



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 240 OF 2012

Formerly HCC 31 OF 2006

ORIENTAL COMMERCIAL BANK LTD.....PLAINTIFF

VS

JAPHET OGENDO OWUOR.....DEFENDANT

(Application to have suit marked as compromised; claim by plaintiff that the defendant fraudulently and in collusion with lands officers caused a charge to be discharged; plaintiff seeking orders in the plaint to have the charge re-instated; plaintiff later filing application to state that the charge has been reinstated and seeking to have matter marked as settled/compromised; defendant in his defence denying allegations of plaintiff; no evidence that there was ever a discharge as alleged or a reinstatement of the same; no agreement by defendant that the matter is settled or compromised; application unsupported and is dismissed with costs)

RULING

The application before me is the Motion dated 18 October 2010 filed by the plaintiff. It is an application brought under the provisions of Order XXIV Rule 6 and Order L Rule 1 of the former Civil Procedure Rules. It is asking for orders that :-

(a) The defendant be deemed as having satisfied the plaintiff in respect of the whole subject matter of the suit, to wit, reinstatement of the charge and judgment be entered accordingly.

(b) Costs be awarded to the plaintiff.

The application is opposed by the defendant.

This suit was commenced by way of plaint filed on 8 March 2006 against one defendant, Japheth Ogendo Oduor. In the plaint, it is pleaded that on 14th July 1997, the defendant executed a charge over the the property Eldoret Municipality Block 10/107 in favour of Delphis Bank Ltd, to secure a loan and overdraft facilities advanced to Agro-Millers Ltd. The Charge was registered on 24th July 1997. The plaintiff has pleaded that it is the successor of Delphis Bank Ltd which is now inexistent. It is averred that the defendant, fraudulently and in collusion with land officers, caused the said charge to be discharged without the knowledge of the plaintiff. The plaintiff is seeking orders of declaration that the discharge of charge and cancellation of the charge against the title Eldoret Municipality Block 10/107 is unlawful and that the charge be restored at the defendant's expense.

In a long and winded statement of defence, filed in person, the defendant denied the plaintiff's allegations. He averred that there was no privity between himself and the plaintiff, and contested the locus standi of

the plaintiff in the matter, since Delphis Bank is inexistent. He has contested the loan, contested the validity of the charge, and denied owing the plaintiff any money. He has denied having colluded with the land registry, or acting fraudulently on the charge, and has averred that such allegations are defamatory, scandalous, frivolous and an abuse of the process of court. He has put the plaintiff to strict proof of the same.

The plaintiff filed an interlocutory application dated 8 March 2006 seeking orders to restrain the defendant from dealing with the suit land pending the hearing of the suit. Interim orders were granted, but that application never proceeded for interpartes hearing. On 27 June 2006, Mr. Mwetich for the plaintiff, stated from the bar that the discharge of charge, the subject matter of the suit, had been re-instated. The court then ordered the withdrawal of the application for injunction, since the charge had been re-instated, and vacated the interim orders granted. Nothing much transpired in this suit until this application was filed.

For some reason, which I cannot explain, the application as titled seems to suggest that there exists a 2nd and 3rd defendant named as The Lands Registrar, Uasin Gishu District and the Attorney General respectively. The original defendant is described as the 1st defendant. I can in fact see that the State Law Office had counsel attending in the matter, but I can see no amendment to the plaint, and no joinder of the Lands Registrar nor the Attorney General, to these proceedings. This matter is squarely between the plaintiff and the one defendant Mr. Owour. The Lands Registrar and Attorney General are not parties.

It was the argument of Miss. Mufutu, for the applicant, that this suit ought to be marked as settled and that the defendant be ordered to pay the costs of the suit. She relied on the supporting affidavit of one Vijayshree Jethwa the Manager of the plaintiff's Eldoret Branch and a further affidavit sworn by Mr. R. R Mwetich advocate. The affidavit of Mr. Jethwa depones that the defendant purported to discharge the charge on 20.10.1999. It further states that in the year 2006 the bank discovered that the charge had been discharged fraudulently and it then commenced these proceedings. It is further deponed that on 4th May 2006, the Land Registrar on noting the illegality, proceeded to reinstate the charge. Since the charge has been reinstated, it is averred that the substance of the suit has wholly been compromised. There are two exhibits namely "A" and "B" which are said to be annexed to the affidavit but I have seen no annexures to that affidavit. The further supporting affidavit sworn by Mr. R.R. Mwetich, has annexed an official search of the suit land dated 21 November 2011.

The defendant later appointed the firm of M/s Ngigi Mbugua & Co Advocates, and Mr. A.M.Ngigi for the defendant, vehemently opposed the application. He averred that in the plaint, the plaintiff sought a declaration, which can only be proved by way of evidence. He further argued that if the plaint sought a reinstatement of the charge, which the plaintiff thinks has been done, then the avenue is to withdraw the suit and not have it marked as settled, for the defendant, has not agreed to compromise the suit. He pointed out that the official search annexed to the affidavit of Mr. Mwetich does not show any discharge of charge and the whole claim that there was ever a discharge of charge is unsupported.

I have considered the application. The same is premised upon the former Order XXVI Rule 6. That rule provided as follows :-

(compromise of a suit)

(1) Where it is proved to the satisfaction of the court, and the court after hearing the parties direct, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole suit, the court shall, on the application of any party, order that such agreement, compromise, or satisfaction be recorded and enter judgment in accordance therewith.

(2) The court on the application of any party may make any further order necessary for the implementation and execution of the terms of the decree.

The above provisions presuppose a situation where the parties agree to compromise a suit or where the

defendant satisfies the plaintiff in respect of the prayers in the suit. The plaintiff states that the charge was reinstated by the Lands Registrar on 4 May 2006. If indeed this is what happened, that reinstatement was not done by the defendant, but by a person who is not a party to the suit. The defendant has not admitted to having ever reinstated the charge; indeed he denied ever having colluded with the Lands office to have the charge discharged irregularly as alleged by the plaintiff. That reinstatement, if at all there was any, was also never done with the agreement of the parties. There is no agreement between the plaintiff and defendant to compromise this suit or to have it marked as satisfied. It is not therefore a case fit to fall within the purview of Order XXIV Rule 6.

I have seen the official search annexed to the affidavit of Mr. Mwetich. I can see that a charge was registered on 24th July 1997. I cannot see any discharge of charge of that charge. Neither can I see any reinstatement of a discharged charge. From what I can see, there is no evidence of there ever having been a discharge of the charge of 24th July 1997 or , if there was any discharge, a reinstatement of that discharge. From the material before me, I am unable to hold that there was any discharge of charge, and if ever there was one, I am unable to hold that the same was reinstated on 4th May 2006 as alleged.

This application has absolutely no basis and is indeed frivolous. I dismiss it with costs.

One last word, if the plaintiff feels that there is no substratum left in the suit, then it is upon it to make a decision to withdraw the suit and probably face the consequences on costs. However, if it feels that it has a case to proceed for trial, then it ought to take steps to list the matter for hearing, as the defendant has denied all the allegations in the plaint.

That is my order.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF JUNE 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. T.K. Kwambai holding brief for Ms Manani, Lilan for the plaintiff/applicant

Mr. A.M. Ngigi or Ms Ngigi Mbugua & Co present for the defendant