



**Bomett (As administrator of the Estate of Eric Bomett (Deceased) v  
Post Bank Credit Ltd (In Liquidation) (Environment & Land Case  
137 of 2018) [2023] KEELC 15950 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15950 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 137 OF 2018**

**A OMBWAYO, J**

**MARCH 2, 2023**

**BETWEEN**

**NANCY JERUTO BOMETT (AS ADMINISTRATOR OF THE ESTATE OF ERIC  
BOMETT (DECEASED)) ..... PLAINTIFF**

**AND**

**POST BANK CREDIT LTD (IN LIQUIDATION) ..... DEFENDANT**

**RULING**

1. The Plaintiff vide the application dated August 3, 2022 and filed on the same day seeks the following orders;
  - a. Spent
  - b. Spent
  - c. That the intended sale of the suit land LR No 10302/3 or LR No 10302/02 set for September 6, 2022 (or any other date), whether by the defendant itself or by its agent George Njoroge Muiruri T/A Philips International Auctioneers or any other auctioneers or agents, servants or representatives of the defendant, be and is hereby cancelled and prohibited.
  - d. That the defendant by itself, its servants, agents, representatives including George Njoroge Muiruri T/A Philips International Auctioneers or any other auctioneers and anyone else acting through or under the defendant, be and are hereby restrained by order of injunction from selling, offering or advertising for sale, conducting or completing the intended sale set for September 6, 2022 or any other date, and from transferring, alienating, entering into, remaining on, wasting, or in any other manner whatsoever interfering with the plaintiff's ownership, possession and use of the suit land LR No 10302/3 and/or LR No 10302/02



situate in Rongai District, Nakuru County-unless and except as may be expressly authorised and/or directed by this court.

- e. That costs of this application be borne by the defendant.
2. The grounds on the face of the application are that the defendant tried to execute the consent order without leave of court and without issuing a Notice to Show Cause. That the defendant is seeking to recover Kshs 22.053 million which is more than the agreed amount of Kshs 11.4 million from the initial loan of kshs. 3 million. That the said claim is unlawful and is in contravention of the in duplum rule. That the defendant is seeking to exercise chargee's statutory power of sale in respect to land that was not charged which is different from the suit land herein.
  3. That the property the defendant is attempting to sell is 1,600 acres whereas the charged land which the parties had consented to be sold is a different parcel of land measuring 400 acres. That the parcel of land the defendant is trying to sell is worth Kshs One billion towards the recovery of a debt of Kshs 11.4 million and has declined to excise a portion of the property and sell it. That the defendant is attempting to exercise its statutory power of sale without issuing the chargor with the requisite statutory notices and without any valuation of the charged land.
  4. The application is supported by the affidavit of the plaintiff sworn on August 3, 2022. She averred that she instituted the present suit as an administrator of the estate of her late father Eric Kibet Bomett. That the suit was concluded vide the consent letter dated July 15, 2019 and adopted as an order of the court on February 14, 2020. The consent order set the final debt at Kshs 11.4 million to be paid within ninety days and that upon payment, the defendant was to discharge the charged land no LR No 10302/3. The consent order provided that in default, either party would be at liberty to move the court appropriately for any further orders. That the suit property LR No 10302/3 was charged to the defendant and measures around 400 acres. She deposed that she defaulted in settling the consent judgement due to lack of liquidity of the estate and wrangles that caused hiccups in the administration of the estate.
  5. She further deposed that in July 2022, she got two notices from Philips International Auctioneers through her gate which were a 45 days redemption Notice and an undated Notification of Sale of Immovable property which did not refer to the charged land but made reference to LR No 10302/02 which measures 652.4 Ha. That the said notices are unlawful since they do not refer to the charged property and that the defendant has not issued notices with respect to the charged property. That the said notices quote an outstanding debt of Kshs 22,043,017.60 which is erroneous as the consent had set the amount owing to Kshs 11.4 million.
  6. She deposed that she is advised by her advocates on record that the redemption notice and notification of sale were improper as they were issued concurrently as opposed to consecutively. That no valuation has been undertaken prior to the intended sale by the defendant.
  7. She reiterated the grounds on the face of the application and deposed that in October 2020, the defendant served her with a three months statutory notice dated October 16, 2020 for sale of the charged property LR No 10302/3 and that later she was served with a further Notice of Sale dated January 27, 2021 which quoted the outstanding debt to be Kshs 22,043,017.30 instead of Kshs 11.4 million. That no subsequent Redemption Notice or Auctioneer's Notification of Sale was issued in respect to the charged property which is LR No 10302/3.
  8. She also deposed that she engaged counsel for the defendant for them to excise 30 acres from the suit land for it to be sold through private treaty to be used to utilize the outstanding debt of Kshs 11.4 Million but the defendant rejected the said proposal. That owing to disputes in Eric Bomett's



- estate, she has been removed as an administrator of the estate. That the High Court in Nakuru Succession Cause No 488 of 2006 vide the ruling dated May 23, 2022 revoked her Grant of Letters of Administration and temporarily appointed one Nicholas Kibet as an administrator.
9. She deposed that she applied for reinstatement of the grant of letters of administration which application is pending before the court. That even without the grant of letters of administration, she still has the locus standi as the sole plaintiff herein and the sole beneficiary of the estate of her late father Eric Kibet Bomett (Deceased).
  10. She then sought the court to stop the defendant from the intended sale of the suit land or any other land towards recovery of the debt herein unless allowed to do so by the specific order or directions of the court.
  11. In response to the application, the defendant filed a replying affidavit sworn on February 13, 2023 by Stanley M Milimu and filed on February 14, 2023.
  12. He deposed that the plaintiff's application was triggered by the advertisement for sale of the suit property LR No 10302/02 also referred to as LR No 10302/3 by public auction that had been scheduled for September 6, 2022 by M/s Philips International Auctioneers. That the intended sale had been preceded by the issuance of the relevant statutory notices. The statutory notices included the following; three months Statutory Notice dated October 18, 2020, forty days Statutory Notice dated August 27, 2021, 45 days redemption notice by M/s Philips International Auctioneers dated June 29, 2022 and the Notification of Sale of Immovable Property by the said auctioneers.
  13. That the defendant is not executing the consent order but is exercising its statutory power of sale as exhibited by the various notices. That he is advised by his advocates on record that the exercise of a Chargee's statutory power of sale is a process outside of the purview of this court as it cannot rewrite the contract between the two parties. He deposed that the plaintiff has not denied that the suit property was charged to the defendant and it is therefore entitled to exercise its statutory power of sale. That the plaintiff does not deny service of the various statutory notices. That the defendant had the suit property valued and a valuation report dated November 29, 2021 was prepared and it showed the market value of the property at Kshs 780 million and the forced sale value at Kshs 585 million. That the plaintiff did not make any payments after the consent was entered into and that the balance of convenience tilts in favour of the defendant as the loan has remained un serviced.
  14. The plaintiff filed her submissions dated January 23, 2023 on January 24, 2023 while the defendant did not file any submissions.
  15. The plaintiff in her submissions submitted that the court has jurisdiction to determine the pending application and relied on the cases of *Owners and Masters of the Motor Vessel 'Joey' versus Steve B [2007] eKLR* and *Kiplangat Korir vs Dennis Kipngeno Mutai [2006] eKLR* in support of her arguments.
  16. The plaintiff also relied on Section 34(1) of the *Civil Procedure Act* and the case of *Lydia Nyambura Mbugua vs Diamond Trust Bank Kenya Ltd & another [2018] eKLR* and reiterated that the court has jurisdiction to deal with disputes involving charges to land and Chargee's exercise of statutory power of sale.

### **Analysis and Determination**

17. After considering the application, replying affidavit and the submissions, the issues that arise for determination are whether the plaintiff has the locus standi to institute the present application and whether she is entitled to the orders sought in the application.



18. In her supporting affidavit, the plaintiff averred that she is no longer an administrator of the estate of the late Eric Kibet Bomett as the High Court in succession cause No 488 of 2006 had revoked her grant of letters of Administration.
19. Attached to the supporting affidavit of the plaintiff is a ruling that was delivered by the High Court at Nakuru in Succession Cause number 488 of 2006 in the matter of the estate of the late Erick Kibe Bomett. The ruling is indicated to be 15 pages but the plaintiff attached only five pages of the ruling. In the said ruling the court revoked the grant issued to the plaintiff.
20. The court in the case of *Isaya Masira Momanyi v Daniel Omwoyo & another [2017] eKLR* held as follows:

' With respect I do not agree that failure to obtain a grant of letters of administration to a deceased estate to enable one to acquire capacity to file a suit on behalf of the deceased estate would be a mere procedural technicality. The law is express that a deceased estate can only be represented by a person who is duly authorized to do so.'
21. The plaintiff instituted the present matter as the administrator of the estate of Eric Kibet Bomett and since the said grant has been revoked, it is my view that the plaintiff no longer has locus standi to represent the said estate and file the application under consideration.
22. Given the said finding, I will not address the other issue identified for determination. Consequently, the plaintiff's application dated August 3, 2022 is struck out with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AND VIA EMAIL ON 2<sup>ND</sup> MARCH 2023.**

**A.O. OMBWAYO**

**JUDGE**

