



REPUBLIC OF KENYA



Equip Agencies Limited & 3 others v Diamond Trust Bank Limited & another (Civil Case E316 of 2022) [2023] KEHC 24658 (KLR) (Commercial and Tax) (27 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24658 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E316 OF 2022
EC MWITA, J
OCTOBER 27, 2023**

BETWEEN

**EQUIP AGENCIES LIMITED 1ST PLAINTIFF
ASHITE CHANDRAKANT PATEL 2ND PLAINTIFF
GRISHMA ASHITE PATEL 3RD PLAINTIFF
BIO CORN PRODUCTS (EPZ) LTD 4TH PLAINTIFF**

AND

**DIAMOND TRUST BANK LIMITED 1ST DEFENDANT
STEPHEN KARANJA KANGETHE T/A DALALI TRADERS
AUCTIONEERS 2ND DEFENDANT**

RULING

1. The 1st defendant a financial institution, extended financial facilities to the 1st plaintiff as the principal borrower. The facility was guaranteed by the 2nd to 4th plaintiffs. A charge was executed over L.R No. No 209/3477 to secure Kshs. 40,000,000. The facility was enhanced and a further charge was executed to secure a further Kshs. 100,000,000 and a second further charge to secure a further Kshs. 140, 000, 000.
2. In April 2015, the 1st defendant reorganized the overdraft facilities by allocating the 1st and 4th plaintiffs Kshs. 250,000,000 and Kshs. 30,000,000, respectively.
3. Parties went into litigation and on 22nd April 2021, a Deed of Settlement (the Deed) was executed between the plaintiffs and the 1st defendant settling the disputes between the parties. In the Deed, the plaintiffs agreed to withdraw suits pending in this Court and the Court of Appeal.



4. The plaintiffs also agreed to pay Kshs. 370,000,000 in two installments of Kshs. 168,000,000, within 15 days of executing the Deed and Kshs. 272,000,000 within 120 days from the date of executing the Deed. Interest of 14% would be charged in the event of delay in settling the amount. The Deed had a provision that in default, the 1st defendant would be at liberty to execute the accrued statutory power of sale.
5. The Plaintiffs paid the first instalment of Kshs. 68,000,000 and interests on the balance but defaulted in paying the balance. The 1st defendant moved to sell the property in terms of the Deed and instructed the 2nd defendant to sell the properties and recover Kshs. 272,000,000 plus interest. The 2nd respondent issued and served a 14 days' notice demanding payment of Kshs. 272,000,000 with interest at 14%.

Application

6. Following the 1st defendant's action, the plaintiffs filed this suit simultaneous with motion on notice and sought an interlocutory injunction restraining the defendants from selling the properties (Eldoret Municipality/Block 10/34 and L.R No. 209/3477 pending the hearing and determination of the suit.
7. In the alternative, plaintiffs urged the court to extend the time for compliance or rectifying any default to enable them redeem the properties in terms of sections 104 and 105 as read with section 90 of the [Land Act](#).
8. The plaintiffs further sought an order compelling the 1st defendant to render a true, proper account on the actual status of the borrower's accounts.
9. The application was premised on the affidavits sworn by the 1st and 4th plaintiffs' directors and written submissions. The plaintiffs' case is that the 1st defendant moved to sell the properties without issuing statutory notices as required by law (sections 90 and 96 of the [Land Act](#) and Rule 15 of the Auctioneers' Rules.)
10. The plaintiffs also challenged the Deed on grounds that they signed it under undue influence, duress and that it was based on material non-disclosure, misrepresentation and was unconscionable.
11. The plaintiffs stated that although the cumulative aggregate maximum principle amount borrowed under the charges was Kshs. 280,000,000, the full amount was not drawn. The plaintiffs stated that they had repaid over Kshs. 806,000,000 and a further Kshs. 100,000,000 under the impugned Deed, which was more than 4 times the amount borrowed, contrary to the in duplum rule (under section 44 and 44A of the [Banking Act](#)).
12. The plaintiffs argued that 1st defendant had combined all the debts including unsecured ones, thus increased the level of risk exposure on the charges above the amounts secured contrary to sections 82 and 84 of the [Land Act](#). The plaintiffs also argued that the impugned Deed changed the terms set out in the letter of offer and charge documents.
13. The plaintiffs asserted that despite receiving payments, the 1st defendant refused to delist the 1st plaintiff from Credit Reference Bureau thereby preventing the 1st plaintiff from accessing further credit because the bank that had offered to take over the facility withdrew.
14. The plaintiffs posited that the application is not res judicata as it deals with a different cause of action, circumstances and issues from previous suits and applications preceding the execution of the impugned Deed.
15. in this regard, the plaintiffs relied on *Kibundi v Mukobwa & another* (Civil Suit No. 390 of 1992 (OS) [1993] eKLR); *Nyali Construction & Ele v Barclays Bank Limited* [2015] eKLR, *Super Drill*



- International Limited v Sidian Bank Limited (Civil Suit No. 310 of 2018) [2021] eKLR and Equip Agencies Limited v I&M Investment Bank Limited & 2 others (Civil Suit No. 87 of 2019) [2019] eKLR.
16. The plaintiffs again relied on *Giella v Cassman Brown and Company Limited* [1973] E. A. 358 and *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR to assert that they had met the conditions for granting an interlocutory injunction.
 17. The plaintiffs took the view, that exercise of statutory power of sale cannot proceed without the defendants issuing mandatory statutory notices. The plaintiffs relied on *Nyangilo Ochieng & another v Fanuel B. Ochieng & 2 others* [1996] eKLR, *Stephen Boro Gitiha v Nicholas Ruthiru Gatoto & 2 others* [2017] eKLR, *Michael Gitere & another v Kenya Commercial Bank Limited* [2018] eKLR, *East Africa Ventor Co. Ltd v Agricultural Finance Co-op Ltd & another* [2017] eKLR, *David Ngugi Ngaari v Kenya Commercial Bank Limited* [2015] eKLR and *Harbert Ponyochi Kunyobo v National Housing Corporation & another* [2019] eKLR on this point.
 18. The plaintiffs maintained that the amount claimed offends the in duplum rule in that interest on a non performing loan stops once the accrued interest and expenses equal the amount of the loan advanced. Reliance was placed on *Kenya Hotels Ltd vs Oriental Commercial Bank Ltd (Formerly Known as Delphis Bank Limited)* (CA No. 252 of 2009) [2019] eKLR and *Housing Finance Company of Kenya Limited v Scholarstica Nyaguthii Muturi & Another* (CA No. 153 of 2017) [2020] eKLR to support this this argument.
 19. The plaintiffs again relied on *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* (CA No. 282 of 2004) [2014] eKLR to argue that the Court ought to set aside the Deed as it is illegal, unconscionable and improvident.
 20. The plaintiffs cited the cases of *Gerishon Mbugua Kang'ethe v HFC Limited* (HCCC NO. 620 of 2015) [2016] eKLR; and *Beatrice Wathanu Waithaka v Kenya Women Micro-Finance Limited & another Eldoret* (Civil Case No. 20 of 2018) [2019] eKLR to argue that the Court may consider mitigating factors in granting an injunction.
 21. The plaintiffs stated that they were not able to settle the balance due to force majeure resulting from non-payment of Kshs. 50,000,000,000 owed to the 1st plaintiff by the Government (in the decree in HCCC Petition No. 159 of 2006, HCJ. R No. 55 of 2017 *Equip Agencies Limited v The Hon. Attorney General and other* and Kshs. 885,400,000 from Nairobi Metropolitan Services (NMS) for services they had rendered.
 22. Again referring to the force majeure situation, the plaintiffs argued that it was proof that that they would be able to settle the outstanding amount from the amount owing from the Government and Nairobi Metropolitan Services. The plaintiffs relied on *Pankaj Transport PVT Limited v SDV Transami Kenya Limited* (HCCC No. 162 of 2014) [2017] eKLR to argue that they had shown that a force majeure situation had arisen, even though they were not admitting the debt.
 23. The plaintiffs posited that they had a prima facie case because they signed the Deed under duress and undue influence. The plaintiffs relied on *Benson Omwenga Anjere v Kivati Nduto & another* [2013] eKLR on duress and *Ezekiel Osugo Angwenyi & another v National Industrial Credit Bank Limited* [2017] eKLR on undue influence.
 24. Citing the decisions in *James Titus Kisia v Guaranty Trust Bank (Kenya) Limited* (Mombasa Civil Suit No. 77 of 2016) [2018] eKLR and *Lucy Njoki Waithaka v Industrial & Commercial Development Corporation* (HCCC No. 321 of 2001), the plaintiffs asserted that they stand to suffer irreparable



loss that cannot be compensated by damages. This is because the suit properties are highly valued and located in prime areas and would be impossible to replace once sold.

25. The plaintiffs again relied on *Bomet Teachers Training College Limited v Bank of Africa Limited & another* (Bomet Civil Case No. E001 of 2020) [2021] eKLR that the balance of convenience tilts in safeguarding the properties.

Response

26. The 1st defendant opposed the application through a replying affidavit and written submissions. The 1st defendant asserted that the application is res judicata since the plaintiffs had previously filed similar applications seeking similar orders over the same properties which were however dismissed on 8th February 2019 and 24th September 2019 in NRB HCCC No. 382 of 2018 and Eldoret HCCC No. 19 of 2019 and by the Court of Appeal on 4th December 2020 in Civil Appeal (Application) No. 245 of 2019.
27. The 1st defendant relied on *Kenya Commercial Bank Limited v Muiiri Coffee Estate Limited & another* (SC Motion Nos. 42 and 43 of 2014) [2016] eKLR, *Pop-In (Kenya) Ltd & 3 others v Habib Bank AG Zurich* (CA No. 80 of 1988) [1990] eKLR and *Equip Agencies Limited & 3 others v I&M Bank Limited & another* (Nairobi HCCC No. E943 of 2021).
28. The 1st defendant further argued that pursuant to the Deed, the plaintiffs withdrew the suits and appeals arising from those rulings, namely, NRB Civil Appeal No. 259 of 2019 and ELD Civil Appeal No. 245 of 2019.
29. The 1st defendant asserted that the plaintiffs had defaulted in payments in 2017 and statutory notices were issued as required by law, seeking settlement of Kshs. 30,619,761.73 as at 2nd February 2018. The plaintiffs did not take step to settle the loan within the three months' period. A 40 days' notification of sale was then issued and served but again the plaintiffs did not settle the loan.
30. The 1st defendant instructed the 2nd defendant to sell the properties in exercise of the statutory power of sale. The 2nd defendant issued a 45-day redemption notice which was again served on the plaintiffs. The plaintiffs did not settle the outstanding balance of Kshs. 272,000,000 that had fallen due according to the Deed.
31. The plaintiffs sought more time to settle the outstanding amount. The 1st defendant's advocate wrote back notifying the plaintiffs that due to the default the 1st defendant was proceeding to exercise the statutory power of sale. The plaintiffs paid money to cater for interest of several months but failed to settle the outstanding balance. The 2nd respondent then issued a 14-day courtesy notice to the plaintiffs.
32. The 1st defendant argued that the plaintiffs had not met the threshold for granting an interlocutory injunction. They had not shown a prima facie case since they executed the Deed without coercion or duress and partly complied with the terms of the Deed.
33. The 1st defendant contended that the plaintiffs had acknowledged owing the money on several occasions and statutory notices were served. The 1st defendant relied on para 5 of the Deed to the effect that it was at liberty to exercise the accrued statutory power of sale over the properties in the event of default.
34. The 1st defendant relied on *National Bank of Kenya Limited v Juja Coffee Exporters Limited* (CA No. 39 of 2019) [2021] eKLR, that a dispute as to how much is outstanding cannot be the basis for granting an injunction.



35. The defendant again cited the decision in *Nguruman Limited v Jan Bonde Nielsen & 2 others* (Civil Appeal No. 77 of 2012) [2014] eKLR, *Andrew Muriuki Wanjohi v Equity Building Society & another* [2006] eKLR and *Andrew Ouko v Kenya Commercial Bank & 3 others* (HCCC No. 558 of 2004) [2005] eKLR, to argue that the plaintiffs will not suffer irreparable damage since the properties were given to secure a specific sum of money and their values are ascertainable thus damages are an adequate remedy since the 1st defendant is a stable bank capable of paying any award on damages.
36. The 1st defendant argued that the balance of convenience tilts in its favour since the outstanding amount continued to attract interest and the arrears could outstrip the value of the properties exposing it to substantial irrecoverable loss.
37. Relying on the decision in *Kenya Breweries Ltd & another v Washington O. Okeya* (CA No. 332 of 2000) [2002] eKLR, the 1st defendant posited that there are no special circumstances to warrant granting a mandatory injunction to render accounts in an interlocutory application. The 1st defendant faulted the plaintiffs for renegeing and seeking to reopen the Deed whose terms had been partially performed.

Determination

38. The plaintiffs' application is for an interlocutory injunction to restrain the 1st defendant from selling the suit properties to recover an outstanding loan amount pending determination of the suit.
39. The plaintiffs' argument is that the defendants did not serve mandatory statutory notices as required by law. The plaintiffs again argued that the Deed was executed under duress, material misrepresentation and undue influence.
40. The 1st defendant's answer to the plaintiffs' concerns is that the application is not only res judicata because similar applications had been previously dismissed by courts of competent jurisdiction, but also that the Deed was freely and willingly executed by parties.
41. The 1st defendant also argued that the plaintiffs partially performed the terms of that Deed, including withdrawing suits in this Court and the Court of Appeal that were pending before execution of the Deed. The plaintiffs further paid the first instalment of KShs. 68,000,0000, thus the application should be dismissed.

Res judicata

42. The core issue in this application is whether this Court should grant the interlocutory injunction sought. There is however the argument that this application is res judicata which the Court has to dispose of first.
43. The 1st defendant argued that the application is res judicata because the plaintiffs had filed similar applications seeking the same orders over the same properties and between the same parties being NRBI-HCCC No. 382 of 2019 and Eldoret-HCCC No. 19 of 2019. The applications were dismissed in rulings dated 8th February 2019 and 24th September 2019, respectively.
44. The plaintiffs on their part argued that the application is not res judicata because it deals with a different cause of action, circumstances and issues from previous suits and applications preceding the execution of the impugned Deed.



45. Section 7 of the *Civil Procedure Act* provides that:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

46. For the plea of res judicata to succeed, the party seeking to rely on res judicata must show that there was a previous suit raising the same issue or a substantially similar issue as in the present application; that the previous application was between the same parties or parties acting on their behalf and the issue in that application was finally determined by a competent court with jurisdiction to determine the issue.

47. In *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR, the Court of Appeal stated the public policy behind the doctrine of res judicata thus:

The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.

48. In *E. T. v Attorney General & another* (Petition No. 212 of 2011); [2012] eKLR, the court cautioned that:

(57) The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.

49. And in *Omondi v National Bank of Kenya Limited and others* [2001] eKLR, the court held that parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.

50. I have perused the replying affidavit which states that all notices were served as required by law. The plaintiffs then filed suit HCCC No. 382 of 2018 challenging the 1st defendant's invocation of the statutory power of sale over parcel No. 209/3477. The application dated 4th September 2018 was heard by Tuiyot J (as he then was) but was dismissed on 8th February 2019.

51. Another suit was filed in Eldoret, being HCCC No. 19 of 2019 challenging sale of Eldoret Municipality/Block 10/34. The application dated 3rd May 2019 was heard by Omondi J (as she then was) but was dismissed on 24th September 2019, thus confirming service of statutory notices.

52. I have also read the ruling of 8th February 2019 delivered in HCCC No. 382 of 2018. The application was filed by Achite Chandrakant Patel and Grishma Ashite Patel (the 2nd and 3rd plaintiffs herein)



- v Diamond Trust Bank (the 1st defendant herein). The application sought an injunction restraining the 1st defendant from selling parcel No. 209/3477 situate at Industrial Area, Nairobi. The court considered the application but dismissed it as lacking merit.
53. I have perused the pleadings in HCCC No. 19 of 2019 (Eldoret) Bio Corn Products Ltd (the 4th plaintiff herein) v Diamond Trust Bank Ltd (the 1st defendant herein). The application dated 3rd May 2019 sought an injunction restraining the 1st defendant from selling parcel No. Eldoret Municipality/Block 10/34. The Court (Omondi J as she then was) delivered a ruling dated 24th September dismissing that application with costs.
 54. The plaintiffs were aggrieved and filed an application in the Court of Appeal (Civil Appeal (Application) No. 245 of 2019 which was also dismissed with costs on 4th December 2020.
 55. The parties in HCCC No. 382 of 2019 are the 2nd and 3rd plaintiff before this Court. The defendant in that case is the 1st defendant in this court and the issue before that court was an injunction to stop the 1st respondent from selling one of the properties in this suit. That application was dismissed.
 56. The Eldoret suit and application (HCCC No. 19 of 2019) was also for an injunction to stop the 1st defendant from selling one of the properties in this suit, namely; parcel No. Eldoret Municipality/Block 10/34. The application was by Bio Corn Products (EPZ) Ltd, the 4th plaintiff herein and was against the 1st defendant herein. The application was also dismissed on 24th September 2019. An application to the Court of Appeal for injunction was again dismissed by that Court on 4th December 2020.
 57. Those applications, just like this application, were essentially challenging the 1st defendant's right to exercise its statutory power of sale over the two parcels of land that are the subject of this application. The issues in those applications were similar to what is before this court now: the sale of the two parcels of land.
 58. The applications were by the same plaintiffs (except the 1st plaintiff herein) who are the parties before this court and were against the same 1st defendant in this court. Two of the applications were determined by courts of competent and of concurrent jurisdiction to this court. One other application was determined by the Court of Appeal.
 59. There can be no argument, therefore, that the main issue in the previous applications and the issue before this court is the same: an injunction to restrain the 1st defendant from selling the suit properties.
 60. There is also no doubt that parties in the previous applications are the same parties in the present application. Addition of the Equip Agencies Ltd to make the number higher does not make the application less res judicata. The principle remains that the suit relates to issues that were determined between the parties by courts of competent jurisdiction to determine those issues.
 61. The reason for selling the properties then and now is the plaintiffs' default in meeting their contractual obligations. In that regard, it is not available for the plaintiffs to argue that because there is another party or a dispute on the execution of the Deed, that makes the issue in this application different from what was before court in the previous applications.
 62. Section 7 of the *Civil Procedure Act* is clear that a court should not try a suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties and was finally determined by a court of competent jurisdiction.



63. The record of the previous applications shows that the issue in those applications and what is before this court is the same, against the same parties and over the same subject matter. The application before this court is, without a doubt, *res judicata*.

The Deed

64. The plaintiffs however argued that the issue before this court is different because it relates to the Deed which was not an issue in the previous applications.
65. The 1st respondent argued that the Deed was willingly executed between the parties on 22nd April 2021 following several discussions between the parties. After execution of the Deed, the plaintiffs acknowledged the statutory notices that had been served and the outstanding amount of Kshs. 340,000,000. The plaintiffs then paid Kshs. 68,000,000 on 5th May 2021 pursuant to that Deed and withdrew the suits pending both in this court and the Court of Appeal.
66. I have perused the Deed dated 22nd April 2021 executed between Equip Agencies Ltd, Bio Corn Products (EPZ) Ltd, Ashite Chandrakant Patel and Grisma Ashite Patel the 1st, 2nd, 3rd and 4th plaintiffs on the one hand and Diamond Trust Bank Ltd, the 1st defendant on the other.
67. The Deed provided that on execution and not later than 15 days thereafter, the plaintiffs were to pay Kshs 68 million which the plaintiffs did. Consents were also to be filed in various courts settling the cases that were then pending before those courts. This was done too. The consents were signed by respective parties' advocates and were all dated 21st July 2021 but were filed on different dates in the various cases.
68. In HCCC 382 of 2018, judgment was entered in terms of the Deed. A similar consent was recorded in HCCC 19 of 2019. In CA No. 245 of 2019, a consent was recorded settling the matter with no order as to costs. A similar consent was recorded in CA No. 258 of 2019.
69. Another term in the Deed was that after paying Kshs 68,000,000, the balance of Kshs. 272,000,000 was to be paid in 120 days from the date of execution of the Deed. In default, outstanding balance would attract interest at 14% per annum. The 1st defendant would also be at liberty to recover the amount by exercising the accrued statutory power of sale over the two properties.
70. Clause 10 of the Deed stated that the Deed contained the whole agreement and understanding between the parties relating to the transactions contemplated in the Deed and superseded all previous agreements between the parties on such matters.
71. The Deed having been adopted as a judgment of the court by consent of parties in HCCC Nos. 382 of 2018 and 19 of 2019, the 1st defendant obtained a judgment against the plaintiffs in terms of the Deed. Execution of that judgment was to be done in accordance with the terms of that Deed.
72. The plaintiffs acknowledged in the Deed that the amount owing was Kshs 272,000,000 which would attract interest at 14% in case of default. The Deed also allowed the 1st defendant to recover the outstanding amount by exercising the accrued statutory power of sale.
73. The plaintiffs' argument that statutory notices were not served or that there was violation of the *duplume* rule would not have basis given that the 1st defendant was executing a judgment of the court obtained by consent of the parties and which could only be executed in terms of the Deed. The plaintiffs' failure to comply with the terms of the Deed availed the 1st defendant the right to move to sell the property as was allowed by the Deed.



74. Flowing from what I have observed above, even if the application was not res judicata, it would not succeed on merit. The plaintiffs have not shown that they could surmount the terms of the Deed. The Deed is not a new contract but a judgment of the court to be executed as parties agreed under the Deed.
75. The plaintiffs could not show a prima facie case that would succeed or that they would suffer irreparable loss that could not be compensated by damages, given their clear undertaking to be bound by the terms of the Deed which superseded all other previous agreements between the parties.
76. The plaintiffs executed the Deed conscious of the fact that the 1st defendant's statutory power of sale had accrued and would be exercised in case of default. The Deed was also a result of the plaintiffs' failure to convince the courts (at this level and the Appellate level) that the 1st defendant had in any way violated the law relating to exercise of the statutory power of sale then.

Conclusion

77. Having considered the application, the response and arguments by parties and upon perusing rulings in the previous applications, the conclusion I come to is that this application is res judicata. The previous applications were between the same parties, over the same subject matter as that raised in this application. The applications were determined by competent courts with jurisdiction to determine the issue in those applications.
78. The Deed having been adopted as a judgment of the court, became a decree to be executed as parties had agreed. The application before this court is not an application to set aside the judgment obtained by consent of the parties when the consents were filed in court.

Disposal

79. The application is declined and dismissed with costs

DATED SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER 2023

E C MWITA

JUDGE

