



**Njenga & another v DIB Bank Kenya Limited (Civil Suit E171 of 2023)  
[2023] KEHC 21772 (KLR) (Commercial and Tax) (28 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21772 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E171 OF 2023  
JWW MONG'ARE, J  
AUGUST 28, 2023**

**BETWEEN**

**IRENE NJERI NJENGA ..... 1<sup>ST</sup> PLAINTIFF**

**PATRICK THURANIRA RIMBERIA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**DIB BANK KENYA LIMITED ..... DEFENDANT**

**RULING**

1. On April 6, 2023 the Plaintiffs/Applicants under a Certificate of Urgency filed a Notice of Motion under Section 1A, 1B, 3A, 59 and 63 of the Civil procedure Act, Orders 40 Rule 1, 2, 4(1) and 8, Orders 51 Rule 1 of the Civil Procedure Rules, Sections 83, 84, 85, 90(1), (2) & (3), 96, 97, 98, 102, 103, 104(3), 105 and 106 of the Land Act, Sections 3, 4, 5, 12, & 33(4) of the Banking Act, Sections 7, 9, 12, 13, 15 and 16 of the Consumer Protection Act, sections 7, 9, 12, of the Competition Act, Articles 27, 35, 40, 46, 47 & 50 of the Constitution of Kenya, seeking the following orders:-
  - a. Spent
  - b. Spent
  - c. That pending the hearing and determination of this suit, an order of Injunction do issue restraining the Defendant/Respondent whether by itself, employees, servants and/ or agents, Auctioneers or otherwise assigns and / or any persons whatsoever acting on its behalf and/ or mandate and/or instructions from alienating, Transferring, advertising for sale, offering for sale, selling by Public Auction, taking possession of, leasing, transferring, charging, or otherwise in any manner whatsoever interfering with the Plaintiffs' properties namely, Nairobi/Block 110/379 and L R No 109/141 (Title No IR 180834).



- d. An order to compel the Defendant to release to the Plaintiffs' original title deed over property Nairobi/Block 110/379 and L R No 109/141(Title No IR 180834) or in the alternative facilitate the acquisition of provisional title).
  - e. An order to compel the Defendant to remove the 1<sup>st</sup> Plaintiff from the negative listing in the Credit Reference Bureau (CRB).
  - f. That the court maybe pleased to make such orders as it deems fit for the end of justice.
  - g. That cost of this Application be provided for.
2. The application is supported by the replying affidavit of Irene Njeri Njenga and Patrick Thurania Rumberia sworn on April 6, 2023 and a Supplementary Affidavit of Patrick Thurania Rumberia sworn June 20, 2023. The application is opposed and the have filed a replying affidavit therein sworn by Badru Jaffer Swaleh sworn on May 26, 2023.

### **The Applicants' Case:-**

3. It is the Applicants' case that the 1<sup>st</sup> Applicant, Irene Njeri Njenga was employed by the Respondent at the time the loan facilities were advanced to her. The 1<sup>st</sup> Applicant is married to the 2<sup>nd</sup> Applicant as evidence by the Statutory declaration annexed to these proceedings sworn on October 7, 2009 by the Applicant. The Applicants are jointly registered as owners of the two properties subject matter of the dispute herein being LR No Nairobi/Block 110/379 and LR No 109/141.
4. As an employee of the Respondent, the 1<sup>st</sup> Plaintiff was advanced a total of Kshs 21,089,765/- under the following facilities in accordance with Islamic Banking principles as elaborated at great length in the pleadings by the Respondent;
  - i. Ijara without Asset under letter of offer dated November 2, 2017 for Kshs 14,474,348/-.
  - ii. Commodity Murabaha under letter of offer dated December 5, 2017 for Kshs 4,965,417/-.
  - iii. Wakala Murabaha under letter of offer dated November 30, 2017 for Kshs 1,650,000/-.
5. Subsequently, a first Applicants contend that the said facilities were serviced by a deduction of Kshs 202,631.680/- from her salary until the termination of her employment by the Respondent. The Applicants, while acknowledging the existence of their indebtedness under the various Islamic banking facilities argue that the Respondent has failed to follow the tenets of the said Islamic banking principles under sharia law and chosen to exercise its statutory power of sale irregularly without giving them the requisite statutory notice as required by law.
6. The Applicant argue that despite the loss of employment of the 1<sup>st</sup> Applicant they have made attempts to settle the debt and succeeded in paying off the Wakala Murabaha facility by disposing of the Motor vehicle registration number KCN 234N jointly registered between the 1<sup>st</sup> Applicant and the Respondent allowing them to pay off the sum of Kshs 714,279/-.
7. The Applicants further contend that they have applied for the release of the second title deed known as LR. 109/141 that was placed with the Respondent under a simple deposit but the defendants have blatantly refused to make available the said title and hence frustrating the sale. The Applicants argue that had the sale been concluded they would have raised Kshs 6,500,000/- which was to be utilised to reduce the Applicants' indebtedness.
8. The Applicant argue that the termination of the 1<sup>st</sup> Applicant employment by the Respondent in the manner carried out greatly prejudiced her ability to claim protection from the insurance protection



which would have been used to offset the loans at the end of the employee-employer relationship with the Respondent. The Applicants seek to have the Respondents restrained from selling or in any way interfering with their peaceful occupation and enjoyment of the charged property in LR No. Nairobi/Block 110/379 which is also their matrimonial property and the family residence occupied by the Applicants and minor children.

### **The Respondent's Case;**

9. In a detailed response to the Applicants case, the Respondent have filed a replying affidavit sworn by Badru Jaffar Swaleh, a sharia coordinator and a member of the Sharia Supervisory Board at the Respondent Bank. In the said replying affidavit, the deponent has gone to great length to explain the nature, purpose and function of each of the three facilities under which the Applicant was advanced the sharia complaint loans. The Respondent contends that the said facilities were applied and held within the tenets and principles of Islamic Financing Principles created under Sharia Law and at no one time did the Respondent deviate from the same.
10. The Respondent further contends that it has complied with all the legal requirements as set out in the [Land Act](#) and other statutes in that it served the requisite and relevant statutory notices as set out in the various laws relevant to securities. In any event, the Respondent argued that there is a pending suit in the in the Labour and Employment Court being ELRC No. E400 of 2020: Irene Njeri Njenga –v- DIB Bank Kenya Limited in where the court restrained the Respondent herein,

“from exercising its statutory rights of recovery of the same by way of liquidation of securities that it is holding, subject to the Applicant continuing to service the loans in accordance with the contracts in respect of the same.”
11. The Respondent further argue that despite the 1<sup>st</sup> Applicant obtaining the said reliefs, the Applicants have neglected to comply with the said court orders and instead moved to this court to file a separate suit ostensibly seeking similar reliefs from the court. The said ELRC matter is still pending for determination before the court. The Respondent further argues that the orders sought by the Applicants herein are equitable in nature and that the Applicants have not come to equity with clean hands. The Respondent denies being in possession of the second title deed being LR No. 109/141 and argues that nothing whatsoever has stopped the Applicants from selling the same since it holds no legal charge over it. The Respondent urges the court to find that the application is not merited and dismiss the same and allow the Respondents to proceed with the realization of the security for which it holds a legal charge.

### **Analysis and Determination: -**

12. I have carefully considered the pleadings and the submissions filed by the parties and I have identified one issue for determination, to wit; “whether the Plaintiffs/Applicants are entitled to the reliefs sought.” I note that the Respondent is licenced to offer financial products governed by Islamic Banking Principles under Sharia Law. These facilities however create contractual obligations by and between the parties that are to be determined by the court applying the various laws created by Statutes and the [Constitution](#) of Kenya.
13. Both parties herein acknowledge that there existed an employment contract between the 1<sup>st</sup> Applicant and the Respondent and that arising from the same the 1<sup>st</sup> Applicant was accorded various banking facilities under the different Islamic Banking Products that the Bank was licensed to provide. The Applicants acknowledge that they are indebted to the Respondent but differ on the amounts due and also take issue with the mode of recovery put in place by the Respondent towards realizing the securities



thereto given as collateral to secure the advances. They seek injunctive reliefs from the court among other orders.

14. I note from the response filed herein by the Respondents that the 1<sup>st</sup> Applicant, upon the termination of her employments filed ELC No E1400 of 2020; Irene Njeri Njenga -v- DIB Bank Kenya Limited and this matter is yet to be determined. The Applicant in the said matter was able to establish a *prima facie* case and was granted the following orders:-

“That an injunction do and is hereby issued at the Respondents:

- i. Restraining the Respondent from adjusting, altering or in any manner changing the rebated and preferential terms of the accounts and financial facilities advanced to the claimant during her employment with the Respondent and in particular Account Numbers 001MU0xxxx, 001MU011xxxx, 0011JMDxxx held with the Respondent.
- ii. The above orders shall be on condition that the claimant continues to service the loans in accordance with the contracts in respect of the same which Respondent shall be at liberty to exercise its rights of recovery of the same by way of liquidation of securities that it is holding.”

15. The Applicants have not denied the existence of the above suit and the subsequent court orders issued in respect thereto, and therefore the assertions by the Respondent remain uncontroverted and uncontested. The Employment and Labour Relations Court for which the 1<sup>st</sup> Applicant filed her claim and obtained restraining orders therein is a court of equal status with the High Court. The said court is also a court of law and established under Article 162 while the High Court is established under Article 165 of the [Constitution](#) of Kenya.
16. In appreciating that the ELRC jurisdiction is specific to labour disputes, this court notes that the issue around the various banking facilities are interrelated as they were created during the existence employment relationship between the 1<sup>st</sup> Applicant and the Respondent and hence the reason why the ELRC court issued injunctive orders in the first place, in the matter before them, that prohibited the sale of the securities thereto which are the issues before this court.
17. The Applicant having moved to court and obtained orders from therein is obligated by law to comply with the directions issued by that court. Where an Applicant encounters difficulties in complying or fulfilling requirements or conditions set thereto, the correct procedure is to return to the court issuing the said orders and seek a variation of the same and not to file a fresh suit in a different court altogether. In my view, what the Applicant are doing is to forum shop for a court that will be sympathetic to their course. In my view, the Applicant already obtained orders in their favour granted by a court of competent jurisdiction, coming to this court to seek orders similar to those they already are enjoying is to say the least an abuse of the court process.
18. To sum my findings, I therefore find and hold that the matters being canvassed before this court can properly be addressed and determined in ELRC No. E1400 of 2020; Irene Njeri Njenga -v- DIB Bank Kenya Limited appropriately. I therefore find no reason to consider the merits or lack thereof the application as filed before me. The Applicants have already properly moved the ELRC court and should have returned to the said court for any other reliefs or orders that they purport to seek herein. I find therefore the application and the suit herein are incompetent before this court. The same are struck out forthwith with costs to the Respondent.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF AUGUST 2023.**

.....

**J. W. W. MONG'ARE**

**JUDGE**

In the Presence of:-

Ms. Mohammed and Ms. Mary Wanjiku for the Plaintiffs/Applicants.

Ms. Detho for the Defendant/Respondent.

Lucy- Court Assistant

