



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT 1217 OF 2002

GEORGE W OMONDI.....PLAINTIFF

VERSUS

**GUILDERS INTERNATIONAL BANK
LIMITED.....DEFENDANT**

R U L I N G

On 29th October, 2010 the Hon. Mr. Justice L. Kimaru delivered his Judgment in this matter as follows:-

“In the premises therefore, having considered the totality of the evidence adduced in this case, and the applicable law, judgment is entered in this case in the following terms:-

- (i) The Defendant is hereby ordered to forthwith release to the Plaintiff the duly discharged title in respect of the Lavington Property i.e. LR No.3437/311-Lavington.***
- (ii) The Defendant is permanently restrained by means of a permanent injunction from interfering with the Plaintiff’s ownership and occupation of the Lavington property.***
- (iii) The Defendant shall be at liberty to exercise its statutory power of sale to sell the Makadara property i.e. LR No. 209/4401/307 (if the Plaintiff shall not repay the debt) to recover the amount owed by the Plaintiff pursuant to the loan that was advanced to the Plaintiff.***
- (iv) The Plaintiff shall pay to the Defendant the amount he owes to the Defendant which stood at Kshs.36,137,388.05 as at 10th February, 2002. This amount shall be paid together with the prevailing rate of interest of 18% per annum from that date until payment in full.***
- (v) The Plaintiff shall be paid 2/5th of the costs of this suit.***

A decree to that effect was extracted and issued on 1st December, 2010. However, when it came to executing the decree, the parties could not agree on the wording of the discharge to be drawn pursuant to order No. 1 of the decree. A Discharge of Charge for LR No. 3437/311 – Lavington was drawn by the parties whose version was not agreed by the parties. Parties therefore appeared before me on 29th May, 2012 and argued their respective positions and this is the ruling in respect thereof.

Mr. Murugara, learned Counsel for the Defendant submitted that the discharge as amended by his firm reflected Order Nos. 1 and 2 of the Decree of 1st December, 2010, that the words in the discharge to the effect ***“and from all principal monies interest costs and expenses secured by and from all claims and demands under the charge or otherwise howsoever”*** defeat order No.4 of the decree since that order

directs the Plaintiff to pay the Defendant certain monies due to the Defendant. Mr. Murugara therefore proposed the addition of the words **“but subject to any other legal encumbrances registered against the aforesaid including cautions, caveats or any prohibitions”** in order to reflect order No. 4. He further submitted that the court is able to execute its own decrees, that the prohibitory order registered against the title was given by the court pursuant to Order 22. He urged the court to uphold the wording of the discharge of charge as submitted by the Defendant.

Mr. Wasunna, learned Counsel for the Plaintiff was of a different view. He submitted that the judgment and the decree was categorical that the Defendant was to forthwith release the title to the Plaintiff the duly released title, that Defendant failed to release the property but proceeded to register a prohibitory order two months after the decree was issued, that Order No. 2 prohibits the Defendant from interfering with the Plaintiff’s property, that the registration of the prohibitory order was in breach of that order, that order Nos. 1 and 2 bars the Plaintiff from executing order No.4.

I have considered the judgment of the court, the extracted decree the Affidavits on record and the able submissions of Counsel.

My view of the matter is that the orders in the decree were made in the same judgment of the court and at the same time. In order to decipher the courts intention, it is imperative to refer to the basis of the orders.

As regards order number 1, the court arrived at it after evaluating the evidence and stated thus:-

“Having evaluated the conflicting evidence adduced on behalf of the Plaintiff and the Defendant in this regard, this court holds that the Defendant indeed gave an undertaking to the Plaintiff that it would release the title in respect of the Lavington property if the Plaintiff charged the Makadara property

The Defendant made a representation to the Plaintiff, a representation which the Plaintiff acted upon to his detriment. The Defendant cannot therefore be allowed to back out of the representation that it made to the Plaintiff that it would release the title in respect of the Lavington property to him if the Plaintiff charged the Makadara property.” (Emphasis mine)

It is on this basis that the court issued order Nos. 1, 2 and 3 in the judgment and decree. The court’s conclusion was reached after analyzing the correspondence relied on and in particular a letter dated 29th December, 1997 by the Defendants then Advocates Ms P. L. Mutuli Advocate which stated in part:-

“Please also note that the discharge of the Lavington Property shall only be drawn, executed and released to you upon registration of the charge over the Makadara Property.”

From the foregoing, it is clear that the court had intended to free the title for the Lavington Property from the reach of the Defendant in so far as the loan and exercise of Statutory Power of sale was concerned, the reason why order Nos. 1 and 2 were issued and read as they did.

As regards order No. 4, the same emanate from the fact the court found that the Plaintiff still owed the Defendant under the loan agreement between themselves. The Defendant is entitled to realize its rights under the judgment as it wishes. However, can it do so while in the process breaching some parts of that judgment. I think not.

My view is that the Defendant is acting in bad faith. Had it discharged and released the title for Lavington property, then exercised its Statutory power of sale and there was a shortfall on the amount decreed in its favour, then it could proceed to encumber the Lavington Property in the way it did. By lodging the Prohibitory order as it did before complying with Order No.1, in my view, the Defendant while purporting to enforce its rights under the decree was at the same time breaching order No.2 of the decree. I do not think that was the intention of the court when it decreed its judgment under consideration.

Further, by seeking to execute order No. 4 before complying with order No. 1 in my view, the Defendant

was in fact placing in place circumstances that the court had firmly reversed, i.e. the encumbering of the Lavington Property whilst still the Makadara Property was under its control and subject to be sold in the exercise of its statutory power of sale. I think that is wrong. The letter and spirit of the judgment was to free and release the title for Lavington to the Plaintiff, realize the security in accordance with the law and then if there is any shortfall, then pursue execution. The Judgment and order made on order 4 was subsequent and predicated upon order no. 3 in the decree.

I think I have said enough. The Prohibitory Order was made and registered against the title in contravention of order Nos. 1 and 2 of the decree.

Accordingly, the discharge of charge should be as drawn by the Plaintiffs Advocates but with the words:-

“from all principal monies interest and expenses secured by and from all claims and demands under the charge.”

The words **“costs”** and **“or otherwise howsoever”** are to be excluded from the order.

Orders accordingly.

DATED and delivered at Nairobi this 13th day of July, 2012.

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A. MABEYA
JUDGE