



UBA Kenya Bank Limited v Uchumi Supermarkets PLC & another (Insolvency Petition 25 of 2018) [2025] KEHC 6567 (KLR) (Commercial and Tax) (15 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6567 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION 25 OF 2018**

F GIKONYO, J

MAY 15, 2025

**IN THE MATTER OF UCHUMI SUPERMARKETS PLC
AND
IN THE MATTER OF THE INSOLVENCY ACT, OF 2015**

BETWEEN

UBA KENYA BANK LIMITED APPLICANT

AND

UCHUMI SUPERMARKETS PLC 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. This ruling relates to the application dated 29th March 2023, by UBA Kenya Bank Limited (UBA) made under Order 45 Rule 1 of the Civil Procedure Rules, seeking:-
 1. That this Honourable Court be pleased to review and/ or set aside its Ruling delivered on 19th May 2022 in respect to the Applicant's Amended Notice of Motion Application dated 7th April 2021.
 2. That this Honourable Court be pleased to allow the Applicant to exercise its statutory power of sale and enforce its security over all that property known as Land Reference Number 209/12593 Nairobi.
 3. In the alternative to prayer 2 above, the court be pleased to grant the following orders;



- a. The Applicant/ Bank, UBA Kenya Bank Limited be granted leave to enforce its security over all that property known as Land Reference Number 209/12593 Nairobi by appointing a receiver of income over the charged land;
- b. That this Honourable Court be pleased to make any such or further order as it may deem necessary in the interest of justice.
- c. That this Honourable Court be pleased to make an order as to costs.

Background

2. Through a ruling dated 27th February 2025, this court set aside *ex debito justitiae*, the ruling dated 3rd November 2023 by Justice Mabeya which permitted UBA to exercise its statutory power of sale and enforce its security over L. R. No. 209/12593. The court found that there was an error on the face of the record in that, whereas the court confirmed that the National Treasury had filed its replying affidavit to the application subject of the impugned ruling, the court inadvertently did not consider the objections to the sale presented by the attorney general for the National Treasury in its ruling.
3. In a ruling dated 19th May 2022, Justice Mabeya dismissed an application dated 7th April 2021 by UBA Bank Kenya Limited seeking leave to exercise its statutory power of sale over L. R. No. 209/12593. The reason for dismissal was that the government had commenced the process of compulsorily acquiring the property. UBA Bank had also indicated a loss of interest in pursuing the application.
4. On 29th March 2023, UBA Bank lodged another application, now under consideration, seeking a review of the ruling of 19th May 2022 and seeking to be allowed to exercise its statutory power of sale.

Grounds

5. The application was premised on the grounds set out in the application, the supporting and supplementary affidavits sworn by Mickey Matheka on 29th March 2023, 17th October 2023 and 26th October 2023.
6. Mr. Matheka averred that the compulsory acquisition collapsed and that it was unforeseen. He also averred that the company has breached the court's ruling of 1st July 2020 by failing to subject it to review every 6 months, failing to call a creditor's meeting to review the CVA which had detrimental effects on the UBA. It was therefore within its rights to seek leave to exercise its statutory power of sale.
7. Mr. Matheka further averred that UBA did not recognize the revised CVA; thus, the CVA in force was the one dated 2nd March 2020. He stated that UBA was unaware of the alleged creditor's meeting of 31st August 2023 as it was not invited. He asserted that under section 635 of the *Insolvency Act*, the CVA had prematurely ended as the company was not repaying the debt.
8. Mr. Matheka pointed out that the company was in default of its facility for close to 4 years. He deposed that the open market value of the subject property as at 10th September 2019 was Kshs. 600M and forced sale value of Kshs. 450M and that the amount of income generated from the subject property had not been disclosed.

Uchumi's Response

9. In opposition to the application, the company filed replying affidavits sworn by its director and chief executive officer, Lawrence Ngao, on 5th and 23rd October 2023 and its Company Voluntary



Arrangement (CVA) supervisor, Owen Koimburi on 26th September 2023 and a joint further replying affidavit sworn by both on 20th October 2023.

10. Mr. Ngao asserted that the application is res judicata; that the company and the supervisor had acted in compliance with the CVA which was in place. He also deposed that the principal amount owed to UBA is Kshs. 161,502,000/-, less than the value of the charged property as per the valuation done in 2017. UBA has not obtained consent to sell the property from other secured creditors. The value of the charged property was Kshs. 1.4 Billion as at 2018 as per a report by Clayton Valuers; that if the applicant was allowed to sell the property at an open market value of Kshs. 600,000,000/- and a forced sale value of Kshs. 450,000,000/- the property will have been sold at a loss and the funds from the sale would not be sufficient for the secured creditors.
11. According to Mr. Koimburi, the company's creditors held a meeting on 31st August 2023 where they agreed to revise the CVA to address issues that had hindered implementation of the original CVA. The notice of the meeting was published in the Daily Nation newspaper on 25th August 2023. The company intends to honour its obligation and pay its debts to UBA and it has been included in the revised CVA. The *Insolvency Act* does not permit the appointment of a receiver over the whole or substantially part of the assets of a company where a CVA is in existence and a court appointed monitor is in place. The debenture having been created post the *Insolvency Act*, the mandate to supervise the income from the charged property rests with the monitor. If leave to exercise statutory power of sale is granted, the ongoing CVA will be affected to the detriment of the whole body of creditors.

National Treasury's Response

12. The National Treasury filed a grounds of opposition dated 25th April 2023 and a replying affidavit sworn by Prof. Njuguna Ndung'u on 26th October 2023. He deposed that the Government of Kenya acting through the National Treasury approved the issuance of an emergency shareholder loan of 1.2 Billion to Uchumi. Upon Cabinet approval, the Cabinet Secretary to Treasury pursuant to Section 57(6) of the *Public Finance Management Act* and Section 3 of the Cabinet Secretary to the Treasury (Incorporation) Act Cap 101, registered a charge against L. R. No. 209/12593 on 21st November 2017. It was registered alongside other charges, UBA Bank and ICDC (now Kenya Development Corporation, KDC) whose securities were registered on 31st March 2016 and 9th September 2013 respectively.
13. Prof Ndung'u further deposed that the Ministry of Defence expressed interest in the acquisition of the suit property. The National Treasury indicated its acquiescence to the compulsory acquisition process and submitted to the NLC's process. The Ministry of Defence sought Kshs. 6.614 Billion to offset the outstanding encumbrances.
14. The National Treasury indicated that it was not in a position to provide additional funding due to the tight fiscal framework in the 2021/22 Budget. It advised the Ministry of Defence to prioritize the proposed expenditure within the context of the Financial Year 2022/23 and the Medium Term Budget. It was in the dark as regards the proceedings and the gazette notice 1358. It thus objected to the application as the compulsory acquisition was still on course, citing that as late as July 2022, the discussions over it were still ongoing.
15. Prof. Ndung'u asserted that public interest lies in the Government recovering its debt.



Analysis and determination

16. I have considered the application and the responses. Some issues are of preliminary significance (res judicata) but whose determination will determine whether the court should consider the request for review.

Res judicata

17. The company pleaded res judicata under Section 7 of the *Civil Procedure Act* to bar consideration of the application because it holds the view that, the substance thereto had already been determined completely.
18. The application under consideration is for review which in law, comes after a decision has been made by the court. Under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules the court may review its decision-whether final or otherwise- if it finds that: there was a discovery of new and important matter or evidence, or an error on the face of record, or for any other sufficient reason. Therefore, res judicata is inappropriately invoked.

Review: Statutory power of sale

19. Thus, has UBA met the threshold for review of the ruling dated 19th May 2025 that dismissed its application dated 7th April 2021, and be granted leave to exercise its statutory power of sale over L. R. No. 209/12593?
20. As earlier noted, in the ruling of 19th May 2022, Justice Mabeya dismissed UBA's application due to the commencement of the process of compulsory acquisition by the government and an indication by UBA that it had lost interest in the said application.
21. The grounds now being pleaded by UBA for review of the ruling was that the CVA had not been implemented as per the court order. Secondly, the compulsory acquisition process had collapsed.
22. UBA had indicated that it was not aware of the revised CVA that was passed by the creditors at the meeting of 31st August 2023. It had complained that there was no application for adoption of the revised CVA that had been filed before the court.
23. However, I note from the record that the company filed an application dated 26th March 2023, subsequently amended on 14th April 2025 for adoption of the revised CVA passed on 31st August 2023, which is pending determination.
24. The record also shows that UBA in a replying affidavit sworn by its Head of Legal, Micky Matheka on 9th December 2024, indicated that there was a consent dated 5th March 2024 between it and the company which resulted in the company being able to utilize the charged property to pay its creditors.
25. Therefore, as it stands, the issue of exercise of statutory power of sale has been rendered moot. Leading to the finding that the applicant has not established any or any proper grounds for the review of the ruling of 19th May 2022.

Two-pronged approach

26. In its reply, the National Treasury urged the court to decline the orders sought by UBA Bank and to instead grant the following orders: -



- a. The UBA Kenya Bank Limited and the National Treasury leave to conduct a joint valuation of the property known as Land Reference Number 209/12593; and
 - b. The UBA Kenya Bank Limited and the National Treasury leave to jointly exercise their statutory power of sale over all the property known as Land Reference Number 209/12593 by appointing a receiver of the income over the charged land.”
27. These are substantive prayers, yet, contained in a replying affidavit. They are also incompatible with my findings above. For these reasons, the prayers are inappropriately stacked and are moot.

Public interest

28. The National Treasury asserted that public interest lies in the Government recovering its debt as it was a chargee of the subject property having advanced the company a loan of Kshs. 1.2 Billion. There is no threat to the public interest intimated by the National Treasury given the consent between UBA and the company. Further, through the orders of 27th February 2025, this court set aside *ex debito justitiae*, the ruling dated 3rd November 2023 by Justice Mabeya which permitted UBA to exercise its statutory power of sale and enforce its security over L. R. No. 209/12593. Completely eliminating the threat.
29. Nevertheless, the greatest danger lies in the uncertainty of the status of the company and its affairs, assets, income, debts, payments made so far, any funding received since the appointment of a monitor and supervisor, creditors, creditors meetings and the way forward. The risk of injecting more public funds in the company is a major concern to the public. Accordingly, the company, the monitor and supervisor shall, within 30 days of today, furnish the court and all creditors, information and details on the status of the company and its affairs, assets, income, debts, payments made so far, any funding received since the appointment of a monitor and supervisor, creditors, creditors meetings, any CVA's and the way forward.

Compulsory acquisition

30. Before I close, I do note that The National Treasury indicated that the compulsory acquisition was underway, yet it still sought to be allowed to carry out valuation and exercise statutory power of sale jointly with UBA. These two are incompatible. Nonetheless, The National Treasury as the custodial of public resources should protect and be seen to protect public interest by being involved in this phase of the company in a manner that yields most benefits whilst lessening loss to public resources. Their role cannot be diminished.

Disposal

31. The application dated 29th March 2023, by UBA Kenya Bank Limited is dismissed with no orders as to costs.
32. The company, the monitor and supervisor shall, within 30 days of today, furnish the court and all creditors, amongst other things, information and details on the status of the company and its affairs, assets, income, debts, payments made so far, any funding received since the appointment of a monitor and supervisor, creditors, creditors meetings, any CVA's and the way forward. This order is informed of the role of the court in insolvency laws and the averments by the company, UBA and National Treasury which are documented in their pleadings and affidavits under consideration. I make these orders fully aware of the pending application for adoption of the CVA.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 15TH DAY OF MAY 2025



F. GIKONYO M

JUDGE

In the presence of: -

1. Ms. Matata for Kibet for Company
2. Ms. Murugi for National Treasury
3. Wawire for Broadways
4. Ms. Mangich for Bidco
5. Ms. Jebiwor for Diana for New KCC
6. Dachi for UBA
7. Bundotich for Townsville Ltd
8. CA- Kinyua

