



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO. 92 OF 2007**

**MECHANICAL ENGINEERING PLANT LTD. ::::::::::::::: 1<sup>ST</sup> PLAINTIFF/APPLICANT**

**ERNEST MUNGAI KAMAU ::::::::::::::: 2<sup>ND</sup> PLAINTIFF/APPLICANT**

**FLORENCE NJERI MUNGAI ::::::::::::::: 3<sup>RD</sup> PLAINTIFF/APPLICANT**

**- VERSUS -**

**STANDARD CHARTERED BANK LTD. :::::::::::::::DEFENDANT/RESPONDENT**

**R U L I N G**

1. Before the court is the Notice of Motion application dated **20<sup>th</sup> January 2011** filed under **Section 1, 1A, 3A of the Civil Procedure Act**. The application seeks the following orders:-
  1. *That this application be certified urgent and service be dispensed with in the first instance.*
  2. *That the auction slated for 31<sup>st</sup> January 2011 be stayed pending the hearing and determination of this application inter-partes and or further orders of the court.*
  3. *That the Plaintiff be allowed to liquidate the loan account with the Defendant by way of equal quarterly installments until payment in full.*
  4. *That in the alternative the Plaintiffs be allowed to sell one of the securities by private treaty and settle the loan account.*
  5. *That the costs be provided for.*
2. The application is premised on the grounds set out therein and on the affidavit of **ERNEST MUNGAI KAMAU** dated **20<sup>th</sup> January 2011** with annexures thereto.
3. The application is opposed through a Replying Affidavit sworn by **JOSEPHINE NGUNJIRI**, described as the Account Manager of the Applicant's account with the Respondent Bank.
4. The brief history of the application is that by a Plaint filed in court on 19<sup>th</sup> February 2007 the Plaintiffs sought various reliefs against the Defendant, including injunction against the sale of the suit properties named in the Plaint. Simultaneously filed with the suit was a Chamber Summons application of the same date seeking temporary injunctive orders against the sale of the suit properly until the determination of the application or until further orders from the court. That application was heard *inter-partes* before Justice Azangalala J. (as he then was). By his Ruling

dated 28<sup>th</sup> February 2008 the Judge dismissed the Plaintiff's application.

5. On 7<sup>th</sup> May, the court also dismissed the Plaintiff's suit under Order XVI Rule 2 (1) of the Civil Procedure Rules for want of prosecution. However the suit was reinstated on 16<sup>th</sup> December 2010 by Justice Njagi upon application by the Plaintiff.
6. Little appears to have taken place until the current application was filed seeking the said orders. From this application we now know that the Respondent bank had scheduled a public auction on 31<sup>st</sup> January 2011 to sell the suit property arising from the dismissal of the Plaintiff's application aforesaid.
7. The Respondent opposes this application on grounds *inter-a-alia* that the application is *res-judicata* having been dismissed by Justice Azangalala. To this the Applicant replies that what is before the court now is completely different from what was before Justice Azangalala and therefore the issue of *res-judicata* does not arise.
8. Parties made oral submissions before Honourable Justice Njagi on 27<sup>th</sup> January 2011, and I have been called upon to write a Ruling based on those submissions and on the affidavits on record.
9. I have carefully considered those submissions and the application. For me there are only 2 issues to address.
  - *Whether the application is res-judicata;*
  - *Whether the Applicant can be allowed to liquidate the claim by installments as requested.*
10. On the issue of whether or not the application is *res-judicata* it is clear to me that although the current application is cauched to read and appear as though the application is mainly seeking leave to pay the loan by installment, however, to the extent that prayer (b) of the application seeks to stop or stay the auction dated 31<sup>st</sup> January 2011 pending the hearing of the application or further orders from this court, the application is substantially the same as the Chamber Summons dated 15<sup>th</sup> February 2007 and is *res-judicata* for all intents and purposes. I therefore agree with the Respondent's submissions that the current application is *res-judicata*. It appears to seek orders which had already been dismissed by this court and no appeal has been preferred against the same.
11. On the second issue whether or not the Plaintiff can be allowed to repay the loan by installment, my simple answer is that the Applicant has not shown that he has presented any payment to the Respondent which the Respondent has rejected. An Applicant who wishes to settle a decree by installment only needs to show good faith by tendering what he proposes. We are now in the 3<sup>rd</sup> year since the Applicant made the proposal to pay by installment. If today there was any evidence of substantial payment by the Applicant there would be on record a demonstrated goodwill which could move this court to act in favour of the Applicant. There is nothing on record. Indeed the Plaintiff's have not even stated how much they wish to pay per month by way of installment. I therefore reject this request as no good faith has been demonstrated by the Applicants in the last 3 years since they filed this application.
12. Finally this court notes that the Applicants have severally admitted their indebtedness to the Respondent. There is no doubt that they owe money to the Respondent. It is also not in doubt that the Respondent is entitled to exercise its right to realize securities which were freely given to it by the Applicants under the lawful charge instruments. This court has no right to fetter this right of the Respondent to realize its security. Neither will this court purport to rewrite the terms of the Chargers to impose repayment terms by installment or otherwise when the Applicants have already freely offered their properties as securities for the loans.
13. In the case of **LABELLE INTERNATIONAL LTD. AND ANOTHER – VS – FIDELITY COMMERCIAL BANK & ANOTHER, CIVIL CASE NO. 786 OF 2002**, the court re-stated the now long established legal rule that, **“ . . . when part of amount claimed is admitted or proved to be due, a Chargor cannot be restrained by an injunction.”** See also **HABIB BANK -**

**ATTORNEY GENERAL ZURICH – VS – POP IN KENYA LTD. LLR 3069 (CAK).**

14. For the foregoing reasons the Notice of Motion application dated 20<sup>th</sup> January 2011 fails in its entirety and is dismissed with costs to the Respondent.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 30<sup>TH</sup> DAY OF MAY 2013**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

*No appearance for the Plaintiff/Applicant*

*No appearance for the Defendant/Respondent*

*Teresia – Court Clerk*