



**REPUBLIC OF KENYA**  
**HIGH COURT OF KENYA AT NAIROBI**  
**IN THE ENVIRONMENT AND LAND COURT**

**ELC NO. 204 OF 2016**

**SAVANNAH ACADEMY LIMITED.....**  
**PLAINTIFF**

**VERSUS**

**CHARTERHOUSE BANK LIMITED (UNDER STATUTORYMANAGEMENT)**  
**.....DEFENDANT**

**STARTLIGHT SPRINGS ACADEMY LIMITED.....INTERESTED PARTY**

**RULING**

On 16<sup>th</sup> April, 2002 the Plaintiff charged all that parcel of land known as L.R No. 13767/49/3 (“the suit property”) to the Defendant to secure various credit facilities that were granted to the plaintiff by the Defendant. As at 12<sup>th</sup> February 2016 an amount of Kshs.12,274,748.96 was due and owing by the Plaintiff to the Defendant on account of the said credit facilities. In order to settle its indebtedness to the Defendant, the Plaintiff entered into an agreement for sale of the suit property with the interested party on 30<sup>th</sup> October 2015 under which the Plaintiff agreed to sell to the interested party the suit property at a consideration of Kshs.51,000,000/=. The Plaintiff intended to use part of the said purchase price in the sum of Kshs.12,274,748.96 to settle the debt owed to the Defendants.

The interested party is being financed by Family Bank Limited to purchase the suit property from the Plaintiff. Family Bank through its advocates Mamicha& Company Advocates has requested the Defendant to release to it the original title for the suit property and a discharge of charge which the Defendant has over the suit property on its said advocates professional undertaking to pay to the Defendant the said sum of Kshs.12,274,748.96 due by the Plaintiff to the Defendant within 14 days of registration of the transfer of the suit property in favour of the interested party and a charge in favour of Family Bank Limited. This undertaking was given on 10<sup>th</sup> February, 2016.

The Plaintiff brought the present application by way of Originating Summons dated 2<sup>nd</sup> March 2016 seeking the following orders:-

1. THAT this Honourable Court do order that the Deputy Registrar of the High Court of Kenya, Nairobi sign the discharge of charge on behalf of the Defendant on the strength of the undertaking issued or to be issued by the advocates of the financier of the interested party who have entered into a sale agreement for the purchase of the suit property.
2. THAT each party bears its cost.

The Plaintiff's application was brought on the grounds that the Defendant is unable to execute the discharge of charge in favour of the Plaintiff on the strength of the undertaking aforesaid which has been given by the advocates for Family Bank Limited due to its receivership status. It is for this reason that an order was sought for the Deputy Registrar of this court to execute the said discharge of charge on behalf of the Defendant. The application was supported by the interested party which did not file any affidavit. The Defendant filed an affidavit in opposition to the application. The Defendant's replying affidavit was sworn by the Defendant's statutory manager, Jimmy Muiwa on 1<sup>st</sup> April 2016. In his affidavit, the Defendant's statutory manager admitted that the Plaintiff had charged the suit property to the Defendant to secure credit facilities that were granted to it by the Defendant and that the amount which is due by the Plaintiff to the Defendant under the said charge is Kshs.12,274,748.96. The said statutory manager stated that the Plaintiff is not entitled to the orders sought herein until it pays to the Defendant the said sum of Kshs.12,274,748.96.

I have considered the Plaintiff's application together with the affidavit filed in support thereof. I have also considered the Defendant's affidavit in response to the application. The Plaintiff's application was brought under order 37 rules 4 of the Civil Procedure Rules which provides as follows:-

**“Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable before the judge in chambers, for such relief of the nature or kind following as may be by the summons specified, and as the circumstances of the case may require; that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee.”**

There is no dispute that the Defendant granted credit facilities to the Plaintiff which were secured by a charge over the suit property. There is also no dispute that the Plaintiff is indebted to the Defendant. The extent of the Plaintiff's indebtedness is also not disputed. The Plaintiff is willing to settle its indebtedness to the Defendant. The problem is that the Plaintiff wants to sell the suit property to raise money to pay the debt. The Plaintiff has identified a purchaser who is ready and willing to purchase the suit property at a sum in excess of the amount owed to the Defendant. The sale of the suit property cannot go through unless the Defendant surrenders the original title for the suit property and the discharge of charge over the same property to the financial institution (Family Bank Limited) which is financing the interested party to purchase the suit property. Family Bank Limited's advocates who are also acting for the interested party has given the Defendant a professional undertaking that they will pay to the Defendant the sum of Kshs.12,274,748.96 which is due by the Plaintiff to the Defendant within 45 days of registration of the transfer of the suit property in favour of the interested party and a charge over the same in favour of Family Bank Limited.

From its replying affidavit, it appears as if the Defendant is not satisfied with this undertaking. The Defendant wants the Plaintiff to pay the said sum of Kshs.12,274,748.96 in exchange with the said original title and discharge of charge. It is on account of this demand that the Plaintiff has sought the assistance of the court because it is not in a position to pay to the Defendant the outstanding amount unless the sale of the suit property is completed.

The Defendant has a right to hold on to its security until the amount owed to it is paid in full. Its demand for cash in exchange for the original title and discharge of charge is therefore not unreasonable. That said, the Defendant's right to hold to its security must be balanced against the Plaintiff's right to redeem its property which it charged to the Defendant. It is normal practice for financial institutions to release title documents and discharge of securities held by them on the strength of professional undertakings from advocates acting for debtors or other financial institutions which want to create securities over the properties the subject of such securities being held. This court cannot however dictate to the Defendant what sort of undertaking it should accept and from whom. Whatever decision the Defendant has to make on the issue must however be in tandem with common banking practice and should not in any way stifle the Plaintiff's right to redeem its property. In this case, the Defendant is not satisfied with the professional undertaking provided by the advocates for Family Bank Limited. It is not clear from the material on

record as to why the Defendant has found that undertaking unacceptable. As I have stated above, I am unable to dictate to the Defendant what sort of undertaking or security it should accept. If I was to grant the prayer sought by the Plaintiff, it would be tantamount to forcing the Defendant to accept the professional undertaking which has been provided by the advocates for Family Bank Limited and the interested party. That would not be in order in view of what I have stated above.

In order to strike a balance between the right of the Defendant to secure the amount owed to it and the Plaintiff's right to redeem its property and doing the best I can for the Plaintiff in the circumstances, I would make the following orders:

1. The Defendant's Manager, Jimmy Muiwa, or any other person or persons authorized under the Kenya Deposit Insurance Act, 2012 or Central Bank of Kenya Act, Cap 491 Laws of Kenya shall execute a discharge of charge that was registered against the title of L. R. No. 1376/49/3 (Grant Number I.R 73184) in favour of the Defendant to secure credit facilities that were granted to the Plaintiff by the Defendant within fourteen days (14) of the interested party's financier, Family Bank Limited providing the Defendant, in addition to its advocates undertaking dated 10<sup>th</sup> February 2016, with an irrevocable bank guarantee or irrevocable insurance bond approved by the Defendant's advocates on record that it will pay to the Defendant a sum of Kshs.12,274,748.96 within fourteen (14) days and in any event within Forty Five (45) days of the simultaneous registration of the instrument of transfer of the suit property in favour of the interested party and a charge in favour of Family Bank Limited over the suit property.
2. In the alternative, the said discharge of charge may be executed in the manner indicated in paragraph 1 above within 14 days of unconditional payment to the Defendant of the said sum of Kshs.12,274,748.96 by the Plaintiff, the interested party or the Family Bank Limited.
3. For the avoidance of doubt, Family Bank Limited is not under any obligation to provide the security set out in paragraph 1 or to make the payment provided for in paragraph 2 above.
4. The parties are at liberty to agree on any other mode of securing the debt owed by the Plaintiff to the Defendant pending the completion of the sale of the suit property by the Plaintiff to the interested party.
5. Each party shall bear its costs of this suit.

**Delivered, Dated and Signed at Nairobi this 5<sup>th</sup> day of April, 2016**

**S. OKONG'O**

**JUDGE**

**In the presence of**

Ms. Otieno for the Plaintiff

Mr. Ouma for the Defendant

Mr. Mutero for the Interested Party