



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E461 OF 2020

KHADAR DEVELOPMENT LIMITED.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK LIMITED.....DEFENDANT

RULING

1. By a Motion on Notice dated 10/11/2020, the plaintiff sought an order to compel the defendant to release title **L.R No. 13871 IR. No.1413015/1** (hereinafter “the title”) to the plaintiff. The application was brought under **sections 1A, 1B & 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules**.

2. The grounds upon which the application was brought were that; on or about 2015, the plaintiff delivered the title to the defendant with the intention of jointly finding a buyer, the joint intention had since become been unsuccessful.

3. That with the failure of the purpose for which the title was originally deposited with the defendant, the plaintiff had demanded that the defendant do release the same to it but the defendant had declined. That the plaintiff needed the said title returned so that it could use the same to raise a Bank Guarantee for Kshs. 100,000,000/- ordered by Honorable Justice Maureen Odero in **Civil Suit No.139 of 2018**.

4. Through its Debt Recovery Officer, the defendant opposed the application vide a replying affidavit sworn on 17/11/2020. The defendant contended that the plaintiff had offered the property, the subject of the title, as collateral for an overdraft facility of Kshs. 30,000,000/- advanced to New Nyanza Wholesalers Limited. A Board Resolution of the plaintiff to authorize the same was duly issued.

5. Further, the plaintiff executed a Letter of Offer, a Charge, a Deed of Guarantee by Asha Hersi Moghe & Sarah Hersi Ali and a Corporate Guarantee by the Plaintiff Company to perfect the security thereof. As a result, the plaintiff deposited with the defendant the title to perfect the intended security.

6. However, the Charge was not registered as the plaintiff failed to pay the legal fees and the stamp duty for the transaction. In the premises, the title remained charged to the bank under **section 79 of the Land Act**.

7. On 3/12/2020, the Court directed the parties to file their respective submissions, but at the time of writing this ruling, none had filed the same. The Court has considered the depositions on record.

8. **Section 79(6) of the Land Act** provides: -

“(6) An informal charge may be created where –

(a) a chargee accepts a written and witnessed undertaking from a chargor, the clear intention of which is to charge the chargor’s land or interest in land, with the repayment of money or money’s worth, obtained from the chargee;

(b) the chargor deposits any of the following-

(i) a certificate of title to the land;

(ii) a document of lease of land;

(iii) any other document in which it is agreed evidences ownership of land or a right to interest in land.”

...

8. ***“An arrangement contemplated in subsection (6)(a) may be referred to as an “informal charge” and a deposit of documents contemplated in subsection (6) (b) shall be known and referred to as a “lien by deposit of documents.”***

9. ***A chargee shall not possess or sell land whose title document has been deposited with the chargor under an informal charge without an order of the Court.”***

9. From the foregoing, it is clear that an informal charge can be created by the depositing of the title to land or any document that evidences ownership to land.

10. In the present case, it was the plaintiff’s case that the title had been deposited for purposes of the parties jointly looking for a buyer thereto. On the other hand, the defendant denied that allegation and swore that, the title was deposited for purposes of securing an overdraft of Kshs. 30,000,000/- advanced to a company known as **New Nyanza Wholesalers Limited**.

11. The plaintiff did not deny or controvert the averments in the defendant’s replying affidavit. The defendant produced a Letter of Offer, a Board Resolution by the plaintiff and a Charge duly executed by the defendant over the suit property in respect of the title. These were neither disputed nor challenged.

12. To my mind, the defendant had proved that an informal charge had been created over the title. It is unfortunate and reprehensible that the plaintiff outrightly sought to mislead the Court. It swore to falsehoods. That is a conduct that is extremely reprehensible and should not be encouraged of litigants.

13. The fact that the security was not perfected by way of registration of the Charge does not in itself deny the defendant the right to hold onto the title until the monies for which it was deposited is fully paid. Informal Charges are known and recognized in law. See **Tassia Coffee Estate Limited and Another v. Milele Ventures Limited (2014) Eklr** and **Lincoln Kivuti Njeru v. Insurance Company of East Africa [2017] Eklr**. They are lawful and enforceable.

14. In this case, the plaintiff deposited the title with the defendant for securing facilities amounting to Kshs.30,000,000/-. An informal Charge was created in respect thereof. The defendant is entitled to hold unto the title so long as those facilities have not been fully paid.

15. Accordingly, I find the application to be without merit and dismiss the same with costs.

DATED and DELIVERED at Nairobi this 4th day of March, 2021.

A. MABEYA, FCI Arb

JUDGE