



**Fitdeal Enterprises Limited & 2 others v Absa Bank Kenya Plc & another
(Civil Suit E034 of 2024) [2024] KEHC 8852 (KLR) (22 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8852 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E034 OF 2024
JK NG'ARNG'AR, J
JULY 22, 2024**

BETWEEN

**FITDEAL ENTERPRISES LIMITED 1ST PLAINTIFF
ABDULLAHI YUSSUF BUTHUL 2ND PLAINTIFF
SUADHA YUSSUF BUTHUL 3RD PLAINTIFF**

AND

**ABSA BANK KENYA PLC 1ST DEFENDANT
SUSAN WAWERU T/A TREVO AUCTIONEERS 2ND DEFENDANT**

RULING

1. The Plaintiffs/Applicants filed a Notice of Motion application dated 5th July 2024 under Certificate of Urgency pursuant to Sections 3, 3A and 63 (e) of the *Civil Procedure Act*, Order 40 Rule 1 (a) and 2 of the *Civil Procedure Rules*, and all other enabling provisions of the law.
2. The Plaintiff/Applicants seek that the court issues an order staying the auction slated for 11th July 2024, that a temporary order of injunction restraining the Defendants whether by themselves, their agents, servants and/or employees from attaching, repossessing, selling, auctioning or in any way alienating property Title Number Mombasa/Block XXVI/47 on condition that the applicants pay up Kshs. 4,200,000 as ordered on 29th May 2024 and that costs of the application be provided for.
3. The application was supported by grounds on its face and the affidavit sworn on 5th July 2024 by Abdullahi Yussuf, the 2nd Plaintiff and director of the 1st Plaintiff. The deponent averred that the 1st Respondent through the 2nd Respondent intends to auction the aforementioned property vide a public auction on 11th July 2024. That this court issued directions on 29th May 2024 where the Applicants were to deposit with the 1st Respondent a sum of Kshs. 4,000,000 and an additional Kshs. 200,000 within 14 days from the date of the court's direction. That the Applicants have since raised the amount



despite the economic challenges coupled with ongoing unrest and are willing to abide by orders of the court. That no prejudice will be suffered if the application is allowed as prayed and it is in the interest of justice that the orders sought are granted.

4. The Respondent through their Replying Affidavit sworn on 12th July 2024 by Samuel Njuguna, the Legal Officer of the 1st Defendant/Respondent stated that the Plaintiff/Applicants had previously filed an application for temporary injunction dated 13th May 2024 before Justice Florence Macharia highlighting the same in the present application where they sought orders of temporary injunction. That the current application is res judicata since the matters have been directly and substantially in issue in the application dated 13th May 2024 as well as the current application, they have been between the same parties and they have been heard and finally decided by the courts and orders given.
5. The Respondent further stated that if the Applicants were not satisfied with the orders granted on 29th May 2024, they ought to have filed an application seeking review of the orders granted or even appealed the same at the appellate level. That the 1st Respondent's rights and remedies as stipulated under the Charge as well as the *Land Act* crystallized. That the Applicants have not demonstrated a prima facie case with a likelihood of success and have further approached the court with unclean hands having admitted being indebted to the bank and failing to comply with the orders of 29th May 2024. That the Applicants have failed to demonstrate how they would suffer irreparable damage incapable of being compensated by way of monetary damages. The Respondent therefore urged the court to dismiss the Applicant's application with costs to the 1st Respondent.
6. Having considered the Notice of Motion application herein dated 5th July 2024 and the Respondent's Replying Affidavit sworn on 12th July 2024 as well as the Notice of Motion application dated 13th May 2024, the Respondent's Replying Affidavit sworn on 27th May 2024 and orders of the court of 29th May 2024 issued by Hon. Lady Justice F. Wangari, this court establishes that the two applications seek the same orders. The only new thing that has been raised by the current application dated 5th July 2024 is the issue of the ongoing unrest which made it difficult for the Applicants to raise the amount ordered by court.
7. The court takes judicial notice of the current unrest that may hinder economic activities. However, the Applicant appears desirous to settle the late payments. This court also notes that the matter has been fixed for hearing on 7th October 2024.
8. Pursuant to Article 159 of the *Constitution* and the obtaining scenario, I am inclined to allow the Applicants to make good the delayed payments by 1st August 2024. The Applicants should regularize their position and proceed to settle the accrued payments as earlier ordered on 29th May 2024 failure to which execution to issue. All subsequent issues may then be handled by the trial court when the matter comes up for hearing on 7th October 2024. The upshot of this is that the application dated 5th July 2024 is marked as spent.

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Saadik Advocate for the Plaintiff

Mbira Advocate for the Defendant

Court Assistant – Samuel Shitemi

