



Muthoka & another v Kenya Women Microfinance Bank Ltd (Civil Case E10 of 2021) [2023] KEHC 20158 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20158 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL CASE E10 OF 2021**

**RK LIMO, J
JULY 6, 2023**

BETWEEN

STELLA KAVUTHA MUTHOKA 1ST PLAINTIFF

KENNY MUTHOKA MALUKI 2ND PLAINTIFF

AND

KENYA WOMEN MICROFINANCE BANK LTD DEFENDANT

RULING

1. The Defendant herein, Kenya Women Microfinance Bank Ltd., has moved this court vide a Notice of Motion dated April 12, 2023 seeking the following Orders/reliefs;
 - i. Spent
 - ii. Spent
 - iii. Pending the hearing and determination of this application, an order do issue directing all occupants of the property known as Title No Kitui Municipality Block111/290& Kitui Municipality Block 1/90 to furnish Gimco Limited, the appointed receiver all lease agreements, tenancy agreements, together with proof of payment of all rent arrears.
 - iv. This Honourable Court be pleased to issue a mandatory injunction as follows;
 - a. Directing the 1st and 2nd Plaintiffs, either by themselves, their agents, employees, assigns, agents or any other persons acting under the Plaintiff's to forthwith grant unrestricted access to Gimco Limited, the duly appointed receiver of the property known as Title No Kitui Municipality Block111/290& Kitui Municipality Block 1/90 for purposes of exercising the powers and functions of the receiver under Section 92 of the *Land Act*, 2012.



- b. Directing the 1st and 2nd Plaintiffs, together with all the tenants, 1st to 7th Interested Parties, occupying the Property known as Title No Kitui Municipality Block111/290& Kitui Municipality Block 1/90 to remit all rent to the following account:

Bank Name: Kenya Women Microfinance Bank PLC

Account Name: GIMCO Limited

Account Number: 1005902240

Branch: Upper-hill

Swift Code: KWMIKENX

Branch Code: 21

Bank Code: 78

Pay bill: 101200

- v. An order be and is hereby issued restraining the Plaintiffs, their agents, employees, assigns, agents or any other persons acting under the Plaintiffs' authority from interfering with Gimco Limited's management of properties known as Title No Kitui Municipality Block111/290& Kitui Municipality Block 1/90 while exercising the powers and functions of the receiver under Section 92 of the Land Act, 2012
- vi. An order be issued directing the Officer Commanding Kitui Police Station to provide police assistance to the agents of both the Receiver and the Applicant to access the said properties known as Title No Kitui Municipality Block111/290& Kitui Municipality Block 1/90 using reasonable force to gain access
- vii. An order be issued that the Plaintiffs' and 1st to 7th Interested Parties to provide the Statement of Accounts, rent books and or any other documentation for proof of payment for rent for the months of January, February, March and April 2023.
2. The application is supported by the Supporting Affidavit of Marion Wasike sworn on April 12, 2023 and is premised on 23 grounds and which I have summarized as follows;
3. That the Respondents charged to the applicant bank the subject properties vide a legal charge dated March 20, 2015. The Respondents defaulted on the loan advanced to them which default stood at Kshs 117,356,053.61/- as at September 15, 2021. The bank sought to exercise its statutory power of sale but the Respondents approached this court seeking injunctive orders vide an application dated September 8, 2021. This court rendered itself on the application vide its ruling delivered on March 17, 2022 where it dismissed the Respondent's application. As the default persisted, the Applicant sought to sell the subject properties via auction but was not successful which prompted the process of appointment of a receiver. That the Respondents also executed a Deed of Assignment of Rental Income over the property assigning all rent collected over the subject properties to the Applicant. That the Applicant issued a 30 days Statutory Notice to the Respondent following the botched auction but the Respondents failed to rectify the default, resultantly, the Applicants appointed Gimco Limited as a receiver of the rental income from the subject properties. That the receiver asked all the interested parties herein who are tenants in the subject properties to provide their respective tenancy agreements and also informed them of the bank account where they would be paying rent to. That despite passing that information, the interested parties (tenants) refused to provide the tenancy agreements



and also refused to pay rent to the bank account provided by the receiver which prompted filing of this application.

4. The applicant argues that the right to appoint a receiver is one of the rights to a charge which can be exercised as stipulated under Section 90 (3) (b) of the *Land Act* 2012.
5. It is submitted that the Plaintiff provided a Deed of assignment of Rental Income over the charged property and that under clause 4&5 of the agreement, the applicant has priority in receiving rental income of the property. It accuses the Respondents herein of placing hurdles to the applicant in realization of that right adding that any effort to engage the tenants have been frustrated by the respondent.
6. It is further argued that the tenants (the interested parties herein) have no issue paying rent to the applicant and all that is required is an order from this court.
7. The applicant avers that the respondent through her Counsel wrote a letter to the tenants disputing the remittance of rent to the applicant and that because of that letter it has been forced to approach this court through this motion.
8. It points out that the outstanding debt now stands at Kshs 117,356,653 and that the respondent has made no attempts to pay adding that the last payment was made on May 10, 2018.
9. The Respondent is opposed to this application. It has filed grounds of opposition dated May 15, 2023 as well as a replying affidavit sworn on May 18, 2023. The grounds of opposition raised are as follows: -
 - i. That the application is bad in law as it is not accompanied by properly marked exhibits
 - ii. That it is not open to the Defendant to appoint a receiver while still exercising statutory power of sale
 - iii. That the appointment of the receiver is unprocedural and therefore bad in law and cannot take effect
 - iv. That the appointment of the receiver will lead to reduction of the value of the Plaintiff's property and it is therefore not an appropriate remedy in the circumstances of this case
 - v. That the terms of reference for the receiver are ambiguous, equivocal, an inequitable and cannot therefore be ratified by this Honourable Court
 - vi. That the Defendant's application is fatally defective as it introduces parties who have not been joined in the suit by an order of this Honourable Court
 - vii. That the orders sought cannot issue as they affect the 1st to 8th Interested Parties who are strangers to these suit and are therefore outside the ambit of the court's jurisdiction
 - viii. That in any event, the Civil Procedure does not recognize parties who are styled as interested parties
 - ix. That the orders sought are substantive in nature and ought to have been founded in a substantive suit.
10. In the Replying Affidavit sworn by Kenny Muthoka Maluki on May 18, 2023, the deponent avers that Applicant failed to issue a proper notice of appointment of receiver. Further that the appointment of a receiver cannot happen concurrently with the process of exercising statutory power of sale. She contends that there are certain equitable prerequisites to appointment of a receiver which have not



been met by the applicant. Finally, avers that the inclusion of the interested parties in this suit is unprocedural as they have not been joined as parties to this suit by a court order.

11. When the present application came up for hearing before the court on May 22, 2023, counsels for the respective parties made oral submissions in support of their respective case. Counsel for the Respondents' submissions were on the following fronts, first, that the Applicant's right to exercise its statutory power of sale was not tied to its right to appoint a receiver, consequently, that the Applicant had failed to follow the set down procedure of appointing a receiver. That the application encompasses a fresh cause of action which cannot be canvassed in the present suit instead, the Applicant should file its own claim. Secondly, counsel submitted that the Applicant was estopped from filing the present application and seeking substantive orders as it had failed to file a defence or counter claim in the main suit. For the two reasons stated above, counsel for the Respondents contended that the present application stands on what counsel referred to as quick sand.
12. From the court record and the facts presented before the court, the Applicant was represented by learned Counsel in the proceedings preceding the instant Application. It was the same firm of Advocates that filed both a Notice of Appointment and a response to the Application dated September 8, 2021. The firm did so through the Notice of Appointment of Advocates dated September 15, 2021 filed on September 17, 2021 and opposed the said Application through an Affidavit sworn by Marion Wasike on September 16, 2021. It also opposed the Application by filing submissions. The ruling thereon was delivered on March 17, 2022 in this court. Following delivery of that Ruling, the Respondents herein filed a subsequent application dated July 13, 2022 which was dismissed for want of prosecution on November 7, 2022. It is significant to note that the Applicant herein, was represented by the same firm of advocates who opposed the said application vide a Replying Affidavit of Marion Wasike sworn on July 18, 2022 and filed on the same day. After dismissal of the aforementioned application, the Applicant, through the same firm of advocates filed the present application before this court.
13. When put to task by the respondent's counsel argument that the applicant cannot ride on the back of her suit to get substantive orders without a defence and counter-claim, the applicant made a feign attempt to downplay the omission through a replying affidavit by Marion Wasike sworn on May 19, 2023. During the oral submission in court counsel for the defendant/applicant again glossed over the issue and instead focused on the outstanding and undisputed debt owed to the applicant by the respondent.
14. The issue raise by the Defendant / respondent in my view is significant and cannot be downplayed. It is not merely technical or an attempt to avoid obligations as stated by the applicant. The elephant in the room is the consequences of failure to file a defence and counter-claim and the big question is can a party sued in litigation ask for substantive reliefs such as the ones sought herein without first pleading that he has a cause of action or counter-claim against the Plaintiff? My answer to that for obvious reasons is in the negative.
15. From the court record, an Affidavit of Service by Alfonso Musembi Kilonzi an advocate, sworn on September 17, 2021 and filed on September 20, 2021 explains how the advocate served the hearing notice, summons to enter appearance and plaint. Service of the same has not been disputed.
16. Order 6 Rule 1 of the *Civil Procedure Rules* provides;

“Where a defendant has been served with summons to appear, he shall unless some order be made by the court, file his appearance within the time prescribed in the summons.”



17. Order 7 Rule 1 of the *Civil Procedure Rules* provides for timelines of filing of a defence and Counterclaim as follows;

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”

18. Order 7 Rule 5 provides that where there is a defence or counterclaim the following documents should accompany the same;

“

- a. an affidavit under Order 4 rule 1(2) where there is a counterclaim
- b. a list of witnesses to be called at the trial
- c. written statements signed by the witnesses except expert witnesses; and
- d. copies of documents to be relied on at the trial

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.”

19. This court has been asked to grant substantive orders against both the Defendant and the Interested Parties, yet the Party asking for them has no defence or counter-claim on record. The Plaintiff/ Respondent at the hearing of this application even posed a question which I found legitimate and that was what would be the fate of this application was she to stand up and withdraw her suit. The application simply could stand because it has no legs of its own upon which it can stand in law. In the premises, this court finds that the application dated April 12, 2023 though it might have been well intended is simply incompetent and ill conceived. The only viable option legally is simply to strike it out with a view to giving a chance to the defendant to put it house in order. For now, he is condemned to pay costs of this application.

DATED, SIGNED AND DELIVERED AT KITUI THIS 6TH DAY OF JULY, 2023.

HON. JUSTICE R. LIMO-JUDGE

