



Excellent Logistics Limited & 2 others v Kenya Commercial Bank Limited (Commercial Case E070 of 2024) [2025] KEHC 8633 (KLR) (Commercial and Tax) (13 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8633 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E070 OF 2024
JWW MONG'ARE, J
JUNE 13, 2025**

BETWEEN

**EXCELLENT LOGISTICS LIMITED 1ST PLAINTIFF
FREDRICK NGUGI NDUNGU 2ND PLAINTIFF
JOSEPHINE WATETU MUTERU 3RD PLAINTIFF**

AND

KENYA COMMERCIAL BANK LIMITED DEFENDANT

RULING

1. The Plaintiffs have approached the court through the Notice of Motion dated 16th February 2024 that seeks to restrain the Defendant (“the Bank”) from exercising its statutory power of sale over the properties; L.R No. Ewasonyiro/Sunguro/Block VI/3167 Nairuta Laikipia County, L.R. No. Makuyu/Kiriani Block III/460 & 461 Kiriani Makuyu Murangá County, L.R. No. 57/788 (Original No. 57/32/286) Clay City Kasarani, Nairobi County, L.R. No. 14870/584 Membley Estate Ruiru, Kiambu County, LR.20857/130 Clay City Estate, Kasarani, Nairobi County and Title No. Kaliang’ombe/Jimba/1243, Kokotoni, Kilifi County (“the suit properties”).
2. The suit properties are charged to the Bank as securities for various facilities offered by the Bank to the Plaintiffs sometime in July 2021. When the Plaintiffs’ loan accounts fell into arrears, the Bank evinced its intention to sell the suit properties which prompted the Plaintiffs to file the present suit and application to forestall the sale. The Plaintiffs, through the grounds set out on the face of the application and the affidavits of the 2nd Plaintiff sworn on 16th February 2024 and 5th July 2024, contend that the Bank never issued the requisite 3 months’ notice as required under section 90(1) and (2)(a) and (b) of the Land Act (Chapter 280 of the Laws of Kenya) and that the subsequent 45-days’ Redemption



Notice is flawed, null and void ab initio. Further, that the Bank never issued them with the Notice contemplated under Clause 12.27(d) of the Banking Facility Agreement dated 21st July 2021.

3. The Bank responded to the application through the replying affidavit and supplementary affidavit of its Head, Special Assets and Corporate Recoveries, OSCAR OBUNA, sworn on 8th April 2024 and 15th April 2024 respectively. The Bank depones that the Plaintiffs failed to pay the loan amount and further defaulted in their obligations under the charge documents thus compelling the Bank to exercise its statutory power of sale to recover the loan amount which stands at Kshs.370,275,276.65 as at 31st December 2023. It avers that it served the Plaintiffs with the statutory notice in accordance with section 90(1) and (2) of the Land Act but that the Plaintiffs refused to honour the notice, prompting the Bank to instruct auctioneers to realize the suit properties and clear the outstanding loan. That the Plaintiffs were issued with the 45 days' Redemption Notice by the auctioneers together with a Notification of Sale which the Plaintiffs also failed to honour.
4. The Bank contends that the Plaintiffs filed this suit despite having previously filed another suit; HCCOMM No. E148 of 2023 arising out of the same Letter of Offer, which is clearly an abuse of the court process. That the Plaintiffs are not denying that they are in default and that they have failed to discharge their obligations as per the Letter of Offer of 21st July 2021 and thus, the Bank cannot be faulted for exercising its statutory power of sale.
5. The parties have supplemented their arguments by filing written submissions which together with the pleadings, I have considered and I will be making relevant references to. As submitted by both parties, the injunctive orders being sought by the Plaintiffs can only be granted if the conditions set out in *Giella v Cassman Brown & Co., Ltd.* [1973] E.A. 358 are satisfied. The Plaintiffs are required to demonstrate a prima facie case with a probability of success, that they will suffer irreparable injury which would not adequately be compensated by an award of damages and that if the Court is in doubt, it should decide the application on the balance of convenience. These conditions are to be applied as separate, distinct and logical hurdles which the Plaintiffs are expected to surmount sequentially which means that if the Plaintiff does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration (see *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2013] KECA 347 (KLR))
6. I am in further agreement with Bank's submission that in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR)] the Court of Appeal stated that in establishing a prima facie case, an applicant must present material before the court so as to demonstrate that there exists a right which has apparently been infringed by the Bank so as to call for an explanation or rebuttal from the latter. The Plaintiffs admit that they are indebted to the Bank. However, their case is that they were never served with the statutory notice under section 90 of the Land Act. In rebuttal, the Bank has annexed the statutory notice and it deponed that the same was served upon the Plaintiffs via registered post and they have annexed a list of dispatched mails from their Legal Department. Whereas the Plaintiff contends that the same is only addressed to the 2nd and 3rd Plaintiffs and not the 1st Plaintiff, I note that the 1st Plaintiff is copied in the letter. Further, whereas the Plaintiffs submit that there is no proof from the Bank that the 90-day Statutory Notice and the 40-day Notice to Sell were indeed served by registered post as there is no Certificate of Posting from the Postal Office or any other authorized means allowed to serve registered mails, I note that the said List by the Bank is endorsed and stamped by "GPO Nairobi" which is prima facie evidence that the letters were dispatched by the Bank and received by the post office. As the Plaintiffs have not disputed that the addresses therein belong to them, I find that the Plaintiffs received those Notices or it is presumed that the same were received (see *Nyangilo Ochieng & another v Fanuel B. Ochieng & 2 others* [1996] KECA 205 (KLR)).



7. On the contention that the Bank never issued the Plaintiffs with a notice as per Clause 12.27(d) of the Facility Letter, I note that the said provision is couched in discretionary rather than mandatory terms as follows: ‘The Bank may by notice to the Borrower in writing, declare that the Security has become enforceable whereupon the Bank shall be entitled to exercise its rights under the security.’ Thus, the Bank cannot be faulted for not issuing this notice as it was not obligated to do so. As to the orders issued by the court (the late Majanja J.,) in HCCOMM No. E148 of 2023 I note that the injunction therein was in respect of various moveable properties and not the suit properties herein. The Bank was therefore not in contempt of court and it was neither restricted nor restrained from exercising its statutory power of sale over the suit properties.
8. On the alternative prayer by the Plaintiffs seeking an order from the court to direct the Bank to accept their payment proposal to settle the outstanding loan, this court has stated time without number that it cannot force Banks to accept payment proposals of borrowers. It is not the business of courts to rewrite contracts between parties and parties are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved (See Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] KECA 152 (KLR). The primary task of the court is to construe the contract and any terms implied in it and as such, it cannot force parties into a bargain as it is not a matter of an entitlement bestowed upon the Plaintiff, whether by statute or by contract (Muiga Enterprises Limited v Kenya Commercial Bank Limited [2016] KEHC 8509 (KLR). It is for these reasons that the court cannot compel the Bank to accept the Plaintiffs’ payment proposal.
9. In summary, I find that the Plaintiffs remain indebted to the Bank and as such, the Bank had every right to commence the process of realizing the securities. In addition, I find that the statutory notices were properly served upon the Plaintiffs and the Bank’s statutory power of sale had crystallized since the Plaintiffs failed to redeem the suit properties when so notified. Therefore, the court finds that the Plaintiff is not entitled to the prayers for an order of injunction sought or an order directing the Bank to accept their payment proposal.
10. The upshot of the above is that the court finds and holds that the application dated 16th February 2024 is without merit and the same now stands dismissed with costs to the Defendant. It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF JUNE 2025.

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J.W.W. MONGARE.

JUDGE.

In The Presence Of

Mr. Osoro for the Plaintiff/Applicant.

Ms. Kemigicha for the Respondent.

Amos- Court Assistant

