

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
MILIMANI LAW COURTS
HCCC NO. 20 OF 2014
(Coram: F. Gikonyo J)

TITUS WAGENI MAINA.....1ST
PLAINTIFF

ROSE WAMBUI KABUE.....2ND
PLAINTIFF

VERSUS

CFC STANBIC BANK LTD.....1ST
DEFENDANT

KEYSIAN AUCTIONEERS.....2ND
DEFENDANT

DIANA KWAMBOKA ONTIRI.....3RD
DEFENDANT

RULING

1. The plaintiffs filed the notice of motion dated 30th May 2025, seeking the following orders: -

(1) THAT the court orders made on 22nd January 2014 and issued on 24th January 2014 and entered on the register of the Plaintiffs' property, LR. No. 209/19594 Nairobi on 4th February 2014 as entry number 3 be raised and or cancelled from the register of the property.

(2) THAT the 1st Defendant be directed to issue to the Plaintiffs a duly executed discharge of charge and to release the Certificate of Title and all other documents in its custody

with respect to the Plaintiffs' property, LR. No. 209/19594

Nairobi.

2. The application is premised on the grounds outlined in the application, the annexed affidavit sworn by the plaintiffs on 30th May 2025 and written submissions dated 1st July 2025. The main grounds are that there is no outstanding balance owing to the 1st defendant and that its demand for **Kshs. 8,616,397.35 cts** is without legal basis.

Response

3. The 1st defendant opposed the application through a replying affidavit sworn by its manager, recoveries department, **Angela Njeri** on 4th June 2025 and written submissions dated 7th July 2025.
4. The 1st defendant's core contentions are that **Order No. 2 of the judgment** confirms that the plaintiffs have been indebted to it since 2013. The order also confirms that **the statutory notice of 9th May 2013** still stands. That, however, the plaintiffs have yet to make any effort or steps to redeem their property as granted by the judgment.

Submissions

5. The plaintiffs highlighted that during the trial, the 1st defendant's witness, **Mr. Amos Mugambi**, admitted that

the plaintiffs had no outstanding loan balance. They also indicated that the court directed the 1st defendant to give a true and accurate account of the debt. That the 1st defendant provided the same account statements it relied on during the trial, which showed no outstanding balance.

6. The plaintiffs, therefore, disputed the amount demanded by the 1st defendant. They relied on **Carol Construction Engineers Limited & Another v National Bank of Kenya [2021] KEHC 9701 (KLR)**, where the court estopped the defendants from claiming interest that was unknown to the claimants.
7. The plaintiffs pointed out that at the time of the impugned auction, the total amount owed to the 1st defendant was approximately Kshs. 7,000,000/-. That the 3rd defendant paid Kshs. 8,500,000/- as a deposit and part payment for the suit property. That, however, the 3rd defendant neither paid the balance of the purchase price nor sought a refund. She also did not testify in court despite being granted numerous opportunities.
8. The plaintiffs contended that the 1st defendant has not provided any evidence to show that it refunded the monies to the 3rd defendant after failure to pay the remainder of the

auction price. Therefore, they argued that the monies paid by the 3rd defendant stand to be forfeited in their favour.

9. The plaintiffs relied on **Housing Finance Company of Kenya v J. N. Wafubwa [2014] KECA 695 (KLR)**, where the Court of Appeal upheld the award of monies forfeited by a defaulting purchaser at auction in favour of the charger, based on the use of the "finder's keepers" and the "windfall" principles.

10. The plaintiffs, therefore, urged the court to grant the orders sought because the 1st plaintiff's loan account has no outstanding liability and has been fully redeemed. They asserted that the 1st defendant will not be prejudiced in any way. That, on the other hand, they stand to be prejudiced as they are unable to dispose of the property to a willing purchaser. That the charge continues to encumber the title, making it difficult for the plaintiffs to enjoy their property rights.

11. On its part, the 1st defendant submitted that the plaintiffs' application lacks merit and is an abuse of the court process and should be dismissed with costs to the 1st defendant.

12. The 1st defendant submitted that the plaintiffs have a debt to pay to facilitate the discharge of the title to the subject property as sought. That it has rendered accounts to the

plaintiffs and that they have not disputed the amounts as shown in the statement. That they also have not alleged to have any further amounts as paid by themselves, save for the argument that the amounts paid as part of the purported sale process by the 3rd defendant ought to be applied to their account, which is a misplaced argument.

13. According to the 1st defendant, the court invalidated the sale *ab initio*. Thus, all consequential steps and proceedings were nullified, and parties reverted to *status quo ante*. Therefore, it argued that the case of **Housing Finance Company of Kenya v J. N. Wafubwa [supra]**, where the issues revolved around a sale that was aborted, is distinguishable.

14. The 1st defendant indicated that it is ready and willing to discharge the charge on the plaintiffs' title once the outstanding debt is settled as per the charge.

Analysis and Determination

15. The primary issue in contention is whether the **Kshs. 8,500,000/-** paid by the 3rd defendant fully redeemed the debt owed.

16. The plaintiffs argued that the **Kshs. 8,500,000/-** paid by the 3rd defendant was forfeited and ought to be applied in their favour to redeem the debt owed fully.

17. On the other hand, the 1st defendant claims that there is an outstanding loan balance of **Kshs. 8,616,397.35.**

18. The plaintiffs relied on the Court of Appeal's decision in **Housing Finance Company of Kenya v J. N. Wafubwa [2014] KECA 695 (KLR)** where the Court of Appeal found that a mortgagee is entitled to charge the expenses of any actual or attempted sale against the proceeds of sale, NOT where the sale is aborted. It also found that the High Court erred in applying **section 69(C) of the ITPA** to justify the application of forfeited deposit to the mortgage account. However, it still upheld the application of the forfeited deposit to the mortgage account on equitable grounds if the intended purchaser laid no claim and the terms of the sale were that the deposit would be forfeited if the purchaser defaulted in payment within the stipulated timelines.

19. The 1st defendant's position is that the above case is distinguishable from the present case. It highlighted that in this case, the sale was aborted as per the court's judgment dated 3rd January 2025.

20. In the said judgment, **Justice Mabeya** found that:-

"45.The totality of the evidence on record is that the 1st and 2nd defendant conducted an irregular auction which did not pass any title to the 3rd defendant. The plaintiffs

have therefore proved their case to the required standard.

46.As the Court contemplates making a determination, it is clear that the monies received from the 3rd defendant cleared the loan. The plaintiffs had a sum close to Kshs.7m due from them on the loan. It would be unjust to clear them and let them scot free. The best the Court can do is to invalidate the wrongs and leave the parties to be at par. It was confirmed at the trial that the plaintiffs were still in occupation and that the property had not been transferred.

47.Accordingly, the orders that recommend themselves to the Court are that judgment is hereby entered for the plaintiffs against the defendants, jointly and severally in terms of paragraph cc) of the amended plaint and paragraphs a) and d) as prayed for in the alternative save that as far as d) is concerned, the claim for proceeds received from 3rd parties shall not apply. The plaintiffs will have the costs of the suit."

21. From the above, the court pronounced that the auction sale to the 3rd defendant was invalid. This was because the auction was held before the notice period had lapsed. In my view, the auction sale became *void* from the outset.

22. The court also rejected the plaintiff's claim for the sale proceeds received from the 3rd defendant. According to the court, it left the parties at par. But, did not want to let the

plaintiffs to go scot free for there was evidence they owed some balance. Nevertheless, accurate account as was ordered is yet to be provided by the bank. These realities form part of the functional foundation for the determination of this application.

Partial Ruling of 24th July 2025

23. Through the ruling of 24th July 2025, this court directed the 1st defendant to render a true, full and accurate account on the loan account in issue showing all receipts thereto within 30 days which failing the court will determine the application on the basis of the material filed in court.

24. The 1st defendant subsequently filed a list and bundle of documents dated 22nd August 2025.

25. On their part, the plaintiffs filed a further reply to the 1st defendant's documents sworn by the 1st plaintiff on 1st September 2025. They urged the court to find that the 1st defendant has failed to provide ***“full, truthful and accurate account of the Plaintiff's loan account.”***

Lack of accompanying affidavit

26. The plaintiffs faulted the 1st defendant for filing the documents without an accompanying affidavit. They contended that this was done deliberately to prevent the court from calling the deponent to explain the discrepancies.

27. In my considered view, this is a curable defect. Secondly, I do not think that the plaintiffs shall be prejudiced if the 1st defendant's documents are considered by the court as they have filed a response containing their substantive grounds of opposition. I will therefore consider documents and the substantive grounds of opposition raised in the interests of justice guided by **Article 159 (2) (d) of the Constitution**.

Evidence of Refund

28. The 1st defendant produced a real time gross settlement (RTGS) slip showing that it paid Kshs. 8,500,000/- to the 3rd defendant on 27th March 2025. It also produced a copy of a letter dated 21st March 2025 from Messrs. Mose Nyambega & Co. Advocates stating that its client, the 1st and 3rd defendants were both agreeable to the release of the Kshs. 8,500,000/- to the 3rd defendant.

29. The plaintiffs challenged the alleged RTGS from the 1st defendant to the 3rd defendant and a letter from Messrs. Mose Nyambega & Co. Advocates. They highlighted that before the delivery of the judgment; the firm had ceased to act for the 3rd defendant. They filed a formal application seeking leave to cease acting. Thereafter, Messrs. Angaya & Co. Advocates filed a notice of change of advocates dated 15th June 2023 and was on record for the 3rd defendant on

16th June 2023. The firm did not attend thereafter, and the 3rd defendant did not attend court for defence hearing. On 5th June 2025, Mr. Mose Nyambega appeared in court and informed the court that he had previously ceased acting for the 3rd defendant and that Angaya & Co. Advocates took over her representation.

30. The plaintiffs asserted that they ought to have been alerted by the 1st defendant before it made any payment that would impact them. They argued that the alleged refund was made on instructions that could not be verified or corroborated. That the 1st defendant created fictitious accounts to justify the unlawful release of such funds.

31. The plaintiffs averred that they have never been made aware of all the documents produced save for the statement of accounts produced from pages 26 to 110 of the 1st defendant's bundle of documents.

32. The plaintiffs also averred that they have had numerous meetings with the 1st defendant and its lawyers. That at a meeting held on 12th May 2025, to discuss the release of the title to the property, there was no disclosure of the purported refund to the 3rd defendant. The purported refund was made on 27th March 2025, before the meeting.

33. Although there is any rule that prevented **Messrs. Mose Nyambega & Co. Advocates** from representing the 3rd defendant in the communication issued to the 1st defendant, the circumstances of this case and the manner the bank is handling the refund of the proceeds of the botched public auction raises several valid concerns. Why they did not seek for or provide evidence of re-engagement of the said advocates who had ceased acting for the 3rd Defendant? Why they chose to engage the legal counsel and make refund through them in the absence of express written instructions to that effect? What is the role of the banks recovery personnel and why entertain such mystery? Is there any ulterior or extraneous motive or scheme? The bank should provide these answers.

34. I think that, if for anything, good faith demands that the 1st defendant ought to have informed the 1st and 2nd plaintiffs of the making of a refund to the 3rd defendant before its meeting.

35. However, the court had already rendered itself that the plaintiffs' claim for proceeds received from the third party would not apply.

36. Accordingly, I will not make any finding that the RTGS slip is sufficient to prove that the 1st defendant refunded the Kshs. 8,500,000/- to the 3rd defendant.

37. I leave the issue of refund undetermined owing to the questions raised above and in the event of any future litigation on the issue by the 3rd defendant or any other person apart from the plaintiffs.

Duty to Render Accounts

38. For emphasis, I will reproduce paras (b) and (c) of the decree dated 6th February 2025 below: -

“(b) Relief be and is hereby granted against the operation of the remedy of power of sale over the plaintiff’s property L. R. No. 209/19594 in the nature of an order extending the period of time for compliance with the statutory notice dated 9th May 2013 and/ or allowing/ permitting the plaintiffs to redeem their said property L. R. No. 209/19594.

(c) The 1st defendant do render a true account of the plaintiffs’ loan account and further of all proceeds received from the plaintiffs.”

39. The 1st defendant failed to comply with the order (c) above.

Once again, on 24th July 2025, this court gave the 1st defendant the opportunity to render a true, full and accurate account on **the loan account in issue** showing all receipts thereto within 30 days.

40. However, from the foregoing, it is apparent that the 1st defendant has failed to comply with the court's directions. The court gave a rider that upon failure to do so, it would determine the application on the basis of the material filed in court.

41. The 1st defendant claimed that there is an outstanding loan balance of **Kshs. 8,616,397.35**. That **Order No. 2 of the judgment** confirms that the plaintiffs have been indebted to it since 2013. The order also confirms that **the statutory notice of 9th May 2013** still stands. That, however, the plaintiffs have yet to make any effort or steps to redeem their property as granted by the judgment.

42. The 1st defendant produced statements for three separate accounts: -

- (1) current account number **01000006584;**
- (2) loan account number **0100001786867;** and
- (3) loan account number **0100015471381.**

43. The plaintiffs asserted that the first and second accounts have been fully redeemed, and the statements produced support this position. That the statements for the accounts indicate that there are no outstanding sums due or owing from the 1st and 2nd plaintiffs.

44. The statement at pages 26 to 110 of the 1st defendant's bundle of documents is in respect of the 1st plaintiff's current account number **01000006584**. The statement shows that the outstanding balance as of 20th May 2025 is Kshs. 0.00/-.

45. The statement in respect of the 1st plaintiff's loan account number **0100001786867** shows that the closing balance was Kshs. 0.05 as of 12th July 2016. It reflects application of the proceeds from the auction sale to redeem the outstanding loan balance.

Loan account no. 0100015471381

46. The statement in respect of loan account no. **0100015471381** at pages 23 to 24 of the 1st defendant's bundle of documents indicates that a loan of Kshs. 8,500,000/- was disbursed on 28th March 2025 and reflects an outstanding balance of Kshs. 8,629,022.50/- as of 21st August 2025.

47. The plaintiffs challenged the statement for loan account no. **0100015471381** opened on 28th March 2025 in the 1st plaintiff's name. The 1st plaintiff stated that he was not aware of the account and that he did not consent to the opening of the account in his name.

48. The plaintiffs contended that this was not the first time that the 1st defendant opened a fraudulent account in the 1st

plaintiff's name. They pointed out that through a demand letter dated 2nd May 2025, the 1st defendant demanded payment of **Kshs. 8,385,762.83/-** and that the demand contained a different account number from his known loan account number **0100001786867** and current account number **01000006584**.

49. The court's directions of 24th July 2025 were clear. This court directed the 1st defendant to render a true, full and accurate account on **the loan account in issue** showing all receipts thereto within 30 days which failing the court will determine the application on the basis of the material filed in court.

50. The statement in respect of the loan account no. **0100015471381** does not comply with the directions which were specific to the loan account in issue. The statement does not clearly show how the Kshs. 8,629,022.50 was arrived at from the previous amount claimed of Kshs. 6,959,522.75/- as per the statutory notice of 9th May 2013.

51. The 1st defendant further produced a loan repayment breakdown and loan schedule. According to the loan repayment breakdown, the total repayment by the plaintiffs as of 28th January 2014 was Kshs. 1,889,989.83/- and the outstanding balance was Kshs. 7,605,714.36. As of 11th

March 2014, the Kshs. 5,000,000/- proceeds from the auction sale was applied to the loan leaving a balance of Kshs. 7,514.18/-.

52. Similarly, the loan repayment breakdown and the loan schedule do not comply with the court's directions. They do not hold the evidentiary weight as they do not show the actual credits and debits.

53. In **Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] KECA 319 (KLR)** the Court of Appeal underscored the bank's obligation to furnish the borrower with clear and accurate account statements.

54. The only relevant material on record is that as of 9th May 2013, the outstanding loan balance was Kshs. 6,959,522.75/-. But, this figure must be substantiated through the accounts that were ordered by the court. Appropriate order shall be made thereto.

Raising of the court order made on 22nd January 2014

55. The plaintiffs sought: -

THAT the court orders made on 22nd January 2014 and issued on 24th January 2014 and entered on the register of the Plaintiffs' property, LR. No. 209/19594 Nairobi on 4th February 2014 as entry number 3 be raised and or cancelled from the register of the property.

56. The Order of 22nd January 2014, was to the effect that:-

“1. THAT the notice of motion by the Plaintiff dated 21st January 2014 be and is hereby certified urgent.

2. THAT the application shall be served for hearing inter partes on 3rd February 2014 at 9.00 a.m.

3. THAT pending the hearing inter-partes the defendants are restrained by a temporarily (sic) injunction from sale of the suit property L. R. No. 209/19594 ON CONDITION that the plaintiffs shall pay to the 1st Defendant bank Kshs. 1,600,000 (One million six hundred only) before close of business on 22nd January 2014. In default the temporary injunction shall lapse automatically. In addition the plaintiff shall pay the cost of the aborted auction sale.”

57. The orders have now lapsed. Therefore, I see no reason for the continued existence of the entry in the land register.

Disposal

4. In conclusion, I make the following orders: -

(1) I direct the Lands Registrar to cancel entry no. 3 of 4th February 2014 on the register of the Plaintiffs' property, LR. No. 209/19594 Nairobi of the court orders made on 22nd January 2014 and issued on 24th January 2014. For the avoidance of doubt, this cancellation does not affect the validity of the charge, which shall remain in place until the plaintiffs settle the outstanding debt.

(2) I direct the 1st defendant to transmit to the Plaintiffs a duly executed discharge of charge and to release the Certificate of Title and all other documents in its custody

**with respect to the Plaintiffs' property, LR. No. 209/19594
Nairobi subject to clause (3) below.**

**(3) Pending settlement of accounts between the parties
before the Deputy Registrar, the applicants to deposit in an
interest-earning account in the joint names of the legal
counsel for the parties a sum of Kshs. 6,959,522.75/- within
45 days of today.**

**(4) Costs of the application shall be borne by the 1st
defendant.**

**Dated, signed and delivered at Nairobi this 9th
day of October, 2025 through Teams online
application.**

**F. Gikonyo M
Judge**

In the presence of: -

Mwangi/Wanyoike for Applicant
Ms. Kiriimi for 1st Respondent
Lumumba for 2nd Respondent
CA Kinyua