



**Lois Nyambura Mwangi Suing as the Administrator of John Nahashon Mwangi
(Deceased) v Kenya Finance Bank Limited (In Liquidation (Commercial Civil Case
212 of 2009) [2021] KEHC 217 (KLR) (Commercial and Tax) (11 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 217 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE 212 OF 2009
DAS MAJANJA, J
NOVEMBER 11, 2021**

BETWEEN

**LOIS NYAMBURA MWANGI SUING AS THE ADMINISTRATOR OF JOHN
NAHASHON MWANGI (DECEASED) PLAINTIFF**

AND

KENYA FINANCE BANK LIMITED (IN LIQUIDATION) DEFENDANT

RULING

1. The Plaintiff has moved the court by the Notice of Motion dated 18th March 2021 seeking the following relief:
 - (1) THAT owing to the urgency involved, this application be heard ex-parte in the first instance.
 - (2) THAT the Honourable Court be pleased to Order the Defendant to forthwith release the Original title thereof being Title Number IR 5311/1 and issue a Discharge of Charge in respect of Land Reference Number IR No. 2246/5 Langata.
 - (3) THAT upon release of the Plaintiff's Title and Discharge of charge this matter be marked as fully settled.
 - (4) THAT the Honourable Court be pleased to grant any other order it deems fit and appropriate in the circumstances.



2. The application is supported by the Plaintiff's affidavit sworn on 18th March 2021. The Defendant opposed the application through Grounds of Opposition dated 24th May 2021. Both sides have filed written submissions in support of their respective positions.
3. From the pleadings, depositions and record of the proceedings, resolution of the application depends on whether the matter has been settled or not.
4. In its Grounds of Opposition, the Defendant has raised the issue that the application is res judicata in view of the previous application the Plaintiff filed and the ruling delivered thereon. In that application, the Notice of Motion dated 13th February 2019, the Plaintiff sought the following reliefs:
 - (1) Spent
 - (2) THAT the Honourable Court be pleased to order the Defendant to forthwith release the original title thereof being Title Number I.R 5311/1 and issue a Discharge of Charge in respect of Land Reference Number L.R No.2246/5 Langata.
 - (3) THAT the Honourable Court be pleased to order the Defendant to refund overpayment in the sum of Kshs. 928,974.
 - (4) THAT upon release of the Plaintiff's Title and Discharge of charge this matter be marked as fully settled with no orders as to costs.
 - (5) THAT the Honourable Court be pleased to grant any other order it deems fit and appropriate in the circumstances.
5. Apart from prayer No. 3 in the previous application seeking a refund of KES. 928,974.00, all the other prayers are the same. After considering the application, Tuiyott J., by the ruling dated 31st May 2019 ordered as follows:
 - 8.1 The Plaintiff is hereby granted liberty to agree with the Bank on the appointment of an accountant to work out all sums paid after the agreement of Kshs. 6,351,327.32. The repaid sum shall not include Kshs. 800,000.00 paid before 2016. Such appointment to be made within 21 days hereof. In the event of a disagreement as to the accountant, the Chairperson of the Institute of Certified Public Accountants of Kenya to make the appointment within 14 days of request by either party.
 - 8.2 The accountant's fee shall be met in the first instance by the Plaintiff. However, if the accounts reveal on overpayment then the fees shall be paid back to the Plaintiff by the Bank.
 - 8.3 Costs shall be taxed by the Taxing Master of this Court.
 - 8.4 Otherwise the Notice of Motion dated 13th February 2019 is hereby dismissed with costs.
6. The Plaintiff was dissatisfied with the ruling dated 31st May 2019, she applied for review by her Notice of Motion dated 19th June 2019 which application was dismissed by the ruling dated 21st February 2021. In that ruling, Tuiyott J., held that the suit was compromised and the Plaintiff's debt to the Defendant settled at KES. 6,351,327.52 which included the sum of KES. 800,000.00. On the issue of



costs of the suit, the court noted that indeed the Plaintiff conceded that costs should be taxed if not agreed upon. Regarding other costs, the court noted as follows:

17. Lastly as whether payment of costs has a correlation to the discharge of the property, one simply has to look at the charging clause of the charge. The charge remains as security as long as other charges, costs and expenses in respect to the borrowing remains payable to the lender. These include costs incurred in defending a litigation such as this. [Emphasis mine]
7. The Party and Party costs of the suit were settled at KES. 448,193.00 as determined by the ruling dated 1st December 2020. Upon taxation, the Plaintiff's advocates requested the Defendant to forward the Discharge of Charge upon payment of the taxed costs. In response, through the letter dated 10th March 2021, informed the Plaintiff that there was still an outstanding amount of KES. 928,000.00 being valuation costs incurred by the Defendant and that upon payment of that sum, the discharge documents would be released and the matter closed.
8. The Plaintiff claims that the amount demanded is fictitious and not supported by any evidence. It points out the valuation amount was part of the settlement sum reflected in the Defendant's List of Documents supporting the witness statement of Jane Kamita and in particular the Loan Repayment schedule which shows that the collection charges included legal fees, valuation fees and auctioneers' fees amounting to KES. 1,204,001.00 hence it was included in the entire settlement sum.
9. Apart from stating the application is res judicata, the Defendant states that the settlement of KES. 6,351,327.50 was approved by the Defendant subject to the Plaintiff paying additional costs. The Defendant further contends that the issue of valuation costs incurred in 2016 have been brought to the attention of the Plaintiff several times before and as such the Plaintiff was required to pay the same. In its view and in light of the ruling by Tuiyott J., dated 21st February 2021, the issue of valuation costs is res judicata as it ought to have been raised before in the previous application and that the amount is due under the charge.
10. I agree with Defendant that the prayers sought in Prayers 2 and 3 of the application are res-judicata as those prayers were settled in the ruling dated 31st May 2019. A review of the orders failed when the application was dismissed. In effect, the court was of the view that the parties should be held to the bargain struck in the consent and that the only outstanding issue was that of costs which have now been taxed.
11. As to whether the valuation costs are due, this issue too has been dealt with in the ruling dated 21st February 2020 where the learned Judge was of the view that, "The charge remains as security as long as other charges, costs and expenses in respect to the borrowing remains payable to the lender." The Plaintiff therefore is required to pay all the other charges. I have gone through the record and I do not find any consent recorded by the parties stating that the sum of KES. 6,351,327.52 was the full and final settlement. In the same ruling at para. 11, Tuiyott J., explained how the sum came about and it did not include charges and costs incidental to the charge and recovery. These were separate as an incident of the charge and the suit which the borrower was contractually obliged to pay.
12. It is clear therefore that the application dated 18th March 2021 lacks merit and it is dismissed with costs to the Defendant which are now assessed at KES. 10,000.00.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021.

D. S. MAJANJA

JUDGE



Court of Assistant: Mr M. Onyango

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

Mr Thiga instructed by Waruhiu K'owade and Ng'ang'a Advocates for the Defendant.

