



**Asego Holdings Limited v Mayfair Bank Limited & another;  
Okundi (Interested Party) (Commercial Case E005 of 2022)  
[2024] KEHC 16043 (KLR) (Commercial and Tax) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16043 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E005 OF 2022  
A MABEYA, J  
DECEMBER 20, 2024**

**BETWEEN**

**ASEGO HOLDINGS LIMITED ..... PLAINTIFF**

**AND**

**MAYFAIR BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LEGACY AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**EDWARD KENNETH OTIENO OKUNDI ..... INTERESTED PARTY**

**RULING**

1. This is a ruling on two applications dated 11/10/2023 and 26/10/2023, respectively. As the court noted in its ruling of 14/4/2023, the Plaintiff filed the present suit by way of a Plaint dated 13/1/2022 seeking to have the Defendants permanently restrained from selling or disposing off House Number 26 erected on L.R. Number 330/475 Thompson Estate Lavington (“the suit property”) that had been charged to secure financial facilities extended to the Interested Party by the 1<sup>st</sup> Defendant (“the Bank”).
2. Contemporaneous with the Plaint, the Plaintiff also filed an application of even date seeking injunctive orders to restrain the Defendants from selling or disposing off the suit property pending the hearing and determination of the suit. That application is yet to be determined but the Court, has since 17/1/2022 issued status quo orders restraining the proposed sale and have had them extended from time to time. On 2/10/2023, the deputy registrar held that the said interim orders had since lapsed and that she had no jurisdiction to extend the same.



3. Pursuant thereto, on 11/10/2023, the plaintiff filed an evenly dated Notice of Motion under sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, Order 40 Rule 1 and Order 51 Rule 1&3 of the Civil Procedure Rules seeking to reinstate the said status quo orders or in the alternative, that the Court injuncts the defendants from selling the suit property pending hearing and determination of the suit.
4. That application was supported by the grounds set out on its face and the supporting affidavit of the Plaintiff's director, Phillip Okoth Okundi, sworn on 9/10/2023. The application was opposed by the defendants through the replying affidavit of the bank's head of legal, Lynette Kamande sworn on 16/10/2023. When the application came up for directions on 19/10/2023, the Court ordered that the impending public auction in respect of the suit property that had been set for the 24/10/2024 be suspended upon the plaintiff paying Kshs. 7 million before close of business on 23/10/2023.
5. On 26/10/2023, the plaintiff filed another application seeking to forestall the impending public auction of the suit property and for the Court to hold the proprietors of the bank in contempt of the Court's orders of 19/10/2023 for proceeding with the said auction when the same had been suspended. That application was supported by the affidavits of Phillip Okoth Okundi and James Rimui, an advocate in conduct of the plaintiff's case. The same were sworn on 26/10/2023 and 19/1/2024, respectively. The same was opposed by the defendants through the replying affidavit of Lynette Kamande sworn on 8/11/2023.
6. These two applications are the subject of the court's determination and the court directed that they be disposed by way of written submissions which are on record and which I will make relevant references to in my analysis and determination below.
7. In its submissions, the plaintiff urges that the following are the issues for the court's determination: -
  - a. Whether the Plaintiff complied with the court order of 19/10/2023, to warrant the suspension of the planned auction.
  - b. Whether the defendants acted in contempt of that court order that had suspended the auction of the suit property.
  - c. What remedies are available in law to the plaintiff for the unlawful auction of the suit property.
  - d. Whether the plaintiff is entitled to the reliefs sought in the application dated 11/10/2023.
8. On the first issue, the plaintiff claimed that it complied with the court's order of 19/10/2023 by making payment to the tune of Kshs. 7 Million on 23/10/2023 both by RTGS (Kshs. 6,750,000/-) and MPESA (Kshs. 250,000/-) and thereafter promptly notified both defendants and their Advocates of the said compliance, requesting them to call off the auction scheduled for the following day.
9. That the defendants' Advocates who were kept apprised of the status of payment by the plaintiff, and further received evidence of payment from the plaintiff's Advocates acknowledged receipt of the evidence of payment and indicated that they would confirm receipt of funds by 10.00. am on 24/10/2023. However, that despite the plaintiff's compliance with the Court orders as evidenced by the proof of payment shared with the defendants' Advocate, the defendants proceeded with the auction in total contempt of the said orders.
10. In response, the defendants deponed that neither the plaintiff nor the Interested Party complied with the Court's orders as they did not make the required payment in cleared funds by close of business which is 17:00 (5.00 PM) of 23/10/2023, and only made payment out of time as evidenced below:



- a. Kshs. 150,000/- by Mpesa on 23/10/2023 at 19:00;
  - b. Kshs. 100,000/- by MPesa on 23/10/2023 at 19:11; and
  - c. Kshs. 6,750,000/- by RTGS on 24/10/2023 at 12:25. .
11. The defendants stated that as at 11.00AM on 24/10/2024, the RTGS was yet to be confirmed and as such, the auction proceeded in compliance with the order of 19/10/2023.
  12. In my view, resolution of this issue depends on when the aforementioned payments were “received” by the Bank. Was it when the plaintiff initiated the RTGS payment or when the Bank confirmed receipt of this payment in “cleared funds”?
  13. The defendants cited the decision in *Yurub Investments Limited, New Nyanza Wholesalers Limited & Laburman Courts Limited v Diamond Trust Bank (K) Limited & Dalali Traders Auctioneers [2021] KEHC 8766 (KLR)*, wherein the court held that in determining whether a party has complied with the payment timelines set by the court, the time of receipt is when the payment is actually considered to have been made and not when the payment is initiated or applied for.
  14. Indeed, it would defeat the purpose of the timelines and receipt of actual funds if payment was deemed to be done on instruction or initiation rather than when it is received in actual and cleared form. Such an approach would be subject to abuse and mischief as parties would only be initiating such payment to beat the timeline set by the court while the intended recipient would not have received the actual funds.
  15. In this regard, whereas the Court agrees with the plaintiff that the Court did not provide for the mode of payment or that the payment be by way of cleared funds, it was still incumbent for the plaintiff to ensure that whichever payment mode it opted to use, the subject payments were to be actually received by the Defendants before close of business on 23/10/2023.
  16. The Court is in agreement with the defendants that the definition of “payment” given by the Court of Appeal in *Kenya Revenue Authority V. Republic (Exparte Fintel Ltd) (2019) eKLR* is distinguishable from this case as the former was in respect of payment for withholding tax purposes based on the income tax regime that allows for accrual payments.
  17. From the annexures produced, it is evident that the RTGS payment which was initiated by the plaintiff on 23/10/2023 was actually received by the Bank on 24/10/2023. The plaintiff cannot therefore claim to have made the payment within the timelines set out by the Court at least going by the dicta in *Yurub Investments Limited (supra)*. It is therefore my conclusion that the plaintiff did not comply with the Court’s order of 19/10/2023 and as such, the impending auction could not be halted.
  18. On the second issue, having found that the Plaintiff did not make the payment of Kshs. 7 million by close of business on 23/10/2023 as ordered by the Court, the defendants cannot be accused of contempt as the auction was properly conducted because the Plaintiff had failed to satisfy the conditional order.
  19. On the remaining issues, as the auction was undertaken for the failure by the plaintiff to pay the Kshs. 7 million before close of business on 23/10/2023 and the suit property has since been sold to a third party, the only remedy available to the plaintiff, if at all it is dissatisfied with the sale, could be to seek damages which is the statutory remedy provided for in section 99 of the *Land Act* (Chapter 280 of the Laws of Kenya).



20. This is because, once the suit property had been knocked down and sold in a public auction by the Bank in exercise of its statutory power of sale, the plaintiff's equity of redemption was extinguished and since the suit property passed at that instance, the Court cannot issue an injunction to restrain the process of completing the transfer. (See *Jacob Ochieng' Muganda v Housing Finance Company of Kenya Limited* [2002] KECA 109 (KLR) and *Bomet Beer Distributors Ltd, Wilson Maritim Lasoi v Kenya Commercial Bank Ltd & 4 others* [2005] KEHC 2932 (KLR)).
21. In any event, no injunction can be issued stopping the auction as the same has already taken place and thus, the plaintiff's prayer for an injunction restraining the defendants from auctioning the suit property has now been overtaken by events. As such, the orders sought by the plaintiff in its application dated 26/10/2023 cannot be granted for reason of the aforesaid developments.
22. In the upshot, the plaintiff's applications dated 11/10/2023 and 26/10/2023 have no merit and are hereby dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

