



REPUBLIC OF KENYA



**Mbugua & another v Stanbic Bank Kenya Limited (Commercial Case E334 of 2022)
[2023] KEHC 18411 (KLR) (Commercial and Tax) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18411 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E334 OF 2022**

DAS MAJANJA, J

MAY 31, 2023

BETWEEN

FLORENCE WAIRIMU MBUGUA 1ST PLAINTIFF

FARMERS INDUSTRY LIMITED 2ND PLAINTIFF

AND

STANBIC BANK KENYA LIMITED DEFENDANT

RULING

1. The Plaintiffs have moved the court by the Notice of Motion dated March 30, 2023 seeking a number of orders principally an injunction restraining the Defendant (“the Bank”) from selling of Land Reference No 209/1530, Pangani, Nairobi, registered in the name of the 2nd Plaintiff (“the suit property”). They also seeks orders directing the Bank to provide a statement of account since the inception of the account to date and for the court to direct an independent audit to determine the true level of the Plaintiffs’ indebtedness. The application is supported by the 1st Plaintiff’s affidavit sworn on the same day. It is opposed by the Bank through the affidavit of its officer, Amos Mugambi, sworn on May 11, 2023. The application was urged by oral submissions by the parties’ counsel.
2. As I informed the parties at the plenary hearing, the issue of an injunction was a non-starter as the court had already delivered a ruling on February 17, 2023 dismissing the Plaintiffs’ application dated August 31, 2022 seeking an injunction to restrain the Bank from exercising its statutory power of sale (“the Ruling”). In short, the application is res judicata and the court cannot entertain any matters which were raised or ought to have been raised in that application in this application. These issues now raised that statutory notices were not served, or that the property was not valued or that the debt is disputed were issues raised and determined in the Ruling.



3. Once the application for injunction was dismissed, the Bank was at liberty to proceed with the sale of the suit property. There is no requirement, in law, for the chargee to issue fresh notices under sections 90 and 96 of the *Land Act*, 2012, the court having found as a fact that the notices were indeed served. The statutory power of sale crystallizes once the initial statutory notices are served and the chargor is given a chance to exercise its right of redemption.
4. Further, there is no basis for the court to grant an injunction pending the delivery of accounts or appointment of an independent auditor. This issue was also dealt with in the Ruling. The court ruled on the Plaintiffs' indebtedness as follows:

26 First and on the issue of indebtedness, I find that at the material time the Plaintiffs were not up to date with their loan repayments as they allege. Their averment that they rectified the default on August 8, 2022 by paying Kshs 11,341,000.00 is negated by the 1st Plaintiff's email of August 25, 2022 addressed to the Bank where she expressly admits that she was still indebted and promised to pay arrears of Kshs 10,225,363.75 on or before September 16, 2022 "without fail". This correspondence was preceded by the 1st Plaintiff's request to the Bank on the outstanding arrears. The Plaintiffs' contention is further negated by the Bank which has annexed loan statements indicating a debit balance meaning that the Plaintiffs were still indebted to the Bank after the said August 8, 2022.

5. After the court delivered the Ruling, there is evidence that the parties entered into an agreement to resolve the matter. By the letter dated April 3, 2023, the 1st Plaintiff wrote to the Bank where she committed to the Bank to pay the outstanding arrears of approximately Kshs 31.9 million by April 27, 2023 and provide a plan on how this would happen by April 6, 2023 and then pay a quarterly instalment of Kshs. 10 million due at the end of April to be paid by April 27, 2023 whereupon and after clearing the arrears, she would submit, within 90 days, a detailed plan to regarding full and final payment of the loan.
6. From a totality of the evidence and having admitted indebtedness and committed to give the Bank a proposal to clear the outstanding debt, I do not see how the Plaintiffs can now seek an independent audit of the account when this was not an issue all along. The Bank has furnished statements of account to the Plaintiffs through its depositions in this and the previous application and nothing specific has been raised about their veracity. I therefore decline the application for appointment of an independent auditor to verify the accounts.
7. I dismiss the application dated March 30, 2023 with costs to the Defendant. In view of the positions taken by the parties I now refer the matter to court mandated mediation.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2023.

D S MAJANJA

JUDGE

Court of Assistant: Mr M Onyango

Mr Mbabu instructed by Lawrence M Mbabu and Associates Advocates for the Plaintiffs

Ms Mutisya instructed by Walker Kontos Advocates for the Defendant

