



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

MISCELLANEOUS APPLICATION NO.69 OF 2017

IN THE MATTER OF AN APPLICATION FOR AN ORDER TO ALLOW THE CANCELLATION OF THE CHARGE OVER PROPERTY

AND

IN THE MATTER OF THE CHIEF LAND REGISTRAR

AND

IN THE MATTER OF THE LAND ACT OF 2012 LAWS OF KENYA

BETWEEN

EQUITY BANK OF KENYA.....APPLICANT

LYDIA WANJIKU GATHECA.....INTERESTED PARTY

VERSUS

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

ERIC KAGONDU MURATHIMI.....2ND RESPONDENT

JUDGMENT

The Application herein for determination is an amended Origination Summons dated **12th January 2018**, and is filed by the Applicant herein under **Order 37 Rule 4 and 8** of the **Civil Procedure Rules, Sections 1A 1B 3 and 3A** of the **Civil Procedure Act, Section 79(2) and (4) (a-c)** of the **Land Registration Act** and all enabling provisions of law and seeks for the following orders:-

1. A court order be issued directing the 1st Respondent to cancel the encumbrance registered as entry number 131328/2 in relation to Land Title No.IR 131328 LR No. Number 24053/3.

2. That each party bear its own costs.

The application is supported by the grounds stated on the face of the application and on the **Supporting Affidavit** of **Samuel Wamaita**. These grounds are:-

i. That the Applicant is the registered Chargee of that property known as Title Number I.R 131328 LR. No.24053/3 and which title it holds as security of the charged property.

ii. That through the interested party who is also the Chargor , it has come to the attention of the Applicant that the title which it holds as security of the aforesaid charged property is forged since the interested party holds the original title to that property know as Title Number I.R 131328 LR. No.24053/3.

iii. That the 2nd Respondent has been charged with forgery of title deed contrary to Section 350(1) of the Penal Code vide Milimani Criminal Case No 142 of 2017.

iv. That by virtue of the aforesaid the interested party has been prejudiced as she cannot make any transaction in relation

to her aforesaid property since the records at the 1st Respondent's offices indicate that her property is charged.

v. That the Applicant now wants the encumbrance registered as entry No.131328/2 in relation to the aforesaid property be cancelled to enable it substitute the said title with a different one for purposes of ensuring that the amount charged is fully secured.

vi. That the orders sought herein by the Applicant will not occasion any prejudice to any party or persons as the property is charged in the name of the Applicant.

vii. That unless the orders sought herein are granted, both the Applicant and the interested party stand to be greatly prejudiced.

viii. That this Application is brought solely in the interest of justice.

In his *Supporting Affidavit*, Samuel Wamaitha, a legal officer of the Applicant who is in conduct of this matter on behalf of the Applicant reiterated the averments made on the grounds in support of the application. He urged the Court to allow the application.

The application is unopposed.

The Application was canvassed by way of Written Submissions which this Court has carefully read and considered.

Issues for Court's Determination

1. Whether the Applicant deserves the order sought

In its Submissions, the Applicant submitted that the 2nd Respondent applied for a loan with the Applicant and that the same was approved. The 2nd Respondent offered a forged title deed for property Title Number I.R 131328 LR. No.24053/3, as security for the loan. It avers that they approved the security and disbursed the loan to the 2nd Respondent after **registering a legal charge** on **31st September 2015** over the said title with the 1st Respondent as is required hence an entry in that regard with the 1st Respondent's offices.

The Applicant argues that the Chargee and the Chargor are in agreement that the entry has to be cancelled and that no prejudice would be suffered by any party if the orders sought are granted.

Determination

The Land Registration Act under Section 79 allows the Registrar to

rectify the register or any instrument presented for registration in certain cases. Section 80 further allows the Court to direct the Registrar to rectify the Register by directing that any registration be cancelled or amended if the court is satisfied that the registration was **obtained, made or omitted by fraud or mistake**.

In the case of of Esther Ndegi Njiru & Another..Vs..Leonard Gatei (2014) eKLR, the Court held that:-

"...my view therefore is that where fraud or mistake is proved even what would qualify to be a first registration would under the provisions of the Land Registration Act be liable to be rectified and/or cancelled".

Further, in the case of Mary Ruguru Njoroge...Vs...Samuel Gachuma Mbugua & 4 Others (2014) eKLR, the Court held that:-

"...It is however upto the party seeking rectification to prove to the court's satisfaction that there has been fraud or mistake in the registration. In my view the mistake referred to under

Section 80(1) includes both a slip like a typographical error and a substantive mistake like the registration of a wrong or erroneous name.... The Court too has powers to order the rectification of the title or register in appropriate circumstances.....Registration vide the said Section refers and includes a title or entry in the registry or on the title itself".

Though the 1st Respondent opposed the instant *Originating Summons* and averred that the court has no jurisdiction in view of the decision of the *Court of Appeal* in *Civil Appl. No.83 of 2016*, and that there is no cause of action against the 1st Defendant, it is evident that the charge is registered over the suit property by the 1st Respondent. Any entry on the title document is always done by the Land Registrar and the orders sought cannot be directed to anybody else but the **Chief Land Registrar** who keeps register of titles. The court disagree with the 1st Respondent that this *Originating Summons* is *mala fides* against the 1st Respondent and that it is frivolous, vexatious and misconceived.

There is no doubt that the Interested Party herein is the registered owner of the suit property **LR.8950613** situated **South East of Thika Municipality**. The Certificate of title is attached as **annexture SW-1**. There is also no doubt that a Charge in favour of **Equity Bank** was registered on **31st December 2015**.

From the charge document **SW-2**, the Chargor was **Lydia Wanjiku Gatheca**, the registered owner of the suit property who is now the Interested Party herein. The borrower is **Erick Kagundu Murathimi**, the 2nd Respondent who did not file any response. It was alleged that he was arrested and charged with an offence of **Forgery of Title Deed** contrary to **Section 350(1)** of the **Penal code**.

Further it is evident that the Chargee is **Equity Bank of Kenya Ltd**. It is further alleged that the Interested Party is still holding the original title deed, but she cannot utilize it as an encumbrance has been registered against it. Further the Applicant cannot pursue the 2nd Respondent as it is assumed that it is holding a valid security which is the **Forged Title Deed** to secure the loan advanced to the 2nd Respondent.

If indeed the Interested Party did not charge her suit property, then the encumbrances entered on her certificate of title is a mistake and was entered through fraud. The Interested Party should not be made to suffer for an action that she did not initiate.

The Interested Party did not oppose the instant **Originating Summons** and she is therefore in agreement that the said entry regarding the loan should be cancelled. Further, if the said entry is cancelled, there will be no prejudice suffered by the Applicant nor Interested Party given that the title holder has denied ever allowing her property to be charged by the 2nd Respondent and that the charge in question was registered using a forged title deed. If that is the case, and if the said entry is allowed to remain, the Interested Party will greatly be prejudiced.

As provided by **Section 79(1)(b)** the Registrar may rectify the Register or any instrument presented for registration in any case and at any time with the consent of all affected parties.

Though the Respondents have not consented to the said rectification, the title holder who is the Interested Party has no objection to the said rectification and as provided by **Section 80(1)** of the **Land Registration Act**, this Court proceeds to direct the 1st Respondent herein to rectify the register by cancelling the encumbrance registered on the suit property on **31st December 2015**.

Having now carefully considered the pleadings herein and the annexures thereto, the responses to the pleadings, written submissions and the relevant provisions of law, the Court finds that the Applicant has proved its case on the required standard of balance of probabilities. Therefore, the **Court enters Judgment for the Applicant and Interested Party as prayed in the Amended Originating Summons** dated **12th January 2018** and **allows prayer No.2** with an Order that **each party to bear its own costs**.

It is so ordered.

Dated, Signed and Delivered at Thika this 16th day of November 2018.

L. GACHERU

JUDGE

16/11/2018

In the presence of

No appearance for Applicant

Mrs. Kahindi for the Interested Party

No appearance for 1st Respondent

No appearance for 2nd Respondent

Lucy - Court clerk

L. GACHERU

JUDGE

Court – Judgment read in open court in the presence of the above advocate and absence of the other parties.

L. GACHERU

JUDGE

16/11/2018