



**Nyoro Construction Company Limited v Kenya Commercial Bank Limited (Commercial Case E291 of 2024) [2025] KEHC 4685 (KLR) (Commercial and Tax) (10 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4685 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E291 OF 2024**

**PM MULWA, J**

**APRIL 10, 2025**

**BETWEEN**

**NYORO CONSTRUCTION COMPANY LIMITED ..... PLAINTIFF**

**AND**

**KENYA COMMERCIAL BANK LIMITED ..... DEFENDANT**

**RULING**

1. The Notice of Motion dated 28<sup>th</sup> May 2024 is brought under Order 40, Rules 1 and 2 of the Civil Procedure Rules. The Plaintiff/applicant seeks injunctive relief restraining the Defendant, its agents, and /or servants from attaching, selling or otherwise interfering with its movable assets pending the determination of the suit.
2. The application is based on the grounds outlined on its face and is supported by the affidavit of Josiah Njoroge Njuguna, the Director of the Plaintiff, sworn on 28<sup>th</sup> May 2024. In his affidavit, he states that on 8<sup>th</sup> September 2005, the Plaintiff obtained a credit facility of Kshs. 267 million from the Defendant bank. This facility was secured through various legal instruments including legal charges, corporate guarantees, board resolutions and a debenture covering both fixed and future assets.
3. He avers that the Plaintiff has repaid a total of Kshs. 391,285,032.00 through direct transfers and deductions from a performance bond, an amount exceeding the sum originally borrowed. Despite this, on 24<sup>th</sup> May 2024, Westminster Commercial Auctioneers unlawfully proclaimed the Plaintiff's assets in violation of the *Movable Property Security Rights Act*, 2017, and the *Auctioneers Act*, thereby failing to adhere to the requisite legal procedures.
4. The Defendant through the replying affidavit sworn on 3<sup>rd</sup> July 2024 and further affidavit sworn on 1<sup>st</sup> October 2024 by Jeremiah Washiali opposes the application asserting that a similar suit, HC COMM E327 of 2023, exists between the same parties, wherein the court suspended a planned auction on 8<sup>th</sup>



August 2023 on condition that the Plaintiff pays Kshs. 200 million within 14 days. Despite payments totaling Kshs. 278,410,095.00, the Plaintiff remains in arrears of Kshs. 860,452,765.25. The Defendant maintains that it is entitled to exercise its right to realize the security, given the admitted indebtedness by the Plaintiff.

5. The application was heard through written submissions. The plaintiff filed two (2) sets of submissions dated 18<sup>th</sup> June 2024 and 9<sup>th</sup> October 2024. The Defendant's submissions are dated 30<sup>th</sup> September 2024, which I have duly considered. The issues for determination are:
  - a. Whether the suit is sub judice
  - b. Whether the Plaintiff has met the threshold for the grant of an interlocutory injunction.
  - c. Whether the Defendant is entitled to realize the securities in light of the Plaintiff's admitted indebtedness.

### **On whether the suit is sub judice**

6. The doctrine of sub judice is established in Section 6 of the *Civil Procedure Act* and provides:

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

7. A review of the pleadings in HC COMM E327 of 2023 indicates that the Plaintiff had instituted a suit against the Defendant seeking to restrain the realization of securities following its default in repaying the loan facility. In that suit, the Plaintiff sought an injunction to prevent the Defendant from selling its properties, specifically L.R. 6826/3, L.R. 209/10806, L.R. 209/12116/32, and L.R. 209/12116/45, pending the determination of the suit.
8. A cursory look at the pleadings in both suits reveals that the parties and the cause of action are substantially similar, as both cases arise from the loan facilities advanced to the Plaintiff by the Defendant and the enforcement of securities. A determination in either case would render the other suit redundant. The rationale behind the sub judice rule is to prevent conflicting orders from different courts over the same subject matter.
9. The principle was upheld in *David Ndi & Others v Attorney General & Others* [2021] eKLR, where a five-judge bench stated:

“The rationale behind this provision (Section 6 of the *Civil Procedure Act*) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts.”

10. Furthermore, in HC COMM E327 of 2023, the court granted an injunction suspending the auction scheduled for 8<sup>th</sup> August 2023, conditional upon the Plaintiff paying Kshs. 200 million within 14 days and settling auctioneer charges. The court further held that in the event of default, the Defendant was at liberty to proceed with the sale. The Plaintiff defaulted, prompting the Defendant to file a Notice of Motion dated 19<sup>th</sup> January 2024, seeking to vacate the injunction orders. I allowed the application



and set aside the injunctive orders in my ruling dated 7<sup>th</sup> November 2024. Given these circumstances, entertaining the instant application would be both duplicative and oppressive to the Defendant.

11. Having concluded that the issue herein is sub judice, I shall not proceed to consider the merits of the application. It is undisputed that the Plaintiff acknowledges its indebtedness and has defaulted in repayment. The Defendant, as chargee, is entitled to realize the securities, and a defaulting chargor cannot seek equitable relief to prevent a lawful sale unless the full debt is settled. Equity does not aid defaulters, as emphasized in *Caliph Properties Ltd v Barbel Sharma & Another* [2015] eKLR.
12. The letter of offer governing the loan facility clearly provided for the mode of repayment and the Defendant's remedies in the event of default. The Plaintiff cannot evade its financial obligations, and the Defendant must be allowed to realize the securities. The court in *Jopa Villas v Overseas Private Investment & 2 Others* [2009] eKLR aptly stated:

“I am clear in mind that the Applicant is running away from obligations lawfully imposed and with its full knowledge and participation. Courts should not aid it in that quest but will instead uphold the rights of the 1<sup>st</sup> Defendant to recover its monies lawfully advanced. That is a tradition that I cannot depart from and as was advised in *Aiman vs Muchoki* (1984) KLR 353. Our courts must uphold the sanctify of lawful commercial transactions.”

13. Based on the foregoing, I find that the Plaintiff's Notice of Motion dated 28<sup>th</sup> May 2024 is devoid of merit. It is hereby dismissed with costs to the Defendant.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 10<sup>TH</sup> DAY OF APRIL 2025.**

**PETER M. MULWA**

**JUDGE**

In the presence of:

Ms. Dida h/b for Mr. Mutiso for Plaintiff

Ms. Mutisya h/b for Mr. Ogunde for Defendant

Court Assistant: Kadzo

