



REPUBLIC OF KENYA



KENYA LAW
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**Waiyaki Way Developers Limited v KCB Bank Kenya Ltd (Civil Case E202 of 2024)
[2024] KEHC 14593 (KLR) (Commercial and Tax) (18 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14593 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E202 OF 2024
JWW MONG'ARE, J
NOVEMBER 18, 2024**

BETWEEN

WAIYAKI WAY DEVELOPERS LIMITED PLAINTIFF

AND

KCB BANK KENYA LTD DEFENDANT

RULING

1. For determination is the Plaintiff's Notice of Motion Application dated 19/4/2024 seeking a temporary injunction to restrain the Defendant from selling and/or interfering in any way with the Plaintiff's title and rights in the property known as Nairobi/Block 64/2037 (formerly Dagoreti/Kangemi/2037) (hereinafter the suit property) and an order to restrain the Defendant from trespassing upon the suit property.
2. The application was filed inter alia under Order 40 Rule 1 of the Civil Procedure Rules.
3. The grounds upon which the application was predicated were that the Plaintiff obtained financing from the Defendant sometime in June 2017 and January 2020 for the purpose of construction of 264 apartments for sale on the suit property and the title for the suit property was deposited with the Defendant as security for the facility.
4. The Plaintiff averred that the Defendant did not serve it with the Auctioneer's Redemption Notice before exercising its statutory power of sale as provided in the Auctioneers Rules; that the Defendant unlawfully and procedurally caused the issuance of a Notification of Sale of immovable property dated 5/3/2024 by its auctioneers prior to the issuance and expiry of the mandatory statutory notice of sale only served upon the Plaintiff on 27/3/2024 and that the Defendant had not undertaken a forced sale valuation by a valuer prior to exercising the intended statutory power of sale.



5. The Plaintiff further averred that the Defendant was agreeable to the proposed arrangement to externalise the loan debt to a company known as Ultramix (PTY) Limited by way of a buy-out of the loan outlay however the Defendant frustrated the said repayment and takeover of the outstanding facility which caused the loan amount to accrue unnecessary additional interest.
6. It was the Plaintiff's case that the Defendant frustrated the handover of the title of the suit property to it in order to process conversion of the title as required under the new land laws which hampered the registration of leases in favour of apartment purchasers and executing sales with potential purchasers.
7. In opposition to the application, the Defendant filed a replying affidavit sworn on 5/7/2024 by Lilian Sogo, its head counsel-litigation.
8. In the said replying affidavit the deponent averred that the Defendant advanced a facility to the Plaintiff of Kshs.850,000,000/= vide a mortgage facility letter dated 21/6/2017 and a corrigendum dated 24/1/2018 for the construction of 228 apartments for sale on the suit property; that the facility advanced was secured by, inter alia, a first legal charge of Kshs.850,000,000/= over the suit property; that vide the Enhancement of Banking Facilities Letter dated 27/1/2020, the Defendant advanced an additional facility of Kshs.230,000,000/= to the Plaintiff which was secured inter alia by a further legal charge of Kshs.230,000,000/= over the suit property.
9. Ms. SOGO deposed that the Plaintiff defaulted in making monthly loan repayments thereby triggering the occurrence of an event of default which prompted the Defendant to issue the statutory notice dated 23/6/2022 and subsequently the 40-day notification of sale; that the Defendant duly instructed valuers to conduct a valuation of the suit property culminating in a valuation report dated November 2023.
10. Further that the Defendant's auctioneers served upon the Plaintiff the 45-day redemption notice dated 5/3/2024 and an accompanying notification of sale and the charged properties were subsequently advertised on 29/4/2023 in the Daily Nation Newspaper.
11. The Defendant stated that the assertion that it frustrated the buy-out of the outstanding facility by a financier was a misrepresentation and concealment of facts and that the Plaintiff has not disputed being indebted to the Defendant, which amount stood at Ksh.1,831,186,980.15/= as at 29/2/2024.
12. It was averred that the Plaintiff failed to disclose that the suit property is the subject matter of two ongoing suits in which it is a party: HCCOMM E216 of 2023 Ndirangu Meshack Muruthi & 3 Others v Christopher Waweru Thiongo, Waiyaki Way Developers Limited & KCB Bank Kenya Limited and Milimani HCCOMM No. E193 of 2024; Christopher Thiongo Waweru & 2 others v KCB Bank Kenya Ltd & 3 others.
13. The Defendant stated that in HCCOMM No. E216 of 2023, there is an application seeking, inter alia, stay orders against the sale of the suit property before Visram J. while in Milimani HCCOMM No. E193 of 2024, Mulwa J. issued status quo orders with respect to the suit property vide the order issued on 18/4/2024 therefore it is in the interest of justice and judicial consistency if the instant application is dismissed with costs.
14. In rebuttal to the Defendant's replying affidavit, the Plaintiff lodged a further affidavit sworn on 7/11/2024 by Virji Meghji Patel, one of its directors.
15. He reiterated that the Defendant frustrated the Plaintiff's attempt for the loan to be taken over by Ultramix (PTY) Limited; that the purported valuation report is invalid as it does not bear the official company seal nor the signature of the director of the valuation company and that the Defendant failed to release the title of the suit property for the purpose of effecting partial discharge and registration of apartments to prospective purchasers.



16. Further that the purported advertisement of the property for sale on 29/4/2024 was done in contempt of court orders as this court had issued status quo orders on 18/4/2024 in HCCOMM No. E193/2024 Christopher Thiongo Waweru & 2 others v KCB Bank Kenya Ltd & 3 others.

Analysis and Determination:

17. At the time of writing this ruling, only the Defendant's submissions dated 20/9/2024 had been filed. I have carefully considered the pleadings and submissions filed by the parties in this matter.
18. I note that this is an application for an interlocutory injunction seeking to restrain the Defendant from selling the suit property pending the determination of this suit.
19. Before analysing the merits of the application, I note that there is an active suit, HCC No. E193/2024 Christopher Thiongo Waweru & 2 others v KCB Bank Kenya Ltd & 3 others, before Mulwa J. In the suit, the Plaintiffs therein sought, through an application dated 15/4/2024, an injunction pending determination of the application and suit to restrain the Defendants (the Plaintiff and Defendant in the present suit) from selling the suit property. Upon consideration, the court directed on 18/4/2024 that status quo orders be maintained which order is still in place. The order was produced as 'LS-12' in the Defendant's replying affidavit.
20. I note further that there is another active suit, HCCOMM No. E216 of 2023 Ndirangu Meshack Muruthi & 3 Others v Christopher Waweru Thiongo, Waiyaki Way Developers Limited & KCB Bank Kenya Limited before Visram J. whereby an application dated 16/4/2024 was filed seeking, inter alia, stay orders against the sale of the suit property. The application is pending determination. The application was produced as 'LS-12' in the Defendant's replying affidavit.
21. Having the following facts in mind, I am of the view that this court is barred by the sub judice rule from considering and determining an issue in which the subject matter is substantially in issue before another court of equal status.
22. Sub judice is codified under Section 6 of the [Civil Procedure Act](#) which states:
- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
23. In the Supreme Court case of Kenya National Commission On Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties) [2020] Eklr, the court set out the criteria for establishing whether a suit is sub judice, to wit:
- “1) there is more than one suit over the same subject matter; 2) that one suit was instituted before the other; 3) that both suits are pending before courts of competent jurisdiction and lastly; 4) that the suits are between the same parties or their representatives.”
24. In this case, the subject matter in issue is the suit property. In the two suits mentioned above, injunction applications have been sought to stop the sale of the suit property. Similar orders are also sought before me. As has been noted above, status quo orders were issued by Mulwa J. on 18/4/2024 which essentially halted the sale of the suit property pending further direction in that matter.



25. It would therefore violate the sub judice rule and section 6 of the Civil Procedure Rules if I would consider the instant application and suit as the matter in issue is also directly and substantially in issue in two previously instituted suits essentially between similar parties.
26. I am of the considered view that it is in the interest of justice and judicial consistency to dismiss the instant application and strike out the suit before me in its entirety with costs to the Respondent. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 18TH DAY OF NOVEMBER 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Ogendo for the Plaintiff/Applicant.
2. Mr. Ogunde for the Defendant/Respondent.
3. Amos - Court Assistant

