



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 112 OF 2015**

**GAMI PROPERTIES LIMITED.....PLAINTIFF**

**VERSUS**

**DIAMOND TRUST BANK KENYA LIMITED .....1<sup>ST</sup> DEFENDANT**

**CHIEF LANDS REGISTRAR .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This Ruling is in respect of two Applications: the one dated 22<sup>nd</sup> May, 2015 and 14<sup>th</sup> December, 2015. In the Application dated 22<sup>nd</sup> May, 2015, the Plaintiff is seeking for the following orders:

***a. That summary Judgment be entered in favour of the Plaintiff and as against the Defendants, whether jointly and/or severally, in terms of Prayers (b), (c), (e) & (i) of the Plaint dated 8<sup>th</sup> April, 2015.***

***b. That costs of and/or incidental to this Application be provided for.***

2. The Application is premised on the grounds that the 1<sup>st</sup> Defendant has admitted in its Defence that it has never drawn a charge in relation to the Plaintiff's property being L.R. No. 337/4797 (*the suit property*); that the 1<sup>st</sup> Defendant has never held the title to the suit land and that the 1<sup>st</sup> Defendant does not have any interest in the suit land.

3. The Plaintiff's director has deponed that when the firm of Bageine Karanja Mbuu Limited conducted a search on its instructions, it discovered that a charge had being registered in favour of the 1<sup>st</sup> Defendant; that the 1<sup>st</sup> Defendant confirmed it has not registered a charge in respect of the suit land and that vide a letter dated 16<sup>th</sup> April, 2015 together with the Defence, the 1<sup>st</sup> Defendant admitted that it has never charged the suit land.

4. In the Application dated 14<sup>th</sup> December, 2015, the 1<sup>st</sup> Defendant has prayed for the striking out of the name of the 1<sup>st</sup> Defendant from the suit. The Application is premised on the same grounds as those in respect to the Application dated 22<sup>nd</sup> May, 2015.

5. In his Replying Affidavit to the Application of 22<sup>nd</sup> May, 2015, the 1<sup>st</sup> Defendant's Company Secretary deponed that it is a total stranger to the allegations in the Plaint; that the 1<sup>st</sup> Defendant has not had any dealings with the suit land and that this suit was filed before the 1<sup>st</sup> Defendant had finalized its investigations.

6. The 1<sup>st</sup> Defendant's Company Secretary finally deponed that the 1<sup>st</sup> Defendant is non-suited and that the Plaintiff does not disclose a reasonable cause of action against it.
7. The 2<sup>nd</sup> Defendant did not file a response in respect to the Applications.
8. The Plaintiff's advocate submitted that under Order 34 Rule 5, a court can decide a claim in a summary manner with the consent of both parties or upon request of the claimant; that the 1<sup>st</sup> Defendant's Defence together with the Replying Affidavit does not raise any triable issue and that while exercising its judicial authority, the court should ensure that justice is done without undue delay. Counsel relied on numerous authorities which I have considered.
9. In his submissions, the 1<sup>st</sup> Defendant's advocate submitted that the suit herein was filed prematurely and ought to be struck out; that the Plaintiff failed to pursue an alternative statutory mechanism to correct the error in the 2<sup>nd</sup> Defendant's register contrary to Section 79 of the Land Registration Act and that in any event, the Application dated 14<sup>th</sup> December, 2015 is unopposed.
10. The Plaintiff is seeking for an order of summary Judgment. On the other hand, the 1<sup>st</sup> Defendant is seeking for an order to have its name struck out of the suit. The determination of the 1<sup>st</sup> Defendant's Application dated 14<sup>th</sup> December, 2015 can only be considered if the Plaintiff's Application dated 22<sup>nd</sup> May, 2015 does not succeed.
11. The evidence before me shows that upon conducting an official search, the Plaintiff discovered that L.R. No. 337/4797 had been charged in favour of the 1<sup>st</sup> Defendant on 11<sup>th</sup> April, 2013 for Kshs. 70,000,000.
12. Upon realizing that its property had been charged without its authority, the Plaintiff's advocate, vide a letter dated 2<sup>nd</sup> April, 2015, inquired from the 1<sup>st</sup> Defendant about the purported charge. In the said letter, the Plaintiff's advocate informed the 1<sup>st</sup> Defendant that the Plaintiff was in possession of the title document in respect of L.R. No. 337/4797 and that it had never charged or sold the said land. The Plaintiff's advocate informed the 1<sup>st</sup> Defendant that unless it responds to its demand letter by 7<sup>th</sup> April, 2015, it would institute court proceedings.
13. The 1<sup>st</sup> Defendant's company secretary admitted that the 1<sup>st</sup> Defendant received the letter of 2<sup>nd</sup> April, 2015 from the Plaintiff's advocate whereupon the 1<sup>st</sup> Defendant commenced its investigations. According to the 1<sup>st</sup> Defendant, on the same day the suit land was purportedly charged, the bank had charged land known as L.R. No. 7158/612 for Kshs. 70,000,000 and that the entry of the charge in respect of the Plaintiff's land was an error that was committed by the 2<sup>nd</sup> Defendant. It was the deposition of the 1<sup>st</sup> Defendant's Company Secretary that by the time they finalized their investigations, the Plaintiff had already filed the suit and that the notice of seven (7) days was not sufficient for the 1<sup>st</sup> Defendant to conduct and finalize its investigations.
14. The 1<sup>st</sup> Defendant has admitted that the entry that was entered in the register showing that the suit land had been charged was an error. According to the 1<sup>st</sup> Defendant, the error was made by the 2<sup>nd</sup> Defendant. Indeed, in its letter dated 15<sup>th</sup> April, 2015, the 1<sup>st</sup> Defendant informed the Plaintiff's advocate as much.
15. Having admitted that it has never charged the suit land, and that the entry that was made in the register showing that it had charged the suit land was an error, I find that there is no triable issue before me that should proceed to trial. I also find and hold that the error was solely occasioned by the 2<sup>nd</sup> Defendant and not the 1<sup>st</sup> Defendant. Considering that the 1<sup>st</sup> Defendant promptly responded to the Plaintiff's demand letter after conducting its investigations, and in view of the fact that the Plaintiff filed this suit within seven (7) days after issuing its demand notice to the 1<sup>st</sup> Defendant, I am of the view that

the Plaintiff is not entitled to the costs of the suit. I say so because the 1<sup>st</sup> Defendant could not have conducted its investigations in a span of less than seven (7) days to ascertain what transpired before responding to the demand.

16. On the basis of the evidence before me, and having found that there is no triable issue, I allow the Application dated 22<sup>nd</sup> May, 2015 for summary Judgment in the following terms:-

***a. A declaration be and is hereby issued that the Plaintiff is the genuine owner and holder of the title to L.R. No. 337/4797 (IR 56300/4).***

***b. A declaration be and is hereby issued that the charge registered on the title to L.R. No. 337/4797 in favour of the 1<sup>st</sup> Defendant on 11<sup>th</sup> April, 2013 as presentation No. 835 is null and void and should be cancelled.***

***c. An order be and is hereby issued directing the 2<sup>nd</sup> Defendant to cancel all the documents that were used in the registration of the purported charge such that only records showing the Plaintiff as the genuine owner and holder of the title to L.R No. 337/997 are maintained in the registry.***

***d. Each party to bear its/his own costs.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20<sup>TH</sup> DAY OF APRIL, 2018.**

**O.A. ANGOTE**

**JUDGE**