



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 495 OF 2017

ISMAEL EBOSO MUSINYA....PLAINTIFF/RESPONDENT

VERSUS

MARKO JUMA AKHONYA

EZAKIEL MUDAMBA.....DEFENDANTS/APPLICANT

BARCLAYS BANK OF KENYA.....RESPONDENT

RULING

This application is dated 14th November 2017 and is brought under sections 3, 3A and 63 of the Civil Procedure Act and section 30 (2) of the Contempt of Court Act No. 46 of 2016 seeking the following orders;

1. That this honourable court be pleased to grant the firm of M/s. Rauto & Co. Advocates leave to come on record acting for the defendant/applicant.
2. The Barclays Bank of Kenya be enjoined as a party to this application.
3. That this honourable court be pleased to issue a notice to show cause why contempt of court proceedings should not be commenced against the plaintiff/respondent for disobedience of a lawful court order.
4. That Barclays Bank of Kenya be ordered to immediately discharge the charge registered on L.R. BUTSOTSO/SHIKOTI/627.
5. That the Deputy Registrar, Kakamega High Court be authorized to sign all the relevant transfer documents for L.R. NO. BUTSOTSO/SHIKOTI/627 in relation to execution of this honourable court's order issued on 12/5/2015.
6. That costs of this application be provided for.

It is based on the grounds that, the honourable court herein entered judgment in favour of the defendant/applicant on 12th day of May, 2015. That the Judge decreed that land parcel No. BUTSOTSO/SHIKOTI/627 be cancelled and two new titles be issued. That the Judge further decreed that one title deed for 4 acres be registered in the name of the plaintiff/respondent and another title deed for 12 acres be registered in the name of the defendant/applicant and three others. That the said land, the subject of the suit, L.R. BUTSOTSO/SHIKOTI/627 is registered in the name of the plaintiff/respondent. That the plaintiff/respondent had the said L.R. BUTSOTSO/SHIKOTI/627 charged by Barclays Bank of Kenya for a financial facility. That the plaintiff/respondent has deliberately failed to have the charge discharged to enable the Land Registrar cancel the said title, and proceed to issue two title deeds as ordered. That the plaintiff/respondent has failed to enforce the order and or is deliberately interfering with enforcement of the said order to defeat execution of the same. That the plaintiff/respondent's actions and or omissions amount to contempt of court.

The respondent, Ms. Barclays Bank of Kenya Ltd submitted that, the said application at prayer 2, thereof, seeking amongst its reliefs for joinder of Ms. Barclays Bank of Kenya Ltd as a party to this suit is misconceived and constitutes an abuse of the court process on account of the fact that the suit has already been determined and judgment entered thereon on 11th June, 2015, between the original parties to the suits, namely, Kakamega HCC. No. 28 of 2003 and Kakamega HCC No. 39 of 2003, as consolidated by the court in the proceedings of 23rd May, 2005 before Justice G.B.M. Kariuki. The said application at prayer 4 and 5, thereof, seeking to compel Ms. Barclays Bank of Kenya Ltd. to be ordered to immediately discharge the charge registered on L.R. Butsotso/Shikoti/627 is misconceived and constitutes an abuse of the process of the law, in seeking to compel the Bank to discharge or otherwise deprive it of its legal interest on the said parcel of land as security for the repayment of a loan facility secured under the provisions of sections 65 (1), (3) and section 70 of the then applicable

Registered Land Act, Chapter 300, without an opportunity to be heard on the same, in a matter where judgment is already delivered, and the bank would not have a chance to be heard on the same after judgment is delivered and the court is functus officio, unless the judgment is set aside, and the parties, including the bank given an opportunity to be heard, on their respective rights and interests. The interest of the Bank as a genuine stakeholder in the parcel of land in question appears to have been within the knowledge of all the original parties to both the suits known as Kakamega HCC No. 28 of 2003 and Kakamega HCC No. 39 of 2003, before and after the consolidation of the suits, as appears to have been disclosed in the Notice of Motion application dated 2/6/2006 filed in court on 7/3/2006, by Ms. Munyendo Muleshe & Co. Advocates on behalf of Esmail Eboso Musinya in Kakamega HCC. No. 28 of 2003, and the Chambers Summons dated 10/7/2003 filed in court on 8/9/2003, by D.S. Mango Advocates on behalf of Mariko Juma Akhonya in Kakamega HCC No. 39 of 2003. The Bank's interest as a charge registered under section 70 of the Registered Land Act, as disclosed as an agreement endorsed in the land register, in all the certificates of searches, produced in the proceedings in this suit and also in the instant application, protects its interest as a charge, not to allow the suit parcel of land, to be transferred, apportioned, leased or otherwise dealt with in any manner as would prejudice its interests unless, with the bank's written consent, being a right constituted long before the suit was filed in court, and is a right by whose nature, was constituted at a time when the register was not encumbered in any way by the interest of the defendants in this suit. The Bank was entitled to be heard as a party to this suit at its commencement, to enable it protect its inalienable right to natural justice to be heard in the main suit alongside the rival claims of the parties to this suit before any condemnation of that right or interest in the said property. Should the bank be joined at this stage of the suit after judgment, there are no further proceedings on the issues of liability on the subject, hence the bank would be condemned without a fair chance of a hearing on its interests. No orders ought to be issued by this court by way of purported execution of the judgment of this court in the manner sought by the applicant in this instant application, where the judgment, itself, does not place any obligation of compliance or otherwise against the bank, who was not even a party to the suit. The instant Notice of Motion application dated 14/11/2017 by Mariko Juma Akhonya, by his instant advocate, Rauto & Company Advocates, seeks the same reliefs as the earlier Notice of Motion application dated 9th November, 2015, filed by the same party, in person, on the same date, in relation to which the learned Justice Kaniaru, in the proceedings of 17th November, 2015 herein declined to issue any orders and expressed himself, as being inappropriate to issue any order against the bank when it had not been a party to this suit before judgment, and instead of pursuing that application owing to those apparent adverse judicial comments, the same litigant simply abandoned that application without prosecuting it and instead filed the instant application after two years before a different judge of the same court. The instant application constitutes a gross abuse of the court process and is an attempt to play lottery with the judicial system in the hope of a different or favourable decision from a different judicial officer presiding over the same court. The application before this court is misconceived, constitutes an abuse of the court process and ought to be dismissed with costs.

This court has considered the application and the submissions therein. The plaintiff/respondent did not oppose the same. The background of this matter is that, vide a plaint dated 21/5/2003, the plaintiff/respondent filed this suit seeking for an order of eviction against the applicant/defendant from L.R. BUTSOTSO/SHIKOTI/627. That the said L.R. BUTSOTSO/SHIKOTI/627 is registered in the name of the plaintiff/respondent. Annexed and marked MJA 1 is a copy of a search certificate. That upon hearing of the suit, the honourable judge ordered that the title for land L.R. NO. BUTSOTSO/SHIKOTI/627 be cancelled and two fresh titles be issued, one for 4 acres in the name of the plaintiff/respondent and another one for 12 acres in his name and those of his brothers. Annexed and marked MJA 2 is a copy of the decree. That during hearing, they discovered that the plaintiff/respondent had secured a credit facility of Ksh. 10,000/= and charged the subject land for the same as evidenced in annexure marked MJA 1. That immediately after judgment was delivered, he started and/or initiated the execution process of the said order. That he approached the Land Registrar, Kakamega County for execution of the said order but she informed him that the same could not be effected until when the charge is discharged. That he then approached Barclays Bank-Kakamega Branch who informed him that despite the order, the plaintiff/respondent must personally approach the Bank and initiate the discharge process. That he has approached the plaintiff/respondent to have the charge discharged but the plaintiff/respondent has blatantly told him in the face that he will not sign any forms for discharge despite having repaid the loan in full. That the plaintiff/respondent refusal to have the charge discharged holds him in continuous contempt. I find that court orders cannot be issued in vain. The plaintiff/respondent has not appealed against the said judgement delivered way back in 2015. In order for the judgement to be enforced that suit title has to be availed. It is not disputed that the plaintiff/respondent has cleared the loan facility advanced to him by the Bank and the issue in this case appears to be the discharge process of the title. To do the same the Bank has to be enjoined as a party to this suit and they should not at any event at this point have any interest in the suit land.

Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or *suo moto*, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. In the case of *Central Kenya Ltd vs Trust Bank & 4 Others, CA No. 222 OF 1998*, the court stated that, the guiding principle in amendment of pleadings and joinder of parties is that:

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

It is the view of this court that, no suit shall be defeated by reason only of the misjoinder or non-joinder of a party; and that the that the joinder may be done either before, or during the trial; that it can be done even after judgment where execution has to be completed. It is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added even at the appellate stage. This is the only way that a court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned. I see no prejudice that would be suffered if the respondent/ Barclays Bank of Kenya Ltd is enjoined as a party at this stage in order to execute the judgement. I find this application has merit and I grant the following orders;

1. The Barclays Bank of Kenya Ltd is to be enjoined as a party to this application.
2. The plaintiff/respondent is to deliver the said title for L.R. BUTSOTSO/SHIKOTI/627 to the Land Registrar within the next 30 days from the date of this ruling. In default and provided the loan has been repaid in full, Barclays Bank of Kenya Ltd is ordered to discharge the charge registered on L.R. BUTSOTSO/SHIKOTI/627.
3. That the Deputy Registrar, Kakamega High Court be authorized to sign all the relevant transfer documents for L.R. NO.

BUTSOTSO/SHIKOTI/627 in relation to execution of this Court's order issued on 12/5/2015.

4. That costs of this application be borne by the plaintiff/respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9TH DAY OF APRIL 2019.

N.A. MATHEKA

JUDGE