



**REPUBLIC OF KENYA**

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

**ELC NO. 304 OF 2017**

**(FORMERLY MILIMANI ELC NO. 15 OF 2016)**

**PAMOJA WOMEN DEVELOPMENT PROGRAMME.....1<sup>ST</sup> PLAINTIFF**

**VERSUS**

**JACKSON KIHUMBU WANGOMBE.....1<sup>ST</sup> DEFENDANT**

**MURARANDIA DEVELOPMENT COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By a Plaint dated 22<sup>nd</sup> September 2016, the Plaintiff brought this suit against the Defendants seeking for orders that;

*a) Specific performance of the loan facility contract dated 11<sup>th</sup> May 2010 and a Declaration that the 1<sup>s</sup> Plaintiff is the legal owner of Certificate No. 010 Plot No. 107 C part of L.R No. 5805/2 (Phase VI Kamiti Corner Estate) and or alternatively without prejudice to prayer No. (a) above the 1<sup>st</sup> Defendant pays the sum of Kshs. six million Forty Five Thousand and Three Hundred and Fifty (Kshs.6,045,350) from 19<sup>th</sup> September 2016 with interest at Court rate until payment in full.*

*b) Permanent Injunction do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves, their servants or agents or otherwise howsoever from selling, charging or whatsoever disposing plot No. 107 part of L.R No. 5805/2 until determination of this suit.*

*c) Costs and interest thereon.*

*d) Any further or other relief which this Honourable Court may deem fit to grant.*

In its statement of Claim, the Plaintiff averred that the 1<sup>st</sup> Defendant who was its employee applied for a loan facility of **Kshs. 4,650,000/=** which loan facility was approved and disbursed to the 1<sup>st</sup> Defendant through Vouchers **No. 5840,4776,4842,4161,5941 and 1812**. It was further averred that the 1<sup>st</sup> Defendant then deposited the original Certificate for the suit property in custody of the 2<sup>nd</sup> Defendant, a land buying Company.

It was their contention that the security of the suit property was to secure the loan facility by having a legal charge executed against the title but that the same was not completed as the 1<sup>st</sup> Defendant left employment with the Plaintiff before securing the legal charge. It therefore impossible to recover the outstanding loan facility thereafter. It was further contended that the 1<sup>st</sup> Defendant loan with the Plaintiff of **Kshs. 4,650,000/=** continues to accrue interest and other facilities from **31<sup>st</sup> December 2010**, and has thus accumulated to **Kshs. 6,045,350/=** as at **19<sup>th</sup> September 2016**. Further that the 1<sup>st</sup> Defendant had not made good his promises in several meetings with the Plaintiff's Executive Officer. They contended that they have learnt that the 1<sup>st</sup> Defendant is in collusion with the 2<sup>nd</sup> Defendant and they are intending to sell the suit property.

The suit is contested and the 1<sup>st</sup> Defendant filed a Defence dated **5<sup>th</sup> April 2017**, and denied all the allegations made on the Plaint. It was his contention that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs are unnecessary parties in the suit and that they lack locus standi. He averred that the 1<sup>st</sup> Plaintiff was not in a position to advance him the amount as it exceeded his two months' salary. He further contended that there was no legal charge prepared over the said suit property and therefore that his exit from employment prevented the charge from being executed is a proposition lacking in merit. Further, that there was no instrument granting any enforceable interest as may be required under section **13 (2) (d) of the Environment and Land Court Act**. He further averred that the Plaintiffs could not have allowed the advancement of the alleged loan before execution of the alleged charge. He averred that there is no basis for the declaration sought as there was no instrument transferring proprietorship to the Plaintiff. It was his contention that the claim on the plot is premature as the most the Plaintiff can do is claim for the alleged debt and upon getting the decree execute accordingly. That the Plaintiff cannot purport to execute before Judgement. He further

averred that this Court has no jurisdiction to issue orders on loans and their payment and that loans are not one of the items that can be specifically performed.

He admitted the Jurisdiction of the Court with regards to prayer No. (a) but not in respect of other prayer of specific performance of recovery of debt. The 1<sup>st</sup> Defendant urged the Court to dismiss the suit.

The suit proceeded by way of viva voce evidence wherein the Plaintiff called one witness and closed their case while the 1<sup>st</sup> Defendant also called one witness and closed his case. Despite Service, the 2<sup>nd</sup> Defendant did not enter appearance and the suit proceeded without its participation.

### **PLAINTIFF'S CASE**

**PW1 Charity Wahu Ndungu**, testified that she is the Finance Manager with Plaintiff. She adopted her witness statement dated **19<sup>th</sup> September 2016**. She further produced the list of documents dated **22<sup>nd</sup> September 2016**, as exhibit 1. She testified that the Plaintiff is a Non-Governmental Organisation, but that she was not aware if it had been registered with the NGO Council of Kenya. Further that she could not recall if the signature is hers. It was her testimony that the 1<sup>st</sup> Plaintiff has a seal but that they did not seal the Plaintiff. That the 1<sup>st</sup> Defendant was an employee of the Plaintiff and that he was senior in the Management. She further testified that he was given a loan by the Plaintiff and that it was to be secured and that the security was submitted by the 1<sup>st</sup> Defendant.

She told the Court that there were facilitations to be done and that the 1<sup>st</sup> Defendant left the organisation in **2014**, but the Charge was not prepared. That the loan agreement was done on **31<sup>st</sup> December 2010**, and that the payments by the 1<sup>st</sup> Defendant were done before the loan agreement was signed. She testified that they lent the money to the 1<sup>st</sup> Defendant, but that he did not pay back. She further testified that the loan contract is dated **11<sup>th</sup> May 2010**, and that she wanted the organization to be recognized as the owner of the suit property as they had bought it but they did not have possession of the land nor utilized it. She further testified that there were provisions for penalties which is covered under the costs to be incurred.

That the 1<sup>st</sup> Defendant was given the letter of offer and **Kshs. 4,650,000/=** was disbursed, and was to repay at 6% for 5 years. Further that since they could not charge a share certificate, the 1<sup>st</sup> Defendant offered the security but that he resigned when he had only paid **Kshs. 1,590,000/=** and that no legal charge was signed.

### **DEFENCE CASE**

**DW1 Jackson Kihumba Wangombe** adopted his witness statement dated **18<sup>th</sup> April 2017**, and further produced his list of documents dated **5<sup>th</sup> April 2017** as Exhibit 1. It was his testimony that it was not his role to perfect the charge document and that his work was to submit the documents to the institution. He further testified that he was the Deputy Chief Executive officer of the Plaintiff and that his duties were to oversee the general performance of the institution.

That he applied for a loan for **Kshs 400,000/=** on **10<sup>th</sup> September 2010**, and he had a staff loan of **Kshs. 1.5 million** and the application is dated **11<sup>th</sup> August 2010**. He also had another loan of **Kshs. 2,000,000/=** which he applied for on **3<sup>rd</sup> October 2010**, and that in total he applied for **Kshs. 4.6 million** and the employer accepted his application. It was his testimony that the purpose of the loan was to purchase a residential house and that the security was share certificate of the suit property. That he signed the loan facility and that he was to perform his obligation by submitting the Certificate and a legal charge was to be drawn. However, he acknowledged that no legal charge was drawn. It was his testimony that he has been paying the loan, but that it was not the whole of it. Though he testified that he resigned from employment on **30<sup>th</sup> April 2013**, he acknowledged that that was not correct as according to his statement he resigned on **2<sup>nd</sup> April 2013**. He further testified that though he continued to pay the arrears, he did not pay the whole of it as he had financial difficulties. That the Plaintiff filed a case at the **Kiambu Law Courts** wherein he objected and it was then transferred to the **Environment and Land Court in Nairobi**.

He testified that security offered was legal charge over **property No. 107 C** and that it does not talk about security being a share certificate.

The parties filed written submissions which the Court has now carefully read and considered.

The Court notes that while initially there were four Plaintiffs, the other three Plaintiffs were withdrawn from the suit on **12<sup>th</sup> October 2017**, when the Plaintiff's Advocate did not oppose the Application seeking their withdrawal.

It is not in doubt that the 1<sup>st</sup> Defendant was an employee of the Plaintiff and whilst being an employee, he took a loan facility amounting to **Kshs. 4,650,000/=**. Further that though the Loan agreement stipulated that the same would be covered by a security with legal charge over the suit property, the charge document was never prepared nor registered. However, the 1<sup>st</sup> Defendant resigned from employment wherein he had been making various payments amounting to **Kshs.1,590,000/=**. That since then, the Defendant has never repaid the money and it forms the backdrop of the instant suit. The Plaintiff has sought for specific performance of the loan, a declaration that it is the legal owner of the suit and further a permanent injunction over the suit.

Though the 1<sup>st</sup> Defendant has admitted the Jurisdiction of this Court with regards to the issue of the permanent Injunction and seeking a declaration of ownership, the 1<sup>st</sup> Defendant has denied the Jurisdiction of this Court with regards to the issue of specific performance of the loan.

The issues for determination are;

**1. Whether the Court has Jurisdiction to deal with the issue of specific performance and recovery of debt**

**2. Whether the Plaintiff is entitled to the orders sought**

**3. Who should bear the costs of this suit**

**1. Whether the Court has Jurisdiction to deal with the issue of specific performance and recovery of debt**

It is not in doubt that the dispute revolves around the issue of a loan facility that was advanced to the 1<sup>st</sup> Defendant and thereafter a charge that was to be created but was never prepared. **Section 56 of the Land Registration Act**, provides for the form and effect of a charge. It is a requirement under the above section that charge ought to be registered in order for it to be legal which was never done in this case. The Plaintiff has sought for specific performance with regards to the payment of the loan. However the Jurisdiction of the Environment and Land Court has been provided under **Article 162(2)(b) of the Constitution** which provides as follows:-

**“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to: -**

**b. The environment and the use and occupation of, and title to, land.”**

Parliament did proceed to enact the **Environment & Land Court Act No.19 of 2011 to give effect to Article 162(2)(b)** of the Constitution, as provided by **Article 162(3)** which states:-

**“(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”**

The jurisdiction of the court is contained in **Section 13 of the said Act** which provides as follows:

**‘(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any other written law relating to environment and land.**

**(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the court shall have power to hear and determine disputes relating to environment and land, including disputes-**

**a) Relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**

**b) relating to compulsory acquisition of land;**

**c) relating to land administration and management;**

**d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**

**e) any other dispute relating to environment and land.**

**3) –**

**4) –**

**5) –**

**6) –**

**7) – In exercising of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including –**

**a) Interim or permanent preservation orders including injunctions;**

**b) Prerogative orders;**

**c) Award of damages;**

**d) Compensation;**

**e) Specific performance;**

f) Restitution;

g) Declaration; or

h) costs

The above being the jurisdiction of this Court and the Plaintiff seeking for a prayer of specific performance with regards to a loan that ought to have been secured by a charge and payment of the loan amount, then this Court has no jurisdiction to determine the said prayers. See the case of **Co-operative Bank of Kenya Limited ...Vs....Patrick Kangethe Njuguna & 5 others [2017] eKLR** where the Court held that

***“Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to ‘use’ of land as discussed herein above. Such contracts, in our view, ought to be incidental to the ‘use’ of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.”***

The Court therefore holds and finds that having no jurisdiction to deal with the said prayers it must therefore down its tools with regards to the said prayers.

### **2. Whether the Plaintiff is entitled to the orders sought**

The Plaintiff has further sought to be declared as the owner of the suit property as it had advanced the loan to the 1<sup>st</sup> Defendant and in so doing, had acquired interest over the property by virtue of the fact that it was entitled to have the charge over the suit property. As already held above, the charge property was never prepared nor registered and therefore the Court cannot hold as to its validity. Further it is not in doubt that a validity of a charge is completed when the same is filed. See **Section 56(3) of the Land Registration Act** which provides;

***“The charge shall be completed by its registration as an encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument”***

Also see the case of **Coast Brick & Tiles vs Premchand ....** Where the Court held that;

***“By Section 32 upon registration the land specified becomes liable as security....”***

Furthermore even if the charge was duly registered, the same does not confer title upon the Plaintiff but it would only have acted as a security. See **Section 56 (5) of the Land Registration Act** which provides;

***“A charge shall have effect as a security only and shall not operate as a transfer.”***

The Court therefore finds and holds that there is no evidence that the Plaintiff ever acquired legal rights over the suit property and the prayer sought for a declaration that it is the legal owner is therefore unmerited.

The Plaintiff had also sought for a permanent injunction restraining the Defendants from dealing with the suit property. The Court finds that having no legal interest over the suit property, then the said prayer is also not merited. However the Court further notes that the prayer was sought until determination of the suit. It is therefore this Court considered view that the Plaintiff is not entitled to the orders sought.

### **3. Who should bear the costs of this suit**

Though a successful party is always entitled to the Costs of the proceedings, **Section 27 of the Civil Procedure Act** gives the Court discretion to grant costs. Unless otherwise it is always automatic that the Successful party will be granted the costs of the suit. This being a Court of Justice and equity notes that the 1<sup>st</sup> Defendant was advanced a loan by the Plaintiff. However, he has neglected to pay the said amount that necessitated the filing of the suit. The 1<sup>st</sup> Defendant is placing reliance on an omission and has since not paid the loan. It is therefore this Court’s considered view that though the 1<sup>st</sup> Defendant is the successful party, he is not entitled to the costs of this proceedings. The Courts therefore finds that each party should bear its own cost.

Having carefully considered the facts of this case, the pleadings filed by both parties, the evidence on record, the rival submissions herein and the relevant provisions of law and the authorities cited, the Court finds that the Plaintiff has not proved its case on the required standard of balance of probabilities and consequently, the plaintiff’s claim as set out in the Plaint dated **22<sup>nd</sup> September 2016**, is dismissed entirely. Each party to bear its own costs.

It is so ordered.

**Dated, signed and Delivered at Thika this 21<sup>st</sup> day of May 2020**

**L. GACHERU**

**JUDGE**

Court Assistant.....

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgement** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**By Consent of:**

**No appearance for the 1<sup>st</sup> Plaintiff**

**M/s. Guandaru Thuita Advocates for the 1<sup>st</sup> Defendant**

**No appearance for the 2<sup>nd</sup> Defendant**

**L. GACHERU**

**JUDGE**