



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

MISCELLANEOUS APPLICATION NO.4 OF 2018

JAMES KAMAU MURAGURI.....APPLICANT

VERSUS

THE CHIEF LAND REGISTRAR.....1ST RESPONDENT

THE CO-OPERATIVE BANK OF KENYA.....2ND RESPONDENT

JUSTINE MENDI KAMAU.....3RD RESPONDENT

RULING

By an Application dated **19th March 2018**, the Applicant herein brought this suit against the Respondents for orders that;

a) THAT this Honourable Court be pleased to grant Orders directing the 1st Respondent, the Chief Land Registrar to cancel the registration of the charge lodged against the land reference No.13537/67, by the 3rd Respondent in favour of the 2nd Respondent

b) THAT costs of this Application be provided for.

The Application is premised on the grounds that the registration of the said charge in favour of the 2nd Respondent, was obtained and made by fraud as the Applicant who is the husband to the 3rd Respondent, the registered proprietor of the subject parcel of land was not aware of the said transaction and did not give spousal consent to the said transaction, which is mandatory in law before the registration could be effected and as such it is fair and just in the circumstances that the registration of the said charge be cancelled.

In his **Statement of Claim**, the Applicant averred that the 3rd Respondent who is his wife is the registered owner of **L.R 13537/67**. That the said parcel of land was jointly purchased as a marital property by him, but registered in the 3rd Respondent's name. He further averred that they have established their matrimonial home, built their rental premises and he also conducts his other business in the suit premises.

It was his contention that on **13th May 2016**, the 2nd Respondent fraudulently registered a charge in its favour against the title to the suit property without his knowledge and or Consent as a spouse. He denied ever executing a Spousal Consent for the transaction and that if any was presented to facilitate the registration of the said charge, it must have been forged or fraudulently obtained.

The Application is opposed and the 2nd Respondent filed a **Replying Affidavit** sworn by **Eric Mugendi Njeru**, a business banker with the 2nd Respondent. He averred that the Applicant is not known to the 2nd Respondents and the averments that he is the 3rd Respondent's spouse have not been presented before Court. He further averred that the 3rd Respondent is the registered proprietor of the suit land and that the 2nd Respondent issued **Nancy Nyokabi Ndungu** with banking facilities that were secured by a legal Charge over property **L.R 13537/67**, which property the 3rd Respondent was the Chargor/Guarantor. Further that the 3rd Respondent executed the letter of offer as the guarantor and the 2nd Respondent then instructed a Valuer to prepare the **Valuation Report**. The Valuation Report presented confirmed the 3rd Respondent as the registered owner of the suit property. He averred that a **Spousal Consent** affidavit by the 3rd Respondent deposed that she was not married and therefore the property did not form part of the matrimonial property. The 2nd Respondent then presented the Charge and the **Affidavit for Spousal Consent** to the 1st Respondent for registration and the same was registered accordingly. He further averred that the 2nd Respondent carried out due diligence and followed all legal procedures in registering the charge over the suit property. He urged the Court to dismiss the Application.

Despite service the 1st and 3rd Respondents did not enter appearance or file any pleadings in Court. The averments of the Applicant therefore in terms of the two Respondents remained uncontroverted and unchallenged. However this Court still has an obligation to interrogate the evidence that has been placed before it.

The Applicant filed a further affidavit and reiterated that the 3rd Respondent is his wife and the marriage still subsists as evidenced by a letter dated **12th June 2001**, from the **Federation of Women Lawyers[FIDA(K)]** relating to a Divorce Case she had filed against him. He further annexed an affidavit to which the 3rd Respondent pleaded that she is married to him and together they have been blessed with five issues. He further annexed Mpesa messages in which he alleged are evidence that he has been supporting his wife.

The 2nd Respondent also filed a further affidavit sworn by one of its Legal Officer in which he averred that the Application date **19th March 2018**, sought for orders compelling the 1st Respondent to cancel the registration of the Charge lodged against the land reference **No.13537/76**, by the 3rd Respondent in its favour. However the 2nd Respondent had since executed the Discharge of Charge and released the duly executed discharge of Charge and the original title over the suit land to the 3rd Respondent. He further averred that he has been advised by his Advocates that in light of the said events, the matter stands overtaken by events and the instant Application rendered nugatory. He therefore urged the Court to mark the instant Application as spent.

This Court directed the parties to file their written submissions and in compliance with the said directives, the parties filed their respective rival written submissions. However when the matter came up in court on **15th May 2019**, for mention, Counsel for the 2nd Respondent requested for more time to file a further affidavit to which it was filed and the Court has referred to it above. Further when the matter came up on **12th June 2019**, for further orders, Counsel for the 2nd Respondent indicated that a discharge of charge had been annexed, but it had not been registered by the 1st Respondent and executed by the Chargor.

However, Counsel for the Applicant on the other hand stated that the 2nd Respondent had not complied with the orders sought as the discharge is not registered and Applicant was praying for cancellation of the said Charge. He further submitted that it was not the duty of the Chargor to register but the 2nd Respondent to comply and as such the Applicant's Application has not been rendered nugatory.

The Court has now carefully read and considered the pleadings hereto, the exhibits by the parties, the written submissions and oral submissions by Counsel for both parties and finds that the issues for determination are;

1. Whether the Application has been rendered nugatory

2. Whether he Applicant is entitled to the orders sought

1. Whether the Application has been rendered nugatory

The 2nd Respondent has averred that the Application has been rendered nugatory as it has already executed a discharge of charge and therefore the orders sought by the Applicant have been overtaken by events. On the other hand, the Applicant has submitted that the orders sought have not been complied with as he had sought for cancellation of

the Charge, but what has been presented is discharge only and that has not been executed by the 3rd Respondent and further has not been registered.

The **Blacks Law Dictionary** defines to discharge as;

"The opposite of charge; hence to release; liberate; annul; unburden; disencumber. In the law of contracts. To cancel or unloose the obligation of a contract; to make an agreement or contract null and inoperative. As a noun, the word means the act or instrument by which the binding force."

From the above definition of to discharge, it would therefore mean that once something has been discharged, the same has essentially been cancelled or the contract has been made null. The Applicant in his Application had sought for the cancellation of the charge that had been lodged as against the suit property in favour of the 2nd Respondent.

However the 2nd Respondent has averred that it has already executed a discharge of charge. It is not in doubt that when a bank executes a discharge of charge it would only mean that a party that had offered the property as security had already performed their obligation as required by law and being that the purpose of a charge is for security purposes, then it is this Court's holding that the bank has already acknowledged that it does not need the security. Going by the definition of a discharge above and the fact that the 2nd Respondent has already executed discharge, it would therefore mean that the Charge has already been annulled and there would be nothing to cancel. Why then would this Court give orders for academic purposes?

The purpose of a discharge in this Court's holding is that nothing remains for the Court to order for a cancellations and if this Court would order for a cancellation of a charge that is in the process of being discharged as the discharge has been executed, then this Court will be carrying out an academic exercise that it is in this Court's opinion not worth it.

This Court therefore finds that being that there is an already executed discharge of charge, the cancellation of the said charge has already been overtaken by events and would serve no purpose and therefore the Application has been rendered nugatory.

2. Whether the Applicant is entitled to the orders sought

This Court has already held and found that the Applicant's Application has been rendered nugatory and therefore he is not entitled to the orders sought.

Having now carefully read and considered the instant Application and the affidavits by the parties and the written submissions the Court finds that the Application has been overtaken by events and therefore the **Notice of Motion** application dated **19th March 2019** is dismissed entirely and each party to bear its own costs.

It is so ordered.

Dated, Signed and Delivered at Thika this 8th day of November, 2019.

L. GACHERU

JUDGE

8/11/2019

In the presence of

Mr. Mwangi holding brief for Mr. Macharia for Applicant

No appearance for 1st Respondent

Mr. Kinyanjui holding brief for Mr. Muchemi for 2nd Respondent

No appearance for 3rd Respondent

Jackline - Court Assistant

L. GACHERU

JUDGE

8/11/2019