



REPUBLIC OF KENYA



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**Sidian Bank Limited v Ngugi & 5 others (Civil Suit 40 of 2020)
[2024] KEELC 3238 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 3238 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
CIVIL SUIT 40 OF 2020
CK YANO, J
MARCH 14, 2024**

BETWEEN

SIDIAN BANK LIMITED APPLICANT

AND

STELLA NYAKIO NGUGI 1ST RESPONDENT

ANDREW LYALI 2ND RESPONDENT

SAMUEL KIOME MUGAMBI KIMATHI 3RD RESPONDENT

GODFREY MUGAMBI KIMATHI 4TH RESPONDENT

THE LAND REGISTRAR MERU CENTRAL 5TH RESPONDENT

THE ATTORNEY GENERAL 6TH RESPONDENT

JUDGMENT

Applicant's Case

1. By an Originating Summons dated 24th April, 2019 and filed in court on 9th May, 2019 brought under Article 159(2) of *the Constitution* of Kenya 2010, the inherent powers of the court, Sections, 1A, 1B and 3A of the *Civil Procedure Act* Cap. 21 of the Laws of Kenya, Order 37 rules, 4, 8, 13, 14, 15, 16, 17, 18, 19 and 20 and all other enabling provisions of the law, the applicant invites the court to make determination of the following questions and orders:-
 - i. Whether the Meru Central Land Registrar's cancellation of Entry Number 3 in the Encumbrance Section of the Register for Land Reference Number Nyaki/Kithoka/1914 made on 01.08.2013 effecting the registration of the Charge dated 24th July 2013 for Kenya Shillings 3,700,000 issued in favor of the Bank by Michael Rukunga Mowesley without prior notice to the Bank and/or without a just cause is null and void ab initio and of no legal consequence,



- ii. Whether the Meru Central Land Registrar's cancellation of Entry Number 7 in the Proprietorship Section of the Register for Land Reference Number Nyaki/Kithoka/1914 made on 1st August 2013 effecting the registration of a notice in respect of matters reserved under Section 87 of the [Land Registration Act](#) without prior notice to the Bank and/or without a just cause is null and void ab initio and of no legal consequence.
 - iii. Whether all further dispositions effected by the entries made by the Meru Central Land Registrar in the Proprietorship Sections of the Register for Land Reference Number Nyaki/Kithoka/1914 after the cancellation of Entries Number 3 and 7 in the Encumbrance and Proprietorship Sections of the Register comprising of; Entry Number 8 made on 16.06.2015, Entry Numbers 9 made on 16th June 2015 and 16th October 2018, Entry Numbers 10 made on 17th June 2015 & 18th October 2018, Entry Number 11 made on 9th July 2015, entry Number 12 made on 9th July 2015, Entry Number 13 made on 18th August 2015 and, Entry Number 14 made on 23rd August 2017 all made in the Proprietorship Section of the Register are subject to the Bank's Charge dated 24th July 2013 and registered under Entry Number 3 in the Encumbrance Section of the Register for the property.
 - iv. If the Court determines the questions raised in paragraphs [1], [2] and [3] above in the affirmative, whether the Register for Land Reference Number Nyaki/Kithoka/1914 should be rectified by reinstating Entry Number 3 made on 1st August 2013 in the Encumbrance Section of the Register and Entry Number 7 made on 01.08.2013 in the Proprietorship Section of the Register for the property and cancelling all Entries made subsequent to the making of Entry Number 3 in the Encumbrance Section of the Register comprising of Entry Number 8 made on 16th June 2015, Entry Number 9 made on 16th June 2015, Entry Number 10 made on 17th June 2015, Entry Number 11 made on 9th July 2015, Entry Number 12 made on 9th July 2015, Entry Number 13 made on 18th August 2015 and Entry Number 14 made on 23rd August 2017; and
 - v. Is the Applicant entitled to the costs of this Summons?
2. The Applicant prays for reliefs in the following terms.
1. An order be and is hereby issued directing the Meru Central Land Registrar to forthwith effect the rectification of the Register for Land Reference Number Nyaki/Kithoka/1914 by;
 - a. Reinstating Entry Number 3 made on 1.08.2013 in the Encumbrance Section and Entry No. 7 made on 1.08.2013 in the Proprietorship Sections of the Register and;
 - b. Cancelling all other Entries made subsequent to the cancellation of Entry Numbers 3 and 7 in the Encumbrance and Proprietorship Sections of the Register for Nyaki/Kithoka/1914 comprising of Entry Number 8 made on 16.06.2015, Entry Number 9 made on 16.06.2015, Entry Number 10 made on 17.06.2015, Entry Number 11 made on 9.07.2015, Entry Number 12 made on 9.07.2015, Entry Number 13 made on 18.08.2015 and Entry Number 14 made on 23.08.2017 all in the Proprietorship Section of the Register.
 2. A permanent restraining injunction be and is hereby issued against the 1st, 2nd, 3rd, 4th and 5th Defendants, whether by themselves, their agents, servants and or otherwise, from in any manner whatsoever interfering with the Bank's rights under the Charge dated 24.07.2013 registered over the land parcel known as Land Reference Number Nyaki/kithoka/1914 on 01/08/2013 by entries Numbers 3 and 7 in the register for the said property.



3. The applicants cost in these proceedings be borne by the respondents jointly and severally.
3. In support of the originating summons, the applicant (hereinafter referred to as “the Bank”) through its legal Officer, Berveline Chweya, swore a supporting affidavit dated 24/4/2019 which was substituted on 18/5/2021 by Ms. Jackline Ndung’u and a further affidavit sworn by Ms. Jackline Ndung’u on 18/5/2021.
4. In opposing the originating summons, the 1st and 2nd respondent filed a replying affidavit sworn by Stella Nyakio Ngugi on 11/09/2019. The said affidavit was filed on 12/09/2019.
5. The 3rd and 4th respondents equally opposed the bank’s originating summons by replying affidavits sworn on 25/03/2021 and 15/03/2021 respectively. Both affidavits were filed on 6/04/2021. The 3rd and 4th respondents also filed a list of documents dated 29/04/2021 and filed on 30/04/2021, a further list of documents dated 29th April 2021 and filed on 30th April 2021, and a further, further list of documents dated 3rd May, 2021 and filed on 12th May, 2021.
6. The 5th respondent represented by the 6th respondent filed a reply to the originating summons dated 29th September, 2022 and filed on 31st October, 2022. The 5th and 6th respondents also filed a list of documents dated 8th September, 2022 and filed on 9th September, 2022.

The Appellant’s Case

7. The bank’s case is that some times in 2013, One Wilberforce Ndonga Njenga t/a There Traders (Borrower) approached the bank and applied for banking facilities comprising of a term loan of KSh. 6,400,000/= and an over draft facility limit in the sum of 3,600,000/=. That the bank agreed to make available to the borrower the said facilities which were to be secured by inter alia, a legal charge over LR. NO. Mombasa/mn/thathini/Block 4/395 in the sum of KSh. 5,000,000/=: a legal charge over LR. Nyaki/kithoka/1914 in the sum of Ksh. 3,700,000/=: a legal charge over LR no. Nkuene/Taita/1633 in the sum of Ksh. 1,700,000/= and a personal guarantee and indemnity in the sum of Ksh. 10,400,000 from Michael Rukinga Mowesley (chargor), the registered proprietor of the properties to be charged. That both the borrower and the charger executed the letter of offer on 20/6/2013, and by an independent separate stipulation in the said letter of offer, the chargor agreed that the mentioned properties be charged to the Bank as security for the banking facilities.
8. The bank avers that by a charge dated 24th July, 2013, the charge dated 24th July, 2013 the chargor charged LR. NO. Nyaki/Kithoka/1914 (The suit property) to the bank to secure the principal sum of Ksh. 3,700,000/= , made or to be made available by the bank to the borrower plus interest, charges and other expenses as therein covenanted. That the said charge was registered on 1st August, 2013 as Entry Number 3 in the Encumbrances Section of he Register for the suit property. That the Registrar, by entry number 7 in the proprietorship Section of the register, also reserved the banks rights under Section 87 of the [Land Registration Act](#).
9. The Bank states that the borrower defaulted on the obligation to repay the Bank as far back as January, 2014 thereby constraining the bank to commence the realization of her securities, including the suit property. That when the bank moved to exercise her statutory power of Sale over the suit property, the 1st respondent herein instituted a suit at the Environment and Land Court Mombasa on 22/05/2014 being Mombasa ELC Case NO. 115 of 2014, Stella Nyakio Ngugi Versus Wilberforce Njenga Ndonga & 7 Others, including the Bank which was sued as the 5th defendant. That the 1st respondent claimed to institute the suit in her capacity as the administrator of the estate of the late Michael Rukinga Mowesley who was her deceased husband, and her suit was entirely based on her claims that she was the chargor’s



spouse at the date of the creation of the Bank's charge over the suit property. That the Central plank of her case was that the bank, together with the other defendants, had fraudulently caused the suit property together with two other properties to be fraudulently charged to the bank. That, that suit was however struck out with costs pursuant to an application by the Bank who disclosed that the deceased chargor, Michael Rukunga Mowesley had actually divorced Stella Nyakio Ngugi the 1st respondent herein by proceedings conducted in Mombasa High Court Divorce Cause No. 52 of 2017 in which a Decree Nisi had been issued on 24th June, 2009 and the Decree Absolute on 28th March 2011.

10. That in addition to instituting Mombasa ELC. Case NO. 115 of 2014, the 1st respondent made a complaint to the Department of Criminal Investigations to the effect that Wilberforce Njenga Ndonga had forged her signature affixed to the spousal consent that accompanied the charge in respect of the suit property, leading to the arrest of Wilberforce Njenga Ndonga and four others who were charged, but acquitted on 14/12/2019, in Mombasa Chief Magistrate Criminal case No. 1468 of 2016. The bank pointed out that the 5th respondent herein was called as a prosecution witness in the said Criminal Case and was therefore aware of those proceedings.
11. It is the bank's case that sometime in the year 2019, while in the process of exercising its statutory power of Sale, conducted a search at the Meru Central Land Registry over the suit property, and the Bank was shocked to discover that the Land Registrar (5th Respondent) had without prior notice to the Bank and a just cause, cancelled entry number 3 in the encumbrance Section and entry number 7 in the proprietorship Section of the register of the suit property. That having cancelled the said entries, the 5th respondent subsequently proceeded to make the following entries in the proprietorship Section of the register:-
 - i. Entry 8 made on 16/06/2015 without the original Title Deed for the suit property and without registering any valid instruments of assent or transfer, registered Andrew Lyall (2nd respondent) and Stella Nyakio Ngugi (1st respondent) as proprietors of the suit property.
 - ii. Entry 9 made on 1/6/2015 by which the Land Registrar, again without any original Title Deed of the suit property and without registering any valid instrument of transfer, registered the 1st respondent herein as the proprietor of the suit property.
 - iii. Entry 10 made on 17/6/2015, by which the 5th Respondent, again without the original Title Deed for the said property, issued a second edition of Title Deed for the same property.
 - iv. Entry 11 made on 9/07/2015 by which the 5th Respondent again without the Original Title Deed for the property and without registering a valid instrument of transfer, registered the suit property in the name of Samuel Kiome Rimbere Murithi, the 3rd respondent herein
 - v. Entry 12 made on 09/07/2015 by which the Land Registrar issued a further Title Deed.
 - vi. Entry 13 made on 18/08/2015 by which the Land Registrar Registered an inhibition prohibiting any dealings in the suit property until the hearing and determination of Civil Suit No. 373 of 2014 in the Chief Magistrate Court at Meru dated 31st July, 2015.
 - vii. Entry 14 made on 23/8/2017 by which the Land Registrar lifted the inhibition order of 31st July, 2015 in Meru CMC Civil Suit NO. 373 of 2014 vide an order made on 19/8/2017 in the same suit.
 - viii. Entry 9 made on 16/10/2018 by which the Land Registrar, without the Original Title Deed for the said property registering a valid Instrument of transfer, registered Godfrey Mugambi Kimathi (the 4th respondent herein) as the registered proprietor of the suit property.



- ix. Entry 10 made on 18/10/2018 by which the Land Registrar issued a Title Deed in respect of the suit property.
12. It is the bank's contention that it had never been repaid the financial facilities made available to the borrower on the strength of the charge and it was yet to discharge the property hence the filing of this suit.
13. In the affidavit in support of the originating summons, the Bank exhibited copies of the Letter of Offer dated 03/05/2013, charge dated 24/7/2013 over LR. No. Nyaki/Kithoka/1914, the plaint in Mombasa ELC Case No. 115 of 2014, Judgment, Decree Nisi and Decree Absolute in Mombasa High Court Divorce Cause No. 52 of 2007, Notice of Motion dated 29/6/2018 and ruling delivered on 17/10/2018 in Mombasa ELC Case NO. 115 of 2014, charge sheet in Mombasa CM. Criminal Case No. 1468 of 2016 and certified copies of the Land records for the suit property.

The 1st And 2nd Respondents' Case

14. The 1st and 2nd respondents' case is that the 1st respondent is the former wife of Micahel Rukinga Mowesely who was the guarantor/chargor and the registered proprietor of the suit property. That Wilberforce Ndonga Njenga who was the borrower was a stranger to the 1st respondent's former husband who is now deceased. It is their contention that the spousal consent allegedly granted by the 1st respondent to perfect the charge was illegal, unlawful and in contravention of the Land Act as she was already divorced at the time the charge was bring registered. The 1st respondent denied appearing before the Bank's Lawyer to give her consent and averred that whoever appeared was an imposter.
15. The 1st respondent averred that she had no business in making entries in the Land Registry and therefore not in a position to know whether there was any unlawful acts done by the 5th and 6th respondents and argued that the reasons for cancellation of the Bank's charge were best known only to the 5th and 6th respondents.
16. The 1st and 2nd respondents averred that the suit property was registered in their names by virtue of transmission as the legal personal representatives of the estate of the late Michael Rukinga Mowesley. They added that they are innocent inheritors of the suit property by virtue of Section 29 of the Law of Succession Act, and that their only duty was to present the Letters of Administration to the Land Registry and thereafter it was up to the land Registrar to make the relevant entries and changes.
17. The respondent averred that she was no longer the registered owner of the suit property and consequently have no interest in the suit property as the parcel was lawfully sold to the 3rd respondent. They want the suit against them dismissed with costs.

The 3rd Respondent's Case.

18. The 3rd respondent stated that he was the original owner of the suit property before selling the property to the late Michael Rukinga Mowesely in the year 2009. That after the demise of Michael Rukinga Mowesely, the 1st respondent approached the 3rd respondent to buy the property once they were done with the Succession Cause, and had effected transmission of the property into the names of the 1st and 2nd respondents as legal representatives and thereafter to the name of the 3rd respondent.
19. It is the 3rd respondent's contention that if the Bank's charge had been properly entered into the register then the property could not have been transferred by way of transmission to the 1st and 2nd respondents. That the confirmed Grant that effected the transmission and transfer to the 1st and 2nd respondent has not been challenged or revoked.



20. The 3rd respondent stated that he made an inquiry from the land registry on what was the effect of the bank's charge and was informed that the charge had been entered by error and that the registry had realized that the charge was fraudulent as the signature of the chargor in the charge document and the application for consent was differing, and that is why the Registry canceled the entry noting the Legal charge. That subsequently, a transfer was done in his favour on 09/07/2015 upon payment of the relevant stamp duty, and a title deed was issued in his favour.
21. The 3rd respondent further stated that he was subsequently informed by the registrar on 18/8/2015 that another party had obtained a court order inhibiting the land in Meru CMC. 473 of 2014 pending the hearing and determination of the said case. That he obtained a court order and had the inhibition discharged on 23/8/2017, and on 16/10/2018, he put up the property for sale and transferred it to the 4th respondent herein who also paid the requisite stamp duty and a title was issued to him and is currently the registered owner.
22. The 3rd respondent stated that the late Michael Rukunga Mowesely was a longtime friend and they were very close. He said he was concerned that the charge by the bank seems fraudulent because of the discrepancies on the charged documents as well as on the consent. He stated that he knew the 1st respondent was the wife of the Late Michael Rukunga Mowesley, but was not aware that they had divorced.
23. The 3rd respondent stated that he had seen the spousal consent attached to the charged documents and noted that the same was signed by one Stella Wanjiru Muriithi who is a stranger and was not the wife of the deceased. Further, that the deceased died on 16/01/2014 and as at the time of signing the charge, he was gravely ill and was not in his right mental status as he had been sick for a long period of time. That even if he was in his right mental status, he would not have placed two differing signatures on both the charge documents and on the application for the Land Control Board. He questioned the Bank's character and conduct as they have never sued their client in order to realize the loan first from him before going after the chargor's properties. That whereas the said loan was taken for the purposes of purchasing motor vehicles (trucks) and an overdraft, no information has been brought before this court as to what happened with the said motor vehicles. That the bank has also not given information as to the other properties charged to secure the loan. It is his contention that the charge is null and void ab initio due to the discrepancies therein.
24. The 3rd respondent further stated that one week prior to the death of Michael Rukunga Mowesely, they had agreed that the 3rd respondent takes back the money that he had sold the land to him. That when he learnt about the charge to the bank, it occurred to them that this must have been a fraudulent transaction.
25. The 3rd respondent contended that the court cannot cancel Title Deeds or entries made in favour of an innocent purchasers for value without notice in favour of the bank for an illegal and fraudulent charge. That the charge by the bank having been fraudulently registered had to be cancelled as it was void ab initio and nothing could have remedied it as the chargor had died. That its entry in the register thus had no legal implications and that the Succession was done and the property passed to the 1st and 2nd respondents by transmission meaning it was free property and the Bank had not challenged the grant that was issued in that respect. The 3rd respondent annexed a copy of the Green Card and prayed that the suit be dismissed with costs.



The 4th Respondent's Case

26. The 4th respondent associated himself with the averments made by the 3rd respondent. He stated that before he bought the land, he conducted a search at the Land Registry and property did not have any encumbrances. That at the time of transfer the 3rd respondent immediately gave him vacant possession and he started utilizing the land. That he was later informed that the bank had filed this suit in Mombasa.
27. The 4th respondent further states that upon looking at the bank documents, he believes the same and the entire transaction was fraudulent because the signature of Michael Rukinga Mowesly in the Letter of Offer and charge differ from the one in the application for consent. Further, that the property having changed hands through transmission showed that the bank charge had been cancelled and that it no longer had any legal effect. That the Land Registrar could not have allowed all the transactions to pass through his nose without a valid and justifiable reason to do so. He was surprised that it was more than 6 years after the loan amount fell into arrears and the bank never bothered to check the register of title in order to avert any eventualities. That the bank had no interest in proceeding to recover its monies if at all the charge was legal, adding that it never even bothered to go after the borrower who had not even been sued in this case before going to the Guarantor. The 4th respondent contended that the bank has come to court with unclean hands and its plan is to clean up a fraudulent charge transaction. The 4th respondent stated that he is an innocent purchaser for value without notice having conducted a search and no encumbrance was shown from the search certificate. He argued that this suit has no merit and the same ought to be dismissed with costs.

The 5th & 6th Respondent's Case

28. The 5th respondent stated that the charge presented for registration was defective and thus not capable of being registered. That some parts were undated and had glaring misrepresentations, that the certificates for verification were blank and had not been properly filled out and details missing which was contrary to section 56 of the [Land Registration Act](#).
29. The 5th Respondent stated that the spousal consent had errors on who was indicated as the spouse of the registered proprietor of the suit parcel and that the certificates of verification of the spouse were blank and not executed in accordance with the Law. That the spousal consent lacked the particulars of an affidavit as provided in the Oaths and Statutory Declaration Act (Cap 15 of the Laws of Kenya).
30. The 5th respondent stated that as the Land Registrar and being the Secretary of the Miriga Mieru East Land Control Board, the application for consent had glaring defects and errors leading to doubts if the consent to charge had been issued procedurally. That a post registration search was never issued after the registration of the charge as it is customarily done.
31. The 5th respondent further stated that in accordance with Section 14 (c) of the [Land Registration Act](#), the Land Registrar has the authority to refuse to proceed with any registration (despite the same having commenced) after the instruments provided for registration do not meet the statutory requirements.
32. The 5th Respondent states that the applicant/chargor failed to correct and present again the properly executed instruments for registration on a further/subsequent time. The 5th respondent enumerated particulars of illegalities by the Chargor/Applicant as failure to comply with section 56 of the [Land Registration Act](#), failure to have the charge document properly executed and presenting for registration misleading instruments.



33. It is the 5th and 6th respondent's contention that the failure to correct and present the corrected instruments despite the applicant/chargor being given ample time, the misleading entries were struck out since the process of registration of the instruments had not been completed. That the striking out of the misleading entries was done in accordance with the Law (Section 14 of the [Land Registration Act](#)) and in good faith after the hearing of the applicant.
34. The 5th and the 6th respondents prayed for the court to find that the Land Registrar acted within the law when he failed to proceed with the registration of the charge instruments in the suit parcel of land, that the charge instruments presented for registration failed to meet the statutory requirements for the registration in accordance with section 79 of the [Land Act](#), and that the subsequent registration after the striking out of the unqualified misleading entry No.7 and 3 were properly made and registered in accordance with the Law. The 5th and 6th respondents urged the court to find against the lender and borrower for non-compliance with the law and held liable for damages and costs ensuing in the suit. The 5th and 6th respondents prayed for the dismissal of the suit with costs.
35. The matter was canvassed by way of written submissions. The Applicants filed her's dated 1st December, 2022 through the firm of Munyao, Muthama & Kashindi Advocates while the 1st and 2nd respondent filed their submissions dated 29th September 2023 through the firm of Otieno A.& Co. and the 3rd and 4th respondents dated 2nd October, 2023 were filed by the firm of Charles Kariuki & Kiome Associates Advocates. The 5th and 6th respondents did not file submissions despite being granted time to do so.

Applicant's Submissions

36. The Applicant gave a detailed synopsis of the matter and identified only one issue for determination which is whether or not the Land Registrar, Meru, acted within the Law when he purported to cancel Entry Number 3 in the Encumbrances Section of the Register for the suit property and entry number 7 in the proprietorship section of the Register recording the registration of the Charge in favour of the Bank and to thereafter register the purported Transfer instruments in favour of the 1st, 2nd, 3rd and 4th respondents herein on diverse dates, all without prior notice to the Bank in view of the Bank's existing registered interests as a Chargee over the suit property.
37. The applicant's counsel highlighted the undisputed facts of the case and submitted that it is clear that up to date, the bank has never been repaid the facilities made available to the borrower on the strength of the banks charge and that the bank's charge is yet to be discharged. Further that in the absence of a validly drawn and attested discharge of charge presented to the Meru Central Registry and registered, the Land Registrar, Meru had no legal authority to purport to cancel entries No. 3 and 7 made in respect of the banks charge when it was registered on 1/08/2013. Additionally, that the fact that the bank was not notified or given prior notice by the Land Registrar, Meru Registry of its, intention to cancel the entries that registered the bank's interest over the suit property rendered the actions of the land Registrar, Meru Central illegal and an abuse of office and also amounted to an unfair administrative action. It is therefore the submission of the applicant's counsel that the land Registrar Meru, did not act within the law when he purported to cancel the said entries No. 3 and 7 and thereafter proceeding to register purported transfer instruments in favour of the 1st, 2nd, 3rd and 4th respondents herein on diverse dates, all without prior notice to the Bank in view of the Bank's existing registered interest as a chargee over the suit property.
38. To buttress the above submission, the applicant's counsel cited the following provisions of the Law;



Section 36(5) of the [Land Registration Act](#) which provides that:-

“Interests appearing in the register shall have priority according to the order in which the instruments which led to their registration were presented to the registry, irrespective of the dates of the instruments and notwithstanding that the actual entry in the register may be delayed: Provided that where an instrument is prepared in the registry, it shall be deemed to have been presented on the date which the application was made to the registrar”

Section 87 of the [Land Act](#) which provides: -

“If a charge contains a condition, express or implied that prohibits the chargor from, transferring, assigning, leasing, or in the case of a lease subleasing the land without the consent of the chargee, no transfer, assignment, lease or sublease shall be registered until the written consent of the chargee has been produced to the registrar”.

Section 59 of the [Land Registration Act](#) which provides:-

“Lender’s consent to transfer”

“ If a charge contains a condition, express or implied by the borrower that the borrower will not without the consent of the lender, transfer assign or lease the land or in the case of a lease, sublease, no transfer, assignment, lease or sublease shall be registered until the written consent of the lender has been produced to the Registrar”.

Section 88 (1) (g) of the [Land Act](#) provides:-

- “i. There shall be implied in every charge covenants by the chargor with the chargee binding the chargor....
- (g) Not to transfer or assign the land or lease or part of it without the previous consent in writing of the chargee which consent shall not be unreasonably withheld”.

39. The applicant’s counsel pointed out that the Bank’s interest dated 24/7/2013 produced as annexure BC – 2 in the supporting Affidavit shows the date it was received for registration was on 31/07/2013, and the date on which it was registered was on 1/8/2013. That under clause 6 of the said charge, parties adopted the covenants prescribed by the provisions of Section 88 of the [Land Act](#) and the borrower and the chargor further covenanted with the Bank that they shall not sell or agree to sell or part with possession of the charged property or any part thereof without the consent of the bank and further to ensure that no person shall without the prior written consent of the Bank be registered as proprietor of the charged property or any part thereof without consent of the Bank. That consequently, the Land Registrar Meru, having received the charge on 31/7/2013 and registered it against the title on 1/08/2013 was fully aware that the bank’s interest over the suit property took precedence over any other subsequent interests that would be presented for registration against the property. Further, that the land registrar Meru was also fully aware that the written consent of the Bank was required prior to purported transfer or assignment of the suit property for as long as the property remains charged to the bank. The applicant’s counsel submitted that it was therefore illegal for the land Registrar, Meru, to Cancel the entries evidencing the banks interests over the suit property and to thereafter proceed to make entries purporting to transfer the suit property to the 1st, 2nd, 3rd and 4th respondents while knowing that the bank’s written consent had not been sought and presented and without a discharge of charge from the bank discharging the property.



40. The applicant's counsel relied on the case of Paul Gatete Wangai Versus Capital Realty Limited & Another [2020] eKLR in which the court held that:-

“A charge is an overriding interest within the meaning of Section 28(g) of the Land Registration Act, which means that the rights and interest of a charge in the charged property are rights in rem and therefore remain superior to any other interest even where there is a sale, transfer or any other disposition in the property. It is trite that the Bank being the holder of the charge would have first priority over the suit property as long as the land remains charged”

41. As regards the subsequent entries registered by the Meru Land Registrar in favour of the 1st, 2nd, 3rd and 4th Respondent's herein, it is the applicant's counsel's submission that all those purported entries were subject to the Bank's charge and they could not have been legally made without the prior written consent of the Bank. The Applicant's counsel cited section 25 (1) of the Land Registration Act.

42. It is the Applicant's contention that the 4th Respondent who is now registered as the legal proprietor of the suit property cannot claim that they were innocent purchasers for value without notice because the Bank had a prior registered interest in the suit property. That the 4th Respondent's interest cannot at this point seek to defeat the Bank's right as Chargee, which right was duly registered against the Title and illegally cancelled by the Registrar. The Applicant's counsel relied in the case of Mechanised Clearing & Forwarding Co. Ltd & 2 Others -vs- Tulip Apartments Limited & Another [2000]eKLR in which it was held as follows:-

“The plaintiffs may be purchasers for value and may be they were acting in good faith but any fraud perpetuated against them by another cannot interfere with the rights of the bank since the legal estate had passed to the bank as mortgagee See the case of Pitcher Versus Rawlings (1872). CH 259. The plaintiffs as purchasers ought to have taken the trouble to make a search to ensure that the property they were buying was available and free from encumbrances. They did not do so”.

43. The Applicant's counsel submitted that they had demonstrated that the Meru Central Land Registrar's cancellation of Entry Number 3 in the Encumbrance Section and Entry Number 7 in the Proprietorship Section of the Register for Land Reference Number Nyaki/Kithoka/1914 made on 01.08.2013 effecting the registration of the Charge dated 24th July 2013 for Kenya Shillings 3,700,000 issued in favor of the Bank by Michael Rukunga Mowesley without prior notice to the Bank and/or without a just cause was null and void ab initio and of no legal consequence for lack of consent from the Bank as Chargee and/or or the absence of a duly registered discharge of charge, and it is only viable that the subsequent entries made thereafter be cancelled as they were all subject to the Bank's charge and could only have been made with the Bank's consent. They submitted, that the Register for Land Reference Number Nyaki/Kithoka/1914 should thus be rectified forthwith by reinstating Entry Number 3 made on 01.08.2013 in the Encumbrance Section of the Register and Entry Number 7 made on 01.08.2013 in the Proprietorship Section of the Register for the property and cancelling all Entries made subsequent to the making of Entry Number 3 in the Encumbrance Section of the Register comprising of Entry Number 8 made on 16.06.2015, Entry Number 9 made on 16.06.2015, Entry Number 10 made on 17.06.2015, Entry Number 11 made on 9.07.2015, Entry Number 12 made on 9.07.2015, Entry Number 13 made on 18.08.2015 and Entry Number 14 made on 23.08.2017.

44. Learned counsel for the applicant urged the court to grant the reliefs sought in the Originating Summons.



1st And 2nd Respondents' Submissions

45. Learned counsel for the 1st and 2nd respondents gave a brief factual background of the case and submitted that the suit property was registered in the 1st and 2nd respondent's names by virtue of transmission as the legal representatives of the estate of the 1st respondent's former husband, Michael Rukinga Mowesley who was the bonafide registered proprietor of the suit property. It was submitted on behalf of 1st and 2nd respondent's that the transmission of property after confirmation of grant is provided for under the land legislation, specifically [Land Registration Act](#), No.3 of 2012 and the [Land Act](#) No.6 of 2012. The 1st and 2nd respondents cited Sections 60 to 62 of the [Land Registration Act](#).
46. The 1st and 2nd respondents submitted that they were registered as proprietors of the land by transmission and held a valid title which could be passed and that if at all there was a charge registered on the title to the suit property then the parcel of land would not pass to them as it did. Learned counsel for the 1st and 2nd respondents cited Section 3 of the [Law of Succession Act](#) Chapter 160 Laws of Kenya and which defines a personal representative and Section 82(b) which reads:-
- “Personal representative shall, subject to any limitation imposed by their grant, have the following powers:-
- (a)
- (b) to sell, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best”
47. It was submitted that as the administrator of the estate of her deceased former husband, the 1st respondent was tasked with the distribution of the estate of the deceased to its rightful beneficiaries and on that strength, she had good title to pass the land to any person, including the 3rd respondent since she held a good title. It was further submitted that having proved that the 1st and 2nd respondents had a good title they sold the land to the 3rd respondent which sale was lawful and the process was carried out in accordance with the [Law of Contract Act](#). Counsel for the 1st and 2nd respondents cited Section 3(3) of the [Law of Contract Act](#). They also cited Section 2 of the [Marriage Act](#) 2014 and the [Matrimonial Property Act](#) 2013 which describe a spouse as either a husband or a wife under any recognized marriage regimes in Kenya which include Christian, Civil, Customary, Hindu and Muslim marriages.
48. Learned counsel for the 1st and 2nd respondents relied on the case of Esther Njeri Mwangi vs Equity Bank Ltd & Another (2017)eKLR, where the court found that while spousal consent was required to file the suit property (sic), the plaintiff had a duty to bring herself under the scope of the provisions of Matrimonial property by proving existence of a marriage. The 1st and 2nd respondent counsel submitted that in order for the requirements for spousal consent to apply, one must be able to prove that you are a spouse. That part IX of the [Marriage Act](#) 2014 requires that all marriages must be registered and the parties issued with marriage certificates and argued that these documents were never presented. The 1st and 2nd respondents counsel submitted that the spousal consent that is alleged to have been granted by the 1st respondent to perfect the alleged charge was illegal, unlawful and in contravention of the [Land Act](#), provisions as she was already divorced at the time the charge was being registered. That the alleged spouse one Stella Wanjiru Mureithi who gave the spousal consent is not known to the 1st respondent herein and is therefore an imposter. It was further submitted that the certificates of verification of the spouse were blank and not executed in accordance with the law. That the spousal



consent also lacked the particulars of an affidavit as provided in the [Oaths and Statutory Declarations Act](#).

49. It was therefore submitted that the 1st and 2nd respondents legally held the title by transmission upon following the right procedure, hence the applicant's case is without merit and ought to be dismissed with costs. The 1st and 2nd respondents counsel relied on the case of the Estate of Daniel Khasieera Anusu (Deceased) [2022] eKLR ad Nicholas Kioko Muoki & Another Versus Momar Fezal Mohammed [2021]eKLR.

The 3rd & 4th Respondents Submissions

50. Learned counsel for the 3rd and 4th respondents gave a brief history of the matter and relied on [the Constitution](#) of Kenya, the [Land Registration Act](#), The [law of Contract Act](#), The [Land Act](#), Matrimonial Properties Act and the [Registration of Documents Act](#).
51. It was submitted on behalf of the 3rd and 4th respondents that the most inescapable issue before the court determines the merit of the applicant's case is to make a finding as to whether or not there was a registered charge as alleged by the Applicant. Counsel for the 3rd and 4th respondents argued that the 5th respondent's response to the originating summons paints a clear picture of the scenario that there was no perfection of the charge.
52. It was submitted that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists. That in the present context the burden at all times rested with the applicant as the party who instituted proceedings before this court.
53. It is their submission that there was no spousal consent in respect of the charge because the 1st respondent did not sign the same. The 3rd and 4th respondenst submitted that the position to follow is the pre-matrimonial Properties Act and relied on the case of Mugo Muiru Investments Limited Versus EWB & 2 Others [2017]eKLR where the Court of Appeal stated as follows:-

“ Even before the [Land Registration Act](#) came into force on 2nd May, 2021, the equitable beneficial interest of a spouse in a matrimonial home occupied by such spouse was an overriding interest and therefore transfer of the title to the matrimonial home was subject to such overriding interest. It is immaterial that there was not at the time statutory provision expressly declaring it an overriding interest. Under common Law, overriding interests are interests to which a registered title is subject, even though they do not appear in the register. They are binding both on the registered proprietor and on a person who acquires an interest in the property”.

54. The 3rd and 4th respondents submitted that the chargor in the matter was a divorced person and he should have signed an affidavit stating the same and attach the decree nisi. That this court should be alive to the fact that the spousal consent was signed by an imposter by the name Stella Wanjiru Muriithi who is unknown to anyone and further that the court should note that the 1st Respondent filed a succession cause without any interference from the alleged wife. That though the 1st respondent had divorced the chargor, they had not filed a matrimonial property Cause to separate the properties acquired in the cause of their duties thus she still had beneficial interest on all properties acquired in their marriage.
55. The 3rd and 4th respondents counsel submitted that there was no valid legal charge capable of being enforced and referred to the 5th Respondent's witness statement dated 10th July 2019 and filed in



court on 8th September 2022. The 3rd and 4th respondents counsel cited Section 16 of the *Registration of Documents Act* and pointed out that, there were several discrepancies that arose in the charge instrument. That there is no search document produced by the applicant to show that their interest in the suit land had been duly registered in their favour.

56. The 3rd and 4th respondents' counsel cited Section 3(3) of the *Law of Contract Act* and Section 56(3) & (4) of the *Land Registration Act*. The latter provision states that:-

“(3) The charge shall be completed by its registration as an encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument.

(4) The Registrar shall not register a charge unless a land rent...”

57. On costs, the 3rd and 4th respondents cited Section 27 of the *Civil Procedure Act* which provides that costs shall follow the event and the court is given discretion to determine which party will meet the costs and to what extent. It is their submission that from the evidence on record, together with the documents produced both by the applicant and the 3rd and 4th respondents, the applicants have not proved their case on a balance of probabilities. That costs should be awarded to the 3rd and 4th respondents.

Analysis And Determination

58. The court has carefully considered the pleadings, the responses and the submissions filed by the parties to buttress their assertions. I have also considered the legal authorities preferred by the parties. The court identifies the only issue for determination to be Whether or Not the 5th respondent, the Land Registrar, Meru acted within the Law in cancelling entry number 3 in the encumbrance Section and entry number 7 in the proprietorship Section of the Register of the suit property Nyaki/Kithoka/1914 and thereafter register transfers in favour of the 1st, 2nd, 3rd and 4th respondents herein without prior notice to the Bank in view of the Bank's existing interest as the chargee over the suit property, and without a discharge of charge being duly registered.

59. The applicant's case is that it advanced one Wilberforce Ndonga Njenga t/a There Mombasa Traders an overdraft facility and term loan and the two facilities were secured by legal charges over three parcels, including the suit property. The properties were all registered in the name of one Michael Mowesley (now deceased) who had agreed, as guarantor, to charge the said properties. The applicant contended that while the borrower and the guarantor were yet to repay the outstanding charge debt and while the applicant was yet to discharge the charge they established that the suit property had been transferred to the 1st and 2nd respondents, and subsequently to the 3rd and 4th respondents notwithstanding the existing registered charge. That the said dispositions were registered by the 5th respondent despite the fact that the original title documents were still held by the Bank as security. On their part, the 1st and 2nd respondents contended that they filed Succession Cause in which the property was transmitted to their names as legal representatives of the Estate of the deceased and they in turn transferred the property in favour of the 3rd respondent who in turn transferred to the 4th respondent.

60. The main question for determination therefore is whether the 5th respondent acted within the law in registering the instruments in favour of the 1st, 2nd, 3rd and 4th respondents without prior notice to the bank in view of the existing registered interest being a charge and without a discharge of charge. It is not disputed that the Bank availed the Banking facilities which were secured by a legal charge over the suit property among others. I have perused the documents. The banking facility and the charge are annexed to affidavit in support of the originating Summons. Under Clause 6.8 of the charge document,



the chargor and the borrower covenanted and agreed inter alia not to sell or transfer or part with the charged property or any part thereof without the prior written consent of the Bank. The charge was duly registered on 1st August, 2013. The said charge is shown as entry number 3 in the encumbrances Section and entry number 7 in the proprietorship Section of the register of the suit property.

61. Section 37 of the [Land Act](#) is instructive and states that: -

“If a charge contains a condition, express or implied that the charge prohibits the chargor from transferring, assigning, leasing or in the case of a lease subleasing the land, without the consent of the chargee, no transfer, assignment, lease or sub-lease shall be registered until the written consent of the chargee has been produced to the registrar”.

62. In addition, Section 88(1) (g) of the [Land Act](#) provides that:-

“1. 1. There shall be implied in every charge covenant by the chargor with the chargee binding the chargor...

(g) Not to transfer or assign the land or lease or part of it without the previous consent in writing of the chargee which consent shall not be unreasonably withheld”

63. Section 59 of the [Land Registration Act](#) provides as follows:-

“If a charge contains a condition, express or implied by the borrower that the borrower will not without the consent of the lender, transfer, assign or lease the land or in the case of a lease, sublease, no transfer, assignment, lease or sublease shall be registered until the written consent of the lender has been produced to the registrar”.

63. In this case, the Land Registrar, Meru registered the charge against the title on 1st August, 2013. The 5th respondent was therefore aware of the Bank's interest over the suit property. There is no evidence on record to show that the bank was notified of the registration of the transfers in favour of the 1st, 2nd, 3rd and 4th respondents. Indeed the legal procedure regarding the discharge of charge to safeguard the rights of the bank as chargee were not followed. Instead, the 5th respondent obviously ignored the procedure regarding the discharge of charge and proceeded to enter entries to the title register in favour of the 1st, 2nd, 3rd, and 4th respondents while ignoring entries numbers 3 and 7 of the register which were in respect of the charge over the suit property. The 5th respondent's actions clearly goes against the dictates of the law and the rules of natural justice and were an affront of Article 40 of [the Constitution](#) since they resulted in arbitrary definition of property against the applicant. In my view therefore, it was illegal for the 5th respondent to proceed to cancel entries numbers 3 and 7 of the register of the suit property and thereafter proceed to make entries in favour of the 1st, 2nd, 3rd and 4th respondents'. In this case, the Bank had the Original Title Deed. The question that arises is which title did the 5th respondent use to carry out the transmission in favour of the 1st and 2nd respondents and later register transfers in favour of the 3rd and 4th respondents? Furthermore, it has come out from the evidence on record that the 1st respondent was no longer the wife to the guarantor by virtue of Divorce proceedings at Mombasa High Court Divorce Cause No. 52 of 2007 where a Decree Nisi was issued on 24/6/2009 and a Decree Absolute issued on 28/11/2011. It is clear from those proceedings that the 1st respondent had already been divorced by the deceased chargor and the purported transfer of the land by transmission in favour of the 1st and 2nd respondents as legal administrator's of the estate of the deceased was fraudulently done and intended to defeat the Bank's interest in the land. Indeed a suit Mombasa ELC Case No. 115 of



2014 instituted by the 1st respondent against the Bank and others was struck out for being an abuse of the court process. Therefore, even the respondent's arguments that no spousal consent was obtained from the 1st respondent at the time the charge was registered over the suit property cannot succeed.

64. In conclusion, it is my finding that the Land Registrar failed to follow the Law and did not engage the applicant to have the charge discharged. The 5th respondent merely proceeded to cancel entries numbers 3 and 7 on the register. The Bank's consent ought to have been sought before the charge was discharged and the charged property transferred to the 1st, 2nd, 3rd and 4th respondents. Therefore, the 5th respondent's actions were unlawful, null and void. It is trite Law that the Bank being the holder of a charge would have first priority over the suit property as long as the land remained charged.
65. Consequently, from the material and evidence on record, I am persuaded that the applicant has proved her case on a balance of probabilities and all the question numbers 1 to 4 in the Originating Summons dated 24th April, 2019 are answered in the affirmative.
66. In the result the originating summons is allowed in the following terms: -
- i. An order be and is hereby issued directing the Meru Central Land Registrar to forthwith effect the rectification of the Register for Land Reference Number Nyaki/Kithoka/1914 by;
 - a) Reinstating Entry number 3 made on 1/8/2013 in the encumbrance Section and Entry No. 7 made on 1/8/2013 in the proprietorship Sections of the register, and
 - b) Cancelling all other entries made subsequent to the cancellation of entry numbers 3 and 7 in the encumbrance and proprietorship Sections of the Register for Nyaki/Kithoka/1914 comprising of Entry Number 8 made on 16.06.2015, Entry No. 9 made on 16.06.2015, Entry No. 10 made on 17.06.2015, entry No. 11 made on 9.07.2015, Entry No. 12 made on 9.07.2015, Entry No. 13 made on 18.08.2015 and entry No. 14 made on 23.08.2017 all in the proprietorship Section of the Register.
 - ii. A permanent Injunction be and is hereby issued restraining the 1st, 2nd, 3rd and 4th and 5th respondents whether by themselves, their agents, servants and or otherwise, from in any manner whatsoever interfering with the Bank's rights under the charge dated 24/7/2013 registered over the land known as land reference number Nyaki/Kithoka/1914 on 1.08.2013 by entries number 3 and 7 in the register for the said property
 - iii. The applicants shall have costs of the suit to be borne by the respondents jointly and severally.
67. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF MARCH, 2024

HON. C. YANO

ELC – JUDGE

In the presence of:-

Court Assistant: Tupet

M/s Gitari for Applicant

Ms. Kiome for 3rd 4th respondents and holding brief for Ms. Otieno for 1st and 2nd respondents

Wachira for 5th and 6th respondents

