



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 59 OF 2013 (O.S)

(FAST TRACK)

IN THE MATTER OF CR. 23231 PLOT NO. 3793/II/MN

**IN THE MATTER OF A CHARGE DATED 30TH NOVEMBER 1992 AND FURTHER CHARGE
DATED 16TH DECEMBER 1994 IN FAVOUR OF KENYA COMMERCIAL BANK LIMITED**

BETWEEN

KENYA COMMERCIAL BANK LIMITED PLAINTIFF

V E R S U S

JEREMY WILLY TSUMAH DEFENDANT

JUDGMENT

1. By an Originating Summons dated 21st May 2013 the Plaintiff seeks the following orders-
1. **THAT Kenya Commercial Bank Limited is the chargee in respect of the property known as CR No. 23231, Plot No. 3793/II/MN.**
2. **THAT an order be issued to declare that the registration of a prohibitory order dated 25th May 2007 and the vesting order dated 18th September, 2007 against the property known as CR No. 23231, Plot No. 3793/II/MN is null and void vis a viz the chargee's interest of Kenya Commercial Bank Limited.**
3. **THAT an Order be issued to set aside the registration of the Prohibitory Order dated 25th May 2007 and the vesting order dated 18th September, 2007 against the suit property CR No. 23231, Plot No. 3793/II/MN.**
4. **THAT an order be issued to declare that the provisional Certificate of Title dated 10th March 2009 in respect of the suit property CR No. 23231, Plot No. 3793/II/MN is null and void."**

BACKGROUND

2. The Plaintiff's Bank on or about 30th November 1992 granted a loan facility to SULEIMAN YAKO HIRIBAE (**Hiribae**) the then registered owner of property known as CR No. 23231 Plot No. 3793/II/MN (the property). As security for that facility Hiribae charged the property in favour of the Plaintiff. The charge was dated 30th November 1992 and was registered on 1st December 1992. Hiribae further charged the property by a further charge dated 16th December 1994 and registered on 21st December 1994. Those two charges continue to subsist and have not to date been discharged.
3. Hiribae defaulted in the repayment of his loan and Plaintiff while carrying out due diligence over the property found out that on 28th May 2007 a prohibitory order issued in **Civil Suit No. 336 of 2006** was registered against the property without the Plaintiff's consent .
4. Further Plaintiff found that on 29th January 2008 a vesting order dated 18th September 2007 was registered against the Certificate of Title to the property vesting the property in the name of Jeremy Willy Tsuma, the Defendant herein. Plaintiff's consent was not sought.
5. Further it emerged that on 10th March 2009 a provisional Certificate of Title of the property was issued in respect of the property, that is even though the Plaintiff has continued to hold the original Certificate of Title which it holds as security for the loan facility granted to Hiribae.
6. Plaintiff through its credit support manager's affidavit in support of this action has deponed that its investigations found that prohibitory and the vesting orders were issued in **Civil Case No. Machakos CMCC No. 336 of 2006** which was a money suit and which the Plaintiff Bank was not a party. Plaintiff further deponed that its efforts to trace that Court file have not borne any fruits.
7. It is on the basis of the above facts Plaintiff seeks the above prayers.

ANALYSIS

8. A charge is defined in Section 2 of the Land Registration Act No. 3 of 2012 as-

“(a) an interest in land or a lease securing the payment of money or money’s worth or the fulfillment of a condition.”

In the Land Act 2012 under Section 2 the definition is more extensive as follows-

“‘charge’ means an interest in land securing the payment of money or money’s worth or the fulfillment of any condition and includes a subcharge and the instrument creating a charge ...”

It is clear from those two definitions that the charge created by Hiribae was to secure the loan received by him from the Plaintiff. The Plaintiff has deponed that to date that loan has remained unpaid. The property therefore continues to be the Plaintiff's security.

9. Once a charge is registered an interest in land is created in favour of the chargee, which interest is linked to the chargor's obligation to repay the loan. As stated in the book “Land Law” by Nigel P. Gravells, 3rd edition-

“The advantage of such real security is that, even if the borrower becomes insolvent, the lender, as a secured Creditor, will take priority over the general unsecured creditors of the borrower ...”

That quote emphasizes the type of security created by a charge.

Further both sections 87 and 88 of the Land Act prohibit a charger from transferring, assigning,

leasing or subleasing without the chargee's consent. As correctly submitted by the Plaintiff the effect of the legal provisions in both the Land Act and the Land Registration Act is that the disposition of the property to the Defendant and also the issuance of prohibitory and vesting orders and the provisional Certificate of Title are all null and void for they lacked the Plaintiff's consent. The orders sought by the Plaintiff therefore are merited.

10. The Defendant was served on 3rd May 2013 with the Originating Summons but he failed to respond to the same.

11. The Court finds that Kenya Commercial Bank Limited is the chargee of property CR No. 23231 Plot No. 3793/II/MN and therefore grants judgment for the Plaintiff as follows-

- a. **An order is hereby issued declaring the registration of prohibitory order dated 25th May 2007 and the vesting order dated 18th September 2007 against the property known as CR 23231 Plot No. 3793/II/MN as null and void vis a viz the chargees interests of Kenya Commercial Bank Ltd, and accordingly an order is hereby issued setting aside the said registrations of prohibitory Order and the vesting order.**
- b. **An order is issued declaring the provisional Certificate of Title dated 10th March 2009 in respect of property CR. No. 23231, Plot No. 3793/II/MN as null and void and the said provisional Certificate of Title is hereby cancelled. The original certificate in the Plaintiff's possession is hereby reinstated.**
- c. **The costs of the suit are awarded to the Plaintiff.**

DATED and DELIVERED at MOMBASA this 15TH day of MAY, 2014.

MARY KASANGO

JUDGE