



**Bank of Africa Limited v Techspa General Supplies Limited; NCBA Bank  
Kenya PLC (Interested Party) (Miscellaneous Application E588 of 2021)  
[2021] KEHC 196 (KLR) (Commercial and Tax) (3 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 196 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E588 OF 2021  
DAS MAJANJA, J  
NOVEMBER 3, 2021**

**BETWEEN**

**BANK OF AFRICA LIMITED ..... APPLICANT**

**AND**

**TECHSPA GENERAL SUPPLIES LIMITED ..... RESPONDENT**

**AND**

**NCBA BANK KENYA PLC ..... INTERESTED PARTY**

**RULING**

Introduction

1. In the Originating Summons dated 10<sup>th</sup> August 2021 made, inter alia, under Order 37 Rule 4 of the *Civil Procedure Rules*, 2010 (“the Rules”), the Applicant seeks an order to foreclose and attach the Respondent’s account held by the Interested Party in respect of an amount not exceeding KES 88,349,620.89 which the Applicant claims is owed to it by the Respondent.
2. The Originating Summons is supported by the affidavits of Charles Waiyaki, a Senior Recoveries Officer of the Applicant sworn on 10<sup>th</sup> August 2021 and 20<sup>th</sup> September 2021 respectively. It is opposed by the Respondent through the Notice of Preliminary Objection dated 13<sup>th</sup> September 2021 and the replying affidavits of William Kuria Josiah, the Respondent’s proprietor, sworn on 31<sup>st</sup> August 2021 and 13<sup>th</sup> September 2021. The application was disposed by way of written submissions with the parties advancing their respective positions.

The Applicant’s Case



3. The Applicant's case is anchored on a Debenture dated 30<sup>th</sup> August 2010 which the Respondent created and executed in favour of the Applicant in order to secure certain facilities advanced to it by the Applicant. The Applicant granted the Respondent KES 68,000,000.00 on 10<sup>th</sup> June 2010 and a similar facility on 20<sup>th</sup> April 2012. Further, by a letter dated 2<sup>nd</sup> April 2014, the said facilities were restructured and it was indicated that the existing facilities at the time included a first ranking legal charge for KES 11,000,000.00 created by William Kuria Josiah over title number LIMURU/BIBIRIONI/T.909 and an all assets Debenture for KES 68,000,000.00 over the Respondent's assets. According to the Applicant, the Respondent has since defaulted in servicing the facility and now owes it KES 88,349,620.89 as at 6<sup>th</sup> August 2021.
4. The Applicant's case is that the Debenture has since crystallized into a fixed charge due to the Respondent's default and it is thus entitled to call in the securities charged to it which according to Clause 4 of the Debenture include debt revenues such as the Respondent's Bank Deposits and Credit Balances. The Applicant contends that it is entitled to foreclose on this security as provided by Order 37 Rule 4 of the Rules and that the money held in the Respondent's bank account at Interested Party Bank constitutes personal property which can be foreclosed. The Applicant relies on the case of *Bank of Africa Kenya Limited v Techspa General Supplies Limited ML HC Misc. App. 161 of 2016 [2017] eKLR* in support of its position.

#### The Respondent's Reply

5. The Respondent accuses the Applicant of failing to inform the court that there is a similar matter pending between the parties; Kiambu *HCCC COMM No.1 of 2021* (formerly Thika ELC No. E008/2020); William Kuria Josiah v Bank of Africa & Another) ("the Kiambu Suit") thus the present application is contravention of section 6 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya), an abuse of the court process and should be struck out in the first instance.
6. The Respondent further states that the present application as pleaded and canvassed is in contravention of section 44A of the *Banking Act* (Chapter 488 of the Laws of Kenya). It submits that the application is fatally and incurably defective in law and as such cannot stand and or be ventilated before this court.

#### Analysis and Determination

7. From the application, deposition and submissions, there are two issue for resolution. First, whether the application is in contravention of section 6 of the *Civil Procedure Act*. Second, whether the Applicant has made out a case for the grant of the application. In respect of the second issue, I had doubted the court's jurisdiction to grant the orders and directed the Applicant to satisfy the court that it could indeed issue the order sought.
8. The Respondent has stated that this suit ought to be stayed pending the hearing and determination of the Kiambu Suit as it in contravention of section 6 of the *Civil Procedure Act* which provides as follows:

6. Stay of suit

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.



9. The Supreme Court of Kenya, in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) SCK Adv. Ref. No. 1 of 2017 [2020] eKLR* elucidated the principle as follows:

[67].... A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives. [Emphasis mine]

10. Since the Applicant denies that the present suit is res sub judice, it is incumbent upon the Respondent to prove its case by placing before the court the pleadings in the pending suit to enable the court appraise the cause of action in that suit. It is for this reason, I rejected the preliminary objection as the nature of the pending suit was contested. I directed the Respondent to file and serve a replying affidavit attaching the pleadings of the previous case.
11. In the replying affidavit sworn on 31<sup>st</sup> August 2021, the Respondent attached only the first page of the Certificate of Urgency in the Kiambu Suit and a cause list of matters before the High Court at Kiambu for 15<sup>th</sup> June 2021 showing the matter listed before Kasango J. The Respondent annexed to its affidavit of 13<sup>th</sup> September 2021, the Certificate of Urgency, the Notice of Motion dated 28<sup>th</sup> December 2020 and the supporting affidavit of William Kuria Josiah, the replying affidavit in response thereto sworn by George Nyamai, the Notice of Preliminary objection in this case and a copy of the search certificate for LIMURU/BIBIRIONI/T.909.
12. It is evident that the Respondent has not furnished the court with pleadings of the Kiambu Suit in order to satisfy the court that the suit involves the same subject matter as the present one. It is the pleadings that set out the cause of action which are necessary for the court to determine whether in fact the matter violates section 6 of the [Civil Procedure Act](#). I dismiss this objection.
13. The last issue for determination is whether the Applicant has a right of foreclosure in light of the Respondent's default. The Applicant relies on Clause 4 of the Debenture which states;

The Company as beneficial owner HEREBY CHARGES as a continuing Security in favour of the Bank:-

THIRDLY all book and other debts revenues and claims (including bank deposits and credit balances) and the proceeds of sale of all the Land and Fixtures the Securities the stock-in-trade and all thins in action due or owing or which may become due or owing to or purchased or otherwise acquired by the Company and the full benefit of all rights and remedies relating thereto including but not limited to any negotiable or non-negotiable instruments guarantees indemnities debentures legal and inequitable charges and other security reservation of proprietary rights rights of tracing liens and all other rights and remedies of whatsoever nature in respect of the same in all cases both present and future.

14. Upon default, Clause 12 thereof provides that, "The floating charge constituted by this Debenture shall immediately crystallise and attach by way of fixed charge to the property and assets comprised herein then subject to the floating charge without presentment demand protest or notice if the Bank shall take any action to enforce this security and shall also automatically crystallise and attach as aforesaid..." From the above provisions, it can be said that the Debenture crystallized immediately upon the Respondent's default, thus the Applicant is correct to state that the Debenture has since crystallized.



15. What then happens after the debenture crystallizes? Clause 13 of the Debenture provides that when the moneys due become payable or the Respondent defaults, the Applicant is entitled to appoint a receiver or receiver and manager over the property and assets charged. Under Clause 14, the receiver's powers include taking possession, collecting and getting in all or any part of the property and assets that have been charged which include the Respondent's bank deposits and credit balances.
16. The Applicant seeks to foreclose the Respondent's bank account held in the Interested Party. What then is the meaning of foreclosure? This court, in *Delphis Bank Limited (Under Statutory Management) v Flystar Limited ML HC Civil Suit No. 447 of 2002 [2016] eKLR* accepted Blacks Law Dictionary's definition that "to foreclose" means "To terminate a mortgagor's interest in property; to subject the property to foreclosure proceedings". The right to foreclosure has its foundations in the law of real or immovable property where the mortgagee was entitled in law to extinguish the mortgagor's interest in the property initially without recourse to the court. This position was mitigated by legislation that required the intervention of the court before the right could be exercised.
17. Within this jurisdiction, the mortgagee's remedy of foreclosure was anchored in the now repealed *Transfer of Property Act, 1882* which right was in respect of immovable mortgaged property and involved a mortgagee filing a suit to obtain an order that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property and/or that the property be sold.
18. In this case, the Applicant relies on Order 37 Rule 4 of the Rules which provides as follows:
  4. Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable before the judge in chambers, for such relief of the nature or kind following as may be by the summons specified, and as the circumstances of the case may require; that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee. [Emphasis mine]
19. The Applicant also relies on the decision in *Bank of Africa Kenya Limited v Techspa General Supplies Limited (Supra)* where Tuiyott J., accepted its argument in a similar case and held as follows:
  8. The Debenture is in the nature of a charge and so the Applicant bank would in that sense be a chargee. Order 37 Rule 4 seems to permit a mortgagee (reads as well a chargee) who has the right to foreclose any charge to take out, as of course, an Originating Summons for such relief.
  9. It is for the above reason that this Court cannot fault the Originating Summons in so far as it is anchored on the Provisions of Order 37 Rule 4. The Originating Summons survives the Preliminary Objection and the Interim Orders made herein remain in force.
20. Based on Order 37 Rule 4 of the Rules and on the decision I have cited, the Applicant urges the court to allow it to foreclose the Respondent's bank account held in the Interested Party.
21. I am constrained to take a different path from that of my learned brother for two reasons. First, Order 37 Rule 4 of the Rules is a procedural provision. It does not confer substantive rights to a party but merely facilitates the enforcement of existing rights, which are matters of substantive law. Second, as I have stated the law of foreclosure has a long history in the law of real or immovable property. In fact, are reading of Order 37 Rule 4 aforesaid shows that remedies the court may grant, " that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee", all relate to immovable property.



22. I therefore find and hold that money in a bank account is not immovable property capable of being foreclosed in the manner suggested by the Applicant. The remedy of foreclosure contemplated by Order 37 rule 4 of the Rules is not available to the Applicant in respect of the Respondent's bank credit balances. The Debenture has its own remedies that are well known in law.

#### Conclusion and Disposition

23. For the reasons I have set out above, it is not necessary to deal with the issue whether the Respondent is indebted to the Applicant in light of the in duplum rule under section 44A of the Banking Act as urged by the Defendant.

24. I now dismiss the Originating Summons dated 10<sup>th</sup> August 2021 with costs to the Respondent.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF NOVEMBER 2021.**

**D. S. MAJANJA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Mr Omino instructed by Walker Kontos Advocates for the Applicant.

Mr Mango instructed by Kimani Kahete and Company Advocates for the Respondent.

