



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 95 OF 2018

THOMAS KAHARA KANG'ETHE.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 10th May 2018 and filed on 14th May 2018 was brought pursuant to the provisions of Order 40 Rules 1 and 2 of the Civil Procedure Rules, sections 3, 3A, 63 (e) of the Civil Procedure Act, Cap 21 of the Laws of Kenya and all other enabling provisions of law. Prayer No (1) was spent. It sought the following remaining orders:-

1. Spent.

2. THAT an order of this Court do issue against the Defendant/Respondent directing it to release the original title document to the property known as LR No 7660/63 (hereinafter referred to as the suit property) to its owner being the Plaintiff/Applicant pending the full hearing and final determination of this suit.

3. THAT an Order of this court do issue against the Defendant/Respondent directing it to issue the Plaintiff/Applicant an appropriate discharge of charge instrument discharging the legal charge registered against the original title document to the suit property by the Defendant/Respondent pending the full hearing and final determination of this suit.

4. THAT an order of this court do issue against the Defendant/Respondent directing it to release a photocopy of the original title document to the property known as LR No 7660/63 (hereinafter referred to as the suit property) to its owner being the Plaintiff/Applicant to enable them conduct a search at the lands office pending the full hearing and final determination of this application.

5. THAT an order of this court do issue restraining the Defendant from adversely alienating, selling, disposing off (sic) or otherwise dealing with the suit property in a manner prejudicial to the Plaintiff/Applicant pending the hearing and determination of this suit.

6. THAT costs of this application and entire suit be provided for by the Defendant/Respondent.

2. The Plaintiff's Written Submissions were dated and filed on 12th November 2018 while those of the Defendant's were dated 24th November 2018 and filed on 26th November 2018.

THE PLAINTIFF'S CASE

3. The present application was supported by the Plaintiff's Affidavit. The same was sworn on 10th May 2018.

4. He stated that he was a director of Garden Center Ltd that was advanced financial accommodation by the Respondent against a security being a legal charge over L.R No 7660 of 1963 (hereinafter referred to as the "suit property"). The facility was eventually paid in full.

5. He contended that since August 2017 he had been trying to secure the original title for the suit property to no avail. He stated that the Respondent had informed him that it would not release the Title to him without him first forwarding to it a Discharge of Charge but which

could not be prepared in the absence of a copy of the Title.

6. In view of the prejudice that he said he was suffering due to the continued withholding of the original Title, he urged this court to compel the Respondent to discharge the suit property and to be restrained from dealing with the suit property pending the hearing and determination of the suit herein.

THE DEFENDANT'S CASE

7. In response to the said application, Tom Ogola, the Respondent's Legal Manager Litigation Department swore the Replying Affidavit on 24th October 2018. It was filed on 29th October 2018.

8. The Defendant averred that there was no evidence that the Plaintiff was a director of Garden Centre Ltd and denied ever having threatened the borrower and stated that it had only demanded payment on the loan facility in the ordinary course of its business.

9. It contended that it was the Plaintiff's responsibility to prepare a discharge of charge but that he had failed to do so or to furnish it with a copy of the Title. It admitted that it was willing to replace the Title as efforts to locate the same had been fruitless. It asked the court not to penalise it to pay costs as it had offered to replace the Title of which the Plaintiff had refused to co-operate.

LEGAL ANALYSIS

10. The Plaintiff submitted that the Defendant ought to pay all the costs directly and indirectly to replace the Title which it had admitted it could not trace. He added that there was no law that obligated a Chargor to furnish a charge with a discharge of charge instrument prior to the Chargee releasing the charged title to the Charger.

11. He further argued that it no longer had rights over the suit property, the loan facility having been paid in full and that he could choose who could replace the Title.

12. On its part, the Defendant pointed out that it had offered to replace the Title but that the Plaintiff had rejected its offer. It stated that he did not mitigate his losses as he approached it many years after the facility was settled. It relied on the cases of **African Highland Produce Limited vs John Kisono [2017] eKLR** where it was held that:-

“It was the duty of the Plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues and he cannot claim damages of any sum which is due to his own neglect.”

13. It was undisputed that the Title of the suit property could not be traced and that the loan facility over the said suit property was fully paid. What the parties were not agreed upon was, whose duty it was to procure a fresh title?

14. This court gave the parties an opportunity to resolve the matter out of court as it acknowledged that granting prayers (b) and (d) was a challenge as the Defendant had admitted that it did not have the Title. It stared at a scenario where any orders it would grant herein would be in vain.

15. As both parties were agreed that the Title could not be traced, it was not therefore logical for the Defendant to furnish the Plaintiff with the original Title of the suit property or a copy thereof. Granting prayers Nos (b) and (d) therefore remained a purely academic exercise.

16. It is clear the party preparing a discharge of charge must have sufficient details. The Defendant intimated its difficulties in giving the discharge of charge as it was the duty of the Chargor to do so. In the absence of a copy of the Title, this also court had challenges granting Prayer No (c) of the said application.

17. There was no evidence that was adduced by the Plaintiff to show that the Defendant was adversely alienating, selling, disposing off/ or otherwise dealing with the suit property or lay a basis why the Defendant should be restrained from proceeding as aforesaid pending the hearing and determination of the case. The court could not therefore grant Prayer No (e) of the said application.

18. It is trite law that indeed courts ought not to issue orders in vain. Indeed, any order that is issued must be capable of being complied with. An order that is incapable of being complied with or is unenforceable due to prevailing circumstances ought not to be granted as it would definitely prejudice a party against whom the order is purported to be made.

19. It was the considered opinion that granting the orders that have been sought by the Plaintiff would be merely an academic exercise as the Title of the suit property could not be traced. In addition, granting the orders as sought would mean putting the Defendant in conflict with the law as the Plaintiff would be entitled to file contempt of court proceedings in the event it failed to comply with orders to release the Title or a copy thereof.

DISPOSITION

20. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Notice of Motion application dated 10th May 2018 and filed on 14th May 2018 was not merited and the same is hereby dismissed with costs to the Defendant.

21. It is so ordered.

DATED and DELIVERED at NAIROBI this 9th day of April 2019

J. KAMAU

JUDGE