



**Kuhigukah v Faulu Microfinance Bank Limited; Land Registrar Nairobi
County (Third party) (Environment & Land Case E369 of 2022)
[2024] KEELC 13608 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13608 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E369 OF 2022
LN MBUGUA, J
DECEMBER 5, 2024**

BETWEEN

GIBSON HASTINGS GITOME KUHIGUKAH PLAINTIFF

AND

FAULU MICROFINANCE BANK LIMITED DEFENDANT

AND

THE LAND REGISTRAR NAIROBI COUNTY THIRD PARTY

JUDGMENT

1. The plaintiff commenced this suit vide a plaint dated 6.11.2022 and amended on 22.5.2023. He avers that he is the lawful proprietor of parcel LR No. Nairobi/Block 110/645 (the suit property). That in January 2015, he was of poor health and in dire need of medical attention, thus he applied for a loan of ksh.1 million from the defendant and offered the original title to the suit property as security.
2. He states that as part of the loan application process, he was required to submit several documents including clearance from the Land Control Board, Nairobi city council as well as a valuation report which documents he assembled at a cost of ksh.152,770/=.
3. That additionally, he was required to provide a search certificate which he applied for at the lands office but it could not be availed as he was verbally informed that the file over the suit property was missing. The lands office was reluctant to re-construct a new file, prompting him to file ELC Case No. 1588 of 2016 - Gibson Hastings Gitome Kuhigukah v The Attorney General & Nairobi Chief Land Registrar and after a full hearing, the court issued orders compelling the Chief Land Registrar to remove all restrictions on the suit property.



4. He contends that while the trial was ongoing, he learned from his neighbours that the suit property was on the verge of being sold by people who were purporting to be owners, of which he reported the incident to the police leading to 2 arrests. He then obtained a search certificate dated 31.10.2016 which indicated that an entry for a charge of ksh.1 million was registered on 5.11.2015 in favour of the defendant.
5. Following the above discovery, he wrote a letter dated 24.1.2017 wherein he requested the defendant to withdraw his loan application and return the original title over the suit property which he had released for purposes of processing the loan application. He contends that to date, the defendant has failed to release his original title to the suit property. He particularized fraud allegations against the defendant and contends that he has been subjected to agony as a result of the actions of the defendant.
6. The plaintiff therefore seeks the following orders;
 - a. A declaration that the plaintiff is the legal and lawful proprietor of LR No. Nairobi/Block 110/645.
 - b. A declaration that the defendant is in possession of, and is holding the original title of LR No. Nairobi/Block 110/645.
 - c. A declaration that the defendant illegally, irregularly and unprocedurally charged and had registered a charge over LR Nairobi /Block 110/645 for a sum of ksh.1 million.
 - d. An order directing the defendant to forthwith discharge the charge entered in part C in the encumbrances section on 5.11.2015 in favour of the defendant.
 - e. An order directing the defendant to remove all restrictions over LR No. Nairobi/Block 110/645.
 - f. An order directing the defendant to return all documents in its possession submitted by the Plaintiff during the loan application process.
 - g. General damages.
 - h. Special damages amounting to ksh.152,770/=
 - i. Aggravated damages.
 - j. Punitive damages.
 - k. Costs of this suit.
7. The suit is opposed by the defendant vide it's statement of defence dated 17.2.2023 and amended on 24.1. 2024. It denies the allegations levelled against it in the plaint, but admits that it agreed to advance the plaintiff ksh.1 million upon his request, which loan was to be secured by a first charge over title to the suit property.
8. It states that upon execution of the letter of offer dated 1.7.2015, it instructed the firm of M/s Kibatia & Co. Advocates to commence the process of perfection of security over the suit property and in a letter dated 27.9.2015, the said advocates forwarded a charge document for execution and upon return, it lodged the same for registration at the lands registry in Nairobi on 5.11.2015.
9. It is contended that the charge took inordinately long prompting the defendant's advocates to write to the 3rd party on 15.1.2016 requesting for return of the charge document registered or if not registered, returned to them with explanations.



10. The defendant also avers that on 24.1.2017, they received a letter from the plaintiff indicating that he was in possession of the original title over the suit property and informed it of a purported collusion that resulted in the generation of a counterfeit title to the suit property, of which, a charge had been registered in favour of the defendant and urged it to procure cancellation of the counterfeit title.
11. The defendant contends that any entry made at the lands registry was out of its hands, thus the plaintiff should seek recourse from the 3rd party, and that all documents submitted to it remain in its safe custody awaiting determination on who the rightful owner of the suit property was.
12. The defendant filed an application dated 16.1.2024 to bring on board the Land Registrar as a third party which application was allowed on 9.4.2024. This entity did not file any pleadings, nor did it adduce any evidence even though their advocate was in court on 15.7.2024 where they were granted time to file pleadings, witness statements and documentary evidence.

Evidence of the Plaintiff

13. The Plaintiff, (PW1) was the sole witness in his case. He adopted his witness statement dated 10.7.2023 as his evidence in chief. The same is made in furtherance to his statement of 6.11.2022. He produced 16 items from his list of documents dated 6.11.2022 as P. Exhibit 1-16 and 32 items from his list dated 22.5.22 as P. Exhibit 17-48.
14. His evidence is that he is the lawful owner of parcel LR No. Nairobi /Block 110/645, having acquired the same through purchase in the year 2008 and that he is in possession of the same. He states that in year 2013, he was prompted to check the status of the title to the suit parcel following information that someone was purporting to own the suit parcel.
15. Subsequently, he obtained copies of documents from the lands office Nairobi showing that he had allegedly executed a transfer of the suit parcel to one Maureen Akinyi Odero and Dr. Susan Akelo Mboya for a consideration of ksh. 11,500,000/= of which the transferees had paid stamp duty and applied for registration of the transfer on 14.3.2013, a matter he reported to CID following which 2 people were arrested but no prosecution has been opened to date.
16. He states that sometime in early 2015, he was sick and since he needed funds to cover his treatment, he approached the Defendant on 3.7.2015 for a ksh.1 million loan. That he processed a rates clearance certificate from Nairobi City County, consent from the land Control Board and a valuation report which contained a search certificate the valuer had obtained from the land's office showing that there was a restriction registered over the property on 17.2.2013 through the firm of Miller & Co. Advocates.
17. That using the documents he had so far obtained, he went to the defendant and handed over all the said documents including the original title to the suit property to the defendant on 30.7.2015. The defendant acknowledged receipt of the said documents and advised him to have the restriction removed/withdrawn.
18. That on 18.8.2015, he wrote a letter to the Land Registrar requesting the removal of the said restriction and since no action was taken, he instructed Miller & Co. Advocates to assist him, which they did by filing an application to withdraw a caution dated 25.8.2015, but no response was received from the registrar.
19. That on 23.10.2015, he received a letter from the defendant informing him that his request for a loan facility had been accepted and the firm of Kibatia & Co. Advocates were to act on their behalf. Subsequently, he executed a letter of authority together with his wife and they were told to wait for processing of the various documents.



20. That in December 2015, an officer from the defendant informed him that the restriction on his property had not been withdrawn and that he needed to follow up on the matter which he did vide a letter dated 23.12.2015 requesting for removal of the restriction.
21. That in response, the land registrar vide a letter dated 15.1.2016 informed him to provide documents in his possession for verification by the office, particularly the transfer documents issued by the ministry of lands conferring him with ownership of the suit property. This is the time he learned that someone purporting to be him had written a letter dated 18.1.2017 to the Defendant informing them that he was in possession of the original title, that he understood that there was alleged collusion resulting in a counterfeit title and that a 2016 search revealed that the property was encumbered by a charge registered on 5.11.2015 to secure a sum of ksh.1 million.
22. He states that the author of the said letter was impersonating him and it was shocking given that he was not in possession of the original title, having given the same to the Defendant. He therefore alerted the bank vide a letter dated 24.1.2017.
23. He states that since the Land Registrar had not responded to his lawyer's letter requesting for withdrawal of the caution/restriction, and despite many visits to the lands office where he was informed verbally that the file over the suit property was missing, he filed the case ELC No. 1588 of 2016-Gibson Hastings Gitome Kuhigukah v The Attorney General & Nairobi Chief Land Registrar and after full hearing, the court issued orders compelling the Chief Land Registrar to remove all restrictions on the suit property.
24. He contends that he wrote to the defendant vide a letter dated 28.4.2017 demanding it to forward to him ksh.1 million it was claiming to have advanced him in terms of the encumbrance placed on his title. He also copied the letter to Central Bank of Kenya requesting for its intervention, of which the Defendant tried to extricate itself from the complaint vide a letter dated 15.5.2017.
25. After several correspondences, the Defendant admitted that it was still in possession of the original title, but it was claiming that the plaintiff had failed to collect the same.
26. In cross-examination, PW1 stated that he did not know whether the restriction on his title was removed, but his lawyers made a request for it to be removed vide the letter dated 21.8.2015 at page 61 of his bundle and his own letter at page 67 of the same bundle.
27. Refereed to his letter dated 10.8.2015 at page 60 of his bundle addressed to the District Land Registrar, PW1 stated that he had wished to charge the property as security, adding that during the loan application process, only the Defendant's advocate had the responsibility to deal with the charge.
28. He also stated that after learning that there was fraud involved in the transaction, he informed the Defendant to withdraw the transaction vide his letter dated 24.1.2017 at page 78 of his bundle. He clarified that the letter dated 18.1.2017 at page 77 of his bundle addressed to the defendant is not his, it is drafted by the person who was impersonating him while the one dated 23.10.2015 at page 66 of the same bundle is signed by his wife and himself and stipulated costs that would be deducted from the loan.
29. He stated that the letters at page 77 and 78 of his bundle dated 18.1.2017 and 24.1.2017 respectively could not have caused confusion to the defendant as the content is different.
30. To his knowledge, the charge on his property was registered on 5.11.2015. He is aware that the 3rd party is the custodian of land records, but he did not sue it in the matter as he had sued them in the case No. 1588 of 2016.



31. Upon being Cross-examined by the court, PW1 stated that he never got the loan and that he was 78 years at the time of testifying.
32. In re-examination, PW1 reiterated that his original title is with the defendant and that he learnt that it had entries of 5.11.2015 far much later in year 2017 as the defendant never called him to inform him of the encumbrance. He also stated that he got the copy of title at page 104-106 of his bundle from the CID who have stamped it as a “certified true copy” and it shows an entry of a charge of Ksh 1,000,000 to the Defendant.
33. He is aware that CID requested for original title from the defendant vide their letter dated 7.12.2020 at page 110 of is bundle.
34. On being shown the original title in the custody of the defendant, he stated that it is similar to the copy at page 104 of his bundle but when he presented his original title to the defendant, it had no encumbrances and the defendant never called him to tell him about the charge registered against it for ksh.1 million.

Evidence of the Defendant

35. The Defendant called 1 witness, Fredrick Nyambuti (DW1) who is its legal officer. Despite adopting a witness statement said to be dated 10.7.2024 allegedly filed in CTS (Electronic file), the same is not available on the system and neither is the physical copy in the court file. He produced documents ranging from page 1-39 of the Defendant’s list of documents dated 17.2.2023 as D. Exhibit 1-17.
36. In cross-examination, DW1 stated that while the plaintiff started a relationship with the defendant to get a loan of ksh.1 million, he did not know that the money was to be used to get medical help since as per the letter of offer dated 1.7.2015, the purpose of the loan was for construction.
37. He stated that the terms of the loan included depositing the original title and that the Defendant had the responsibility of registering the charge over the suit property.
38. DW1 also stated that the title to the suit land belongs to the plaintiff and it is in their custody and it has entries including; charge to the defendant for ksh.1 million dated 5.11.2015 which was entered after a charge was prepared by the defendant’s internal advocates (Kibatia & Company Advocates).
39. He stated that the said charge was executed by the defendant and the plaintiff and lodged at lands registry with the title for purposes of registration of the charge, then it was registered.
40. DW1 also stated that the defendant did not communicate with the Plaintiff to inform him about the charge registration but he believes it is their advocate who ought to have communicated.
41. He pointed out that the Defendant’s advocates wrote to lands office and copied the defendant the letter dated 15.1.2016 and 1.2.2017 indicating that they had challenges having the charge document returned to them (advocates) and requesting expediting of the charge.
42. He stated that the Defendant never got a copy of the charge document from the 3rd party, and that it is their advocate who took steps to have the illegal entry removed, though he had no evidence to that effect.
43. He averred that the title to the suit property as it is, cannot help the plaintiff and it is he defendant who can have the encumbrance section removed.
44. He is aware that the Plaintiff made complaints to many agents including CID who requested for the title, but the Defendant did not avail it because they wanted the owner to collect it personally.



45. In re-examination, DW1 stated that the transaction between it and the plaintiff did not materialize and at one point, a man named Kennedy Omondi Oketch from Kenworld Holding Limited approached the Defendant saying that he had advanced a facility of ksh.8 million to Gibson Hastings, and he claimed that Kenworld Holding Limited had the original title and that Gibson Hastings and daughter were to turn up for a meeting but they never showed up again.
46. He also stated that CID directed persons privy to the transaction to record statements and on 5.7.2017, the Defendant forwarded statements of Njoroge Kibatia of Kibatia & Co. Advocates and Purity Rukia, the Defendant's legal manager to DCIO Nairobi but he is not aware if criminal proceedings were concluded.
47. He stated that the bank did not collude with anyone to defraud the Plaintiff of his property.
48. After closing its case, the defendant sought judgment against the 3rd party under order 1 rule 18 of the Civil Procedure Rules.

Submissions

49. The parties did not comply with the timelines on the filing of submissions as directed on 24.9.2024.

Determination

50. I have considered the pleadings and the evidence tendered. It is not in dispute that sometime in July 2015, the plaintiff and the defendant had entered into a transaction in which the latter was to advance a loan facility amounting to Ksh.1,000,000 to the plaintiff whereby, plaintiff's title to the suit property was to be the security. The plaintiff did not get the loan, but the title is now encumbered with an entry denoting a charge in favour of the defendant. The questions therefore falling for determination are whether the prayers sought in the plaint are merited, and whether the judgment sought by the defendant against the 3rd party should be allowed.
51. The plaintiff's case is that around January 2015, he was ailing and needed medical attention, he therefore sought a loan from the defendant's Kiambu branch and he offered the title to the suit land which was registered in his name as security. As part of the application process, he gave the defendant all the relevant documents including his original title deed, but he never got the loan, yet as per a search certificate which he obtained on 31.10.2016, it indicated that an entry for a charge of ksh.1 million was registered on 5.11.2015 in favour of the defendant. Subsequently, he wrote a letter dated 24.1.2017 wherein he requested the defendant to withdraw his loan application and return his title.
52. The defendant has not in any way challenged the evidence of the plaintiff. If anything, the witness of the defendant who turned up without any witness statement was holding the original title of the plaintiff right inside the courtroom. The said title contained a charge in their favour. DW1 stated in cross examination that "We didn't call the plaintiff to inform him about the charge registration..... After the encumbrance registration on the title, we didn't communicate with the plaintiff...."
53. Thus as things stand, the Plaintiff's original title is in the custody of the defendant as has always been since 2015 when he deposited it there. The same is now charged. Who stands to benefit from the title? The defendant certainly has 1st priority over it.
54. In *Paul Gatete Wangai v Capital Realty Limited & Another* [2020] eKLR, the court stated that;

".....the Bank being the holder of a charge would have first priority over the suit property as long as the land remained charged."



55. Even DW1 admitted during cross examination that the original title is not useful to the plaintiff as it is.
56. The document at page 7 of defendants bundle indicates that the charge presented by Kibatia and company Advocates who were acting for the defendant was presented on 5.11.2015 for registration at the lands registry. Apparently, the charge was registered on the same date going by the search certificate availed by the plaintiff and DW1's own admission in regard to the entry in the original title in his possession. The letter dated 9.5.2017 at page 16 of defendant's bundle indicates that defendant's lawyers forwarded to them several documents including the original title. This is the title which DW1 was having in court, the one containing the charge. Thus by the time this suit was filed in November 2022, the defendants had all along been in possession of this original title. They have not demonstrated the efforts they made to have the charge removed in their favour seeing that the plaintiff never got the funds.
57. In totality, I have no doubts that there was collusion between the defendant and officers of the 3rd Party. However, whereas the nature of the collusion is manifested in the secret registration of the charge in the title document, and the retention of the said title by the defendant for years, the extent of each entities fraudulent machinations (defendant and 3rd party) cannot be discerned seeing that DW1 did not give any comprehensive evidence in chief. It is however noted that the plaintiff did sue the 3rd party in the case ELC 1588 OF 2016 to have the file in respect of the suit property reconstructed, of which he obtained a judgment in his favour as per the decree at page 85 of his bundle.
58. All in all, I find that the plaintiff has proved its case against the defendant as per the required standard. See - *Samson S. Maitai & Another V. African Safari Club Limited & Another* [2010] eKLR.
59. On damages, I find that plaintiff, an ailing old man has suffered immensely while pursuing justice even taking his complaint to the director of Criminal Investigations. All this time, the defendant did not even attempt to mitigate the situation in any way, for instance, taking steps have the charge removed.
60. In *Dodd Properties (Kent) Limited and Another v Canterbury City Council and others* [1980] 1 All ER 928 cited in *Miaraho Limited v Synohydro Corporation Limited* [2019] eKLR the court stated that:
- “The general object underlying the rules for the assessment of damages is, so far as possible by means of monetary award, to place the plaintiff in the position which he would have occupied if he had not suffered the wrong complained of be that wrong a tort or a breach of contract...”.
61. I proceed to award the plaintiff general damages against the defendant to the tune of Ksh. 4,500,000.
62. Should judgment be entered against the 3rd party as prayed by the defendant?. I find that in all instances, the rules of evidence appertaining to proof as set out under Section 107-112 of the *Evidence Act* must apply. In the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, the Court held that;
- “It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”
63. The 3rd party did not make his presence in the matter. Nevertheless, the defendant was duty bound to adduce evidence to proof their case against the 3rd party. They did not discharge this burden of proof. The defendant's quest to have judgment entered against the 3rd party must fail.
64. In conclusion, I hereby enter judgment for the plaintiff against the defendant in the following terms;



- i. A declaration is hereby made that the plaintiff is the legal and lawful proprietor of LR No. Nairobi/Block 110/645.
- ii. An order is hereby issued directing the defendant to discharge the charge entered in part C in the encumbrances section on 5.11.2015 in its favour and thereafter, to release the title to the plaintiff.
- iii. An order is hereby issued directing the defendant to return all documents in its possession submitted by the Plaintiff during the loan application process.
- iv. The plaintiff is hereby awarded general damages for Ksh.4,500,000 against the defendant.
- v. The plaintiff is awarded Special damages amounting to ksh.152,770/= as against the defendant.
- vi. The plaintiff is hereby awarded costs of the suit plus interests at courts rates from the time the suit was filed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5th DAY OF DECEMBER 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:

Ndambiri for Plaintiffs

Musudi for Defendant

Court Assistant: Vena

