



**Mambo v Equity Bank (Kenya) Limited (Commercial Case E806 of 2021)
[2025] KEHC 6922 (KLR) (Commercial and Tax) (20 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6922 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E806 OF 2021
JWW MONG'ARE, J
MAY 20, 2025**

BETWEEN

LUCY MARY MAMBO PLAINTIFF

AND

EQUITY BANK (KENYA) LIMITED DEFENDANT

JUDGMENT

Introduction and Background

1. The facts giving rise to the present suit are largely common ground and can be gleaned from the pleadings, the evidence and submissions of the parties. By a Letter of Offer dated 4th September 2017 (“the Letter of Offer”), the Defendant (“the Bank”) agreed to extend financial facilities to the Plaintiff and her husband (now deceased) for an aggregate sum of Kshs.24,000,000.00/= to be utilized for purposes of purchasing an Apartment No.301 Block B erected on property LR No. 209/21512 – Vihiga Apartments. One of the conditions present for granting the facility was that the Bank required a ‘Mortgage protection insurance policy with the Lenders interest noted on the policy.’ As per Schedule A of the Letter of Offer, The Plaintiff and her husband waived and/or forfeited their right to select an insurance company and/or insurance broker and they agreed that the Bank may appoint an insurance underwriter and/or insurance broker in its own discretion.
2. By a Plaint dated 20th July 2021, the Plaintiff filed the present suit stating that it was her understanding that the Bank would take out the mortgage protection insurance policy on their behalf and she claims that it is on this basis that on 13th March, 2018 the Bank debited the deceased’s account number 015 6107 with the sum of Kshs.1,060,000.00/= being the full payment/ premium for purposes of the mortgage insurance protection policy. The Plaintiff avers that according to them, all the conditions precedents contemplated in the Letter of Offer were met and the Bank subsequently disbursed the loan facility. That over the years they have devotedly and consistently serviced the loan according to



the terms of the Letter of Offer and that at the time of the deceased's death, the Bank was meant to have fully insured the loan advanced to the Plaintiff and the deceased as they had complied with the relevant mandatory prerequisites for the disbursement of the loan.

3. The Plaintiff contends that at the time of her husband's death, the balance outstanding on the subject loan was the sum of Kshs.22,664,858.18/= and the Plaintiff believed that she was not expected to make any further payments in respect thereof since the risk insured had already crystallized. The Plaintiff states that she notified the Bank of her husband's demise and advised it to proceed to make arrangements to realize the benefits of the mortgage insurance cover. That unfortunately, despite making various visits to the Bank's offices, to enquire on the progress being made to process the insurance policy, she kept on being tossed from one office to the other with the Bank's staff sending mixed signals on the matter.
4. The Plaintiff avers that through her advocates on record; she formally raised the issue with the Bank but there was no response from them and that this inaction by the Bank can only be deduced to mean that it failed to take out a mortgage insurance cover for the subject loan in breach of the terms of the Letter of Offer. That if at all there were any inconsistencies/ failure towards the processing of the mortgage protection insurance cover then it automatically follows that any blame is squarely attributable to the Bank. The Plaintiff is apprehensive that the Bank may proceed at any time to realize the charged securities in respect of the properties L.R No Nairobi/ Block/82/737, Apartment No. 301 Block B erected on property No. 209/21512 - Vihiga Apartments and the motor vehicle registration number KBW *B. As such the Plaintiff prays for the following:-
 1. A permanent injunction restraining the Defendant whether by themselves, their authorized agents, servant, employees, workers or otherwise from advertising, selling or in any manner taking steps towards realization of the charged properties.
 - i. The property L.R NO. Nairobi/Block/82/737;
 - ii. Apartment No. 301 Block B erected on property No. 209/21512 - Vihiga apartments; and
 - iii. Motor vehicle registration number KBW *B.
 2. A mandatory order directed to the Defendant to discharge and surrender the title documents/ log book to the Plaintiff in regard to;
 - i. The property L.R NO. Nairobi/Block/82/737;
 - ii. Apartment No. 301 Block B erected on property No. 209/21512 Vihiga Apartments; and
 - iii. Motor vehicle registration number KBW *B.
 3. An order for permanent injunction restraining the Defendant herein from demanding further instalments or payment from the Plaintiff with regard to the subject loan or loan account no. 082*****815.
 4. Such further orders or reliefs that this Honourable Court may deem just.
 5. Costs of the suit.
5. The Bank responded to the suit through its Statement of Defence dated 6th March 2023. It stated that the exclusion provided in Schedule A of the Letter of Offer was subject to Clause 7 of the Letter of Offer and only referred to the Insurance protections provided therein and not Clause 8 on the mortgage



protection insurance policy. It contends that it complied with its obligation under the said Schedule A of the Letter of Offer and took out an insurance cover for the perils as provided in Clause 7 therein. That the sum of Kshs.1,060,000.00/= that was deducted from the joint accounts of the borrowers' account on 13th March 2018 was to cater for loan processing fee as provided in clause 5(a) of the Letter of Offer and not for the Mortgage Protection Insurance Policy as indicated by the Plaintiff. The Bank avers that it was a condition precedent that the borrowers would take out a Mortgage Protection Insurance Policy under clause 8 (g) of the Letter of Offer and that it was a further obligation under Clause 6.10(i) and (iv) that the chargors would ensure that there was a life policy and to also ensure that the policy was duly deposited with the Bank for compliance purposes.

6. The Bank contends that due to the Plaintiff's failure to take out the Mortgage Protection Insurance Policy, the Bank could not realize the benefits of the same and that the Plaintiff as the surviving chargor should repay the loan, and in default of payment, the Bank should be at liberty to realize the security under its Statutory right of sale. In sum, the Bank states that the suit against it is bad in law, fatally defective, unsustainable and misconceived as the same raises no cause of action against the Bank.
7. At the hearing, the Plaintiff testified on her own behalf (PW 1) where she adopted her witness statement dated 10th March 2023 and the Bundle of Documents of the same date (PEXhibit 1-13). The Bundle contains the Letter of Offer, statement of accounts for account no. 015***107, Charges over Apartments No. 301 Block B and property 82/737, the deceased's death certificate, Letters dated 12th March 2021, 12th April 2021, 23rd April 2021, 3rd May 2021 and 27th September 2021, the Account Statement for account number 082**407, policy for insurance for fire and perils and general insurance and Account statement for Account number 015***107. On its part, the Bank presented its Business Client Advisor, Donholm Branch, RUTH KAGARI as its witness (DW 1). She adopted her substituted witness statement dated 13th May 2024 and produced the Bank's Bundle of Documents dated 6th March 2023(DEXhibit 1-8) containing the Letter of Offer, the Legal Charge over Apartment No. 301 Block B, Joint Statement of Account, Letters of Offer dated 22nd March 2019 and 10th March 2020, Letter of Variation dated 15th March 2018 and 10th July 2018, Fire and Perils Insurance and the Legal Charge over property 82/737.
8. After hearing the parties, the court directed that they exchange written submissions which are now on record. As the evidence and submissions are a mirror of the parties' positions that I have already summarized above, I will not rehash the same but I will make relevant references to them in my analysis and determination below.

Analysis and Determination

9. In making this determination, I am guided by the fact that the standard of proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in section 107 (1) and (2) of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which provides that "whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist" and that "When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person". In *Miller .V. Minister Of Pensions 1947 ALL E.R 372*, Lord Denning aptly summarised the application of the standard in the following terms:

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however



narrow. A draw is not enough. So, in any case is which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

10. The Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Limited* [2019] KECA 1058 (KLR) simply put it that 'Courts will make a finding based on which party's version of the story is more believable.'
11. From the parties' submissions, the court is being called to determine the following issues:
 1. Whether there existed a valid mortgage life insurance policy; and if not, whose responsibility was it for taking out the said insurance policy
 2. Whether the Plaintiff is deserving of the prayers sought in the Plaint

Whether there existed a valid mortgage life insurance policy; and if not, whose responsibility was it for taking out the said insurance policy

12. As stated, the Letter of Offer provided that as a condition precedent for the loan facility, a mortgage protection insurance policy had to be taken out with the Bank's interest noted in the policy. The Plaintiff's case is that the responsibility for taking out the insurance policy was on the Bank in that it had waived its right to select an insurer and agreed to have the Bank appoint one as per Schedule A of the Letter of Offer. However, the Bank stated that this waiver certification at Schedule A of the Letter of Offer was in respect to Clause 7 and not Clause 8. The said Clause 7 of the Letter of Offer provides as follows:
 7. Insurance
 - 7.1 The Borrower hereby undertakes to insure the security(ies) pledged under Clause 6 of this facility in the joint names of the Lender and the Borrower against All perils, loss or damage by fire, accident, third party risks and riot risks(whichever applicable) with an insurance company licensed under the *Insurance Act* and the Borrower further undertakes to pay punctually the premiums and all moneys payable in respect of such insurance and to constantly ensure the Lender is named in such policy as first loss payee at all times when this facility shall be outstanding
 - 7.2 2 The Borrower has a right to select an Insurance Underwriter and/or Insurance Broker from a list of insurance Underwriters or Brokers licensed by the Insurance Regulatory Authority which shall be subject to the Lenders approval
 - 7.3 3 The Borrower further has an option to forfeit his/her/their right under Clause 7.2 of this Facility on execution of Schedule A of this Facility letter.
13. From the above, I am inclined to agree with the Bank's position that the waiver certification at Schedule A was in respect of the insurance at Clause 7. I have gone through the said Clause 8 of the Letter of Offer and I note that there is no reference to Schedule A on the Plaintiff waiving the appointment of an insurer for the mortgage protection policy to the Bank. The Plaintiff also contended that a sum of Kshs.1,060,000.00/= was paid for the mortgage protection policy and as such, the Bank ought to have taken out the policy on the Plaintiff's behalf. The Bank stated that this payment was in respect of Loan Application and Credit Evaluation Fee(LACE) as set out in Clause 5 of the Letter of Offer which indicated that the Plaintiff was supposed to pay Kshs.960,000/= and Excise Duty of Kshs.96,000.00/= the total of which came to Kshs.1,056,000.00/=. The Bank contended that the narration in the



Joint Account Statement that this was for “lace & Insurance For Mortgage” was an error and that this payment was indeed for the LACE payment alone. When this issue was put before PW 1, she did not deny that Letter of Offer specifically provided for the LACE payment and that this was deducted from their Joint Account. Thus, from the evidence, I find that it is possible that the Kshs.1,060,000.00/= deducted from the Plaintiff’s and deceased’s account was in respect of the LACE payment and that the narration for the same being for insurance mortgage as well was in error.

14. The Plaintiff admitted that she never took out the mortgage protection insurance cover in what I have found was the mistaken belief that it was the Bank supposed to do so. As the Letter of Offer did not provide any waiver for the Plaintiff to take out this insurance, it follows that it was her responsibility to arrange and provide this cover to the Bank from her insurer. This was not done meaning that the mortgage protection insurance cover never existed and the Bank never benefitted from it. Whereas PW 1 insisted that the Bank’s Account Manager informed them that the mortgage insurance had been paid, no proof was tendered for this as the Plaintiff never called the said officer of the Bank as a witness. I am therefore persuaded by the evidence on record that there was never a mortgage protection insurance policy for the facility granted by the Bank to the Plaintiff; this cover was to be taken out and paid for by the Plaintiff as the Plaintiff did not waive this right or appoint the Bank to do so on her behalf; the Plaintiff did not pay any premium for this insurance cover and; due to the insurance cover’s non-existence, the Bank never benefitted from it.
15. I am in agreement with the Bank’s submission that the decisions of inter alia Emray Enterprises Limited v National Bank of Kenya Limited [2019] KEHC 12440 (KLR) and Anne N Parmena v Housing Finance Company of Kenya Limited [2015] KECA 476 (KLR) cited by the Plaintiff are distinguishable from this case in that in those decisions and unlike in the present case, insurance policies were in place or were presumed to be in place and that it was the responsibility of the Bank to arrange for the mortgage protection life policies
16. Based on my findings above, I hold that the Plaintiff is not entitled to the reliefs sought in that the Bank never benefitted from the mortgage protection insurance policy as the same never existed and in the absence of such a policy, it would be speculative to find that a mortgage protection life policy relating to the Plaintiff and the deceased would have discharged the loan and their liability from payment (See Keziah Njambi Maingi t/a Arrivals Textile Shop v Barclays Bank of Kenya Limited [2018] KECA 379 (KLR)). The Bank cannot therefore be enjoined from exercising its statutory right of sale over the charged properties, demanding payment of further installments or surrendering the security documents, if at all the Plaintiff is still indebted to it. The Plaintiff is therefore not entitled to the reliefs sought in her plaint.

Conclusion and Disposition

17. In the end, the Plaintiff’s suit is dismissed with costs to the Defendant. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF MAY 2025

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J.W.W. MONG’ARE

JUDGE

In the Presence of:-

Ms. Muriranjia for the Plaintiff.

Ms. Rweya for the Defendant.



