorded on March 23, 2006 (Order therefrom was duly extracted and issued on April 19, 2006) before Hon. Mr. Justice Osiemo (as he then was) by paragraph 4 thereof it was ordered "That the applicant, Benard Gesora Makori be joined herein as plaintiff in this suit"
8. He further stated that paragraph 5 of the supposed ruling by Hon. Ang'awa J (as she then was) which is relied on by the applicant clearly confirms that that By Consent recorded on March 23, 2006 the parties enjoined the 2nd plaintiff, Benard Gesora Makori as the registered owner of the suit land and that paragraph 8 of the said Ruling further confirms that the joinder of the 2nd plaintiff was permitted.
9. He contends that the above joinder of the 2nd plaintiff, Benard Gesora Makori, by consent of parties, has never been discharged or set aside, whereas it is trite law that consent orders can only be vacated



by consent of the same parties or upon application, demonstrating that the agreement was tainted by vitiating factors.

10. That the observations made by Hon. Ang'awa J (as she then was) were to the effect that the correct person to sue was indeed the 2nd plaintiff being the registered owner of the property (and who is not dead) and the holding that 'even if the original plaintiff was the correct person to sue his suit abated' was solely in respect of the 1st plaintiff's case, and not in respect of the 2nd plaintiff's.
11. That the applicant was not the registered owner of the suit land at the time of entry and/or endorsement of the order sought to be discharged and still is not the registered owner thereof. Consequently, the applicant is devoid of any interest in the suit land having failed to demonstrate the same.
12. He stated that the applicant has not disclosed that there is a pending review application at the court of Appeal pertaining to the suit property herein with high chances of success, and thus the applicant is trying to steal a match against the respondents and that the order sought vide the instant application is calculated to defeat and/or circumvent the plaintiff's/respondent's interest in the suit land and the provisions of the land Act.
13. He concluded that the application constitutes an abuse of the due process of the court and is thus premature, presumptive and the orders sought cannot issue.
14. When the matter came up for Direction on April 25, 2023, the applicant's Advocate was given leave to file a replying affidavit to the Grounds of Opposition. It was directed that the application be canvassed by way of written submissions.
15. By the time of writing this ruling, the 2nd defendant/applicant was the only party which had filed its written submissions.
16. Upon my study of the Notice of Motion and the affidavit in support as well as the Grounds of opposition, I find that there is no dispute that this court (Ang'awa, Judge as she then was) stated that this suit had abated vide her Ruling delivered on May 25, 2009.
17. It is also not in dispute that there is an Order issued in this suit and registered as Entry No.24 in the Register for L.R. No.631/60/IV/IR.9454/17. With respect, I agree with the 2nd defendant/applicant's submission that without a suit, the order registered against the title has no legs and must be discharged.
18. There is an assertion by the plaintiffs/respondents that an Application for review has been filed in the Court of Appeal. In my view, unless there is an Order for stay, this Court has no option but to proceed and determine the motion on its merits.
19. In the end, I find the motion to have merits. It is allowed as prayed. Consequently, an Order is hereby issued directing the Chief Land Registrar to discharge the order registered as Entry No.24 in Grant of Title for L.R. No.631/60/IVIR 9454/17. Each party to meet its own costs.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 15TH DAY OF JUNE, 2023.

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J.K. SERGON

JUDGE

In the presence of:

C/Assistant – Rutoh



Bundotich for the 2nd Defendant/Applicant

No Appearance for the Plaintiff

No Appearance for the 1st Defendant

