



**Welcap Works Limited v Equity Bank of Kenya Limited (Commercial Civil Case E736 of 2021) [2021] KEHC 393 (KLR) (Commercial and Tax) (16 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 393 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL CASE E736 OF 2021**

**DAS MAJANJA, J**

**DECEMBER 16, 2021**

**BETWEEN**

**WELCAP WORKS LIMITED ..... PLAINTIFF**

**AND**

**EQUITY BANK OF KENYA LIMITED ..... DEFENDANT**

**RULING**

1. On 10<sup>th</sup> August 2021, I granted an injunction in favour of the Plaintiff on the following terms:
  - (a) The Defendant be and is hereby restrained from selling or otherwise disposing of the suit properties in exercise of its statutory power of sale being; KIAMBU/MUNICIPALITY 5/ (KIAMUMBI) 3284, MAISONETTE NO. 6 ON LR NO. 1//446, BRISTOL COURT, NGONG ROAD, NAIVASHA/MWICHIRINGIRI BLOCK 4/5898, MIKINDANI BLOCK OF FLATS, 9 UNITS pending the hearing and determination of the application dated 5th August 2021 or further orders of the court on terms hereunder.
  - (b) The Plaintiff shall pay the Defendant KES. 500,000.00 being the costs of the application and the scheduled auction within 7 days from the date hereof and KES 10,000,000.00 within 30 days from the date of hereof on account of the facilities. Thereafter the Plaintiff shall continue to pay monthly installments in accordance with Letter of Offer under the applicable facility.
  - (c) In the meantime, and without prejudice to the right of the Bank to receive it monthly installments, the Bank shall give the Plaintiff and Mr Maina an opportunity to sell the suit properties by private treaty.



(d) In default of any term aforesaid, the injunction granted herein shall stand discharged without further orders of the court and the Defendant shall at liberty to exercise its statutory power of sale.

(e) The matter shall be mentioned on 01st October 2021 for further orders/directions.

2. The Bank wishes to exercise its statutory power of sale while the Plaintiff opposes the proposed sale on the ground that it has complied with the terms of the order granting the injunction. In order to ascertain the facts, I directed the parties to file affidavits to support their contentions.
3. The Plaintiff filed an affidavit of its director Peter Mugambi Maina sworn on 14<sup>th</sup> December 2021. In that affidavit he states that he paid KES. 500,000.00 within 7 days and KES. 10,000,000.00 which was payable within 30 days as there was a rider to the orders that the Bank gives him an opportunity of sell the suit properties by private treaty. Mr Maina states that in regard he engaged the Bank which allowed him to dispose of two properties by private treaty; Mikindani Block of Flats, 9 units for KES. 20,000,000.00 and Naivasha/Mwichiringiri Block 4/5898 for KES. 5,000,000.00 and whose proceeds were to be channelled through the Bank. As he was able to secure two purchasers, he deposited KES. 2,500,000.00 with the Bank being the 10% deposit of the purchase price. Mr Maina further states that he agreed with the Bank that he would continue to service the Quality Bitumen Loan account at KES. 500,000.00 per month and he has done so for the months of August, September, October and November 2021.
4. The Bank relied on the affidavit of Roy Akubu, its Senior Legal Manager, sworn on 14<sup>th</sup> December 2021. He depones that while the Plaintiff has paid KES. 500,000.00, it has not remitted KES. 10,000,000.00. He accepts that the Plaintiff presented two sale agreements for the two properties as stated. He however states that despite being given an opportunity to comply with the orders of 10<sup>th</sup> August 2021, the Plaintiff has not complied as it has not been paying monthly instalments.
5. The Bank argues that the Plaintiff is underserving of any orders as its director has filed other suits in relation to the subject of this suit and has obtained injunctive relief without disclosing to this court the existence of the parallel proceedings namely; *HC COMM No. 209 of 2019, Peter Maina Mugambi v Equity Bank Kenya Limited* and *HC COMM No. 141 of 2019 Quality Bitumen Products Ltd v Equity Bank Kenya Limited*.
6. In the ruling of 10<sup>th</sup> August 2021, I expressed the following view of the various suit filed in relation to the subject properties;

As I understand, the Plaintiff and its director, the said Peter Mugambi Maina is pleading for more time to re-organise its affairs in order to consolidate and pay off the facilities. While I am inclined to give the Plaintiff an opportunity to make its case at the appropriate time, my decision is influenced by several factors. First, the Plaintiff is not the registered owner of the suit properties, they are owned by Peter Mugambi Maina and not the Plaintiff. Second, Peter Mugambi Maina has filed another suit HC ML. NO. 209/2019, Peter Mugambi Maina v Equity Bank in which he sought and was granted an injunction restraining the Bank from selling some of the suit properties. There is an argument whether the injunction granted has lapsed by operation of law or is still in force pending the hearing and determination of the suit. Third, there is also a suit concerning a related company in which he is a director HC ML No. 141/2019, Quality Bitumen Products Ltd v Equity Bank Limited pending. Mr Gachie, counsel for the Plaintiff, argues that Mr Maina, as a common director needs time to dispose of his personal properties in order to resolve the Plaintiff's indebtedness.



7. Apart from stating the position regarding the orders, it is clear from the aforesaid ruling, that the court was merely granting the Peter Mugambi Maina, who had sued the Bank in another case, accommodation to resolve his debts as the Plaintiff herein, Welcap Works Limited does not, in reality, have the standing to agitate this suit on behalf of the Mr Maina. This is clear from the sale agreements which show that Mr Maina is the vendor of the subject properties.
8. That notwithstanding, the question I am called upon to answer is whether there has been default in the orders I issued on 10<sup>th</sup> August 2020. Although the Plaintiff states that he paid KES. 500,000.00 being the costs of the aborted auction, it has not paid KES. 10,000,000.00 within 30 days of the order. I have looked at the depositions and annexures and I do not see any agreement by the Bank to accept the proceeds of the sale as a substitute for the KES. 10,000,000.00 which condition was independent of the sale by private treaty. Further, the sale by private treaty was without prejudice to the Bank exercising its statutory power of sale. I also note that the 90-day completion period for the two properties which were put up for sale has now passed.
9. In conclusion, I decline to issue any injunction in view of the default. In addition and for reasons I have stated, the application dated 5<sup>th</sup> August 2021 is now dismissed with costs to the Defendant.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF DECEMBER 2021.**

**D. S. MAJANJA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Mr Mwanza instructed by Gachie Mwanza and Company Advocates for the Plaintiff.

Ms Wamuyu instructed by Igeria and Ngugi Advocates for Defendant.

