



REPUBLIC OF KENYA



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**Mogi v Diamond Trust Bank Kenya Limited & 2 others (Civil Case E941 of 2021)  
[2025] KEHC 4008 (KLR) (Commercial and Tax) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4008 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E941 OF 2021  
F GIKONYO, J  
MARCH 27, 2025**

**BETWEEN**

**CHARLES MAKORI MOGI ..... PLAINTIFF**

**AND**

**DIAMOND TRUST BANK KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**DALALI TRADERS AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**LYDIA KINYA MWITHIMBU ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction**

1. This ruling determines whether the 1<sup>st</sup> defendant bank should refund the Kshs. 2,500,000/- paid by the plaintiff as deposit for the purchase of the suit property be refunded by the 1<sup>st</sup> defendant bank with interest at court rates.

**Background**

2. The background is that the 1<sup>st</sup> defendant granted a loan facility to the 3<sup>rd</sup> defendant and the property known as L. R. No. 209/10206 located as South C was charged to secure the payment.
3. The 3<sup>rd</sup> defendant defaulted and the 1<sup>st</sup> defendant's statutory power of sale crystalized. Before sale by public auction, the 1<sup>st</sup> defendant agreed to the sale of the charged property by private treaty to the plaintiff.
4. The plaintiff and the 3<sup>rd</sup> defendant executed the agreement for sale dated 30<sup>th</sup> July 2020 and the plaintiff deposited 10% of the purchase price. However, the plaintiff failed to meet his obligations by the stipulated completion timeline.



5. The plaintiff proffered that he halted efforts to secure financing for the balance when he came across a letter dated 19<sup>th</sup> January 2021, from the advocates for the 3<sup>rd</sup> defendant's estranged husband to the effect that he had not approved the sale of the property to him.
6. The plaintiff thereafter failed to pay the balance despite a reminder on the timelines issued on 13<sup>th</sup> August 2021 and despite subsequent demand.
7. This prompted the 1<sup>st</sup> defendant bank to commence the sale by public auction.
8. When the plaintiff came across the advertisement for the auction sale, he filed the instant suit seeking suspension of the exercise of the statutory power of sale by the 1<sup>st</sup> defendant for 12 months or 12 months' extension for compliance.

### **Present application**

9. The plaintiff's Notice of Motion dated 12<sup>th</sup> June 2024 is seeking an order that Kshs. 2,500,000/- paid as deposit for the purchase of the suit property be refunded by the 1<sup>st</sup> defendant bank with interest at court rates.
10. The application is premised upon the grounds stated in the application and the supporting affidavit sworn by the plaintiff on 12<sup>th</sup> June 2024.
11. The gravamen is that, the plaintiff paid the deposit sum to the 1<sup>st</sup> defendant bank but the sale was not completed; and subsequently, the 1<sup>st</sup> defendant sold the property to another party through a sale by public auction.
12. The plaintiff asserted that if the orders sought are not granted, he will be highly prejudiced and suffer immense loss. He contended that the defendants will not be prejudiced if the orders are granted.

### **1<sup>st</sup> Defendant's Response**

13. In opposing the application, the 1<sup>st</sup> defendant filed a replying affidavit sworn by its debt recovery officer, Maryanne Mbugua on 23<sup>rd</sup> July 2024 and written submissions dated 15<sup>th</sup> November 2024.
14. The 1<sup>st</sup> defendant submitted that the court cannot issue a mandatory injunction as the suit is yet to proceed to full trial. It also submitted that the plaintiff has not demonstrated special circumstances warranting issuance of such final orders at the interlocutory stage save for his attempt to engage the bank for an arrangement on payment of the balance more than a year after his default and after he came across an advertisement for the sale of the suit property by public auction.
15. The 1<sup>st</sup> defendant relied on *Jay Super Power Cash and Carry Ltd v Nairobi City Council and two Others* Civil Appeal No. 111 of 2002, *Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma* [2020] KECA 831 (KLR) and *Affluent Limited v Ludco Limited & 3 others* [2023] KEELC 16726 (KLR)

### **Analysis and Determination**

16. The plaintiff is seeking for a mandatory interlocutory injunction. The threshold for a mandatory injunction was set out in *Locabail International Finance Ltd v Agro-Export And Another* [1986] 1 ALL ER 901, as follows: -

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple



and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

17. It was buttressed by in the Court of Appeal in *Sbariff Abdi Hassan v Nadbif Jama Adan* (Civil Appeal 121 of 2005) [2006] eKLR, that:-

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case. That position could be taken by the courts in such cases as those of alleged trespass on to the property. In the case of *Jaj Super Power Cash and Carry Ltd vs. Nairobi City Council and two Others* (supra), this Court stated:

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it.” (Emphasis added)

18. The circumstances of this case are that through an agreement dated 30<sup>th</sup> July 2020, the plaintiff agreed to purchase property known as L. R. No. 209/10206 located in South C from the 3<sup>rd</sup> defendant. The property was charged to secure a loan advanced by the 1<sup>st</sup> defendant bank to the 3<sup>rd</sup> defendant trading as Togi Investments (K) Limited. The agreement was made after the 3<sup>rd</sup> defendant had defaulted and the 1<sup>st</sup> defendant’s statutory power of sale had crystallised. The 1<sup>st</sup> defendant acceded that it consented to the sale by private treaty of the charged property.
19. The evidence on record shows that the plaintiff paid a deposit of Kshs. 2,500,000/- to the 1<sup>st</sup> defendant bank in instalments of Kshs. 442,000/-, Kshs. 900,000/-, Kshs. 900,000/- and Kshs. 258,000/- through Banker’s Cheque Numbers 239051, 239050, 00719, 00601. The record also shows that through a letter dated 12<sup>th</sup> August 2020, by its debt recovery officer, Maryanne Mbugua, the 1<sup>st</sup> defendant acknowledged receipt of Kshs. 2,500,000/- made via banker’s cheques being the 10% deposit.
20. A trail of important matters arising out of evidence presented. There was an agreement for sale of the suit property between the plaintiff and the 3<sup>rd</sup> defendant. The suit property was the charged property in favour of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant consented to the sale of the charged property and to the sale agreement thereto. The 1<sup>st</sup> defendant received a deposit which it acknowledged as being 10% of the purchase price as per the said agreement. The 1<sup>st</sup> defendant subsequently, sold the charged property (suit property) through a sale by public auction.
21. The 1<sup>st</sup> defendant claimed that it was not a party to the agreement for sale between the plaintiff and the 3<sup>rd</sup> defendant. Therefore, according to them, the plaintiff could not seek a refund from it. It also claimed that following the rescission of the agreement, the deposit was forfeited. It further contended that if the deposit is to be refunded, it should be sought from the 3<sup>rd</sup> defendant. It further indicated that the 3<sup>rd</sup> defendant merely directed the sum to be deposited to her account held with it, which account was in arrears and that the sum was utilized to service the 3<sup>rd</sup> defendant’s facility, which had fallen into arrears.



22. There is no dispute that the plaintiff paid a sum of Kshs. 2,500,000/- deposit of the purchase price to the 1<sup>st</sup> defendant. Contrary to the argument by the 1<sup>st</sup> defendant, there is no provision in the agreement for sale to the effect that the deposit was to be forfeited upon rescission. The agreement incorporated the Law Society Conditions of Sale (1989 Edition)
23. Condition No. 11 (3) of the Law Society Conditions of Sale states as follows:-
- “(3) On rescission the vendor shall repay to the purchaser his deposit and any payment of purchase price without interest and the purchaser shall return to the vendor all papers belonging to the vendor.”
24. Faced with similar circumstances, the Court of Appeal in *Mwangale v Trust Bank Ltd (In Liquidation) & 3 others* (Civil Appeal 316 of 2018) [2023] KECA 713 (KLR) (9 June 2023) (Judgment) found that:-
- “We have held that the sale of the suit property to the appellant was rescinded because of the appellant’s default. Thereafter, the suit property was sold and transferred to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents at a consideration of Kshs. 14,500,000.00.
52. The sale agreement between the appellant and the 1<sup>st</sup> respondent incorporated the Law Society Conditions of Sale (1989 Edition) in respect of the completion of the same. The sale agreement did not contain a special condition to the effect that upon rescission due to the appellant’s default the deposit and any other payment made towards the purchase price shall be forfeited by the appellant.
53. It follows, therefore, upon rescission of the sale agreement, the 1<sup>st</sup> respondent ought to have promptly repaid to the appellant the sum of Kshs. 2,475,000.00 without interest. That was not done. The learned trial judge cannot therefore be faulted at all for ordering the 1<sup>st</sup> respondent to pay the appellant the said sum together with interest at court rates from the date of filing suit until payment in full.”
25. The 1<sup>st</sup> defendant was aware of, and consented to the sale of the charged property by private treaty. The 1<sup>st</sup> defendant received the deposit of Kshs. 2,500,000 paid by the plaintiff pursuant to the said agreement. It is quite a mischief for the 1<sup>st</sup> defendant to sell the property by public auction without reference to or consideration of the deposit made under a sale by private treaty. This is a case where the 1<sup>st</sup> defendant deliberately intends to steal a march on the plaintiff by seeking to keep the deposit and prolonging the matter by insisting on full hearing of the case.
26. I find that the 1<sup>st</sup> defendant was not entitled to withhold and has no basis for withholding the sum of Kshs. 2,500,000/- deposit from the plaintiff.
27. I also find that the 1<sup>st</sup> defendant did not promptly refund the deposit paid by the plaintiff after it sold the property by public auction. This is a clear case showing that the plaintiff is entitled to a refund of the deposit with interest from the date of filing. The suit should be decided at once.
28. Accordingly, I find that the plaintiff has met the threshold for the grant of the mandatory injunction sought.
- Disposal**
29. The upshot is that the plaintiff’s application dated 12<sup>th</sup> June 2024 is allowed in the following terms: -



1. Kshs. 2,500,000/- paid as deposit for the purchase of the suit property be refunded by the 1<sup>st</sup> defendant bank with interest at court rates from the date of filing the suit until payment in full.
2. The 1<sup>st</sup> defendant shall bear the costs of this application.
3. Orders accordingly.

**DATED, SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 27<sup>TH</sup> DAY OF MARCH, 2025.**

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**F. GIKONYO M**

**JUDGE**

In the presence of: -

Ludeny for 1<sup>st</sup> defendant

CA - Godfrey

