



**Ngugi & 2 others v KCB Bank Kenya Limited & 2 others (Commercial Case E263 of 2022)  
[2024] KEHC 13743 (KLR) (Commercial and Tax) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13743 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E263 OF 2022  
A MABEYA, J  
NOVEMBER 7, 2024**

**BETWEEN**

**MARGARET WAMBUI NGUGI ..... 1<sup>ST</sup> PLAINTIFF  
KIMURI HOUSING COMPANY LIMITED ..... 2<sup>ND</sup> PLAINTIFF  
JOHN NGUGI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**KCB BANK KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT  
JM GIKONYO T/A GARAM INVESTMENT AUCTIONEERS . 2<sup>ND</sup> DEFENDANT  
LERY ENTERPRISES ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. On 19/5/2023, this Court restrained the 1<sup>st</sup> defendant from dealing with the plaintiffs' properties known as LR. Nos. 10390/4 and 11486/11, respectively. The order was as a result of an auction whose bona fides the Court doubted. The properties sold in the said auction fetched a paltry sum of Kshs. 286m.
2. Further, the Court issued the restraining order because the plaintiffs indicated that they had ready buyers for the remaining 2 properties. The said properties were alleged to be valued at Kshs. 1.7b.
3. One of the properties was successfully sold but the second one has taken forever to be sold. The reason for the delay is alleged to be the bank failing or refusing to give its consent to the sale. The plaintiffs insist that their buyer is insisting that the bank should first execute a Memorandum of Consent before they can execute the same. The bank is arguing otherwise.



4. I have seen the correspondence that has been exchanged between the parties. It has taken the parties three (3) months of haggling over the consent and execution of the Agreement for sale. After perusing the correspondence and the documents availed, the Court has formed the opinion that, there is extreme bad faith and mala fides on the part of the bank. There is an attempt to frustrate the deal that the plaintiffs have in disposing the said property, LR. No. 11486 (I.R. 166820).
5. The Court has seen the Agreement for sale that the plaintiffs have proposed to enter with the purchaser. The plaintiffs have executed the same. The purchaser is awaiting the bank as a holder of a charge, to give its consent by executing the Memorandum of Consent appended thereon. The Memorandum reads as follow: -

“We, KCB Bank Limited being the holder of a charge over the parcel of land known as LR. No. 11486/11 registered in the Encumbrances Section of the register and or against the title Hereby Consent To the Agreement of Sale herein provided by Kimuri Housing Company Limited to Mizpa Safety House (and/or nominee) Provided Always That such consent shall not in any way prejudice our rights and powers under the said charge or relieve Kimuri Housing Company Limited from any of its duties and obligations thereunder.”
6. A close reading of the Memorandum shows that there is absolutely nothing therein that exposes the bank to any risk of loss or at all. The Court is therefore at a loss as to why the Memorandum should not have been executed by now. The amount payable to the bank on execution of the said agreement is said to be Kshs. 144,000,000/=. The question that arise is, why would a prudent banker delay, refuse and decline to give a consent to a deal that would have enabled it to have by now received the said sum 3 months ago? Is the bank’s intention to receive or recover its monies or what it wants is the security? Why dilly dally with the transaction? Are there officers in the bank who are salivating for the security or who may have had their own buyer to whom they would have wanted the security disposed to for a song? That won’t do.
7. The Court notes that the bank did not properly exercise its statutory power of sale in the sale of five properties. That issue is still alive and will arise at the trial. It is the reason why an injunction was issued. If at the trial the doubts expressed by this Court in its ruling of 19/5/2023 are confirmed, that will leave the bank with huge damages on its hands. That will be compounded if again, for the bank’s own actions or inaction, the present deal fails. The damages may be insurmountable. I doubt whether that is what a prudent bank would wish for its shareholders.
8. In the opinion of this Court, the bank’s action and/or inaction is geared towards frustrating the sale. The bank must be told in no uncertain terms that its right is not in the property, but the money. Here is a buyer willing to pay over whatever the chargor is owing yet the bank is unwilling to facilitate the sale. Is the bank hoping that by frustrating the transaction, the same will fail and the security reverts back to it? That won’t do. It was alleged that the bank would like to first see proof of funds. For what? All that it should do is to give the consent and if the money is not forthcoming then the security reverts back to it period! Nothing more.
9. It should be noted that with more delay, there may be issues of increased interest. Who will be responsible for the same? Further, the issue of induplum rule may also not be ruled out. Why would the bank take that route? What benefit does it intend to achieve from all this? That is not yet clear to the Court.
10. This is a proper case where an injunction should permanently issue as the bank is hell bent on frustrating the chargor’s equity of redemption. Before going that route, the Court will give the bank the last chance of redeeming itself.



11. The orders for directions that commend itself to the Court are: -

- a. The bank is hereby directed to give its consent to the Sale Agreement between Kimuri Housing Company Ltd to Mizpa Safety House in terms of the Memorandum of Consent set out above by executing the Agreement for sale drawn by the Plaintiffs Advocates within 7 days of the date hereof.
- b. In the alternative, if the bank does not want to execute the Memorandum in the Agreement for sale; let it execute a note in the said terms and address the same to the plaintiffs within 7 days of the date of these directions.
- c. The execution shall be without any reservations or conditions whatsoever.
- d. In default of either (a) or (b) above, the injunction issued on 19/5/2023 shall last until the suit is heard and determined and the parties shall list the matter before the Deputy Registrar for pre-trials immediately. The statutory right of sale shall not be exercisable until the hearing and determination of the suit.
- e. Upon execution of the Memorandum of consent, the purchaser to likewise execute the Agreement for sale within 7 days of the bank's consent and pay the deposit in terms of the said Agreement for sale.
- f. Costs in the cause.  
Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

