



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 520 OF 2014 (O.S)

(Formerly Nyeri HCCC NO. 179 OF 2011)

SAMMY NJOROGE MWANGI..... PLAINTIFF

VERSUS

LAND REGISTRAR, MURANG'A LANDS OFFICE.....1ST DEFENDANT

COMMISSIONER FOR LAND.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

1. On **24th November, 2011** Sammy Njoroge Mwangi (hereinafter referred to as the applicant) took out the originating summons herein for determination of the following questions:-

1. **Whether a declaration should issue to the effect that the property known as L.R No.Loc.2/Mairi/397 (the suit property) is wholly owned by himself?**
2. **Whether the loan he took from Regional Loan Building Society on the security of the suit property has been fully settled? and**
3. **Whether a discharge of charge should be effected in respect of the suit property?**

2. The application is premised on the grounds that in 1985, the applicant gave the suit property to a financial entity called Regional Loan Society Limited (hereinafter referred to as the chargee) to secure a loan of Kshs. 100,000/=; that he repaid the loan in full but before the charge effected in respect of the suit property could be discharged, the chargee closed operations. It is the applicant's case that attempts to get the chargee to discharge the charge effected in respect of the suit property have been in vain.

3. In view of the foregoing, the applicant urges the court to grant the orders sought.

4. The application is supported by the affidavit of the applicant sworn on 12th May, 2011 in which, in addition to reiterating the grounds on the face of the application, the applicant has deposed that despite having repaid the loan advanced to him fully, he is unable to produce proof for payment of the loan. In this regard he explains that the receipts got burnt when his house burnt down in 1995 and that the property is still registered in his name.

5. Maintaining that there is no claim owing from him to the chargee, the applicant argues that the charge in respect of the property is unnecessarily impeding his use of the suit property.
6. To prove the averments contained in the suit property, the applicant has annexed the following documents to his supporting affidavit:-
 - i. Certificate of death No.100902 issued in respect of Grace Wanjiru Njoroge who died on 20th February,1992 (Cause of death is indicated as 90% burn due to body by fire due to septicemia).
 - ii. Police Abstract dated 15th January, 2004 through which the applicant reported loss of various items when his house burnt down in 1992.
 - iii. Certificate of official search in respect of the suit property showing that the applicant is the owner of the suit property and that the property is charged in favour of the chargee herein.
7. The application is opposed through the grounds opposition filed by the 3rd respondent (Attorney General) dated **13th July, 2015**. In those grounds, the 3rd respondent contends that the facts on which the application is premised lack correctness and sufficiency to warrant issuance of the orders sought; that the orders sought are not supported by the facts and the evidence on record and that the facts and matters placed thereto do not disclose any cause of action against the respondents.
8. The 3rd respondent has further contended that the applicant has not demonstrated the efforts made before concluding that the chargee cannot be traced. The facts relied on in support of the application are said to be contradictory and contended that the summons herein are not the best forum for determining the issues raised in the application (Viva voce and documentary evidence is said to be required to prove the issues raised).
9. The orders sought are also said to be incapable of being issued in the absence of the chargee which is a necessary party in the application.
10. The application was disposed of by way of written submissions.

Submissions by the applicant

11. In the submissions filed on behalf of the applicant, it is reiterated that the applicant fully repaid the loan advanced to him by the chargee but owing to the fact that the chargee closed shop before he could get the charge discharged, the property remained undischarged.
12. It is reiterated that documents required to prove repayment of the loan got burnt when the applicant's house got burnt in 1992. Maintaining that the chargee has ceased to exist, the applicant argues that, in the circumstances, the only way he can redeem his property is by getting the orders sought in the application herein.
13. With regard to the grounds of opposition filed by the 3rd respondent, it submitted that the 3rd respondent has not proved that the chargee exists; that the loan is still owing from the applicant to the chargee or that the chargee would suffer any prejudice if the charge is discharged.
14. Based on the decisions in the cases of **Gatatha Farmers Co. Ltd v. The First National Bank of Chicago Nairobi High Court No.313 of 2008** and **Paul Wandati Mbochi v. National Bank of Kenya Ltd Nairobi High Court Misc. Cause No.124 of 2010**; it is submitted that the applicant has made up a case for being granted the orders sought.
15. In **Gatatha Farmers Co. Ltd v. The First National Bank of Chicago** (*supra*) it was stated:-

“...the witness testified that all efforts to trace the defendants for the purpose of obtaining a discharge were fruitless and even after the originating summons was advertised in the media no one came up to defend the same. I am satisfied, on the basis of the evidence placed before me that the plaintiff has proved its case on a balance of probabilities. The documents exhibited before court

speak for themselves and the contends thereof have not been rebutted at all.

Considering also, that all and any claims, as would be based on the charge document herein would be statute barred under the law of limitation, justice demands that the orders sought herein be granted to free the plaintiff's properties from the unnecessary encumbrance." (Emphasis supplied).

16. In the case of **Paul Wandati Mbochi v. National Bank Kenya Limited** (*supra*) it was stated:-

"...It seems from the above paragraph that the Letter of offer dated 28th December 2006 is inconsistent with the lien in that the respondent claims for the payment of moneys for Valuer's and Auctioneer's fees and charge's. In my opinion, the Respondent has provided scant evidence as to why the applicant should pay such monies...In the light of the above, I do not believe that the Respondent herein is in any position to be exercising it's so called Banker's lien....As a result, I allow the applicant's Originating Summons dated 8th February, 2010. I direct that the Respondent will release to the Applicant, within 7 days from the date hereof, the latter's title deeds to the suit property..."(Emphasis supplied).

Submissions on behalf of the respondents

17. In the submissions filed on behalf of the respondents, it is submitted that the applicant has no cause of action against the respondents. Further, the remedies sought are said to be outside the mandate of the respondents. The remedies sought are said to be clearly provided for in statute. The suit/application is said to be incompetent for lack of factual incorrectness and full disclosure and has no basis for issuance of the prayers sought.

18. The applicant is said to have failed to show the efforts made to trace the chargee, for instance, it is submitted that the applicant conducted a search in the wrong office, Central Bank, as opposed to the Registrar of Companies or Societies. It is pointed out that no explanation has been offered as to why the applicant chose to conduct a search at Central Bank as opposed at the Registrar of Companies/Societies.

19. The pleadings filed in this suit are said not to show the kind of business the chargee used to do. It is suggested that the applicant should have lifted the veil of incorporation of the chargee.

20. Failure to take up such crucial steps is a clear indication that the applicant is not candid. He may not have cleared the loan and could be seeking to discharge his title without following due process. It is also submitted that the chargee or the individual(s) behind the Society is a necessary party.

21. It is submitted that no proof that the loan was repaid has been adduced. The alleged arson is not proof that receipts were lost. Further, receipts are not one of the documents said to have been lost in the fire incident. Factual issues relied on are suspect hence incapable of forming the basis for issuance of the orders sought.

22. The date of death of his wife as per the supporting affidavit is not supported by the evidence adduced in respect thereof (alleged arson took place in 1995-death certificate and police abstract show that death and arson occurred in 1992).

23. Owing to incorrectness of the facts, the court is urged to decline the application.

24. The respondents further submit that proper parties to the application are not cited; that the applicant ought to have enjoined the Society as a party or its Directors or Secretary. They are of the view that it is upon court to determine that the chargee is none existent and the applicant is entitled to re-conveyance of the suit property if it finds chargee has refused to carry out its mandate.

25. It is their submission that the declaratory orders have been sought against the wrong party. As such declaratory orders cannot issue against the respondents as they have no interest in the suit property.

26. It is further submitted that the court cannot order discharge of the charge without giving the chargee an opportunity to be heard on the issue. It is suggested that the applicant ought to have enjoined the chargee to the suit and served it with summons to enter appearance as contemplated under **Order 5 Rule 14** and **17** of the Civil Procedure Rules. If the defendant cannot be found, then orders of substituted service would be issued by the court.

27. In view of the foregoing, it is submitted that the application is wanting, unmerited and unsustainable as against the respondents.

28. The court is urged to dismiss the application with costs to the respondents and order that the affected parties be enjoined and the suit served to them accordingly.

Analysis and determination

29. I have read and considered the pleadings filed in this suit and the submissions in respect thereof. Whereas the applicant claims to have paid all the debts owed by him to the chargee and that the chargee is incapable of being traced; upon review of the evidence adduced, I am not convinced that the debts have been repaid and that the chargee cannot be traced. I agree with the submissions filed by the respondents that the suit has been brought against the wrong parties. In my view, the applicant ought to have instituted the suit against the chargee and, if unable to effect personal service against it, applied to effect service upon it by substituted service as was done in the case of **Gatatha Farmers Co. Ltd v. The First National Bank of Chicago** (*supra*).

30. Upon reading and considering the evidence adduced in this case, I find that no reliable evidence has been adduced to warrant a determination that the chargee is none existent or a determination that the loan advanced to the Applicant has been paid. In my view the letter from Central Bank is only proof that chargee is not registered to carry out money lending business and not proof that the chargee is none existent. I reiterate that the applicant ought to have at least enjoined the chargee to the suit and, if need be, sought to have it served through substituted service as was done in the case of **Gatatha Farmers v. The First National Bank of Chicago** (*supra*).

31. The upshot of the foregoing is that the suit/application has no merit and is dismissed with costs to the respondent.

Dated, signed and delivered at Nyeri this 21st day of June, 2016.

L N WAITHAKA

JUDGE.

In the presence of:

N/A for the plaintiff

N/A for the defendants

Court assistant - Lydia