



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

MISC APPLICATION NO. 144 OF 2017

RE FAULU MICROFINANCE BANK LIMITED.....APPLICANT

AND

IN THE MATTER OF A CHARGE BY JOSHUA MUSEMBI NDOLO

RULING

(Application to extend time within which to register a charge with the Registrar of Companies; charge created by an individual and not the company; no legal requirement for such charge to be registered with the Registrar of Companies and no legal requirement to have such charge registered within a certain time; no place for the application for extension of time; application dismissed but there is no bar to have such charge registered with the Registrar and it may indeed be good practice to do so)

1. The application before me was filed on 16 May 2017 by Faulu Microfinance Bank Limited pursuant inter alia to the provisions of Sections 878 and 888 of the Companies Act, 2015. It seeks an order that the applicant be allowed an extension of time of a further 30 days within which to register with the Registrar of Companies a charge dated 14 March 2017 in favour of Eastmore School Limited (the company) over the land parcel Nakuru Municipality/Block 16/303 (hereinafter also described as "the suit land") which land parcel is owned by one Joshua Musembi Ndolo.

2. The supporting affidavit is sworn by Lawrence Macharia Karanja, who has deposed that his law firm received instructions on 1 March 2017 from the applicant to draw a charge over the suit land. The charge instrument was prepared and duly registered. He has annexed a copy of the official search of the property showing that the charge was registered on 15 March 2017. He proceeded to lodge the charge with the Registrar of Companies using copies of documents but he was asked to present the original ones. He sought the originals but by this time the 30 days period required to register the charge with the Registrar of Companies had lapsed. He has averred that this was an inadvertent mistake on the part of his law firm.

3. I have considered the application.

4. The Companies Act, 2015, does require that certain charges over land created by companies be registered with the Registrar of Companies. The applicable provision is Section 878 of the said statute which is drawn as follows :-

878. Charges created by a company

(1) A company that creates a charge to which this section applies shall, before the deadline for registration, lodge with the Registrar for registration the particulars of the charge prescribed by

the regulations, together with the document (if any) by which the charge is created or evidenced.

(2) A charge to which this section applies is registrable on the application of any person who claims to have an interest in it.

(3) If a charge is registered on the application of a person other than the company concerned, that person is entitled to recover from that company the amount of any fees properly paid to the Registrar in respect of the registration.

(4) This section applies to the following charges created by a company:

(a) a charge on land or any interest in land (other than a charge for any rent or other periodical sum issuing out of land) owned by the company or in which it has a proprietary interest;

(b) a charge created or evidenced by a document that, if executed by a natural person, would require to be registered as a bill of sale;

(c) a charge for the purposes of securing an issue of debentures by the company;

(d) a charge on the company's uncalled share capital (if any);

(e) a charge on calls made by the company but not yet paid;

(f) a charge on the company's book debts;

(g) a floating charge on the company's property or undertaking;

(h) a charge on a ship or aircraft, or a share in a ship or aircraft, owned by the company or in which it has a proprietary interest;

(i) a charge on the company's goodwill or intellectual property.

(5) The holding of debentures entitling the holder to a charge on land is not, for the purpose of subsection (4)(a), an interest in the land.

(6) The deposit in the form of security of a negotiable instrument given to secure the payment of book debts is not, for the purpose of section subsection (4)(f), a charge on those book debts.

(7) For the purpose of subsection (4)(i), "**intellectual property**" means—

(a) any patent, trade mark, registered design, copyright or design right; or

(b) any licence under or in respect of any such right.

(8) If a company fails to comply with subsection (1)—

(a) the company; and

(b) each officer of the company who is in default, commit an offence and on conviction are each liable to a fine not exceeding one million shillings.

(9) Subsection (8) does not apply if the charge has been registered on the application of a person other than the company.

(10) If, after the company or any of its officers is convicted of an offence under subsection (8), the

company continues to fail to lodge the prescribed particulars of the charge with the Registrar, the company, and each officer of the company who is in default, commit a further offence on each day on which the failure continues and on conviction are each liable to a fine not exceeding one hundred thousand shillings for each such offence.

5. It will be seen from Section 878 (1) above that the obligation to have the charge registered is actually that of the company although a person having an interest in the charge may also apply to register it as demonstrated by Section 878 (2). Section 878 (4) does provide the types of charges that need to be registered and I need not repeat them save to highlight Subsection 4 (a) which applies to charges over land owned by the company or where the company has a proprietary interest.

6. The other point to note is that generally, the time period for which charges under Section 878 need to be registered with the Registrar of Companies is 30 days from the date the charge is created pursuant to the provisions of Section 885 of the Companies Act.

7. Where a charge to which Section 878 of the Companies Act applies has not been registered within 30 days, as required by Section 885 of the same statute, there is avenue for extension of time within which to have it registered. This is in Section 888 which is drawn as follows:-

888. Rectification of register of charges

(1) A company or interested person who claims that a failure to register a charge before the deadline for registration, or an omission or misstatement of a particular with respect to any such charge or in a memorandum of satisfaction or release—

(a) was accidental or due to inadvertence or to some other reasonable cause; or

(b) is not of a nature to prejudice the position of creditors or members of the company, may apply to the Court for an order under subsection (2).

(2) If, on the hearing of an application made under subsection (1), the Court is satisfied—

(a) that the failure, or the omission or misstatement—

(i) was accidental or due to inadvertence or to some other reasonable cause; or

(ii) is not of a nature to prejudice the position of creditors or members of the company; or

(b) that on other grounds it is just and equitable to grant relief, the Court may, subject to such conditions (if any) as it considers fair and reasonable, order the deadline for registration to be extended, or the omission or misstatement to be corrected.

8. It will be observed that the current application has been brought pursuant to Sections 878 and 888 of the Companies Act, which therefore means that the applicant is of the view that the charge herein needed to be registered within 30 days, but it has failed to register it within this period and therefore needs an extension of time.

9. In our scenario, the land owner is an individual and not the company. The company does not own this land and neither has it been shown to me that it has any proprietary interest in it. The charge has therefore not been created by the company but has been created by the individual land owner. I have not seen any provision in the Companies Act, which requires that such charge be registered with the Registrar of Companies within any particular period of time or indeed at all. I have read, and re-read Section 878 of the Companies Act, 2015 and I have not seen that a charge, such as the one before me, requires to be registered with the Registrar of Companies. I did ask Ms. Gitau, learned counsel for the applicant, to point me to any provision of the law which makes it mandatory to register such a charge with the Registrar of Companies, but she could not point me to any, despite me adjourning the application to another date to

enable her undertake further research.

10. I guess if the chargee, or chargor, wants to notify the Registrar of Companies that there is such a charge, there is no bar in doing so. It is probably good practice to do so, in order that anyone dealing with the company is made aware that there is an individual who has guaranteed the company's debts by creating the subject charge. But since there is no mandatory legal requirement that such charge be registered with the Registrar of Companies, and therefore no legal provision for any extension of time, I am afraid that the orders sought herein are not orders that I am capable of granting. I cannot extend what is not provided for in law as having any period at all. On the above grounds, I have no option but to dismiss this application; however, as I have mentioned, if the applicant wishes to notify the Registrar of Companies about this charge, there is nothing barring her from doing so and she may proceed to do so if she so wishes but I have not seen the place of this application because it is not anchored in any law.

11. There will be no order as to costs.

Dated, signed and delivered in open court at Nakuru this 27th day of June 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of: -

No appearance on the part of M/s Mirugi Kariuki & Co. advocates for the applicant

Court Assistant :Nelima

MUNYAO SILA

JUDGE

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