



**REPUBLIC OF KENYA**

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

**ELC. PETITION NO. 13B OF 2017**

**PHILLIP KIBUBA NZIOKA.....PETITIONER**

**VERSUS**

**THE CHIEF LANDS REGISTRAR.....1<sup>ST</sup> RESPONDENT**

**THE MINISTRY OF TRANSPORT, INFRASTRUCTURE,**

**HOUSING AND URBAN DEVELOPMENT**

*(State Department of Housing and*

*Urban Development).....2<sup>ND</sup> RESPONDENT*

**THE COUNTY COMMISSIONER**

**MACHAKOS COUNTY.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. This Judgment is in respect to the Petitioner's Petition dated 16<sup>th</sup> August, 2017. In the said Petition, the Petitioner has described himself as, the personal representative of the Estate of Monica Koki **Nzioka** (*deceased*). The Petitioner averred that by a Deed of Transfer of Interest and Charge dated 2<sup>nd</sup> December, 1974, the 1<sup>st</sup> proprietor conveyed parcel of land known as Machakos Block 1/127 (*formerly L.R. No. 909/258*) to him.
2. According to the Petitioner, the first charge was registered by the District Commissioner, Machakos on behalf of the 2<sup>nd</sup> Respondent, for KShs. 12,211.17, which had been advanced to the 1<sup>st</sup> proprietor for purpose of developing the suit land and that in 1975, the deceased also advanced to the Petitioner and the first proprietor KShs. 20,000 which led to the second charge being registered over the suit land.
3. The Petitioner averred that in the year 1976, the deceased commenced proceedings in Nairobi HCCC No.2380 of 1976 to recover the debt; that a consent order was recorded in the Nairobi matter and that when the Petitioner and the first proprietor defaulted in making the monthly instalments as agreed, the suit property, escheated and was registered in favour of the deceased.
4. According to the Petitioner, the deceased remained the registered proprietor of the suit property until 1997 when the Petitioner, on behalf of the deceased, applied for the extension of the Lease since the same was expiring in 1999.
5. The Petitioner's complaint is that the failure by the 3<sup>rd</sup> Respondent to vacate the first charge after being informed by the 2<sup>nd</sup> Respondent that they have no claim over the suit property has violated the deceased's interests over the suit land; that the second charge has lapsed as the suit land was transferred to the deceased pursuant to the terms of the consent order and that the Respondents have failed or refused to exercise their statutory duties of vacating the caveat and extending the lease to the detriment of the deceased's Estate.
6. The Petitioner is seeking for an order compelling the 2<sup>nd</sup> Respondent to discharge the charge registered on 28<sup>th</sup> February, 1974 against parcel number Machakos Block 1/127 and for an order of mandamus directed to the 1<sup>st</sup> Respondent commanding him to vacate the first charge and renewing the Lease over Machakos Block 1/127. The Petitioner is also seeking for the costs of the suit.
7. Although the Respondents were served with the Petitioner, they neither entered appearance nor filed Replying Affidavits as required by the "*Mutungu Rules*." The Petition proceeded for hearing by way of viva voce evidence.

8. PW1 repeated the averments in the Petition when he appeared before me, which I have already summarized above. PW1 also produced in evidence the bundle of documents which were filed in court on 4<sup>th</sup> July, 2018. I shall refer to those documents later.

9. The Petitioner's advocate submitted that the Lease which was owned by the first proprietor of the suit property and which was transferred to the other two subsequent proprietors had a term of 33 years, with effect from 1956 upto 1<sup>st</sup> November, 1989; that the deceased was the registered proprietor of the suit land and has always had possession of the same and that because of the existing charge over the suit property, no transactions, including extension of Lease, can take place on the land without the consent of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

10. The Petitioner's advocate submitted that the Petitioner has expressed willingness to settle Kshs. 12,211.17 but no one is willing to receive the money; that the debt should be written off, the first charge vacated and the Lease be renewed and that the Petition should be allowed.

11. The facts of this Petition are that the Petitioner is the personal representative of the Estate of the late Monica Koki Nzioka (*deceased*) who died on 24<sup>th</sup> March, 2009. The deceased was registered as the proprietor of the suit land in 1976.

12. From the copy of the abstract of title (*white card*) produced by the Petitioner, parcel of land known as Machakos Block 1/127 was initially registered in favour of Kyengu Muasya (*the 1<sup>st</sup> proprietor*) who, after obtaining a facility in the sum of Kshs. 12,211.17 from the 2<sup>nd</sup> Respondent, registered the first charge against the title.

13. By way of a Deed of transfer of Charge and Interest dated 2<sup>nd</sup> December, 1974, the 1<sup>st</sup> proprietor transferred his interests, together with the first charge to the Petitioner, who was issued with a Certificate of Lease on 7<sup>th</sup> February, 1975. In the same year, Monica Koki (*the deceased*) advanced to the 1<sup>st</sup> proprietor and the Petitioner Kshs. 20,000, who then sued the two of them in Nairobi HCCC No. 2380 of 1976 for the amount of money that was due and owing.

14. Pursuant to the consent Judgment that was entered into in Nairobi HCCC No. 2380 of 1976, the suit land was transferred to the deceased, who is now being represented by the Petitioner.

15. It is not in dispute that the Leasehold in respect to the suit land was for a period of thirty three (33) years with effect from 1<sup>st</sup> November, 1956. It is also not in dispute that the deceased was the registered proprietor of the land as at the time the Lease expired by effluxion of time in 1989.

16. The Petitioner produced in evidence several correspondences showing the efforts he has made to have the Lease extended in favour of the deceased. The said correspondences include the letters dated 30<sup>th</sup> March, 1999, 24<sup>th</sup> March, 2003, 14<sup>th</sup> July, 2004, 31<sup>st</sup> August, 2015, 10<sup>th</sup> May, 2016, 30<sup>th</sup> May, 2016 and 21<sup>st</sup> June, 2016.

17. Evidence produced by the Petitioner shows that by way of a letter dated 4<sup>th</sup> July, 2004, the 2<sup>nd</sup> Defendant, who is the chargee, informed the Commissioner of Lands and the Director of Physical Planner that it had no objection to the extension of the Lease. On 20<sup>th</sup> July, 2016, the 2<sup>nd</sup> Respondent informed the County Commissioner, Machakos, that the Lease should be extended. In the said letter, the 2<sup>nd</sup> Respondent wrote as follows:

***“An enquiry was made to Housing and Estates offices and was confirmed that we have no records or claim to this property. The purpose of this letter is to request your office to look for ways either to receive this amount plus interest and thereafter vacate the charge to facilitate renewal of the Lease. Alternatively, you may explore ways of writing the debt off officially in order to vacate the charge...”***

18. The letter dated 20<sup>th</sup> July, 2016 was forwarded to the 1<sup>st</sup> Respondent by the 3<sup>rd</sup> Respondent. However, it seems the 1<sup>st</sup> Respondent, whose mandate includes extending Leases, never responded to it.

19. In view of the evidence before the court, and more specifically the letter by the 2<sup>nd</sup> Respondent and the District Physical Planning Officer who have no objection to the extension of the Lease, and in the absence of any pleading or evidence by the Respondents' controverting the averments in the Petition, I find that the Petitioner has proved his case on a balance of probability.

20. For those reasons, I allow the Petition dated 16<sup>th</sup> August, 2017 as follows:

***a. An order be and is hereby issued compelling the Ministry of Transport, Infrastructure, Housing and Urban Development and the County Commissioner Machakos (State Department of Housing and Urban Development and the County Commissioner) to discharge the charge registered on 28<sup>th</sup> February, 1974 against the Deceased's Interests over Machakos Block 1/127 (formerly L.R. No. 909/258).***

***b. An order of mandamus be and is hereby issued directed at the Chief Land Registrar directing and commanding him to vacate the 1<sup>st</sup> charge and renew the deceased's Estate's Lease over Machakos Block 1/127 (formerly L.R. No. 909/258) for a further term of 99 years.***

***c. The Petitioner to bear his own costs.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 29<sup>TH</sup> DAY OF MARCH, 2019.**

O.A. ANGOTE

JUDGE