



Nyaga & another v Bank of Africa Kenya Limited (Environment & Land Case E044 of 2023) [2025] KEELC 3932 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3932 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E044 OF 2023**

**YM ANGIMA, J
MAY 22, 2025**

BETWEEN

HELLEN WANJIRU NYAGA 1ST PLAINTIFF

PETER NYAGA NJOKA 2ND PLAINTIFF

AND

BANK OF AFRICA KENYA LIMITED DEFENDANT

RULING

A. Introduction

1. By a plaint dated 30.11.2023 the plaintiffs sued the defendant seeking the following reliefs;
 - a. A declaration that the agreement dated 01.02.2022 for the sale of the suit premises by the defendant to the plaintiffs was procured by fraudulent misrepresentation and non-disclosure of material facts on the part of the defendant and is null and void and that therefore the plaintiffs are entitled to the refund of the purchase price.
 - b. A declaration that the transfer by chargee executed by the defendant's attorneys over the suit premises is false and its registration would constitute offences under Section 157 of the Land Act, 2012 and cannot therefore be registered.
 - c. A declaration that the defendant materially breached its warranties and contractual obligation in the agreement thereby rendering the agreement null and void and entitling the plaintiffs to damages for breach of contract.
 - d. Judgment be entered for the plaintiffs against the defendant in the sum of Kshs. 45,000,000/ = together with interest from 15.2.2022 up to the date of payment at 14% per annum compounded monthly.



- e. Punitive and aggravated damages at 20% of the purchase price together with interest thereon from the date of judgment until payment in full.
 - f. Damages for breach of contract.
 - g. Costs of and incidental to the suit.
2. The plaintiffs pleaded that on 01.02.2022 the defendant, through fraudulent misrepresentation, induced them to enter into sale agreement for the sale of Title No. Mombasa XVII/586 (the suit property) for a sum of Kshs. 45,000,000/=. It was pleaded that whereas the defendant purported to sell the suit property by private treaty it subsequently advertised the same for public auction pursuant to purported exercise of its statutory power of sale.
 3. It was the plaintiffs' case that the despite paying the full purchase price of Kshs. 45 million the defendant was unable to transfer or hand possession of the suit property to them. The plaintiffs pleaded that they subsequently discovered that the suit property was the subject of various civil suits and court orders whose existence the defendant had failed to disclose at the material time. It was further pleaded that any dealings with the suit property had been restricted by an encumbrance registered at the instance of the Assets Recovery Agency (ARA).

B. Defendant's response to the suit

4. The record shows that the defendant filed a notice of motion dated 10.01.2024 under Sections 1A, 1B, and 3A of the *Civil Procedure Act* (Cap 21), Section 6 of the *Arbitration Act*, Order 2 Rule 15 of the *Civil Procedure Rules* and all enabling provisions of the law seeking the following orders;
 - a. Spent
 - b. This honourable court be pleased to strike out the plaint dated 30.1.2023.
 - c. In the alternative, and without prejudice to prayer 2 above, there be a stay of proceeding in this suit pending the resolution of the dispute by the arbitral tribunal.
 - d. The costs of this application and the entire suit be borne by the plaintiffs.
5. The application was based on the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Victor Keitany on even date. It was contended that the court had no jurisdiction to entertain the suit since there was a binding arbitration agreement among the parties for referral of the dispute to arbitration under the *Arbitration Act* 1995.
6. The defendant further contended that the suit was res judicata since the plaintiffs had previously filed a civil suit against it in Mombasa HCCC No 50 of 2022 (the previous suit) seeking similar reliefs which was ultimately dismissed for want of prosecution on 26.07.2023. It was denied that the existence of the suits referred to by the plaintiffs prevented the registration of the transfer of the suit property to the plaintiffs. It was also pleaded that the restriction over the suit property by ARA was a matter beyond the control of the bank and that ARA had eventually requested the Chief Land Registrar to lift the restriction.

C. Plaintiffs' response

7. The plaintiffs responded by filing a notice of preliminary objection dated 23.01.2023 and a replying affidavit sworn by Hellen Wanjiru Nyaga on 17.01.2024. By their preliminary objection, the plaintiffs contended that the defendant had taken a step in the proceedings by seeking the striking out of the suit hence a stay of proceedings and referral to arbitration were not available to the defendant. It was



further contended that the prayer for striking out under Order 2 Rule 15 (1) (a) was incompetent in so far as it was supported by an affidavit in violation of Order 2 Rule 15 (2) of the Rules.

8. By their replying affidavit, the plaintiffs reiterated that this court had jurisdiction to entertain the suit under Article 162 (2)(b) of the Constitution and the Environment and Land Court Act. It was contended that there was no banker-customer relationship; no lender-borrower relationship; and chargee-chargeor relationship between the parties hence the High Court had no jurisdiction over the dispute.
9. It was the plaintiffs' case that the sale agreement among the parties dated 01.02.2022 was repudiated by the defendant the moment it advertised the suit property for sale by public auction and was further invalidated by the court orders made in Mombasa ELC NO. E051 of 2022 to which the defendant was privy. The plaintiffs denied that the instant suit was res judicata and contended that the previous suit was not heard on merit or before a court of competent jurisdiction.
10. The plaintiffs also reiterated the grounds set out in their notice of preliminary objection and maintained that by seeking an order striking out the suit the defendant had in effect taken a step in the proceedings and that the application was fatally defective for violating Order 2 Rule 15 (2) of the Rules.

D. Plaintiffs' application for summary judgment

11. By a notice of motion dated 17.01.2024 expressed to be grounded upon Articles 57 and 159 (2) (b) of the Constitution, Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act (Cap 21) and Order 36 Rule 1 of the Civil Procedure Rules, the plaintiffs applied for summary judgment against the defendant in the sum of Kshs. 45,000,000/= together with compound interest of 14% per annum.
12. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Hellen Wanjiru Nyaga on even date. The application was based on the very grounds set out in the plaint and the affidavit sworn by the plaintiff in opposition to the defendant's application dated 10.01.2024.
13. The plaintiffs were aggrieved because although they had paid the full purchase price they have been unable to obtain a transfer and possession of the suit property or to obtain a refund of the purchase price. It was their contention that the defendant had no reasonable or plausible defence to the action and that it should not be allowed to keep both the suit property and the purchase price.

E. Defendant's response to the application

14. The defendant filed a replying affidavit sworn by Victor Keitany on 11.03.2024 in opposition to the application for summary judgment. It was the defendant's case that the various civil suits referred to by the plaintiffs did not hinder registration of the transfer and that it was the plaintiffs' default in lodging the transfer documents expeditiously which delayed the process. The defendant contended that there were several triable issues arising from the dealings among the parties which should be determined by the arbitral tribunal.
15. The material on record also shows that the defendant filed a further affidavit dated 11.03.2024 and a supplementary affidavit sworn by Victor Keitany on 19.03.2024. The further affidavit simply repeated the same issues raised in the earlier affidavits whereas the supplementary affidavit stated that a sole arbitrator had already been appointed by the Nairobi Centre for International Arbitration.
16. In the replying affidavit the defendant listed the following as the matters it considered to raise triable issues;



- a. Whether the bank had capacity to sell and transfer the property to the plaintiffs.
- b. Whether the lack of delivery of vacant possession was the reason for the delay and transfer of the property to plaintiffs.
- c. Whether the delay in transfer of the property to the plaintiffs was occasioned by the restriction.
- d. Whether the bank forwarded all completion document to the plaintiffs for registration.
- e. Whether the plaintiffs delayed in lodging the completion documents for registration of the property.
- f. Whether the property was purchased through private treaty or public auction.
- g. Whether the various court cases filed against the bank breached the warranties in the agreement.
- h. Whether the plaintiffs are entitled to any punitive and aggravated damages.

F. Directions on submissions

17. When the matter was listed for directions, it was directed that the two applications shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the plaintiff filed submissions dated 02.04.2024 whereas the defendant's submissions were dated 17.05.2024.

G. Issues for determination

18. The court has perused the two applications on record, the responses thereto, the plaintiffs' notice of preliminary objection as well as the material on record. The court is of the view that the following are the main issues which are for determination herein;
 - a. Whether the defendant is entitled to the orders sought in the notice of motion dated 10.01.2024.
 - b. Whether the plaintiffs are entitled to the orders sought in the notice of motion dated 17.01.2024.
 - c. Who shall bear costs of the applications.

H. Analysis and determination

a. Whether the defendant is entitled to the orders sought in the notice of motion dated 10.01.2024

19. The first order sought in the motion is an order for striking out the suit on the basis that the court had no jurisdiction; that there was a binding arbitration clause among the parties; and that the suit was res judicata. On the question of jurisdiction, the court is satisfied on the basis of the material on record that the plaintiffs are not borrowers or chargors who are seeking to challenge the bank's exercise of its statutory power of sale. The court agrees with the plaintiffs that there was no lender - borrower relationship among the parties in relation to the sale transaction the subject of the suit. As such, the court finds and holds that the case of *Co-operative Bank of Kenya Ltd vs Patrick Kang'ethe Njuguna & 5 Others* [2017] eKLR which the defendant relied upon to be clearly distinguishable.
20. The court has considered the defendant's contention that the instant suit is res judicata on account of the dismissal of Mombasa HCCC No. 50 of 2022 for want of prosecution. It is evident that the parties



in that suit are the same parties as those in the instant suit. The matters in issue in both suits may be the same or substantially the same. However, the court takes the view that in order for the doctrine of res judicata to apply all the elements of the Section 7 of the Civil Procedure Act must be satisfied. In particular, the first court must have been a court competent to hear and determine that dispute.

21. Thus, where a matter is filed before the wrong forum and dismissed for want of prosecution the plea of res judicata cannot apply. The court has already taken the view that the Environment and Land Court is the right forum for adjudication of the dispute among the parties in accordance with the provisions of Article 162 (2) (b) of the Constitution of Kenya and Section 13 (1) of the Environment and Land Court Act. As a result, the court is not satisfied that the instant suit is res judicata.
22. Regarding the issue of the arbitration clause the court takes the view that the remedy provided to a party who is aggrieved by the filing of a suit in violation of an arbitration clause is seeking a stay of proceedings and referral to arbitration. That is what Section 6 of the Arbitration Act provides for and not the striking out of the suit. The question to whether there was a binding arbitration clause among the parties shall be considered in the second limb of the application.
23. The defendant's prayer for stay of proceedings and referral of the dispute to arbitration was opposed by the plaintiffs. The main ground of opposition was that by filing an application seeking, inter alia, an order for striking out the suit, the defendant had taken a step in the proceedings and was thus disentitled to a stay of suit and referral to arbitration. The plaintiffs cited the case of Mombasa High Court Admiralty Claim No. 2 of 2014- Advanced Distributors Co. Ltd vs Ignazio Messina and the Owners of Motor Vessel "Jolly Rosso", "Jolly Verde" and "Jolly "Diamante" in support of their position.
24. The defendant, on its part, disputed that its application for stay and referral to arbitration could not be considered as taking a step in the proceedings since it had not filed any defence to the action. The plaintiffs' case was not that the prayers for stay and referral to arbitration constituted taking a step in the proceedings, but the prayer for striking out.
25. The court takes the view that taking a step in legal proceedings within the meaning of Section 6 of the Arbitration Act, 1995 is not confined to filing a defence only. It may also invoke taking steps such as filing a notice of preliminary objection and applying for striking out a suit for whatever reason. This is because if either of those two steps were to succeed then the suit would stand terminated. The court is thus of the opinion that by asking the court to strike out the plaintiffs' suit on account of lack of jurisdiction and res judicata the defendant has taken a step in the proceedings. In the event, the defendant is not entitled to either a stay of proceedings or referral to arbitration.

b. Whether the plaintiffs are entitled to the orders sought in the notice to motion dated 17.01.2024

26. The court has considered the material and submissions on record on the plaintiffs' applicant for summary judgment. Order 36 Rule 1 of the Civil Procedure Rules as follows;

“In all suits where a plaintiff seeks Judgment for –

- (a) – liquidated demand with or without interest; or
- (b) The recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non – payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for



Judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and mesne profits.”

27. The court has considered and the plaintiff the various affidavits filed by the parties in these proceedings. The court is not prepared to hold that the claim is an open and shut case. The plaintiffs have raised serious allegations against the defendant. In particular, the plaintiffs have pleaded various particulars of alleged fraud and misrepresentation against the defendant which the defendant has disputed in its affidavits on record.
28. There is no doubt that the plaintiffs paid the sum of Kshs.45,000,000/= as purchase price pursuant to the sale agreement dated 01.02.2022. The plaintiffs’ view was that the agreement was no longer in force since it was repudiated by the defendant’s conduct. The defendant took a contrary position on this question. The court is of the opinion that there are several other questions which may have to be investigated, tried and decided by the court before the question of liability is determined in the suit. As a consequence, the court is not satisfied that the defendant has no bona fide triable issues to raise at the trial of the action.
29. The court is of the view that the plaintiffs’ liquidated claim cannot be separated from the rest of the reliefs sought in the plaint. A trial would be required to determine if the sale agreement was repudiated. The allegations of misrepresentation and fraud would have to be determined before the issue of a refund of the purchase price can be determined. In the premises, the court is not inclined to allow the application for summary judgment.

c. Who shall bear costs of the applications

30. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. In view of the fact that both applications have failed, the court is of the view that each party should bear his own costs.

I. Conclusion and determination

31. The upshot of the foregoing is that the court finds no merit in both the plaintiffs’ application for summary judgment and the defendant’s application for stay of proceedings, referral to arbitration and striking out of the suit. As a result, the court makes the following orders for disposal of the applications;
 - a. The defendant’s notice of motion dated 10.01.2024 is hereby dismissed in its entirety.
 - b. The plaintiffs’ notice of motion dated 17.01.2024 is hereby dismissed.
 - c. Each party shall bear their own costs of both applications.
 - d. The defendant shall file and serve its statement of defence within 14 days from the date hereof.
 - e. The plaintiffs shall be at liberty to file a reply to defence within 7 days upon service of the defence.
 - f. The parties shall be at liberty to amend their pleadings at any time before the close of pleadings.
 - g. The suit shall be mentioned on 09.07.2025 For pre-trial directions.

Orders accordingly



RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 22ND DAY OF MAY, 2025.

.....

Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

Ms. Muyaa for the plaintiffs

Mr. Wawire for defendants

