



REPUBLIC OF KENYA



**Kinyanjui & another v NCBA Bank Kenya PLC & another (Commercial Case E500 of 2022)  
[2024] KEHC 12267 (KLR) (Commercial & Admiralty) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12267 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND ADMIRALTY  
COMMERCIAL CASE E500 OF 2022**

**MN MWANGI, J**

**OCTOBER 4, 2024**

**BETWEEN**

**PATRICK KAIBA KINYANJUI ..... 1<sup>ST</sup> PLAINTIFF**

**ALICE MUTHONI KAIBA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**NCBA BANK KENYA PLC ..... 1<sup>ST</sup> DEFENDANT**

**PHILLIPS INTERNATIONAL AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiffs filed a Notice of Motion application dated 2<sup>nd</sup> October, 2023 pursuant to the provisions of Order 50 & Order 40 Rules 1, 2, 3, 4 & 10 of the Civil Procedure Rules, 2010 and Sections 3, 3A and 63(c) of the *Civil Procedure Act*, Cap 21 Laws of Kenya seeking an order for extension of the orders of temporary injunction for a limited period of ninety (90) days, restraining the defendants from exercising the 1<sup>st</sup> defendant's statutory power of sale over all that parcel of land known as L.R. NO. 14902/81 (Original Number 14902/72/2) in Nairobi, and in particular proceeding with the scheduled sale and/or alienation vide public auction, pending the hearing and determination of instant application. The plaintiffs other prayers are that within ninety (90) days of being granted a temporary extension of injunction, the plaintiffs deposit Kshs.10,000,000/= with the 1<sup>st</sup> defendant, and submit a mutually agreeable restructuring proposal to the 1<sup>st</sup> defendant.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Patrick Kaiba Kinyanjui, the 1<sup>st</sup> plaintiff herein. Mr. Kinyanjui averred that the plaintiffs are the legal registered owners of the suit property, where they reside with their children, and they were previously granted a conditional temporary injunction restraining the defendants from selling the said property by public auction. That the conditions imposed thereof



- required the plaintiffs to pay the Auctioneer's fees, which they did in December 2022. They were also required to deposit Kshs.8,000,000/= with the 1<sup>st</sup> defendant within thirty (30) days, which they failed to, thus the injunctive orders in place elapsed. He further averred that the 1<sup>st</sup> defendant has since attempted to auction the suit property three times without success, but it is still actively seeking a buyer for it. He claimed that their debt to the 1<sup>st</sup> defendant currently stands at Kshs.77,000,000/= but the defendant is trying to sell the suit property at its forced sale value of Kshs.58,000,000/=.
3. Mr. Kinyanjui argued that selling the property at the undervalued price would cause the plaintiffs irreparable loss. He asserted that he is the beneficial owner of Eldoret Motor Dealers Limited, which has been tasked with building and operating a vehicle service center and regional spare parts distribution center in Eldoret town, Uasin Gishu County. He mentioned that Fie Consult is committed to securing funding for the project and promised to provide the Court and the defendants with evidence of the funding within thirty (30) days from the date of the application herein.
  4. In opposition to the application herein, the defendants filed a replying affidavit sworn on 6<sup>th</sup> December, 2023 by Christine Wahome, the 1<sup>st</sup> defendant's Senior Legal Counsel. She averred that the 1<sup>st</sup> defendant extended a credit facility of Kshs.55,000,000/= to the 1<sup>st</sup> plaintiff, secured by a legal charge dated 4<sup>th</sup> March 2019 over property L.R. NO. 14902/81 (Original Number 14902/72/2). She deposed that additional advances were made to the 1<sup>st</sup> plaintiff that were secured by a further legal charge dated 13<sup>th</sup> February, 2020, bringing the total secured amount to Kshs.65,000,000/=, but the plaintiffs defaulted on their loan repayment obligations, prompting the 1<sup>st</sup> defendant to initiate the process of exercising its statutory power of sale over the suit property. She averred that upon issuance of all the necessary statutory notices and conducting a valuation on the suit property, it was scheduled for auction on 8<sup>th</sup> August, 2022, but the auction did not take place as the 1<sup>st</sup> plaintiff paid Kshs.800,000/= on the same day and sought for more time to repay the facility.
  5. Ms. Wahome contended that the 1<sup>st</sup> plaintiff failed to honour his commitment, leading to the suit property being advertised for sale via a public auction that was to be hold on 16<sup>th</sup> December, 2022. She stated that the plaintiffs filed the suit between the parties hereby, accompanied by an application under certificate of urgency seeking temporary injunctive orders to restrain the 1<sup>st</sup> defendant from exercising its statutory power of sale over the suit property. That on 16<sup>th</sup> December, 2022, the Court granted the plaintiff a temporary injunction on condition that the plaintiffs pay Kshs.8,000,000/= to the 1<sup>st</sup> defendant within thirty (30) days and the Auctioneer's charges within fourteen (14) days. She deposed that the plaintiffs failed to meet these conditions, causing the injunctive orders to elapse. Ms. Wahome contended that the said injunctive orders having elapsed are not capable of extension. She noted that as at 6<sup>th</sup> December, 2023, the 1<sup>st</sup> plaintiff's debt to the 1<sup>st</sup> defendant stood at Kshs.68,614,004.92, and despite being given multiple opportunities to repay the loan and redeem the property, the 1<sup>st</sup> plaintiff has failed to do so.
  6. The application herein was canvassed by way of written submissions. The plaintiffs' submissions were filed on 14<sup>th</sup> February, 2024 by Patrick Kaiba Kinyanjui, the 1<sup>st</sup> plaintiff herein, whereas the defendants' submissions were filed by the law firm of Kimondo Gachoka & Company Advocates on 29<sup>th</sup> February, 2024.
  7. Mr. Kinyanjui submitted that the orders sought should be granted since in the intervening period, the loan continues to attract interest on the outstanding loan amount with no financial loss to the 1<sup>st</sup> defendant. He expressed the view that if the orders sought are not granted, the defendants may proceed and attempt to sell the suit property by public auction at the risk of not recovering more than the forced sale value of the suit property being Kshs.58,000,000/=, thus incurring a financial loss in excess of Kshs.20,000,000/=. He stated that it is just and equitable for the orders sought herein to be granted.



8. Mr. Kibaara, learned Counsel for the defendants submitted that the plaintiffs were granted a temporary injunction on condition that they pay Kshs.8,000,000/= to the 1<sup>st</sup> defendant within thirty (30) days and the Auctioneer's charges within fourteen (14) days, failure to which the injunctive orders would elapse. He indicated that the plaintiffs did not meet these conditions, thus the injunctive orders elapsed. He asserted that since there are no existing orders to extend, the current application is null and void. Counsel contended that the plaintiffs had requested for an extension of the injunctive orders for ninety (90) days, during which period they would deposit Kshs.10,000,000/= with the 1<sup>st</sup> defendant. He stated that even though the Court granted status quo orders on 3<sup>rd</sup> October, 2023, the 90-day period ended on 2<sup>nd</sup> January, 2024 without the plaintiffs making any payments or engaging meaningfully with the 1<sup>st</sup> defendant.

### **Analysis And Determination.**

9. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof. I have also taken into account the replying affidavit by the defendants and the written submissions by Counsel for the parties. The issue that arises for determination is whether the instant application is merited.

### **Whether the instant application is merited.**

10. The plaintiffs are seeking an order of extension of the temporary injunctive orders granted by the Court on 16<sup>th</sup> December, 2022 for a limited period of ninety (90) days, within which time they will pay to the 1<sup>st</sup> defendant Kshs.10,000,000/= and submit a mutually agreeable restructuring proposal to the 1<sup>st</sup> defendant. It is however noted that the order for extension of the temporary injunctive orders granted by the Court on 16<sup>th</sup> December, 2022 for a ninety (90) days' period was granted pending the hearing and determination of the application herein. That means that the said order is spent and cannot be granted by this Court at this juncture, because if it was to granted, it would elapse as soon as this Court delivers this ruling. The Court in the case of Catherine Njeri Macharia v Macharia Kagio & another [2013] eKLR, when faced with a similar situation made the following observation -

I accept and approve the holding by Hon. Justice Lesiit in HCCC No. 329 of 2003 Ano Shariff Mohammed v Abdulkadir Shariff Abdirahimand Hon. Justice Fred Ochieng in HCCC No. 2047 of 2000 Wilfred O. Musingo v Habo Agencies Ltd where my colleague judges were faced with applications seeking prayers similar in wording as in the instant application by the plaintiff. Justice Lesiit rendered herself as follows in the case referred to:

The prayer seeks a stay of execution of decree pending the hearing and determination of this application. The issue is that once the application is heard and determined then what. I do not think the prayer is worded correctly as the stay of execution should be prayed pending something other than the application itself. Considering this prayer and the manner it is worded, it is my view that the entire application is spent and that there remains nothing for me to stay.

For his part Hon. Justice Ochieng rendered himself thus: -

Now I revert to the orders sought by the Defendant. First it seeks an order of stay of execution pending the hearing and determination of this application. In other words, the very moment the court will have heard and determined the application dated 27<sup>th</sup> September, 2005 there would be no orders for stay of execution. Therefore, even if I were to grant prayer



2 as prayed, it would lapse as soon as I finish reading this ruling. As on 28<sup>th</sup> October, 2005, I had already given an order staying execution until today.

I hold that there is no need for the court to grant another order whose purport and effect would be the same as that which has already been given."

11. This Court agrees with the above observation and I find that the prayer for extension of the temporary injunctive orders granted by the Court on 16<sup>th</sup> December, 2022 for a limited period of ninety (90) days is already spent.
12. It is important to note that even if the said prayer and/or order was not spent, it could still not be granted, because the injunctive orders sought to be extended were granted on 16<sup>th</sup> December, 2022 on condition that the plaintiffs pay the 1<sup>st</sup> defendant Kshs.8,000,000/= within thirty (30) days and Auctioneer's fees within fourteen (14) days, failure to which the injunctive orders would elapse. From the record, there is no evidence of compliance with the aforementioned conditions, hence the injunctive orders granted by this Court on 16<sup>th</sup> December, 2022 in favour of the plaintiffs as against the defendants elapsed on 7<sup>th</sup> February, 2023, in light of the provisions of Order 50 Rule 4 of the Civil Procedure Rules, 2010 which states as follows in regard to computation of time–

Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction."

13. Since the prayer sought in the instant application is for extension of temporary injunctive orders, it ought to have been made during the pendency and/or subsistence of the injunctive orders which was on or before 7<sup>th</sup> February, 2023. The issue of extension of the temporary injunctive orders issued by this Court on 16<sup>th</sup> December, 2022 was first raised before this Court on 10<sup>th</sup> July, 2023 informally, and thereafter formally through the instant application which was filed on 2<sup>nd</sup> October, 2023. From the foregoing, it is evident that the said extension is sought after the injunctive orders sought to be extended elapsed, thus there is nothing before this Court for extension.
14. The above notwithstanding, if at all the plaintiffs were keen on repaying the facility advanced to the 1<sup>st</sup> plaintiff by the 1<sup>st</sup> defendant, they would have at least paid the 1<sup>st</sup> defendant Kshs.10,000,000/= within ninety (90) days from 3<sup>rd</sup> October, 2023 when they were granted status quo orders by this Court. To date, the plaintiffs have neither paid the 1<sup>st</sup> defendant the said sum of Kshs.10,000,000/= nor submitted a mutually agreeable restructuring proposal of the loan facility to the 1<sup>st</sup> defendant. For this reason, I agree with Counsel for the defendants that the plaintiffs are not operating in good faith and this application is only meant to buy time.
15. In the circumstances, this Court finds that the application herein is not merited. It is hereby dismissed with costs to the defendants.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF OCTOBER, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**



**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Mr. Patrick Kaiba (in person) for the plaintiffs/applicants

Mr. Kibaara for the defendants/respondents

Ms B. Wokabi - Court Assistant

