



Muburi & 2 others (Suing as the administrators of the Estate of Teresa Kirangari Muburi) & 2 others (Suing as the administrators of the Estate of Teresa Kirangari Muburi) v First Credit Exchange Development Limited (Environment & Land Case 61 of 2017) [2023] KEELC 20673 (KLR) (12 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20673 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 61 OF 2017
LA OMOLLO, J
OCTOBER 12, 2023**

BETWEEN

**MATHEW JOHNSTON MUBURI 1ST PLAINTIFF
JOSEPHINE JOAN WATHI 2ND PLAINTIFF
EVELYN NJOKI MUBURI 3RD PLAINTIFF
SUING AS THE ADMINISTRATORS OF THE ESTATE OF TERESA
KIRANGARI MUBURI**

AND

FIRST CREDIT EXCHANGE DEVELOPMENT LIMITED DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff commenced this suit vide Originating Summons dated 2nd October, 2015.
2. The Plaintiff seeks the following orders:
 - a. That the Applicant Teresa Kirangari Muburi of P.O Box 28483-00200 Nairobi be declared by this Honourable Court as the legal and lawful owner of the property known as IR Number 37496/1
 - b. That the charge dated 15.8.1990 registered against the property known as LR No 1144/846 as defined in the grant registered as IR Number 37496/1 in favour of First Credit Exchange Development Limited be discharged.



- c. That the deputy Registrar of this Honourable Court do sign all documents necessary to discharge the said charge and to effect the court order
 - d. That costs of this summons be provided for.
3. The Originating summons are based on the following grounds:
- a. The Plaintiff avers that she is the registered owner of all that property known as LR Number 1144/846.
 - b. The Plaintiff took a loan of Kshs 80,000 from the Defendant and a charge on her plot No 1144/846 was drawn and effected on 15th August, 1990.
 - c. The Plaintiff completed repaying the loan and the Defendant issued a letter of discharge to the Ministry of Lands on 30th November, 1995.
 - d. That upon carrying out a search at the Lands Office this year (2015), they came to learn that the discharge was never effected.
 - e. The Plaintiff tried to get a discharge at the Lands Office but was informed that the letter alone was not sufficient and was referred back to the Defendant.
 - f. The Defendant company is No longer operational and they have been having a difficult time trying to gather information about it.
4. The Plaintiff avers that she continues to suffer as she cannot enjoy or use her property in whichever manner she wishes and that she makes the instant application in the interest of justice.

Factual Background.

5. Subsequent to the filing of this suit, No steps were taken to prosecute it until 17th July, 2022. On the said date, the suit came for hearing of a notice to show cause why the suit should not be dismissed.
6. Counsel for the Plaintiff informed court that the Plaintiff is deceased and further that they had been having trouble finding and/or serving the defendant herein. Counsel also informed court that he needed time to file an application for revival of the suit and for substitution.
7. Several mentions and applications later, on 28th March, 2023 an order for extension of time within which to apply for joinder of the legal representatives of the deceased ,their joinder and substitution and revival of the suit was granted.
8. On 30th May, 2023, the court allowed an application dated 25th October, 2018 which was an application seeking leave to serve the Defendant by way of substituted service. Subsequently, directions were also given that the Originating summons would be heard by way of affidavit evidence.
9. On 4th July, 2023 counsel for the Plaintiff informed the court that the Defendant had been served by way of advertisement in the daily Nation Newspaper of 12 June, 2023. The affidavit of service in respect of service upon the Defendant was filed on 13th June, 2023 and is sworn on 12th June, 2023.
10. The Plaintiff's counsel also informed the court that he had not received any response from the Defendant and stated that he had filed his written submissions.
11. The court being satisfied that proper service had been effected upon the Defendant, reserved the suit for Judgement.



Issues For Determination.

12. On 4th July, 2023, Counsel for the Plaintiff made brief oral submission.
13. In his opening remarks, he stated that the Plaintiffs were seeking orders discharging the charge registered against the suit property. He submitted that the Defendant has since ceased operations and cannot be found.
14. He further submitted that they have attached a search showing that the Plaintiff is the owner of the suit property and that there is a charge on the property.
15. Counsel for the Plaintiff went on to submit that they have attached a letter issued by the Defendant showing that the loan has been repaid. He submitted that they have also attached an affidavit by a process server showing the efforts that had been made in finding and/or tracing the Defendant to execute the discharge or respond to this application but the efforts had not bore fruit.
16. Counsel for the Plaintiff asked the court to further rely on the written submissions and prayed that the charge registered against the suit property be discharged and the discharge documents be signed by the Deputy Registrar of the Court in place of the Defendant.
17. The Plaintiff filed their written submissions on 3rd July, 2023.
18. They identify the following issues for determination:
 - a. Whether the Plaintiff is the legal and lawful owner of property known as LR No 1144/846 registered as IR Number 37496/1?
 - b. Whether the charge dated 15th August, 1990 registered against the property known as LR No 1144/846 as defined in the grant registered as IR Number 37496/1 in favour of the Defendant should be discharged?
 - c. Whether the Deputy Registrar of this Honourable do sign all documents necessary to discharge the said charge and effect the court order?
 - d. What is the appropriate order as to costs?
19. The Plaintiffs submit that it is not in contention that the Chargor is the legal and beneficial owner of the subject parcel. The Plaintiffs submit that they have annexed copies of a search on the property which shows that a grant of title was issued in favour of the deceased Plaintiff which grant is dated 30th March, 1983 and registered as IR 37496/1 on 25th May, 1990.
20. The Plaintiffs submit that a certificate of title is to be held as conclusive evidence of proprietorship and they rely on Section 26 (1) of the [Land Registration Act](#). They also submit that there is No doubt that the deceased Plaintiff for whose estate the current Plaintiff's act is the legal and lawful owner of suit property.
21. The Plaintiffs also submit that the Chargee/Defendant's advance manager Mr. Harrison M Kioko vide a letter dated 30th November, 1995 wrote to the Ministry of Land Reclamation and confirmed that the Defendant had redeemed the charge. The Plaintiffs submit that he further directed that the property be discharged to the Plaintiff having completed payment of her loan in full.
22. The Plaintiffs also submit that the intention of the letter dated 30th November, 1995 is clear i.e. "that property Number IR 37496 Naivasha be discharged since the Plaintiff has paid her loan in full."



23. The Plaintiffs rely on Section 97 (1) of the Evidence Act Cap 180 and submit that the Defendant's authorization, vide the letter dated 30th November, 1995, to discharge the charge ascertains the intentions of the chargee.
24. The Plaintiffs rely on the case of Twiga Chemical Industries Limited v Allan Stephen Reynolds NRB CA Civil Appeal No 300 of 2006 [2014] to buttress the importance of Section 97 of Cap 180 in evidence.
25. The Plaintiffs submit that the delay in discharging the suit property was occasioned by the unavailability of the Chargee.
26. The Plaintiff's rely on the case of National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited and another NRB CA Civil Appeal No 95 of 1999 [2001] eKLR and submit that clause 5 of the charge document is clear that subject to payment of the loan, the Chargor's property shall be discharged from any encumbrance. They submit that there has been No evidence of malfeasance or undue influence to bar the discharge.
27. The Plaintiff's submit that the right of discharge and/or re-conveyance of charge or any other instrument used in extinguishing of interests in land conferred by charges is envisaged under the Land Act. The Plaintiff's rely on Section 85 (1) of the Land Act, 2012.
28. The Plaintiffs submit that clause 5 of the Charge Instrument dated 15th August, 1990 states that;

“...Provided Always That subject to the Chargee's rights of consolidation herein contained if the charger shall on the date of redemption or at any time thereafter pay to the Chargee all moneys secured by this Charge and all costs and expenses properly incurred by the Chargee in relation to the mortgaged property at the time of such payment then the Chargee will at the request and costs of the Chargor release the mortgaged property to the Chargor or as the Chargor shall direct.”
29. The Plaintiffs submit that the express term under Clause 5 is clear that subject to payment of the loan the Chargor's property shall be discharged from any encumbrance and re-conveyed to the Chargor or as he may direct.
30. The Plaintiffs submit that the Chargor, subject to fulfilment of its obligations is entitled to a discharge from any encumbrance tied to its title. The Plaintiffs also submit that in compliance with Article 40 (1) of the Constitution of Kenya and in the interest of Justice, this Honourable Court should re-convey the subject land to its lawful owner because the owner has redeemed the loan secured by the charge. The Plaintiffs also submit that it would be in the interest of justice that the grant registered as IR Number 37496/1 in favour of the Defendant be discharged.
31. The Plaintiffs further submit that the Defendant/Chargee herein is unavailable to sign the discharge. They submit that all efforts that have been made to trace its whereabouts have bore No fruit. They submit that however, the subject parcel is still encumbered to the detriment of the estate of Teresa Kirangari Muburi.
32. The Plaintiffs also submit that they have made necessary effort in tracing the defendant including advertising in the Daily Nation Newspaper on 12th June, 2023.
33. It the Plaintiff's submissions that they have, through the affidavits of service of Haron Maina Muinuki attached to the application dated 12th September, 2022, shown that the Defendant cannot be traced physically for service and No records exist at the registrar of companies. They submit that it would



be in the interest of justice that the Deputy Registrar signs all documents necessary to discharge the said charge.

34. The Plaintiffs pray that the court grants the reliefs sought and also submit that there is No prejudice that would be suffered by the Defendant since the loan facility covered by the charge in issue has long been repaid and the purpose of this suit is only to obtain a formal discharge to enable the Plaintiffs transact on the parcel of land.

Analysis And Determination.

35. After considering the pleadings and submissions of the Plaintiff; the following issues arise for determination;

- a. Whether Teresa Kirangari Muburi (Deceased) is the owner of the suit land and whether the charge dated 15th August, 1990 registered against the suit land, in favour of the Defendant, should be discharged.
- b. Whether the Deputy Registrar of this Honourable should sign all documents necessary to discharge the charge.
- c. Who should pay the costs of this suit?

36. The Defendant was served and failed to enter appearance. This court will none the less interrogate the evidence tendered by the Plaintiff. This is in light of the decision in *Propwa Company Limited v Justus Nyamo Gatondo & another* [2020] eKLR, wherein it was held as follows:

“The fact that the evidence is not challenged does not entirely mean that the Court will not interrogate the evidence tendered by the Plaintiff. The Court still has an obligation to interrogate the Plaintiff’s evidence and determine whether the same is merited to enable the Court come up with logical conclusion as ex parte evidence is not automatic prove of a case on the required standard. The Plaintiff has to discharge the burden of proof.

37. In *Kenya Power & Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR, the Court held thus;

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a Defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A Plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

38. Further the judicial decision of *Gichinga Kibutha v Caroline Nduku* (2018) eKLR, the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants 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.”



A. Whether Teresa Kirangari Muburi (deceased) is the owner of the suit land and whether the charge dated 15th august, 1990 registered against the suit land, in favour of the defendant, should be discharged.

39. Teresa Kirangari Muburi (Deceased) moved this Court vide the Originating Summons Application dated 2nd October, 2015. On 12th June, 2023, one of the co-administrators with the authority of the other co-administrators of her estate swore an affidavit in support of the Originating Summons.
40. He deposes that Teresa Kirangari Muburi (Deceased) was the owner of the suit property i.e. LR No 1144/846 situated within the Naivasha Township measuring 0.0753 ha. He has attached a copy of the certificate of grant.
41. Entry number 2 on the said certificate of grant shows a charge registered on 17th August, 1990 in the name of the Defendant as security for an amount of Kshs 80,000.
42. Mathew Johnston Muburi deposes that Teresa Kirangari Muburi (Deceased) took a loan of Kshs 80,000 from the Defendant and that the suit property was offered as security and a charge registered against the title. A copy of the charge is attached.
43. It is his deposition that Teresa Kirangari Muburi (Deceased) completed repaying the loan. Thereafter, the Defendant through its advance manager one Harrison Kioko wrote a letter dated 30th November, 1995 addressed to the Ministry of Land Reclamation which letter states the fact of charge and that Teresa Kirangari Muburi (Deceased) has completed paying the loan in full. The advance manager asks that the suit property be discharged. The letter is attached.
44. He deposes that Teresa Kirangari Muburi (Deceased) carried out a search in the year 2015 and learnt that the discharge was never effected. The deceased was also informed that the letter was not sufficient and was referred back to the Defendant to process the discharge.
45. The Plaintiffs have also attached an affidavit sworn by one Haron Maina Muinuki- a process server- to demonstrate efforts that have been made in finding the defendant so as to serve him with the court processes. This includes attempts at finding information about the Defendant from the Company Registry and Company registry informed him that they do not have the Defendant in their records.
46. Section 85 (1) of the Land Act 2012 provides as follows:
- “Subject to the provisions of this section, the chargor shall, upon payment of all money secured by a charge and the performance of all other conditions and obligations under the charge, be entitled to discharge the charge at any time before the charged land has been sold by the chargee or a receiver under the power of sale.”
47. The facts in the judicial decision of Sammy Njoroge Mwangi v Regional Loans Building Society [2018] eKLR, mirror the facts in this suit. The Court expressed itself as follows;
- “In the instant case according to the feedback from Central Bank of Kenya, the official regulator and licensee of all banks and firms that offer financial services, it is doubtful whether the Respondent was offering financial services in a legitimate manner. The Registrar of Companies under which all companies, building societies, banks etc. are registered did not have any information on the entity as well. Leaving the charge subsisting on the title in my view will create unnecessary hardship to the Applicant’s right of



redemption of the suit land in view of the whereabouts of the Respondent not being traced.” (Emphasis mine)

48. Bearing the evidence adduced and the Judicial decisions cited, I have No reason to refuse, to grant orders of discharging the charge registered in favour of the Defendant. I am satisfied that the affidavit evidence and the documents attached are sufficient.

B. Whether the Deputy Registrar of this honourable should sign all documents necessary to discharge the charge.

49. Given that the Defendant failed to enter appearance and cannot be found after all reasonable efforts have been made by the Plaintiffs and Teresa Kirangari Muburi (Deceased) to trace it, Justice demands that the Deputy Registrar sign all documents necessary to discharge the charge.

C. Who should pay the costs of this suit?

50. The general rule is that costs follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act*. (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition.

51. In view of the foregoing, the Originating Summons dated 2nd October, 2015 is allowed in the following terms:
- a. Teresa Kirangari Muburi of P.O Box 28483-00200 Nairobi is hereby declared as the owner of the property known as IR Number 37496/1.
 - b. The charge dated 15.8.1990 registered against the property known as LR No 1144/846 as defined in the grant registered as IR Number 37496/1 in favour of First Credit Exchange Development Limited (Defendant) is hereby discharged.
 - c. The Deputy Registrar of this Honourable Court shall sign all documents necessary to discharge the charge and to give effect to these orders.
 - d. The Plaintiffs shall have costs of this suit.
52. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 12th DAY OF OCTOBER, 2023

L. A. OMOLLO
JUDGE

