



Equip Agencies Limited v I & M Bank Limited & 2 others; Attorney General (Garnishee) (Civil Case 87 of 2019) [2023] KEHC 18549 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 87 OF 2019
DAS MAJANJA, J
JUNE 16, 2023**

BETWEEN

EQUIP AGENCIES LIMITED PLAINTIFF

AND

I & M BANK LIMITED 1ST DEFENDANT

**JOHN GIKONYO T/A GARAM INVESTMENTS AUCTIONEERS 2ND
DEFENDANT**

**LUCAS KIIRU MBUGUA, PAUL MBUGUA & MARY WANGARI GATHUME
(SUED ON THEIR OWN BEHALF AND IN THEIR CAPACITY AS
OFFICE BEARERS OF GIL GIL TOTAL INVESTORS SELF HELP
GROUP) 3RD DEFENDANT**

AND

THE HON. ATTORNEY GENERAL GARNISHEE

RULING

1. By the Notice of Motion dated March 1, 2023, the 1st Defendant ('the Defendant') seeks several order principally and an order attaching a decree dated October 30, 2012 in Milimani HC COMM No 159 of 2006; Equip Agencies Limited v Attorney General in which the Plaintiff was awarded Kshs 1,862,302,792.00 together with interest compounded at 18% per annum from March 1, 1999 until payment in full together with costs toward satisfaction of the decree dated September 30, 2022 in this case of Kshs 2,592,428,607.61 as at February 21, 2023 which amount continues to accrue interest at 14% per annum until payment in full plus costs of Kshs 24,848.246.



2. The application is supported by the affidavit of the 1st Defendant officer, Andrew Muchina, sworn on March 1, 2023. The 1st Defendant has opposed the application through a Notice of Preliminary Objection dated March 7, 2023 and the replying affidavit of its director, Divyesh Indubhai Patel sworn on March 23, 2023. The garnishee also opposes the application through the affidavit of Peter Tum, the Principal Secretary State Department of Medical Services, Ministry of Health, sworn on March 22, 2023. The parties have filed written submissions in support of their respective positions and which I have considered.
3. It is not in dispute that the Judgment in favour of the 1st Defendant is grounded on a Deed of Settlement dated June 10, 2023 under resolving to settle several suits including this suit. In consideration, the 1st Defendant would waive interest on the debt due to it and which secured by several securities, inter alia, Gilgil Township Block 2/210, LR No MN/VI/3075 Changamwe, Mombasa, LR No 209/8755 and LR No 209/4535, Nairobi. The 1st Plaintiff, its related companies and its directors would pay a discounted sum of Kshs 875,000,000.00 in instalments; Kshs 100,000,000.00 within 15 days of execution of the Deed, Kshs 50,000,000.00 within 120 days from the date of execution of the Deed and then Kshs 725,000,000.00 within 180 days from the date of execution of the Deed. Upon receipt of the settlement amount, the 1st Defendant would then discharge the securities and the parties would record consents marking the pending suits as settled.
4. In due course filed the application dated June 7, 2022 seeking, inter alia, that this suit be marked as compromised and or settled in terms of the Deed of Settlement. By the ruling dated September 30, 2022, I allowed the application on terms that, ‘judgment is entered for the 1st and 2nd Defendants on terms that this suit is marked as settled in accordance with terms set out in the Deed of Settlement dated June 10, 2021.’ It is this order that gave rise to the decree that the 1st Defendant seeks to enforce.
5. Since the judgment is in terms of the Deed of Settlement, it is important to appreciate the nature of the settlement as set out in Clause 1 of the Terms and Conditions of Settlement which are as follows:
 1. ‘In consideration of the Chargee waiving interest on the outstanding debt of Kenya Shillings 1,936,548,732.71 as at September 22, 2020, the Chargee the Borrower, Chargor and Mortgagor have reached a compromise and settlement of the outstanding loan owed to the Chargee at a discounted amount of Kenya Shillings Eight Hundred and Seventy Five Million only [Kes 875,000,000.00] with each party agreeing to bear own litigation costs. Any costs relating to the discharge of the securities shall be paid by Borrower, Charger and Mortgagor.’
 2. The Borrower, Chargor and Mortgagor shall pay sum of Kenya Shillings One Hundred Million (Kes 100,000,000.00) within 15 days from the date of execution of this agreement. Upon confirmation of receipt by the Chargee of the sum of Kenya Shillings One Hundred Million [Kes 100,000,000.000], the Chargee shall immediately thereupon procure the removal of the negative customer credit information of the Borrower, Charger and/or Mortgagor from the Credit Reference Bureaus.
 3. The Borrower, Chargor and Mortgagor shall pay sum of Kenya Shillings Fifty Million (Kes 50,000,000.00) within 120 days from the date of execution of this agreement.



4. The Borrower, Chargor and Mortgagor shall pay sum of Kenya Shillings Seven Hundred and Twenty Five Million [Kes 725,000,000.00) within 180 days from the date of execution of this agreement.
5. Upon confirmation of receipt by the Chargee of cleared funds equivalent to the Settlement Amount on the due date, the Chargee shall immediately thereupon cause such action to be executed as may be required to:
 - a. Discharge the various securities forthwith with costs relating to the discharge of the securities to be borne by Borrower, Chargor and Mortgagor.
 - b. Record Consents in the High Court, Court of Appeal and Supreme Court to mark as settled, all pending cases particularized in Clause 6 [a] to [m] above in accordance to the terms of this settlement deed and that this deed be filed as an order of the court.

Subject to the Consents for all pending cases particularized in Clause 6 [a] to [m] being signed by all the respective parties, the Chargor shall, Inform the Directorate of Criminal Investigation (DCI) on the property known as Title Number Gilgil Township Block 2/210 Leasehold by writing a formal letter to the DCI confirming that all pending cases particularized in Clause 6 [a] to [m] have been settled and that they have no further claims against the bank and/or its officials.

6. In the event of default in the payment of the Settlement Amount within fourteen [14] days from the due date of payment, the Chargee's entire original debt shall be reinstated together with accrued interest and all outstanding legal costs that shall be taxed and the Chargee shall be at liberty to forthwith proceed with realization of the charged properties after giving a Seven [7] day notice of default.
7. The Chargee accepts the conditions described in clauses 1.1, 1.2 1.3 and 1.4 as full and final settlement of all outstanding liabilities with Borrower, Chargor and Mortgagor under the various Agreements and shall formally discharge Borrower, Chargor and Mortgagor from any and all liabilities under the Agreements upon satisfaction of the conditions in clause above.
8. The Chargee, Borrower, Charger and Mortgagor agree that this Deed of Settlement is in full and final settlement of all disputes arising in the pending cases particularized in Clause 6(a) –(m) and that neither party shall have any claim against each other, now or In future in respect of any matter whatsoever arising out of the various lending agreements executed, the suit filed In court, the mortgages and debentures or any other matter whatsoever and for this purpose the parties bind themselves, upon due fulfilment of the terms set out in clause 1.4 hereof, to file appropriate discontinuance process in the aforesaid suits.
9. It is hereby further declared and confirmed that the Borrower, Chargor and Mortgagor, irrevocably bind themselves to the terms of this Deed and the production by the Chargee of an executed copy of this Deed before any court of law or tribunal shall constitute an unimpeachable and effective



defence to any claim, demand, action or other proceeding which the Borrower, Chargor and Mortgagor, whether by the or agents, servants or any other person whatsoever acting or purporting to act on their behalf may hereafter seek to bring against the Chargee and its officers over any matters arising in connection with the Agreements.

10. The Borrower Chargor and Mortgagor hereby agree to indemnify the Chargee, and Its officers against all claims whatsoever, present and future, made by any person or entity against the Chargee and its officers as a direct result of default by the Borrower Chargor and Mortgagor with respect to their outstanding liabilities contained in clauses 1.1, 1.2 1.3 and 1.4 in connection with the pending cases particularized in Clause 6 [a] to [m] above.
 11. The Chargee reserves the right to exercise all its rights arising under the Chargee Bank loans and security documentation including claiming and enforcing against the Borrower Chargor and Mortgagor all amounts due if the Settlement Amount is not paid as agreed herein.
 12. This Deed constitutes the entire Agreement of the parties and supersedes all previous negotiations, representations and agreements. No variations of this Deed shall be effectual unless agreed in writing by all parties hereto.
6. It is not in dispute that the Plaintiff has defaulted on the terms of the Deed of Settlement. At any rate, the fact of default was clearly recognized in the ruling dated June 2, 2022 in HC COMM E943 of 2021, Equip Agencies and Other v I & M Bank Ltd and Another where the court dismissed the Plaintiffs' application for injunction seeking to restrain the Defendant from selling the secured properties. What then is the Defendant's remedy? According to the aforesaid provisions, the Defendant has the right to sell the secured property to recover the debt. Apart from the agreed Settlement Amount, the amount now due and reinstated by reason of clause 1.6 is the 'entire original debt'. Under clause 1.1, the debt exclusive of interest was Kshs 1,936,548,732.71 as at September 22, 2020. The Plaintiff is therefore correct to point out that it is not clear how the amount claimed of Kshs 2,592,428,607.61 is made up in the absence of a decree to that effect.
7. I further hold that that the Plaintiff is correct to object to the application for attachment of the decree in its favour because the Deed of Settlement does not give rise to a specific or determinate sum nor does it give the 1st Defendant the right to judgment for a specific sum. From the provisions I have outlined, the right of the Defendant is to exercise its statutory power of sale without hindrance. In light of the conclusion I have reached, I do not consider it necessary to deal with the other grounds opposing the application.
8. I therefore order as follows:
- a. The 1st Defendant's application dated March 1, 2023 be and is hereby struck out.
 - b. The Garnishee Order Nisi in force is hereby discharged.
 - c. The 1st Defendant shall bear the costs of the Plaintiff and Garnishee.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango



Mr King'ara instructed by Gichuki King'ara and Company Advocates for the Plaintiff.

Mr Wawire instructed by Wamae and Allen Advocates for the 1st and 2nd Defendant.

Mr Bett, Senior State Counsel instructed by the Office of the Attorney General (Garnishee)

