



**Muli (As administratrix of the Estate of the Late John Muli Kimuyu - Deceased) v Central Bank of Kenya (Environmental and Land Originating Summons E004 of 2023) [2024] KEELC 5624 (KLR) (22 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5624 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2023**

**AE DENA, J**

**JULY 22, 2024**

**BETWEEN**

**ESTHER WAYUA MULI (AS ADMINISTRATRIX OF THE ESTATE OF THE LATE JOHN MULI KIMUYU - DECEASED) ..... APPLICANT**

**AND**

**CENTRAL BANK OF KENYA ..... RESPONDENT**

**JUDGMENT**

1. By originating summons brought under Article 40 of *the constitution* of Kenya 2010, Order 37 Rule 4 of the Civil Procedure Rules 2010 and all other enabling provisions of the law, the Applicant is seeking the following Orders; -
  1. A declaration that all that property known as KWALE/MAFISINI/695 wholly belongs to the estate of the late JOHN MULI KIMUYU [Deceased].
  2. A declaration that the loan of Kshs 10,000/- taken from the defunct KENYA GOVERNMENT [NAIROBI SPECIAL LOANS COMMITTEE] on security of the suit land has been fully settled.
  3. The Respondent through the relevant officers do execute discharge documents on behalf of the defunct KENYA GOVERNMENT [NAIROBI SPECIAL LOANS COMMITTEE] discharging the charge dated 10<sup>th</sup> January 1986 registered against title no KWALE/MAFISINI/695 as entry number 3 made on 15<sup>th</sup> January 1986.
  4. In default of order number 3 above, the charge dated 10<sup>th</sup> January 1986 registered against title number KWALE/MAFISINI/695 as entry number 3 made on the 15<sup>th</sup> of January 1986 be and is hereby declared as duly discharged and the Land Registrar Kwale Lands Registry do cancel the said entry number 3.



5. An order for costs of this application be provided for.
2. The summons is premised upon 8 grounds listed on the face of the application and the supporting affidavit of the Applicant ESTHER WAYUA MULI. The deponent states that she is the administratrix of the estate of the late John Muli Kimuyu who used his parcel of land no KWALE/MAFISINI/695, hereinafter referred to as the suit property, to secure a loan of Kshs 10,000/- from the KENYA GOVERNMENT [NAIROBI SPECIAL LOANS COMMITTEE]. The same was secured vide a charge dated 10<sup>th</sup> January 1986. That the loan was cleared and the original title released to the deceased but the deceased never proceeded to discharge the charge.
3. It is stated that the administratrix of the estate of the deceased presented transfer documents before the land registrar to effect the transfer of shares of each of the beneficiaries as per the certificate of confirmation of grant but the same could not be effected as the charge has never been discharged. That the Respondent should therefore be ordered to execute the discharge documents in favour of the Applicant herein in view of discharging the charge to the suit property. The court is urged to grant the prayers sought in the summons.
4. In response to the originating summons, the Respondent filed a Notice of Motion pursuant to the provisions of Order 2 Rule 15[1] of the Civil Procedure Rules, Article 159 of *the Constitution* of Kenya 2010, Section 3A of the *Civil Procedure Act* for the following orders;
  1. That the Honourable court be pleased to strike out the Respondents originating summons dated 17<sup>th</sup> February 2023.
  2. That the costs be awarded to the Applicant.
5. The application is premised upon grounds listed on its face and the supporting affidavit of one Kennedy K Abuga Legal Counsel for The Central Bank of Kenya. The court is referred to Article 231 of *the constitution* which established the Central Bank and outlines its mandate. It is averred that the subject matter of this suit is land related and which is at variance with the Respondent's mandate. That the prayers sought can only be executed by the Land Registrar and not the Respondent.
6. At paragraph 8, it is averred that the Respondent is a distinct legal entity from the defunct Kenya Government [Nairobi Special Loans Committee] and at no time did the Respondent exercise any authority against the defunct entity. That for the said reason the Respondent cannot inherit the defunct Kenya Government [Nairobi Special Loans Committee] liabilities and neither can the same accrue against the Respondent. The Respondent seeks that the originating summons by the Applicant herein be struck out for failure to raise a reasonable cause of action.
7. In opposing the application, the Applicant herein filed a replying affidavit before court on 6/2/2024. The Applicant avers that the application is malicious, vexatious and an abuse of the court process. That the orders sought relate to execution of a discharge of charge and not a dispute related to land. The court is referred to Order 4 of the Civil Procedure stated in the application and which is an alternative prayer seeking the Land Registrar to discharge the charge. That the orders sought will not prejudice the Respondent in any manner and as such the Respondent is the proper entity to execute the discharge documents in favour of the Applicant in view of discharging the charge. The court is urged to dismiss the Respondent/Applicant application dated 3/10/2023 with costs.
8. On 6/2/2024, the matter was placed before this court for mention, court indicated that the Notice of Motion is to be treated as a response to the originating summons. Further that the Originating Summons and Notice of Motion be canvassed by written submissions.



## Submissions

9. The Applicant has placed reliance in the case of *Sammy Njoroge Mwangi V Regional Loans Building Society* [2018] eKLR. The Applicant states that the Respondent is only opposing the application to the extent that it is not their mandate to sign the discharge of charge documents. That there is no claim that the loan was never paid, as such the beneficiaries of the estate of the deceased should not be put in shackles of a charge over a loan that was cleared a long time ago.
10. The Respondent in its submissions identified one issue for determination, whether the Respondent is the proper entity to execute the charge. The court is referred to the holding in *Republic Versus Attorney General* [2004] eKLR 431 where Ojwang J stated that courts ought not to make orders in vain. In distinguishing the authorities cited it is stated that in the *Sammy Njoroge Mwangi V Regional Loans Building Society* [2018] eKLR case, the Applicant sued the defunct entity directly and not the Central Bank. That the case involved a private entity while in the present case the defunct entity is a government institution.
11. In a rejoinder to the above it is urged that under the Kenyan government all resources are consolidated under a treasury single account maintained at the Central Bank. That it is therefore the Respondent that can verify government financial documents. It is further averred that the Respondent has failed to give records as to who the successor of the defunct Kenya Government [Nairobi Special Loans Committee] is. That the Applicant could not sue a non-existent entity as court action cannot be maintained against such an entity. The court is asked to exercise its discretion and discharge the charge in view of giving effect to Article 40 of *the Constitution* of Kenya.

## Analysis and Determination

12. The court has considered the pleadings as filed by both parties herein and the submissions for and against each parties case. The main issue that emerges for determination is whether the discharge of charge herein should be discharged and if yes whether the Central Bank is the appropriate entity to sign the discharge.
13. For the purpose of ease of reference, I will refer to the administrator of the deceased estate as the Applicant and the Central Bank as the Respondent. At the outset the matter before me is not a dispute over the ownership of the suit property. However it would also be upon the Applicant to prove that certain facts exist and especially as to the ownership of the suit property and the repayment of the alleged loan of Kshs. 10,000. Thereafter, the main issue will be how the charge will be discharged.
14. The hurdle that is between the parties herein is whether it is the Respondent that should sign the discharge of charge documents in the place of KENYA GOVERNMENT [NAIROBI SPECIAL LOANS COMMITTEE] which is said to be no longer in existence. The Respondent states that it has at no given point exercised any authority over the defunct KENYA GOVERNMENT [NAIROBI SPECIAL LOANS COMMITTEE] and cannot bear the responsibility of discharging a charge made by the said defunct institution.
15. I have interrogated the Applicant's argument that it is the Respondent that ought to sign the discharge of charge documents on behalf of the defunct entity that issued the loan to the deceased. I have also read the persuasive decision in *Sammy Njoroge Mwangi V Regional Loans Building Society* (supra) and I noted that while the principles would apply, the Applicant in that case was able to demonstrate the trouble they took to find out about the status of the Respondent therein. In the instant case I have nothing to fall back to as a court. Firstly, no evidence has been tendered by the Applicant indicating that the KENYA GOVERNMENT [NAIROBI SPECIAL LOANS COMMITTEE] indeed collapsed



and that at the collapse the Respondent took over the administration and management of the same as successor. It is merely deponed there is no successor and or the same cannot be found. There is need for proof that the Respondent is responsible for any issues arising out of any transaction that might have involved the KENYA GOVERNMENT [NAIROBI SPECIAL LOANS COMMITTEE]. Secondly, I have nothing to rely on in proof of the loan repayment and it is not stated why this evidence is not in court. I say so in view of the Sammy Njoroge Mwangi V Regional Loans Building Society (supra) where the Applicant was able to explain their predicament as to proof of the repayment records.

16. In view of the foregoing this courts hands as a court of evidence are tied as to granting of the orders sought in the originating summons. I have further noted the Applicant's submission that prayer 4 of the originating summons has been left out. My understanding of prayer 4 is that it is conditional upon this courts finding that the Respondent is the correct entity to sign the discharge of charge documents and upon default. It is not an independent prayer. Assuming it is I would still for the same reasons cited hereinbefore not grant the prayer.
17. The Respondent has sought for striking out of the Applicant's originating summons for failure to raise a reasonable cause of action. Order 2 Rule 15 of the Civil Procedure Code deals with striking out of pleadings and provides as follows;

Rule 15.

- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
  - i. It discloses no reasonable cause of action or defence in law; or
  - ii. It is scandalous, frivolous or vexatious; or
  - iii. It may prejudice, embarrass or delay the fair trial of the action; or
  - iv. It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

18. From the above provisions of law, it is clear the court should therefore be keen in examining pleadings in order to ascertain whether the impugned pleading raises a reasonable cause of action or defence. In DT Dobie & Co (K) Ltd vs Muchina, [1982] KLR, the Court of Appeal defined the term;

Reasonable cause of action” to mean “an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer”

19. Further, the Court of Appeal in the Crescent Construction Limited vs Kenya Commercial Bank Limited [2019] eKLR, stated as follows:

However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”



20. I have already stated the reasons why this courts hands are fettered and which largely speak to the provisions of Order 2 above. I will not belabour the point. I see no reasonable cause of action against the Respondent herein.
21. As explained above, the Respondent cannot in anyway be imposed with the duties of the alleged defunct Kenya Government [Nairobi Special Loans Committee], with this in mind, the cause of action can definitely not survive. I am guided by the holding in Paolo Murri vs Gian Battista Murri & Another [2000] eKLR that:
- It seems to me that when that situation arises the comments of Lord Blackburn in Metropolitan Bank vs Pooley (1885)10 App Case 210 at 221, are applicable. He said that a stay or even dismissal of proceedings may 'often be required by the very essence of justice to be done'. The object is to prevent parties being harassed and put to expense by frivolous vexatious or hopeless litigation. It would be contrary to the public interest that justice should be shackled by rules of procedure when the shackle will fall to the ground the moment the uncontested facts appear; and that is just this case. ....”
22. The upshot of the foregoing is that the Originating Summons should be struck out and it is hereby struck out. Each party will bear their own costs noting that the matter revolves around a property whose alleged owner is deceased.

**JUDGEMENT DATED SIGNED AND DELIVERED THIS 22<sup>ND</sup> DAY OF JULY 2024.**

.....

**A.E DENA**

**JUDGE**

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -

No appearance for the Applicant

No appearance for the Respondent

Mr. Daniel Disii – Court Assistant

