Echuka Country Estate Limited v Housing Finance Company Limited (Civil Suit E357 of 2022) [2026] KEHC 616 (KLR) (Commercial and Tax) (30 January 2026) (Judgment)

Neutral citation: [2026] KEHC 616 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E357 OF 2022

H NAMISI, J

JANUARY 30, 2026

BETWEEN

ECHUKA COUNTRY ESTATE LIMITED ..... PLAINTIFF

AND

HOUSING FINANCE COMPANY LIMITED ..... DEFENDANT

JUDGMENT

1. This matter presents a complex tapestry of commercial lending, secured transactions, and the equitable doctrines that govern the relationship between a chargor and a chargee. At its core, the dispute involves the enforcement of a legal charge over properties known as L.R. No. 155/89, 155/93, and 155/115 (hereinafter "the suit properties") situated in the prime locality of Tigoni, Limuru. The Plaintiff, a property developer, seeks the intervention of this Court to halt the exercise of the statutory power of sale by the Defendant, a licensed financial institution.

2. The Plaintiff's claim is founded on the bold assertion that the secured facility has been fully redeemed through a combination of direct payments and the realization of securities by the Defendant. Specifically, the Plaintiff alleges that the Defendant has recovered a sum of Kshs. 174,730,000/- against a principal borrowing of Kshs. 76,000,000/-. Furthermore, the Plaintiff invokes the equitable jurisdiction of this Court to challenge the accrual of interest, alleging that the Defendant engaged in unconscionable conduct by delaying the subdivision of the security documents for a period of four years, thereby clogging the equity of redemption.

3. Conversely, the Defendant characterizes this suit as an abuse of the court process, arguing that the Plaintiff is estopped from re-litigating matters settled by a Deed of Settlement executed in May 2020 and adopted as an order of the Court in HCCOMM No. 41 of 2020. The Defendant contends that the debt remains outstanding and that the statutory power of sale has properly crystallized following the Plaintiff's default on the settlement terms.

Brief Background

4. The relationship between the parties commenced in or around 2013 when the Defendant extended a construction loan facility to the Plaintiff. The purpose of the facility was to finance the development of residential units on the parent title, L.R. No. 155/57 (Original No. 155/52/2). The principal amount advanced was Kshs. 76 million.

5. The project, 'Echuka Country Estates', encountered significant headwinds. By 2016, the facility was non-performing. In an effort to salvage the project, the parties entered into a restructuring arrangement vide a Letter of Offer dated 4 April 2016. This document is critical to the determination of the opening balances in this dispute. Under the terms of this restructure, the Plaintiff acknowledged a total outstanding balance of Kshs. 104,221,992.20 as of 30 April 2016. The facility would attract interest at the rate of 17% per annum, with a default rate of 20.75%. The Plaintiff undertook to facilitate the subdivision of the parent title into 42 sub-plots to enable the sale of individual units (Clause 3.2).

6. A central pillar of the Plaintiff's case is the delay in subdividing the property. The Plaintiff alleges that the process, which was contractually estimated to take 30 days, took four years to complete. The Plaintiff attributes this delay entirely to the Defendant and its appointed Advocates, Messrs. Kamotho Maiyo & Mbatia Advocates. The Plaintiff contends that this delay paralyzed the project, as titles for the individual units were unavailable for transfer to buyers, thereby preventing the repayment of the loan from sales proceeds.

7. The Defendant, however, asserts that under Clause 3.2 of the 2016 Restructure Letter, the obligation to facilitate the subdivision and pay the requisite legal fees lay squarely with the Plaintiff. The Defendant's witness, Mr. Emmanuel Yebei (DW1), testified that the Plaintiff failed to pay the legal fees, forcing the Bank to step in and settle them to protect its security interest. The replacement charge over the subdivided titles was ultimately registered on 24 May 2019 (DEX 6).

8. Following the registration of the replacement charge, the Plaintiff failed to regularize the account. In early 2020, the Defendant instructed auctioneers to sell the charged properties. To forestall this sale, the Plaintiff filed ELC Case No. 63 of 2020 (transferred to the Commercial Division as HCCOMM No. 41 of 2020).

9. Crucially, rather than proceeding to trial, the parties engaged in negotiations which culminated in the execution of a Deed of Settlement in May 2020. This Deed was adopted as an Order of the Court on 22 September 2020, effectively compromising the suit. The Deed contained pivotal acknowledgments. The Plaintiff unequivocally admitted that the outstanding debt stood at Kshs. 180,901,013.00. The Bank agreed to accept a reduced sum of Kshs. 123,882,586.00 in full and final settlement, provided the Plaintiff strictly adhered to a schedule of payments derived from the sale of specific Settlement Units.

10. The Deed stipulated that in the event of default, the full debt of Kshs. 180 million, plus accruing interest, would become immediately due and payable, and the Bank would be at liberty to exercise its statutory power of sale.

11. The Plaintiff failed to meet the obligations under the Deed of Settlement. Consequently, the Defendant moved to realize its security. This triggered a second suit by the Plaintiff, HCCOMM No. E085 of 2021, seeking another injunction.

12. In a Ruling delivered on 31 August 2022 in E085 of 2021, the Court (Mabeya J) dismissed the Plaintiff's application for an injunction. The Court found that the Plaintiff had not complied with conditional orders to make a partial payment of Kshs. 10 million. Following this Ruling, the Defendant

proceeded with the public auction of 17 properties on 13 April 2021, realizing a sum of Kshs. 93,845,000/-.

13. Despite the sale of the 17 units, the Defendant maintained that a substantial residual debt remained. It, therefore, issued statutory notices to sell the remaining three properties: L.R. No. 155/89, 155/93, and 155/115. This precipitated the filing of the current suit on 21 September 2022, where the Plaintiff now claims that the debt was fully extinguished by the 2021 auction and other alleged payments.

14. By Plaint dated 21 September 2022, the Plaintiff seeks the following reliefs:

    i. A declaration that the loan on account of which a charge was created over LR NO. 155/89, 155/93 and 155/115 has been redeemed;

    ii. A permanent injunction restraining the defendant, its servants or agents, advocates or auctioneers or any other person acting for and/or on its behalf, from doing the following act or any of them, that is to say from advertising for sale, disposing off, selling by public auction or otherwise howsoever from completing by conveyance or transfer of any sale concluded by auction and/or private treaty, leasing, letting or otherwise howsoever interfering with the ownership of title to and/or interest in the property known as LR No. 155/89, 155/93 and 155/115;

    iii. Accounts be rendered on the mortgage account;

    iv. Costs of this suit.

The Plaintiff's Case

15. The Plaintiff's case rests heavily on the testimony of PW1, Albert Thuo Chege, and an "Account Analysis Report" prepared by Interest Rates Advisory Centre (IRAC). The Plaintiff submits that the loan has been overpaid. PW1 testified that the total realization by the Bank amounts to Kshs. 174,730,000/-. This figure is comprised of:

    i. Kshs. 93,845,000/- from the public auction of 17 units (admitted by the Defendant);

    ii. Approximately Kshs. 80,000,000/- allegedly realized from the sale of 6 units by private treaty and other cash payments.

16. When pressed on cross-examination to produce evidence of the Kshs. 80 million private treaty sales, PW1 stated: "It is not in these documents". The Plaintiff relies on the IRAC report, which reconstructed the loan account and concluded that as of 2 February 2022, the Plaintiff had a credit balance of Kshs. 15,675,840.36.

17. The IRAC report excluded a sum of Kshs. 59,425,223.42 from the loan balance. This sum represents interest accrued between 1 May 2016 and 28 January 2020. The justification offered for this exclusion is the subdivision delay. The Plaintiff argues that because the Defendant's Advocates delayed the subdivision, it is equitable to expunge the interest that accrued during the period of delay.

18. The Plaintiff further argues that the Defendant breached Section 97 of the *Land Act*, 2012 by selling the properties at an undervalue and failing to account for the proceeds. They contend that the accounts rendered by the Bank are un-contractual and loaded with illegal penalties.

The Defendant's Case

19. The Defendant relies on the testimony of DW1, the Deed of Settlement, and certified bank statements (DEX 12).

20. The Defendant submits that the Plaintiff is estopped from disputing the debt amount of Kshs. 180 million as of May 2020, having admitted it in the Deed of Settlement which was adopted as a Court order. The Defendant argues that the IRAC report attempts to reopen matters that were settled by consent in HCCOMM 41 of 2020, which is impermissible under the doctrine of res judicata and the principle of finality in litigation.

21. The Defendant contends that the Plaintiff has failed to discharge the burden of proof regarding the alleged repayment of Kshs. 174 million. The Defendant asserts that the only verified repayment is the Kshs. 93 million from the auction. The certified statements of account show a debt of Kshs. 67,467,848.00 as of July 2023.

22. Regarding the delay, the Defendant points to Clause 3.2 of the restructure letter, which placed the burden of the subdivision on the Plaintiff. The Defendant argues that it cannot be penalized for the Plaintiff's failure to fund the subdivision costs.

Analysis & Determination

23. Upon a thorough appreciation of the pleadings, the evidence adduced at trial, and the rival written submissions, the following issues crystalize for determination:

    i. Whether the Plaintiff is bound by the admission of debt contained in the Deed of Settlement dated May 2020.

    ii. Whether the Plaintiff has discharged the burden of proof to show that the loan facility has been fully redeemed.

    iii. Whether the Defendant is liable for breach of contract regarding the delay in subdivision and whether this Court can expunge contractual interest on equitable grounds.

    iv. Whether the Defendant has exercised its statutory power of sale lawfully and in compliance with Section 97 of the *Land Act*.

    v. Whether the Plaintiff is entitled to the equitable reliefs of injunction and accounts.

The Deed of Settlement and Consent Judgment

24. The Defendant's primary shield against the Plaintiff's claim is the Deed of Settlement. The evidence is uncontroverted that this Deed was executed by both parties and subsequently adopted as an order of the Court in HCCOMM No. 41 of 2020.

25. The law regarding consent judgments in Kenya is well-settled. A consent order effectively constitutes a contract between the parties, superadded with the command of the sovereign. In the seminal case of Flora N. Wasike vs. Destimo Wamboko eKLR, the Court of Appeal held:

> "A consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, for example, fraud, mistake or misrepresentation."

26. This principle was reiterated in Hirani v Kassam (1952)19 EACA 131 where the Court emphasized that the finality of litigation requires parties to be held to their bargains unless vitiating factors are strictly proved.

27. The Plaintiff attempts to bypass the 2020 admission of debt (Kshs. 180 million) by relying on an IRAC report that reconstructs the account from 2013. This engages the doctrine of estoppel by

convention. As elucidated by Lord Denning in Amalgamated Investment & Property Co Ltd v. Texas Commerce International Bank (1982) ALL ER 577, when parties to a transaction proceed on a common assumption of facts or law—in this case, that the debt was Kshs. 180 million—they are precluded from subsequently denying the truth of that assumption if it would be unjust to allow them to do so.

28. The Plaintiff induced the Defendant to suspend the 2020 auction by admitting the debt and signing the Deed. Having benefited from that suspension, it would be unconscionable to allow the Plaintiff to now turn around and claim, based on a retrospective audit, that the debt was actually much lower. The Plaintiff is approbating and reprobating, a conduct that equity abhors.

29. The Plaintiff has neither pleaded nor proved fraud, coercion, or mistake in the execution of the Deed of Settlement. Consequently, the admission of debt in that Deed is binding. The starting point for any accounting in this suit is the sum of Kshs. 180,901,013.00 as of May 2020. Any attempt by the Plaintiff to reopen the accounts prior to that date is barred by the doctrine of res judicata and estoppel.

Proof of Redemption

30. The Plaintiff alleges that it has paid Kshs. 174,730,000/-. This is a positive assertion. Section 107 of the *Evidence Act* places the burden of proving any fact on the person who asserts it. Specifically:

    107.

        (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

31. Furthermore, Section 109 provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.

32. The Defendant admits to realizing Kshs. 93,845,000/- from the auction. The dispute concerns the difference of approximately Kshs. 80 million, which PW1 claims was realized from private treaty sales.

33. During cross-examination, PW1 admitted that there was no evidence of the sale and receipt of the Kshs 80 million. This admission is fatal. In a commercial dispute of this magnitude, the Court cannot rely on mere averments of a witness. The Plaintiff was obliged to produce deposit slips, RTGS confirmations, completion statements, or bank statements showing the credit of these specific funds.

34. The Court draws guidance from Sammy Japheth Kavuku v Equity Bank Limited & another [2014] KEHC 6216 (KLR) , where the Court dismissed a similar claim of repayment for lack of evidence, stating:

> " It was incumbent upon the Plaintiff to demonstrate how much he has paid and produce evidence such as cheques, deposit slips or direct transfer. The Plaintiff did not discharge that burden."

35. Similarly, in Kenya Commercial Bank Limited v James Kuria Njine KEHC 1274 , Ringera J held that a statement of account produced by a bank under Section 176 of the *Evidence Act* constitutes prima facie evidence of the entries therein. The Defendant produced such a certified statement (DEX 12). The Plaintiff failed to produce any primary documents to rebut it.

36. The Plaintiff has failed to prove the payment of Kshs. 174,730,000/-. The Court finds as a fact that the only proven realization is the Kshs. 93,845,000/- from the auction. Given the admitted debt of over Kshs. 180 million in 2020, a significant balance clearly remains outstanding. The prayer for a declaration of redemption must, therefore, fail.

Breach of Contract and the Accrual of Interest

37. The Plaintiff seeks to expunge Kshs. 59,425,223.42 in interest, relying on the IRAC report. The premise is that the Defendant delayed the subdivision of the land for four years, making it impossible for the Plaintiff to sell units and service the loan.

38. Clause 3.2 of the Letter of Offer dated 4 April 2016 states that the Borrower shall facilitate the completion of the subdivision. While the Bank appointed the Advocates, the primary obligation to fund the process and facilitate the Surveyor's work remained with the Plaintiff.

39. The evidence of DW1, which was consistent with the documents, is that the delay was caused by the Plaintiff's failure to pay the requisite legal and survey fees. The Bank was eventually forced to pay these fees to salvage the security. It is a principle of law that no one can take advantage of his own wrong. The Plaintiff cannot fail to fund the subdivision and then blame the Bank for the delay.

40. The Plaintiff effectively asks this Court to rewrite the loan agreement to suspend interest during the period of delay. This request runs contrary to the doctrine of pacta sunt servanda.

41. In the leading case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd [2001] eKLR, the Court of Appeal reversed a High Court decision that had waived interest on the grounds that it had become staggering. The Court of Appeal held:

> " A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved... It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity function to allow a party to escape from a bad bargain."

42. This Court is bound by that precedent. The interest charged by the Defendant (17% p.a.) is contractual. There is no clause in the loan agreement that suspends interest if administrative processes are delayed.

43. While the Court acknowledges the recent Court of Appeal decision in Dhiman v Shah KECA 1264 , which allows courts to intervene in unconscionable contracts, the facts here are distinguishable. In Dhiman, the interest rate was 36% p.a., which the Court found usurious. Here, the rate is 17%, which is within standard market parameters. The large quantum of interest is a function of time and the Plaintiff's default, not an inherently unfair term.

44. Furthermore, regarding the in duplum Rule (Section 44A of the *Banking Act*), the Plaintiff has not demonstrated that the interest accrued has exceeded the principal amount in a manner prohibited by the Act. The IRAC report does not conduct an in duplum analysis but rather a delay-based exclusion, which has no statutory basis.

45. The Court finds no breach of contract by the Defendant regarding the subdivision delay. The Plaintiff was contractually obligated to facilitate the process. Consequently, there is no legal basis to expunge the accrued interest. The Defendant was entitled to charge interest as per the contract throughout the period.

The Statutory Power of Sale and Section 97 Duty of Care

46. The Plaintiff does not contest the service of the statutory notices under Section 90 and Section 96 of the *Land Act*. The challenge is based on the argument that the sale is illegal because the accounts are disputed.

47. It is now a settled principle of Kenyan law that a dispute over the exact amount owed is not a ground to restrain a mortgagee from exercising its statutory power of sale. This principle was crystallized by the Court of Appeal in J. L. Lavuna And Others V Civil Servants Housing Co. Ltd.& another [1995] KECA 111 (KLR).

48. In Lavuna case, the Court held that the right of sale arises upon default. If the bank sells the property and it later emerges that the debt was less than claimed, the remedy for the borrower lies in damages (an account of the surplus proceeds), not in an injunction. In this case, the default is admitted (via the Deed of Settlement). The dispute over the quantum cannot be used to shackle the Bank's statutory rights indefinitely.

49. The Plaintiff invokes Section 97 of the *Land Act*, which imposes a duty on the chargee to obtain the best price reasonably obtainable.

> Section 97(1): "A chargee who exercises a power to sell the charged land... owes a duty of care to the chargor... to obtain the best price reasonably obtainable at the time of sale.

50. The Plaintiff argues the injunction should issue because the Bank might sell at an undervalue. This argument is pre-emptive and speculative. The duty under Section 97 crystallizes at the time of sale. A borrower cannot stop a sale in advance by alleging a potential future breach of this duty. The law provides a remedy: if the Bank sells at a gross undervalue (below 75% of the market value as per Section 97(3)), the sale can be impeached or damages awarded.

51. There is no evidence before this Court that the Defendant intends to sell the property without a valuation. The Defendant is aware of its statutory obligations.

52. The granting of an injunction is an equitable remedy. He who comes to equity must come with clean hands. The Plaintiff admitted the debt in 2020 to stop an auction, defaulted on the settlement, and now seeks to use the court process to stop another auction without offering to pay the undisputed portion of the debt. In Trust Bank Ltd v Eros Chemists Ltd [2000] eKLR, the Court held that a debtor who admits indebtedness but refuses to pay approaches the court with unclean hands and is disentitled to injunctive relief.

53. The statutory power of sale has validly crystallized. The dispute over accounts does not bar the sale. The Plaintiff's reliance on Section 97 is premature. The Plaintiff, having approached the court with unclean hands, is not entitled to the equitable relief of an injunction.

Accounts

54. The Plaintiff seeks an order for the rendering of accounts. The record shows that the Defendant has provided bank statements and a breakdown of the debt (DEX 12). The Plaintiff's grievance is not the absence of accounts, but their disagreement with the figures.

55. As established in Pipeplastic Samkolit, it is not the function of the Court to act as an accountant and reconcile ledgers where the bank has provided prima facie evidence of the debt. The Plaintiff had the opportunity to present specific evidence of errors (e.g., a missing receipt) but failed to do so, relying instead on the broad generalizations of the IRAC report.

56. Accordingly, the prayer for accounts is futile as the accounts have been rendered. The Court accepts the Defendant's statement of account as the accurate reflection of the indebtedness, subject to the adjustments agreed in the Deed of Settlement.

57. For the reasons elaborated above, I find no merit in the Plaintiff's suit. It is hereby dismissed, with costs to the Defendant.

DATED AND DELIVERED AT NAIROBI THIS 30 DAY OF JANUARY 2026

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For the Plaintiff: N/A

For the Defendant: Mr Mutinda

Court Assistant: Lucy Mwangi