



**Namu v Advocates & 2 others (Enviromental and Land Originating Summons  
E002 of 2024) [2025] KEELC 347 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 347 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2024  
MD MWANGI, J  
JANUARY 31, 2025**

**BETWEEN**

**TITO NAMU ..... PLAINTIFF**

**AND**

**WANGAI MAINA T/A MAHIDA & COMPANY ADVOCATES 1<sup>ST</sup> DEFENDANT**

**DILIPSINH MAHIDA ..... 2<sup>ND</sup> DEFENDANT**

**PROPERTY HOUSE LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. The Plaintiff in this case prays for an order of mandatory injunction to compel the Defendants whether jointly or severally by themselves or their servants to deliver to him or his nominee, the original title deed for the property known as Naivasha/Maraigushu Block/10/2513 (Kedong). The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are advocates trading as Mahinda & Maina Co. Advocates.
2. In his originating summons dated 17<sup>th</sup> December 2023, the Plaintiff asserts that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are advocates acting or retained by the 3<sup>rd</sup> Defendant in a lease (transaction) for a property known as Oval at Westlands in Nairobi. The 3<sup>rd</sup> Defendant leased the said property to a company known as Wellness Project Limited.
3. The Plaintiff asserts that at the request of the Lessee he delivered his original title to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to hold in trust as security for the subsequent Lessee's settlement of alleged rent arrears arising from the demised lease with 3<sup>rd</sup> Defendant. He alleges that the Defendants did not accept the said title as security and demanded that he executes a transfer in favour of the 3<sup>rd</sup> Defendant. The Plaintiff declined the request to execute a transfer in favour of the 3<sup>rd</sup> Defendant on the basis that there was no privity of contract between him and the Defendants or consideration for the said transfer.



4. The Plaintiff contends that no legal or equitable charge was created nor registered on his title as the Defendants jointly rejected his offer. Subsequently, the Plaintiff avers that the Lessee (whom he was standing surety for) actually surrendered the lease to the 3<sup>rd</sup> Defendant. The 3<sup>rd</sup> Defendant even sued the Lessee to recover the outstanding rent.
5. The Plaintiff states that the Defendants have declined to return the original title deed to him without any legal basis. They have threatened and/intend to continue holding the title deed without any justifiable reasons.

#### **Response by the Defendants.**

6. The Defendants responded to the Plaintiff's Originating Summons by way of a replying affidavit sworn by Wangai Maina on 21<sup>st</sup> May 2024. The deponent explains that Wellness Project Limited, the Lessee, had accumulated arrears of rent and park fees, utilities and service charge amounting to Kshs. 5,891,279.16 as of 27<sup>th</sup> March 2019. An arrangement was arrived at between the Lessee and a subsequent Lessee (Digs and Dwellings Limited) who took over the demised premises with the agreement of the 3<sup>rd</sup> Defendant herein. The subsequent Lessee referred to as the 2<sup>nd</sup> Lessee hereinafter settled the outstanding utility bills and service charge, accumulated by the 1<sup>st</sup> Lessee leaving a sum of Kshs. 4,986,588.01 as the outstanding debt incurred by the 1<sup>st</sup> Lessee.
7. A deed of acknowledgment of debt and agreement to settle arrears dated 22<sup>nd</sup> May 2019 was executed by the Lessees and the 3<sup>rd</sup> Defendant herein. The 1<sup>st</sup> Lessee further surrendered the lease with effect from 31<sup>st</sup> March 2019. The 3<sup>rd</sup> Defendant entered into a new lease with the 2<sup>nd</sup> Lessee.
8. The 2<sup>nd</sup> Lessee too defaulted accumulating rent arrears culminating into a fresh arrangement with the 3<sup>rd</sup> Defendant. Eventually, the 2<sup>nd</sup> Lessee offered to furnish a security in form of a title deed which was to be held by the law firm of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants pending issuance of an undertaking and payment of the outstanding sum by 31<sup>st</sup> January 2020. The 2<sup>nd</sup> Lessee offered and voluntarily surrendered the Plaintiff's original title deed as the security.
9. The Defendants affirm that the Plaintiff's title was surrendered voluntarily by the Plaintiff on the undertaking that it would be held by the 2<sup>nd</sup> Defendant as security until the outstanding amounts were paid.
10. The Defendants claim that the Plaintiff has conveniently failed to join the Lessees whose payments of the outstanding amounts is a condition precedent to the release of the title. The deponent deposes that the Plaintiff is a relative of the directors and shareholders of the 2<sup>nd</sup> Lessee. The non-disclosure of the facts demonstrates that the Plaintiff has not come to court with clean hands. He is therefore undeserving of the reliefs sought.
11. The debts owed by the 2<sup>nd</sup> Lessee remain outstanding to date. It would therefore, according to the deponent, be unjust for the court to order the return of the title pledged as a security when the debts are still outstanding. It is denied that the offer of the security was rejected as alleged by the Plaintiff. What the Defendants wanted was that the Plaintiff executes a blank transfer to enable the 3<sup>rd</sup> Defendant realize the security on account of the prolonged breach and numerous broken promises on the settlement of the outstanding debts. The request for blank transfers did not negate in any way the 3<sup>rd</sup> Defendant's lien over the title deed, the same having been offered as a security.
12. The Defendants assert that they are ready to release the title deed upon full payments of the outstanding debts for which the title was pledged or upon the Lessees offering an alternative security of equal value. They therefore pray for the dismissal of the Plaintiff's suit.



13. In a further affidavit by HIRJI KHIMJI SEYANI sworn on 21<sup>st</sup> May 2024, the 3<sup>rd</sup> Defendant exhibited a statement of accounts, marked as HKS (a and b) showing the extent of indebtedness of the Lessees. The deponent reiterated the averments in the replying affidavit of Wangai Maina.
14. The Plaintiff in a further affidavit deposed on 19<sup>th</sup> September 2024 reiterated the averments in his affidavit in support of the Originating Summons. He avers that there is no privity of contract between the Defendants and himself at all. Equally that there is no evidence of a charge, guarantee or mortgage executed between himself and the Defendants to secure any debt. Accordingly, there is no equitable charge over the suit property for any debt owed to the 3<sup>rd</sup> Defendant.
15. The Plaintiff alleges that no security would be effected in his title in relation to the alleged debt owed by the Lessees to the Defendants unless the same is evidenced by a charge, mortgage or promise in writing signed by himself to the Defendant, because such is a disposition of interest in land which in law, particularly Section 3(3) of the *Law of Contract Act* must be in writing. The Defendants' claim would therefore be unlawful and unenforceable in law. The purported lien lacks basis in fact or law. The Plaintiff states that he is neither a guarantor nor a chargor in favour of the Defendants or at all.

#### **Court's directions.**

16. The directions by the court were that the Originating Summons be disposed of by way affidavit evidence and written submissions. Both sides complied and filed their respective submissions. The court has had occasion to read the submissions and consider them in writing this judgment.

#### **Issues for determination.**

17. The issues for determination are as framed in the originating summons by the Plaintiff dated 17<sup>th</sup> December 2023, namely;
  - a. Whether the Defendants should be compelled to return the Plaintiff's original title deed for land known as Naivasha/Maraigushu Block 10/2513 (Kedong).
  - b. Whether the Plaintiff should be awarded the costs of these proceedings.

#### **Analysis and determination.**

18. The Plaintiff readily admits that he willfully delivered his original title to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Law Firm at the request of the 2<sup>nd</sup> Lessee. The same was to be held in trust as security for the settlement of alleged rent arrears arising from the demised lease between the Lessees and the 3<sup>rd</sup> Defendant herein. The Plaintiff alleges that the Defendants though declined his title demanding that he signs a transfer in favour of the 3<sup>rd</sup> Defendant.
19. The Defendants on their part deny the allegation that they declined the Plaintiff's title deed explaining that all that they wanted was that the Plaintiff executes a blank transfer in addition to providing the title deed to enable the 3<sup>rd</sup> Defendant realize the security on account of breaches and broken promises by the Lessees. The Defendants insisted that the request for a blank transfer did not negate the 3<sup>rd</sup> Defendant's lien over the title deed provided by the Plaintiff.



20. The court agrees with the Defendants' assertion that the request that the Plaintiff signs a blank transfer was not tantamount to a rejection of the title deed as a security. The email dated 24<sup>th</sup> April 2020, does not express a rejection of the title deed. The writer states that,
- “Your client's move to refuse to execute the transfer is in bad faith as the title and the executed transfers were the only commitment to be furnished from your end.”
21. Having said so, the arrangement between the 3<sup>rd</sup> Defendant, the Lessees and the Plaintiff created what is referred to under Section 79 of the Land Act, as an “informal charge.”
22. Under Subsection (6) of Section 79, an informal charge is 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, or
    - iii. Any other document which it is agreed evidences ownership of land or a right to interest in land.
23. The arrangement is referred to as an informal charge and a deposit of the documents contemplated under Subsection (6)(b), is referred to as “lien by deposit of documents.”
24. An analysis of the evidence presented before the court demonstrates that the 2<sup>nd</sup> Lessee (who has not been made a party in this case) gave a written commitment to the 3<sup>rd</sup> Defendant offering to furnish a security for payment of the debts owing to the 3<sup>rd</sup> Defendant in form of a title deed which was to be held by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants law firm as such. The Plaintiff on his part willfully delivered that title deed at the request of the 2<sup>nd</sup> Lessee, with the clear intention that it acts as the security for the repayment of the monies owing by the 2<sup>nd</sup> Lessee to the 3<sup>rd</sup> Defendant. The Plaintiff thereby made himself a guarantor and cannot now turn around alleging that the Defendants are unlawfully holding his title deed. A lien by deposit of documents was created by the deposit of the title deed one of the documents contemplated under Subsection (6)(b).
25. The Plaintiff prays for an equitable remedy of mandatory injunction. It is a well settled principle of equity that he who comes to equity must come with clean hands.
26. Equity too follows the law. The arrangement by the parties to secure payment of the debt owed, as I have explained above is recognized by law.
27. The Plaintiff's submissions that no security would be effected against his title in relation to any alleged debt by the Lessees to the 3<sup>rd</sup> Defendant unless it is evidenced in writing in accordance with Section 3, (3) of the Law of Contract Act is defeated by the provision Section 161(2) of the Land Act.
28. The Land Act, at Section 161 (2) expressly provides that,
- “All other law relating to land shall be construed with the alterations, adaptations, qualifications and exceptions necessary to give effect to this Act.”



29. The *Land Act* was enacted after the *Law of Contract Act*. The *Law of Contract Act* must therefore be construed with the alterations, adaptations, qualifications and exceptions necessary to give effect to the provision of Section 79 of the *Land Act* on informal charges. I need not say more. The Plaintiff's case fails and is hereby dismissed with costs to the Defendants.

It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 31<sup>ST</sup> DAY OF JANUARY, 2025.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Kinyanjui h/b for Mr. Litoro for the Plaintiff

Ms. Kibore for the Defendants

Court Assistant: Mpoye

**M.D. MWANGI**

**JUDGE**

