



**MWK v PKM; Equity Bank (Kenya) Limited (Interested Party) (Environment and Land Case 319 of 2017) [2019] KEELC 5113 (KLR) (24 June 2019) (Judgment)**

*Mwk v Pkm Interested Party Equity Bank (Kenya) Limited [2019] eKLR*

Neutral citation: [2019] KEELC 5113 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND CASE 319 OF 2017**

**JG KEMEL, J**

**JUNE 24, 2019**

**BETWEEN**

**MWK ..... PLAINTIFF**

**AND**

**PKM ..... DEFENDANT**

**AND**

**EQUITY BANK (KENYA) LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

1. This suit was first filed on the 25/11/13 and later amended on 29/10/18. The Plaintiff claims to be the wife of the Defendant having solemnized their union of 2 sons by customary marriage in 2001. That during the subsistence of the said union, they owned and managed a business in Kangema Town through which they bought a property LOC12/Gakira/xxx (suit land) which property was registered in the name of the Defendant on 9/2/06. It is her averment that they built a matrimonial home on the suit land.
2. The Plaintiff contends that the Defendant obtained a loan facility from the Interested Party and defaulted in repayments. She avers that the Defendant deserted the matrimonial home and on learning that he intended to sell the property to a third party caused a caution to be registered on 20/11/12 which was later removed without any notice to her. The Interested Party caused a discharge of charge to be registered against the suit land paving way for possible sale of the suit land to a third party. On 25/11/13 she obtained a Court order barring the Defendant from dealing with the suit land in any manner.
3. On discovering that the Defendant had obtained a loan from Equity bank and had defaulted she took it upon herself to make repayments to salvage the property. Further she avers that the bank caused the



cancellation of the discharge of charge registered on 13/7/13 hence reinstating the charge dated the 31/3/2011 on the suit land during the pendency of a Court order forbidding any dealings subsisting on the title. She accuses the Defendant and the Interested Party of breach of the Land Registration Act and Land Act, 2012 and in particular that it failed to adhere to the provisions of the said laws; failed to issue 90 days' notice of intention to rectify the register under section 79(2) of the Land Registration Act; failed to seek spousal consent from the Plaintiff and failed to obtain Land Control Board consent to charge.

4. The Plaintiff sought the following orders;
  - a. Declaration that the house that has been the matrimonial home of the Plaintiff and the Defendant and registered in the name of the Defendant is the matrimonial property held in trust by the Defendant for both of them and that it does not belong solely to the Defendant.
  - b. Declaration that the spousal interest in the matrimonial home as wife and part owner.
  - c. Declaration the charge instrument dated the 31/3/2011 and reinstated on the 4/2/14 registered against the suit property is null and void.
  - d. Declaration that the Interested Party's statutory power of sale crystallized after the Land Act and the Land Registration Act, 2012 came into force.
  - e. That an order do issue directed at the Lands Registrar, Murang'a to include the name of the Plaintiff in the register as a joint tenant.
  - f. The Court be pleased to reopen the charge dated the 31/3/2011 in the interests of doing justice between the parties.
  - g. Any other orders that this honourable Court may deem just.
5. The suit is opposed by the Defendant who filed a defence on the 16/1/14. He conceded that he and the Plaintiff were once married but have since separated. He denied that the suit property was jointly owned. He argued that the Plaintiff did not contribute to the acquisition of the property. That it was acquired solely by himself to the exclusion of the Plaintiff. He undertook to raise a preliminary objection that the Court has no jurisdiction to deal with matrimonial property under the Married Women Property Act 1882 and sought to apply for striking out of the plaint.
6. The Interested Party (bank) opposed the claim and admitted that the suit land was security held by the Interested Party due to legal charge over the title registered and stamped to cover Kshs 1.1 million in favour of the bank. That the Defendant sought to sell the suit land to a third party to enable him defray the charged debt due and owing to the bank. In furtherance of this action, the Defendant requested the bank to register a discharge of charge over the suit land to enable the Defendant present a clean title to the land control board to obtain consent to transfer. The bank asserted that the repayment of the loan was irregular. It denied that the Plaintiff has been making repayments towards the loan.
7. The bank denied that it acted irregularly in causing the rectification of the register by cancelling the discharge that had been procured through false pretense of the Defendant and avers that the register was rectified through section 79(2) of the Land Registration Act. It averred that the Plaintiff will not suffer any prejudice as no statutory notices have been issued and/or served upon the Plaintiff. In the alternative the bank sought for dismissal of the suit on grounds inter alia; the Plaintiff has acknowledged the debts owed to the bank; the Plaintiff has not proved payments she alleges to have been made and the statements from the bank does not support her allegations; no statutory notice has been served on the Plaintiff and the Plaintiff cannot misrepresent to the Court to get orders based on lies; the law allows the bank to commence recovery through a statutory notice.



8. The Plaintiff testified and stated that the Defendant is her husband having gotten married by way customary law in 2001. She told the Court that she did not have any document to evidence the customary marriage. That the union of 2 boys has not been dissolved or annulled. She attached the birth certificates of the boys and on the day of hearing informed the Court that one of the sons accompanied her to Court. Both were professional tailors who owned tailoring businesses in Gakira and Kangema townships. That using the revenue from the tailoring business acquired by purchase the suit land where they built their matrimonial house and later rental units for lease. In September 2012, she informed the Court her husband deserted the home.
9. She informed the Court that in 2011 the Defendant obtained a loan from Equity Bank in the sum of Kshs 960,000/- which was secured by a legal charge in the sum of Kshs 1.1 m registered on the 31/10/11 over the suit land. She avers that the Defendant did not consult her about the loan and therefore unaware how the proceeds of the loan were utilized. She stated that in around Nov 2012, she learnt that the Defendant wanted to sell the property to a third party and she lodged a caution on 20/11/12 but was removed without her notice on the 29/4/13 by the Land Registrar Muranga under s 73(3) of the Land Registration Act, 2012. She also received information that the Defendant had defaulted on loan repayments and the bank was at the verge of exercising its statutory power of sale. Some of the statutory notices by the Interested Party were copied to her. She also learnt that the Defendant was planning to sell the land to repay the loan. She then entered into an agreement with the bank dated the 30/5/13 in which she committed to repay the loan at the rate of Kshs 20,000/- monthly to safeguard the property. She informed the Court that she paid Kshs 63,000/- in arrears as shown by the receipts on pages 48-57 of her bundle of documents. That she stopped paying the loan when she learned that the bank was planning to sell the land by public auction. Despite these attempts she informed the Court that she learnt that the Defendant and the Interested Party were in the process of selling the property to one Hezron Muchiri Maina to defray the loan arrears and the bank was going to finance the purchase. The bank then discharged the property on the 13/7/13 to enable the Defendant obtain consent to transfer from the relevant land control board.
10. Upon this discovery she filed this suit on the 25/11/13 and obtained orders on 25/11/13 restraining the Defendant from dealing with the suit land in any manner. The said orders were registered on the title on the 27/11/13.
11. On 4/2/14, whilst the orders aforesaid were still subsisting the bank through its lawyers caused the cancellation of the discharge registered on the 13/7/13 on the grounds that the discharge of charge had been obtained by false pretense on the part of the Defendant. The order of 25/11/13 was temporary pending the hearing and determination of the application. The application was finally determined on the 28/10/14. By the time the cancellation of discharge was done, the orders were still in force. See Order 40 Rule 6. Although the order did not bar the bank as at that time it was not a party, it gave notice on the register (record) that no dealings were to be done on the title pending the application.
12. The notice to exercise statutory power of sale dated the 4/3/14 was issued to the Defendant immediately following the reinstatement of the charge on the 4/2/14.
13. According to the register of the suit land, the charge was registered on the 14/4/11 and the same was discharged on the 17/7/13 as entry No 3. On the 4/2/14 another entry named discharge No 4 cancelled under section 79 (2) see Muraguri Letter dated the 4/2/14.
14. The Plaintiff argued that the effect of cancelling the discharge had the effect of reinstating the charge in 2014, the new land laws had come into force and so required the Interested Party to register a fresh charge to comply with the new land laws. She faulted the bank for failing to obtain spousal consent, Land Control Board consent and failing to comply with the new land laws.



15. The new land laws came into force on the 2/5/2012. Can it be argued that the registration of the reinstatement of the charge should have complied with the provisions of the new land laws? This is so because of the period it took to reinstate the charge, 9 months. Did the position of the parties change? The Plaintiff has made repayments pursuant to the agreement with the bank dated the 30/5/13 on the loan thus acquired beneficial interest as a result of the contribution. The Plaintiff has acquired spousal rights in law. Her rights are now overriding under section 28 of the *Land Registration Act*. The bank being aware that the Plaintiff was and is a spouse of the Defendant should have ensured that the law is complied with as the rights of the parties thereon had changed in legal latitude.
16. In support of her case the Plaintiff produced documents marked PEX No 1-13. She explained to the Court that she was served with the notification of sale by the auctioneers. Further she stated that she did not collude with the bank to defeat its statutory power of sale.
17. The Interested Party (the bank) testified through Ngunjiri Maina, its Kangema branch credit manager. He stated that by an instrument dated the 31/3/11 the Defendant charged the suit lands for Kshs 1.1m . further advances were extended to him by the bank in the sum of Kshs 960,000/- secured by the existing charge of Kshs 1.1m on the 12/11/12. On the 23/4/13 the Defendant sought to sell the suit land to Hezron Muchiri Maina. The sale to Maina was to be financed by the bank as per the terms of the letter of offer dated the 11/6/13. The bank through its lawyers Muraguri & Muraguri issued a professional undertaking on 2/7/13 to the Defendant/Charger/Vendor for the payment of the balance of the purchase price in the sum of Kshs 2.4 million upon transfer of the suit land to maina and registration of the charge in favour of the bank. On the 13/7/13 the suit land was discharged and thereafter the Defendant discontinued all communication with the bank and failed to transfer the suit land to the intended purchaser. On the 4/2/14 the bank through its lawyers aforesaid wrote to the Land Registrar to cancel or rectify the register by cancelling the discharge of the charge and reinstating the charge.
18. The witness stated that the outstanding loan as at 18/10/18 stood at Kshs 599,047/- which sums continue to accrue interest. He stated that the bank is yet to issue a statutory notice under section 90 of the *Land Act* despite the default and denied the assertion by the Plaintiff that statutory notices had been issued. He argued that the bank should be allowed to sell the property on account of default in payments.
19. In cross examination he stated that though the Court order was registered against the title on the 27/11/13 , the preceding transactions were carried out in the subsistence of a Court order issued in ELC No 242 of 2013. Although he informed the Court that a new charge was prepared after the old charge was discharged, he did not show the Court any documents to support his testimony. He informed the Court that the charge was reinstated in 2014 without the consent of the Plaintiff being sought and obtained. He was not able to answer if the Land Control Board consent was obtained either. He neither tabled any document in Court to support the outstanding loan in the books of the bank.
20. In evidence he produced a list of documents to support his averments marked DEX No 1-15.
21. The Plaintiff submitted that the removal of the caution lodged by the Plaintiff was done without due notice having been given by the Land Registrar to the cautioner and therefore the removal was illegal null and void.
22. In respect to the reinstatement of the charge, the Plaintiff submitted that it was irregular and the reinstated charge cannot form a basis for the bank to exercise its statutory power of sale. That the cancellation of the discharge amounted to an alteration of the register which is null and void for want



of issuance of the 90 day notice to the proprietor/Defendant of his intention to alter or rectify the register as required under section 79(2) of the Land Registered Act.

23. Relying on the case of Adonijah Oginga Otieno & Anor Vs Kisumu East District Land Registrar & Anor (2017) where the Court held that the actions of the Land Registrar in adding the name of a party as an equal co-owner of land was ultra vires the powers of the Land Registrars under section 79(2) and further that it was arrived at without giving them and other beneficiaries of the estate a fair hearing in contravention of Art 50 of *the Constitution*. The Plaintiff argues that by the time the charge was being reinstated in 2014, the new land laws had been enacted which then required the Interested party to register the instrument of charge in compliance to the new land laws. It is her submission that the reinstated charge is null and void for want of spousal consent, land control board consent and failure to recognize the beneficial interest in the suit property as a spouse or a resident of the matrimonial property. It urged the Court to reopen the charge in the interest of doing justice between the parties.
24. The Interested Party/bank submitted that the suit as abated as per order 15 Rule 1 of the civil procedure Rules on grounds that the Plaintiff did not accompany the plaint with summons no showed that the Defendant was served and therefore the suit abated by operation of law.
25. As to whether the banks right of statutory power of sale has accrued the bank submitted that arising from the default of the Defendant to pay the loans the bank issued the following notices; letter of demand dated the 24/9/13, the statutory notification of sale dated the 4/3/14 and the redemption notice dated the 29/9/14 in accordance with the provisions of the Act. It argued that the Defendant was duly served and neither the Defendant nor the Plaintiff have challenged the same and the bank should be allowed to exercise its power of sale as per law.
26. As to whether the property is a matrimonial property, the bank argued that the Plaintiff has not proved that she is a wife for purposes of *matrimonial property Act*. That she failed to submit any evidence of customary marriage either by way of affidavit evidence or oral evidence. In any event the bank argued that the Plaintiff did not file the claim under the matrimonial; property Act nor under the provisions of order 38 of the civil procedure Rules (originating summons) to assert any trust as required by law.
27. As to whether the bank disobeyed any Court orders the bank submitted that at the time the orders were issued the bank was not a party.
28. According to the facts and evidence of this case the key issues for determination are:
  - a. Whether the suit property was matrimonial property.
  - b. Whether the chargee was required to obtain spousal consent before reinstating the charge.
  - c. Whether discharge of charge and further cancellation of discharge were irregular.
  - d. Whether the rectification of the register was unlawful.
  - e. Whether the Interested Party's actions were a spite to the restraining orders stopping sale of the suit land.
  - f. What orders may issue.

### **Whether the suit land was matrimonial property?**

29. The Plaintiff led evidence that they got married through Kikuyu Customary rites in 2001 and out of the union are two sons. That they practiced their trade of tailorship in Kangema and as their business thrived they bought the suit land out of the proceeds of their trade. The Plaintiff produced birth certificates for two children, which indicate that the Defendant is the biological father of the children.



The Defendant did not rebut this evidence. In fact the answer to the question as to whether the Plaintiff was a spouse of the Defendant is found in para 3 of his statement of defence where he averred as follows;

“Save that the Plaintiff and the Defendant were once married under kikuyu customary law and have since parted ways, the Defendant denies that the parcel of land was family property .....

This averment serves to corroborate the statement of the Plaintiff that indeed there was a customary marriage. The Defendant failed to give evidence to challenge this marriage nor to show that it had been dissolved in any way.

30. It must be noted that the Interested party did not dispute the particulars of marriage that were set out in the plaint either in their pleadings or in evidence. The Plaintiff has stated that she lived with the Defendant and during this period, they bought the land through their income in their successful tailoring business. They had children together until he deserted them. There was no cross examination and it seems the Interested Party did not take issue with those set of facts. The Interested Party may be estopped from disputing this fact at the submissions stage.
31. It is the Courts finding that the Plaintiff was the wife/spouse of the Defendant.
32. The Plaintiffs case is that after the rectification of the charge in 2014, the charge became subject to the new land laws and the suit land fell under the Matrimonial Property Act for which she is laying a claim as to matrimonial and spousal rights.
33. Section 93 of the Land Registration Act provides as follows:

‘Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act.’

Section 2 of the Land Act defines ‘matrimonial home’ to mean any property that is owned or leased by one or both spouses and occupied by the spouses as their family home.

Section 6 of the Matrimonial Property Act Number 49 of 2013 defines matrimonial property ...:

i.

(a) the matrimonial home or homes;

Section 2 of the Land Act No 6 of 2012 defines “matrimonial home” as

“...any property that is owned or leased by one or both spouses and occupied by the spouses as their family home;

34. In this case, the Matrimonial Property Act came into force on the 16/1/2014. The charge in issue was created in 2011 and therefore this Act cannot be applied retrospectively in this case.
35. It would then follow that the position pre-matrimonial Property Act would be as applied in the case of Mugo Muiru Investments Limited v E W B & 2 Others [2017] eKLR where the Court of appeal stated as follows;

“Even before the Land Registration Act came into force on 2nd May 2012, the equitable beneficial interest of a spouse in a matrimonial home occupied by such spouse was an



overriding interest and therefore transfer of the title to the matrimonial home was subject to such overriding interest. It is immaterial that there was not at the time statutory provision expressly declaring it an overriding interest. Under common law, overriding interests are interests to which a registered title is subject, even though they do not appear in the register. They are binding both on the registered proprietor and on a person who acquires an interest in the property”.

36. The Plaintiff’s testimony was that the property was jointly acquired through income from their tailoring business and was registered in the name of the Defendant on their behalf. The Plaintiff has led evidence that she is in control occupation and possession of the suit land. I refer to the letter dated 26/11/12, which was uncontroverted, by the Defendant nor the Interested Party where the Chief of Muguru Location wrote to the Land Registrar; Muranga confirming that the Plaintiff who was interested in cautioning the suit land was the wife of the Defendant and that she resided on the suit land. This was one of the requirements for registration of caution.
37. I have taken note of the micro credit appraisal form by the Interested Party dated the 10/10/12 that the source of repayment was to come from the clothing and tailoring shop at Kangema town. In addition the rental income from the rental units on the property was also included as another source of repayment of the loan. The Plaintiff did sign this form as one of the partners/directors on the 10/10/12 together with the Defendant. She signed under her maiden name of MWK. This document is corroborated by another document dated the 30/5/15 in which the Interested Party bank and the Plaintiff entered an agreement where the Plaintiff was to repay the outstanding loan on behalf of the Defendant. The source of repayment was to be the rental income from the rental units on the suit land.
38. The conduct of the Interested Party is also important. It entered into an agreement with the Plaintiff and received moneys to settle the arrears as well as going further to serve her with notices in lieu of exercise of statutory power of sale. She led evidence that she paid Ks 63,000/- but stopped when she realized that the Interested Party bank was selling the suit land despite the contract they had to repay the loan. The statement dated the borrower for the period dated 1/11/12- 19/1/15 shows at least three payments made by the Plaintiff into the account totaling Ksh 67,000/-. This was not done in a vacuum. In so paying, the Plaintiff accrued a beneficial interest in the property to herself. The Plaintiff must have a recognizable stake in the land, which the Interested Party bank had also acknowledged. The set of facts in this case coupled with the conduct of parties is enough evidence to confirm that her interest in the land is evident and that she was a known spouse of the Chargor.
39. It is clear to this Court that the Plaintiff is not an idle bystander in this suit. She has beneficial interest in the suit land. In as much as the same is not registered on the title, it is an overriding interest in common law and equity.

#### **Whether the rectification of the register was unlawful.**

40. The Interested Party bank explained that the charge was discharged to allow the Plaintiff to obtain a consent to transfer the suit land to a Mr. Maina for purposes of repaying the loan. It is not clear to the Court how this transaction was done and the Court will examine the two transactions in detail. Starting with the discharge of charge registered on the 17/7/13. According to the jumbled up green card submitted to Court, this discharge was registered when a Court order subsisted and registered under entry No 15. I say jumbled up because the entries are running from Nos 1-15 and then start again from 1-5 on the proprietorship section. The Court order was issued on the 3/12/13. This injunction was therefore in force up to and including the 3/12/14. The fact that the discharge was registered on the 4/2/14 means that it was done while a Court order restraining any dealings on the suit land was made.



41. The Interested Party bank has argued that it was not a party to the said injunction or the suit then and therefore was not bound by the orders. In the case of *Clark and Others versus Chadbourn & Others* [1985] 1 All E R (P.C.) 211, the Privy Council to which appeals from Kenya went in the pre-independence days observed –

“...those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted with illegality that produced them... even if the Defendants thought that the injunction was improperly obtained or too wide in its terms that provides no excuse for disobeying it. The remedy is to vary or discharge it.”

42. In the case of *In Mawji v. US International University & Another* [1976] KLR 185, Madan JA, as he then was, stated that the doctrine of *lis pendens* under Section 52 of (I) TPA is substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law.

“It is based on expedience of the Court. The doctrine of *lis pendens* is necessary for final adjudication of the matters before the Court and in the general interests of public policy and good effective administration of justice. It therefore overrides Section 23 of the Registration of Titles Act (now repealed) and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other....”

43. It is this Court’s finding that the Interested Party bank procured a discharge of charge while a Court order was subsisting.

44. As regards rectification of title, the Plaintiff has referred the Court to the provisions of Section 79 of the *Land Registration Act* that provides that. .... ‘

(1) The Registrar may rectify the register or any instrument presented for registration in the following cases—

- a. in formal matters and in the case of errors, mistakes or omissions not materially affecting the interests of any proprietor;
- b. in any case and at any time with the consent of all affected parties; or
- c. if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel;
- d. for purposes of updating the register;
- e. for purposes of correcting the name, address or other particulars of the proprietor upon the written application by the proprietor in a prescribed form.

(2) No alteration affecting the title of the proprietor may be made pursuant to sub-section (1) without the proprietor’s consent unless—

the proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or it would for any other reason be unjust for the alteration not to be made, Provided that a written notice of ninety days shall be given to the proprietor of such intention to make the alteration.



45. When the title was rectified by the Registrar pursuant to a letter of the Interested Party bank advocates on the 4/4/14, section 79(2) stated as follows;
- “ notwithstanding subsection (1), the Registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud. This clause was amended in 2016 to read as stated in para 53 above.
46. In as much as one may argue that the Act did not provide for notice by the Land Registrar to the proprietors of the suit land, including the Plaintiff who has an overriding interest on the property, the provisions of Art 50 on the right to be heard before an action is taken is the guiding principle that should always guide the Land Registrar. A discharge is a disposition of an interest in land and the same cannot be casually be entered in the register. By this time, the positions of the parties have changed. For example, the Plaintiff had started making repayments into the Defendant’s account thus creating a further beneficial interest in the suit land. The Defendant has not rebutted this evidence as to whether or not he was notified. The Interested Party bank has not disclosed whether the Defendant was notified either. It is the finding of the Court that this rectification was unlawful null and void.
47. Had the Land Registrar been guided by Art 47 on fair administrative actions and Art 232 on the principles of public service, he /she would not have rectified the register without issuing notice to the registered owner, the Plaintiff included.
48. Having declared the discharge and the reinstatement of the charge null and void, the party’s position is that the charge registered on the 4/4/11 subsist on the title. The claim of the Plaintiff that the bank should have sought spousal consent is not tenable. The provision of spousal consent was introduced in our laws in 2012 vide Registration of *Land Act* section 28.

**Whether the charge dated, the 31/3/11 should be reopened.**

49. Section 105 and 106 of the *Land Act* provides as follows:-

“ The Court may reopen a charge of whatever amount secured on a matrimonial home, in the interests of doing justice between the parties”.

Exercise of power to re-open certain charges.

- (1) The Court may exercise the powers conferred on it by this Act either—
- (a) on an application made to it for that purpose by either the chargor or the chargee—
    - (i) to enforce the charge; or
    - (ii) to commence an action under section 90; or
  - (b) on an application by the chargor for relief against the exercise by the chargee of any remedy in connection with a default by the chargor under a charge; or
  - (c) on an application by the Registrar in respect of—
    - (i) charges provided by one or more specific chargees where there is prima facie evidence of a pattern of unfair dealing and practices by that chargee or those chargees; or
    - (ii) a chargee, being a corporate body, that appears to exercise discrimination against chargors on account of their gender, or by refusing to grant charges



to persons on account of their gender except that a chargee, being a corporate body that is implementing any programme, approved or assisted by the national or county governments, designed to assist women to improve their economic and social position by providing them with advances secured by a charge of land shall not be taken to be acting in discriminatory manner if the advances under that programme are made only to women.

- (2) In reopening the charge, the Court may—
- (a) direct that the charge shall have effect subject to modifications that the Court shall order;
  - (b) require the chargee to repay the whole or part of any sum paid under the charge or any related or collateral agreement by the chargor or any guarantor or other person who assumed an obligation under the charge whether it was paid to the chargee or any other person;
  - (c) require the chargee to pay any compensation to the chargor which the Court shall think fit; or
  - (d) direct the chargee, being a corporate body to cease acting in a discriminatory manner with respect to the granting of charges.
- (3) In considering whether to exercise the powers conferred on it by this section, the Court shall have regard to—
- (a) the age, gender, experience, understanding of commercial transaction, and health of the chargor at the time when the charge was created, if the chargor is an individual;
  - (b) the financial standing and resources of the chargor relative to those of the chargee at the time of the creation of the charge;
  - (c) the degree to which, at the time of the creation of the charge, the chargor was under financial pressure and the nature of that pressure;
  - (d) the interest rates prevailing at the time of the creation of the charge and during the continuation of the charge and the relationship of those interest rates to the interest rate applying from time to time in the charge;
  - (e) the degree of risk accepted by the chargee, having regard to the value of the charged land and the financial standing and other resources of the chargor;
  - (f) the importance of not undermining the confidence of reputable chargees in the market for charges; and
  - (g) any other factors that the Court considers relevant”.

50. In this case, the Plaintiff has not led any evidence to proof the circumstances that ordinarily lead a Court of law to open the charge. The Court finds that the prayer as set out by the Plaintiff was not supported in evidence nor the pleadings. The Court is of the view that the charge was not irregular, null or void nor unconscionable to warrant the reopening of the same. The Plaintiff has acknowledged throughout her evidence that indeed there was an outstanding liability to the Interested Party bank, which she even took steps to settle. She did not raise any issue as to the illegality of the same.



51. In conclusion having held that the Plaintiff has established a beneficial interest in the suit land, there is nothing to prevent the Interested Party bank from exercising its statutory power of sale as provided by the law and in recognition of the declared interests of the Plaintiff.
52. The justice of this case leads the Court to grant the following orders;
- a. A declaration the Plaintiff has a beneficial interest on the suit land that is situated at LOC.12 / Sub Location /Gakira / xxx (Suit Land) registered in the name of the Defendant.
  - b. That the discharge of charge registered on 17/7/13 and the subsequent discharge entry No 4 registered on the 4/2/14 are null and void.
  - c. The Land Registrar is ordered to rectify the register by cancelling entries Nos. 4 and 5 in the green card.
  - d. The cost of the suit is payable by the Interested Party.

Orders accordingly

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 24<sup>TH</sup> DAY OF JUNE 2019.**

**J G KEMEI**

**JUDGE**

Delivered in open Court in the presence of;

Kiranga for the Plaintiff

Defendant: Absent

Ms. Njoka for Mwicigi for the Interested Party

Njeri and Kuiyaki, Court Assistants

