



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndiritu v Kenya Commercial Bank (Civil Suit E059 of 2024)  
[2025] KEHC 12302 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 12302 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT E059 OF 2024  
F WANGARI, J  
JULY 17, 2025**

**BETWEEN**

**JAMES KABIRU NDIRITU ..... PLAINTIFF**

**AND**

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

**RULING**

1. The Notice of Motion dated 26/08/2024 sought for the following orders;
  - a. Spent
  - b. Spent
  - c. That pending the hearing and determination of the suit, the Defendant by itself, its servants and/or agents, particularly Watts Auctions be restrained by a temporary injunction from alienating, selling, advertising or in any other way dealing with the Plaintiff's property known as Title No. Kwale/ Diani/ 726.
  - d. That costs of the application be provided for.
2. The application was based on grounds the Applicant is the registered owner of the suit property valued at Kshs. 60,000,000/= where he is carrying out hospitality business in the name of 'The Bright Star Resort Diani' in the said premises. The Applicant took a loan facility with the Respondent and charged the suit property as security.
3. The Applicant admits undergoing financial challenges due to Covid 19 epidemic and the same was explained to the Respondent. He applied for a loan moratorium and restructuring of the loan facility as he was falling into arrears in making the loan repayments. He was however not eligible for the moratorium as he was in default of repayments.



4. Thereafter after more follow-ups with the bank and explaining his situation as to why he fell into arrears, he was informed by a bank official that his moratorium had been considered and allowed and was to last for one year. On 11/05/2021, the auctioneers visited his property and informed him that they were preparing to auction his properties. He had not been served with any statutory notice as required under the law.
5. The Bank was said to have gone behind the Applicant's back to have the property auctioned illegally despite it granting a one year moratorium. The Appellant filed Civil Suit No. E052 of 2021 seeking to have the intended auctioned declared illegal, null and void ab initio unless the Defendant complies with the law.
6. The Parties entered into a consent where the Bank was to restructure the loan to be repayable for the next 10 years from August 2022, the Applicant was to provide the source of repayment and in the event of a 6 months' default, the Bank to proceed with execution.
7. The Bank was said to neglect to restructure the loan as per the consent and instead, it has instructed an auctioneer to proceed with recovery proceedings. The Respondent is accused of undervaluing the suit property giving a forced sale value of Kshs. 33,750,000/= which is way below the market value, yet in year 2021, the valuation carried out by the Respondent had the forced value of the property at Kshs. 38,000,000/=. The Applicant seeks to have the intended sale cancelled.
8. In the Replying Affidavit dated 04/12/2024, the Respondent Bank stated that the issues being canvassed in this matter were already settled in Mombasa HCCC E052 of 2021 via a Consent Judgment dated 14/07/2023 and the file was closed.
9. The Respondent states that the loan was restructured but the Applicant remained in arrears. The Statutory Notices were issued to the Applicant. It was further stated that the current valuation report reflected the wear and tear arising from about 3 years, and the said valuation was undertaken by a competent valuer, and it meets all the requirements of the law.
10. The Respondent disputed that the Applicant would suffer irreparable loss as by his own volition, he offered the suit property as security for the loan facility. It was prayed that the Respondent be allowed to sell the suit property as it would enable it to recover the outstanding debt. The Respondent Bank being a very stable institution was said to have the capacity to compensate the Plaintiff in the event the suit was ruled in favour of the Applicant.
11. The application was canvassed by way of written submissions and parties were directed to file their submissions. Both parties complied by filing their rival submissions.

### **Analysis and Determination**

12. I have carefully considered the pleadings, the evidence tendered, submissions together with the authorities relied upon by the parties as well as the law and in my view, the following are the issues for determination: -
  - a. Whether the application has merits.
  - b. What is the order as to costs and interests?
13. It is not in dispute that the Applicant obtained a loan facility from the Respondent Bank. The Applicant was faced with financial challenges and was unable to repay his loan amount as scheduled. The Respondent Bank had previously made an attempt to auction the suit property but parties entered into a consent where the loan was to be restructured.



14. The Applicant accuses the Bank for failing to restructure the loan and adhere to the consent judgment. On the other hand, the Respondent stated that it restructured the loan but the Applicant was in default of payment hence the commencement of recovery proceedings.
15. Having settled on the above, the only issue is whether the Respondent can proceed to realize the security. The Applicant admits that he was served with the Notification of Sale and the Redemption Notice. His only issue is that the suit property had been undervalued to the detriment of the Applicant. The Applicant has the responsibility to repay the loan as per the loan agreement. The Respondent has the right to recover the money advanced to the Applicant.
16. In any event, the Applicant has not denied being indebted and no evidence was tendered to show that he had made effort to make any payment towards reducing the debt. However, the Respondent must ensure that the sale of the suit property obtains the best price reasonably attainable at the time of the sale as per section 97 (1) and (2) of the Land Act which provides as follows;
  97. Duty of chargee exercising power of sale
    - (1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.
    - (2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.
17. From the above, the Respondent has a duty of care towards the Chargee to ensure that the best price is obtained at the time of the sale. The auction being guided by the valuation report; it must be ensured that the forced value of the suit property reflects the current status of the property.
18. The Applicant stated that he shall suffer irreparable loss if the sale is conducted using the valuation report which grossly undervalues the suit property, taking into consideration that the property had been valued at a higher price in the last report. On the other hand, the Respondent states that the valuation report reflects the wear and tear of the property over a period of 3 years. The issue is whether there is need to call for another valuation report yet the report was prepared by a professional.
19. Rule 11 (b) (x) of the Auctioneers Rules which stipulates;
  - 11(1). A court warrant or letter of instruction shall include, in the case of
    - (b) immovable property—
      - x. the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.
20. The valuation report to be relied on having been prepared over 12 months ago, it is hereby directed that a fresh valuation report and Statutory Notices reflecting the current valuation be issued to the Applicant. In order to protect the interests of the Applicant, a valuer to be agreed upon by the parties be appointed, and in default of agreement, a Government Valuer be appointed to carry out the fresh valuation report. An order of injunction therefore issues pending compliance with the above.
21. On costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not



deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The Applicant having partially succeeded, I direct that each party shall bear their own costs.

22. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
- a. The Notice of Motion dated 26/08/2024 partially succeeds to the extent that the Defendant/ Respondent is hereby directed to comply by issuing the fresh requisite statutory notices;
  - b. An order of injunction is hereby issued against the Defendant from dealing in any way with the suit land pending compliance with statutory notices and/or agreement between the parties;
  - c. A fresh valuation of the suit property be conducted by a valuer to be agreed upon by both parties within the next 30days.
  - d. In default of an agreed valuer, the valuation of the suit property be conducted by a Government valuer.
  - e. Each party to bear own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF JULY, 2025.**

**F. WANGARI**

**JUDGE**

In the presence of;

Mr. Deche Advocate for the Plaintiff/ Applicant

N/A by the Defendant/ Respondent

Ms. Norah, Court Assistant

