



Angira v Industrial & Commercial Development Corporation (Environment & Land Case 800 of 2017) [2023] KEELC 15678 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15678 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 800 OF 2017
MN KULLOW, J
FEBRUARY 16, 2023
(FORMERLY KISII ELC CASE NO. 217 OF 2014)**

BETWEEN

MUSA ANGIRA ANGIRA PLAINTIFF

AND

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION DEFENDANT

JUDGMENT

1. The Plaintiff herein commenced this suit by way of a Complaint dated June 4, 2014; against the Defendant seeking the following Orders: -
 - i. Declaration that the Discharge dated and issued on the September 2, 2013 over and in respect of LR No SUNA/WASWETA II/216 and registered on the September 10, 2013, was legitimate, lawful and duly executed by and/or on behalf of the Defendant.
 - ii. Declaration that LR No SUNA/WASWETA II/216 is clear of any encumbrance in favour of the Defendant, whatsoever and/or howsoever.
 - iii. Declaration that the Registration of the Caution on the February 3, 2014 and Re-instatement of the Charge on the February 4, 2014, over LR No SUNA/WASWETA II/216, are irregular, misconceived and illegal.
 - iv. An Order compelling and/or directing the Defendant to unconditionally remove the Caution and Discharge the re-instated Charge on the register of LR No SUNA/WASWETA II/216. In the alternative, the Court be pleased to decree the removal thereof.
 - v. Permanent Injunction restraining the Defendant either by herself, agents, servants and/or anyone claiming under the said Defendant from alienating, advertising for sale, selling



vide Public Auction and/or Private Treaty, disposing of, clogging and/or in any other way restricting the Plaintiff's rights and/or interests over the suit property, that is, LR No SUNA/WASWETA II/216 whatsoever and/or howsoever.

- vi. Payment of Damages for unlawful restriction of the Title of LR No SUNA/WASWETA II/216.
 - vii. Costs of the suit be borne by the Defendant.
 - viii. Any such further and/or other reliefs as the Honourable Court may deem fit and expedient so to grant.
2. The Plaintiff avers that sometimes in September 1974, he approached the Defendant for a loan facility of Kshs 30,000/=. The Defendant agreed to advance the said amount as requested, subject to the Plaintiff providing and perfecting security in favor of the Defendant. The Plaintiff agreed to the said terms and a Charge was registered against the Title of the suit parcel LR No SUNA/WASWETA II/216 in favor of the Defendant. Subsequently, the said amounts were advanced and he commenced the repayments thereof; which were duly receipted and acknowledged.
 3. It is his contention that upon completion of the said loan repayments; the Defendant confirmed the same and proceeded to prepare a Discharge of Charge; the same was duly executed and attested by the Defendant and transmitted by the Plaintiff to the Land Registry. The Discharge of Charge was registered and the necessary endorsement entered in the Green Card and the original Title Deed on the September 10, 2013; thus clearing the suit land of any encumbrance in favor of the Defendant.
 4. It is now his claim that sometimes on April 8, 2014, he carried out an official search over the suit land and was surprised to find out that the Defendant had caused the registration of a Caution over the suit land claiming Chargee's interest, notwithstanding that the Charge had already been discharged. Despite his requests to withdraw the said Caution; the Defendant has refused and continues to maintain the said Caution and gone further to re-instate the Charge over the suit land on February 4, 2014 which had already been discharged. He contends that the restoration and reinstatement of the said Charge is fraudulent, irregular and illegal and he outlined the particulars of fraud and illegality thereof.
 5. He is now apprehensive that upon reinstating the Charge, the Defendant has proceeded to retain the services of M/S Keysian Auctioneers, to dispose off the suit property in exercise of the Defendant's Statutory Power of sale. He thus claims that not only is the Defendant's interest of the suit property become instinct, but the intended sale is irregular, premature, misconceived and illegal and he outlined the particulars of fraud and illegalities thereof. He urged the court to grant the orders sought in the interest of justice.
 6. In his Reply to Defence; the Plaintiff maintained that he made substantial repayments of the loan amount in full liquidation of the facility Charged and hence the Discharge of Charge prepared by the Defendant to that effect. He thus denied the particulars of fraud as outlined by the Defendant.
 7. It was his claim that the loan facility has been fully repaid and liquidated and the Defendant does not therefore have any right whatsoever over the suit land.
 8. The Defendant entered Appearance and filed a Statement of Defence dated June 27, 2014. He confirmed having advanced a loan facility to the Plaintiff sometimes in the year 1974 but averred that the Plaintiff only made negligible payments towards the loan repayment; thus defaulting his loan repayment and which is in arrears todate.



9. The Defendant further denied causing any Discharge of Charge to issue over the suit parcel and disowned the Discharge of Charge referred to by the Plaintiff. He maintained that the said Discharge registered on the September 10, 2013 was a forgery and outlined the particulars of fraud thereof. He stated that the said Discharge of Charge was procured illegitimately without its knowledge and thus had no legal consequence. It is the Defendant's contention that upon realizing the fraudulent registration of the fraudulent Discharge of Charge; he tendered the evidentiary proof of the fraudulent Discharge of Charge to the Land Registrar Migori County, who then caused the reinstatement of the Charge, rectified the register and a lodged a Caution against the suit land.
10. He therefore maintained that upon reinstatement of the Charge; he acquired rights over the suit property and its intended exercise of its statutory powers of sale, for the repayment of the loan facility which stood at Kshs 6,000,000 in arrears, was justified. It is his position that the said decision to exercise its statutory Power of Sale was done in accordance with the relevant provisions of law.
11. He opposed the grant of the Orders sought and maintained that the same should only be allowed upon the plaintiff's full repayment of his loan arrears. He urged the court to dismiss the Plaintiff with costs.

TRIAL

12. On January 19, 2021, the matter proceeded for hearing of the Plaintiff's case. Samuel Onyango Angira testified as PW1; he substituted his late father Musa Angira on October 16, 2018. He adopted his father's witness statement dated June 4, 2014 as his testimony and evidence in Chief. He further stated that his late father repaid the loan amount in full by the September 4, 2013 and subsequently, a Discharge of Charge was made on September 10, 2013 to that effect.
13. He further denied the claims of fraud and illegality levelled against him by the Defendant and urged the court to grant the orders as sought in the Plaintiff.
14. He also produced the documents in his List of Documents dated June 4, 2014 as exhibits marked PExhibit 1 – 9 in further support of his case. The Plaintiff thereafter closed his case.
15. The suit proceeded for Defence hearing on May 30, 2022. Earnest Lewa Mwachui testified as DW1; he adopted his witness statement dated March 7, 2022 as his evidence in chief. He further stated that the Plaintiff's loan is still outstanding and stands at Kshs 5,570,408.86/= and hence the Charge lodged against the suit title has never been discharged.
16. He further stated that the Discharge of Charge was not from the bank and that they still had the original title in their custody. The same was reported to the police and the Charge reinstated.
17. He also produced the documents in his List of Documents and marked as DExhibits 1- 12 as follows; witness statement as Dexh 1, Offer letter dated July 3, 1974 as Dexh 2, Loan Agreement as Dexh 3, Copy of Title Deed and Certificate of Official Search as Dexh 4 (a) and (b), Copy of Charge as Dexh 5, Plaintiff's Loan Account Statement as at September 30, 2013 as Dexh6, Demand letter dated May 29, 2009 as Dexh 7, letter dated June 30, 2004 as Dexh 8, Letter dated August 6, 2004 as Dexh 9, Statutory Notice as Dexh 10, ICDE sample Discharge as Dexh 11 and the Power of Attorney dated January 16, 2006 as Dexh 12.
18. On cross-examination; he stated that the loan was partly repaid and the amount so repaid was Kshs 48,510/=. He further stated that the loan is still in arrears stands at Kshs 6,000,000/=. On the issue of Discharge of Charge, it was his testimony that the Green Card showed that there had been a Discharge to Charge in respect to the suit property, however the same was fraudulently done and the matter had been reported to the DCI Migori. He added that he did not know the person indicated as the Attorney



on the said Discharge of Charge and that the same was different from their known sample of Discharge of Charge as shown in Dexh 11.

19. On re-examination he reiterated that the sample produced as Dexh 11 was the same one being used throughout their stations. The Defence thereafter closed their case.
20. Upon close of the Defence case; parties were directed to file their final submissions; both parties filed their rival submissions together with authorities which I have read and taken into account in arriving at my decision as hereunder;

Analysis And Disposition

21. I have carefully considered the Plaintiff, the respective exhibits and submissions filed by the Plaintiff herein. On that account, it is this court's considered view that the issues arising for determination are: -
 - a. Whether the Discharge of Charge registered on the September 10, 2013 was lawful and subsequently whether the reinstatement of the Charge and registration of the Caution against the Suit title was lawful and justified.
 - b. Whether the Plaintiff is entitled to the Orders/Reliefs sought in the Plaintiff dated October 3, 2017

A. Whether the Discharge of Charge registered on the September 10, 2013 was lawful and subsequently whether the reinstatement of the Charge and registration of the Caution against the Suit title was lawful and justified

22. It is the Plaintiff's claim that upon redeeming the loan advanced to him in full; the Defendant prepared, executed, attested and endorsed the Discharge of Charge in respect of the suit property. The same was given to the Plaintiff together with the original Title Deed for onward transmission to the Lands Registry for purposes of registering the same and making the relevant entries in the register to that effect.
23. The Plaintiff further contends that pursuant to the registration of the Discharge of Charge on the suit parcel; the Defendant had no encumbrances in its favor over the said parcel. He thus maintained that the registration of a Caution and reinstatement of the Charge was fraudulent, irregular and illegal.
24. The Defendant on the other hand maintained that the Plaintiff only made negligible repayments of the loan advanced to him and the same is still in arrears of Kshs 6,000,000/= and he produced the Plaintiff's Loan Account Statement as at September 30, 2013 as Dexh 6 in that regard. He further disowned the Discharge of Charge referred to by the Plaintiff and maintained that the same was a forgery, he produced Dexh 11 in support of his claims.
25. The Defendant further contends that upon discovering the fraudulent Discharge of Charge by the Plaintiff over the suit parcel; he presented evidentiary proof as per Dexh 6 and 11, to the Lands Registrar for purposes of ascertaining the status of the said loan and it is then that a Caution was lawfully registered against the title of the suit land and the Charge was subsequently reinstated.
26. He thus maintains that upon reinstatement of the said Charge, he attained the requisite rights over the suit land and was entitled to exercise its Statutory Power of Sale for the failure by the Plaintiff to repay the advanced amount in fully, which according to them was in arrears of Kshs 6,000,000/=.
27. Caselaw On When A Charge Can Be Reinstated And Who Has The Right To Lodge A Caution – Section Of The Act And Caselaw.



28. It is not in contest that sometimes in the year 1974, the Defendant advanced a loan facility of Kshs 30,000/= to the Plaintiff. The Plaintiff offered the suit parcel herein LR No Suna West/ Wasweta II/ 216 as a security for the said loan facility and subsequently the Defendant registered a Charge against the said Title in its favor. The Defendant produced Dexh 6 to show that the loan was still pending/ in arrears hence the need for the reinstatement of the Charge and the Caution placed against the title of the suit to protect its interests as the Chargee pending the complete and final payment of the loan amount advanced.
29. This court is however mindful not to comment on matters touching on the 'Duplum Rule' which are not within its jurisdiction as expressed under Article 162 (2) (b) of the Constitution of Kenya, Section 150 of the Land Act as well as Section 13 of the Environment and Land Court Act nor connote the land use. The jurisdiction of the of the ELC in entertaining disputes touching on the question of accounting in respect of loan advanced was succinctly addressed by the Court of Appeal in Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR.
30. The Plaintiff produced Pexh 4 which was the copy of the Discharge of Charge dated September 10, 2013, which was duly received and registered at the Lands Registry. The Defendant on the other hand also produced Dexh 11 as sample of the Discharge of Charge used by the facility in all its branches, and from a cursory look the two samples are significantly different.
31. I have considered the rival positions taken by both parties herein. However, at the center of the dispute herein is the reinstatement of the Charge and the Caution registered against the title of the suit land. The Defendant's claim is that the said Charge was reinstated since the Plaintiff is yet to fully redeem the loan advanced by repaying the arrears which stood at Kshs 6,000,000/= as at September 30, 2013 and evidenced by Dexh 6. The Defendant thus contends that the Caution was registered to protect its Chargee's Interest.
32. I have noted that even though the Plaintiff claims to have finalized the loan repayment, he did not provide any Statement of Account in relation to the loan repayment in support of his allegations. He did not also challenge the loan account statement produced as Dexh 6 by the Defendant. He further did not challenge the Dexh 11 as produced by the Defendant and which was significantly different from the Discharge of Charge sample that he had relied on; he did not call any witness from the Defendant facility and therefore it is impossible to ascertain the correctness of the said document.
33. Section 6 of the Section 16 of the Registration of Documents Act provide that:
- ' If the registration of any document has been obtained by fraud, mistake or misrepresentation or the document is forged or the execution thereof is contrary to the law, the registration of such document shall forthwith be cancelled by the Registrar'.
34. Therefore, in the absence of any proof to the contrary, I am inclined to find the explanation and evidence adduced by the Defendant as the basis of the reinstatement of the Charge and the Caution against the title of the suit parcel as justifiable and sufficient. Further, I find that the Discharge of Charge was invalid and its cancellation and reinstatement of the Charge was valid.

B. Whether the Plaintiff is entitled to the Orders/Reliefs sought in the Plaint dated 03.10.2017

35. The Plaintiff has sought for the unconditional removal of the Caution and Discharge the re-instated Charge on the register of LR No SUNA/ WASWETA II/ 216. He contends that there is no lawful justification and/or explanation since he had fully redeemed his loan as agreed.



36. The Defendant on the other hand maintains that it was necessary to lodge the Caution against the title of the suit land and to reinstate the Charge in protection of its Chargee's Interests pending the full and final payment of the loan amount which stood at Kshs 6,000,000/=.

37. Section 131 of the repealed Registered Land Act which states as follows: -

' 131 (1) Any person who –

- (a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, that is to say, some defined interest capable of creation by an instrument registrable under this Act; or
- (b) is entitled to a licence; or
- (c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, may lodge a caution with the Registrar forbidding the registration of dispositions of the land lease or charge concerned and the making of entries affecting the same.'

38. The Court of Appeal in National Bank of Kenya Limited v Allan George Njogu Residences Ltd [2017] eKLR while upholding the decision Munyao Sila J. in the trial court, stated as follows: -

'(1) For the prevention of any fraud or 'The learned judge analyzed the issue by examining the provisions of section 131 of the repealed Registered Land Act, and, in our view, arrived at the right conclusion that if an entity is intending to register a charge over land it could register a caution against the title or lease because a charge is an instrument capable of registration. Under that section, any person who claims a right to obtain an interest in any land, lease or charge or who has some defined interest capable of creation by an instrument that is registrable under the Act may lodge an appropriate caution with the Land Registrar.'

39. It is not in dispute that the loan amount advanced is still in arrears, guided by the legal provisions and the Court of Appeal decision above; I accordingly find that the Defendant rightfully lodged the Caution and reinstated of the Charge, pending the final repayment of the loan amount is a sufficient cause. The same is therefore lawful and justified.

COSTS

40. It is trite law that costs generally follow the event and in this case, the Plaintiff having failed to prove his case, I find that the Defendant is entitled to costs of the suit.

CONCLUSION

41. The upshot of the above is that the Plaintiff has not proved his to the required standard and the Plaintiff dated June 4, 2014 is hereby dismissed with costs to the Defendant. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MIGORI ON 16TH DAY OF FEBRUARY, 2023.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

.....**Plaintiff**



.....Defendant
Court Assistant - Tom Maurice/ Victor

