



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 87 OF 2013**

**SIMION OMANWA OSORO .....PLAINTIFF**

**VERSUS**

**BENSON OKENO OKIOMA.....1<sup>ST</sup> DEFENDANT**

**GODFREY MOGENDI OKENO .....2<sup>ND</sup> DEFENDANT**

**CO-OPERATIVE BANK OF KENYA LTD.....3<sup>RD</sup> DEFENDANT**

**LAND REGISTRAR, NYAMIRA.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The 3<sup>rd</sup> Defendant by way of a Chamber Summons application dated 9<sup>th</sup> February 2018 brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 1 Rule 14 of the Civil Procedure Rules 2010 sought the following orders:-

- 1. That the 3<sup>rd</sup> Defendant be struck off from the suit.**
- 2. That the costs of the application together with the suit be provided for.**

2. The application was premised on the following grounds set out on the face of the application and on the annexed affidavit sworn in support of the application by Debra Ajwang Ogada a Legal Manager of the 3<sup>rd</sup> Defendant/Applicant:-

**1. The 2<sup>nd</sup> Defendant offered his property LR No. Matutu/Settlement Scheme/280 as a security (vide legal charge) pursuant to the terms of a loan agreement/facility letter (contract) between the 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> Defendant/Applicant, to secure the credit facilities advanced by the Applicant to the 2<sup>nd</sup> Defendant and or the borrower in the sum of kshs. 2,700,000/=.**

**2. Thereafter, the Chargor and or the borrower repaid the full amount secured by the charge and on or about 13<sup>th</sup> January 2014 a discharge of charge was registered, marking the end of a lender-borrower relationship between the Applicant and the 2<sup>nd</sup> Defendant/ Respondent; and as such the 3<sup>rd</sup> Defendant has neither an interest in property LR No. Matutu/ Settlement Scheme/280 nor in these proceedings.**

**3. The 3<sup>rd</sup> Defendant is thus not a proper party to this suit and it is in the interest of orderly administrative justice that the Applicant be struck off from these proceedings.**

3. The Applicant averred that the 2<sup>nd</sup> Defendant on or about the year 2009 approached the 3<sup>rd</sup> Defendant for a finance facility and offered **LR No. Matutu/Settlement Scheme/280** as security for the loan facility. The 3<sup>rd</sup> Defendant after evaluation of the request and after carrying out due diligence on the security offered, agreed to extend the loan facility to the 2<sup>nd</sup> Defendant against the registration of a legal charge over the property. The 3<sup>rd</sup> Defendant stated that the official search carried out before the charge was registered and the valuation of the property revealed that the suit property was registered in the 2<sup>nd</sup> Defendant's name which enabled the charge to be processed and registered.

4. The 3<sup>rd</sup> Defendant further stated that after the 2<sup>nd</sup> Defendant duly repaid the money advanced as a loan, the 3<sup>rd</sup> Defendant/Applicant executed a discharge of charge on 13<sup>th</sup> January 2014 which was duly registered. The Applicant averred that the 2<sup>nd</sup> Defendant having fully paid the loan, he was released from the obligations of the charge and the 3<sup>rd</sup> Defendant had no further interest in the suit property and thus the Plaintiff had no justifiable reason to enjoin the 3<sup>rd</sup> Defendant to the suit.

5. The Plaintiff swore a replying affidavit dated 24<sup>th</sup> February 2018 in opposition to the 3<sup>rd</sup> Defendant/Applicant's application. The Plaintiff in the replying affidavit alleged that the 3<sup>rd</sup> Defendant had acted in collusion with the 2<sup>nd</sup> Defendant when they advanced the loan to the 2<sup>nd</sup> Defendant and proceeded to take a charge over the whole of the suit property when in fact the Plaintiff had sold only a portion of two (2) acres out of the land and not the entire land. The Plaintiff contended that the 3<sup>rd</sup> Defendant was a critical party in the proceedings and allowing its name to be struck out from the proceedings would prejudice the Plaintiff's case. The Plaintiff further contended the application was not brought without unreasonable delay.

6. The application was canvassed by the parties by way of written submissions. The 3<sup>rd</sup> Defendant/Applicant filed its submissions on 15<sup>th</sup> October 2018 and the Plaintiff filed his submissions on 26<sup>th</sup> June 2019.

7. The 3<sup>rd</sup> Defendant/Applicant in the filed submissions stated that the Bank processed a loan facility in favour of the 2<sup>nd</sup> Defendant for kshs.2,700,000/= on the security of title number **Matutu/Settlement Scheme/280 ("the suit property")** after undertaking all the necessary due diligence. Following the repayment of the loan the bank discharged the property and had no further interest in the suit property. The Applicant stated that although the suit was filed in 2013 the bank was not served with summons to enter appearance until 15<sup>th</sup> June 2017. The 3<sup>rd</sup> Defendant submitted that as at that time the charge registered against the suit property had been discharged and the property had been recharged to Family Bank to secure a sum of kshs. 2,800,000/=. Further after the charge in favour of Family Bank was discharged on 12<sup>th</sup> February 2016 a fresh charge in favour of Housing Finance Corporation Limited was registered to secure a loan of kshs. 2,715,156/= as evidenced by entries made in Part C – Encumbrances Section of the Green Card of the suit property annexed as **"DAO2"** to the supporting affidavit.

8. It was the submission of the 3<sup>rd</sup> Defendant that as it had no interest in the suit property, it was not a necessary party in the suit. The charge the 3<sup>rd</sup> Defendant had on the property was regularly taken and was discharged when the loan it secured was paid. The 3<sup>rd</sup> Defendant submitted that the interest of the Bank having been extinguished, there would be no proper basis for the 3<sup>rd</sup> Defendant to continue being a party to the proceedings.

9. The Plaintiff in his submissions argued that the 3<sup>rd</sup> Defendant/Applicant was a necessary party to the proceedings and ought to be retained and contended that a misjoinder or non-joinder of a party to a suit ought not to render a suit defective. In support of his submissions he placed reliance on the case of **George Kimathi Mugenyu –vs- China National Overseas Engineering Corporation [2014]eKLR** where the Court held that misjoinder or non-joinder of a party per se did not of itself render a suit defective. The Court further observed Order 1 Rule 9 and 10 of the Civil Procedure Rules provided that no suit shall be defeated by reason of the misjoinder or non-joinder of parties. The Plaintiff further placed reliance on the case of **Bhudia Builders and Erectors -vs- Ima Agencies Ltd [2014] eKLR** where the Court of Appeal held that Order 1 Rule 9 and 10 were designed to ensure that the Court focused on administering substantive justice to the parties that are before it. Order 1 Rule 9 provides:-

**“No suit shall be defeated by reason of misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”**

10. It is clear from the plaint that the Plaintiff enjoined the 3<sup>rd</sup> Defendant to the suit because as at the time of filing the suit the 3<sup>rd</sup> defendant had a charge registered against the title to the suit property to secure a loan advanced to the 2<sup>nd</sup> Defendant. Under prayer (c) in the plaint the Plaintiff sought an order in the following terms:-

**(c) An order directed at 4<sup>th</sup> Defendant to cancel the charge transaction registered against the title of the property Matutu/Settlement Scheme/280 as an encumbrance and the registration of the property in the names of the 2<sup>nd</sup> Defendant and in place thereof rectify the register to show the Plaintiff as the registered proprietor.**

11. While it was evident as at 27<sup>th</sup> February 2013 when the present suit was filed the 3<sup>rd</sup> Defendant had a charge registered over the suit property and could be properly enjoined as a party as he stood to be affected in the event any orders affecting the charge were to be made, it was also evident that as at the time the 3<sup>rd</sup> Defendant was served with summons in the suit in May 2017, the charge had been discharged and the 3<sup>rd</sup> Defendant had no further interest in the suit property. The 3<sup>rd</sup> Defendant's interest in the suit property ceased upon its loan being paid and on that account it discharged the charge over the property.

12. Indeed, after the 3<sup>rd</sup> Defendant discharged its charge, Family Bank and Housing Finance Corporation Limited equally registered charges to secure borrowing by the 2<sup>nd</sup> Defendant from them. Presently, it appears it was the charge to Housing Finance Corporation Limited that was subsisting and therefore Housing Finance Corporation Limited would be the party who perhaps may be said to have an interest over the suit property. The Plaintiff accused the 1<sup>st</sup> Defendant of impropriety as he claimed he had only sold the 1<sup>st</sup> Defendant 2 acres out of the suit land. How the 1<sup>st</sup> Defendant got to be registered as the owner of the entire parcel of land and the circumstances under which he transferred the land to the 2<sup>nd</sup> Defendant would appear to be the issues for determination in the suit. The 3<sup>rd</sup> Defendant and possibly the other financial institutions who advanced loans to the 2<sup>nd</sup> Defendant may well have been faithfully executing their mandate as financiers. The Plaintiff has not pleaded any fraud against the 3<sup>rd</sup> Defendant and no particulars of fraud have been given which renders the suit against the 3<sup>rd</sup> Defendant unsustainable.

13. Having considered the pleadings and the record and the application by the 3<sup>rd</sup> Defendant, I am persuaded the 3<sup>rd</sup> Defendant was no longer a necessary party in these proceedings. Whatever interest the 3<sup>rd</sup> defendant may have had in the suit property dissipated when its loan was paid. At the time of discharging the property, there was no evidence the 3<sup>rd</sup> defendant was aware of the suit. The abstract of title shows its discharge was registered on 13<sup>th</sup> January 2014 and summons to enter appearance in the suit were not served upon them until 22<sup>nd</sup> May 2017.

14. In the premises, I find merit in the Chamber Summons by the 3<sup>rd</sup> Defendant dated 9<sup>th</sup> February 2018 and I accordingly order that the name of the 3<sup>rd</sup> Defendant be struck off from the suit. I however make no order for the costs of the suit in favour of the 3<sup>rd</sup> Defendant. At the time the suit was filed the 3<sup>rd</sup> Defendant had an interest in the suit property and was as at that time a necessary party as any orders that may have been given would have somehow affected the 3<sup>rd</sup> Defendant as chargee of the suit property.

15. Orders accordingly.

**RULING DATED AND SIGNED AT NAKURU THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2019.**

**J. M. MUTUNGI**

**JUDGE**

**RULING DELIVERED AT KISII THIS 8<sup>TH</sup> DAY OF OCTOBER 2019.**

**J ONYANGO**

**JUDG**