



Maara v Housing Finance Company of Kenya Limited & another (Commercial Case 136 of 2018) [2025] KEHC 12474 (KLR) (Commercial and Tax) (1 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12474 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 136 OF 2018
JWW MONG'ARE, J
SEPTEMBER 1, 2025**

BETWEEN

JOHN KARUGU MAARA PLAINTIFF

AND

HOUSING FINANCE COMPANY OF KENYA LIMITED 1ST DEFENDANT

THE UNIT PAINTBALL LIMITED 2ND DEFENDANT

JUDGMENT

Introduction and Background

1. In 2011, the Plaintiff purchased land, Title Number Muguga/Nderi/T.19, situated in Kiambu County to build apartments (“the suit property”). In May 2012, he and MNK applied for a loan facility of Kshs.23,070,740.00/= from the 1st Defendant (“the Defendant”) to construct 16 two-bedroom apartments on the suit property. The Borrowers executed a Letter of Offer/Facility Agreement on 14th November 2012 and a Charge was registered on 14th March 2013 to secure the loan. A valuation by Clay Town Valuers Limited estimated the suit property’s market value at Kshs.65,000,000.00/= upon completion. The Bank extended a further loan of Kshs.5,498,986.00/= and a Further Charge was registered against the suit property on 16th March 2015. The 2nd Defendant was engaged as the contractor to undertake construction of the project.
2. The Plaintiff claims that construction stalled in 2013 due to the Defendant’s failure to disburse funds for over 10 months, despite requests from the 2nd Defendant. That the final disbursement was made in October 2014, leading to increased interest and project delays. The Plaintiff also noted discrepancies in the Bill of Quantities, with incomplete or overstated items and that in 2015, due to stalled progress, the Plaintiff took an additional loan of Kshs.5,498,986.00/=. That the project, meant to be completed in 2 years, was only handed over in August 2017 and the Plaintiff claims that in October 2017, the



- Defendant recalled the loan, issued a statutory notice in March 2018, and auctioned the suit property on 19th February 2019 for Kshs.19,200,000.00/= significantly below the initial valuation of Kshs. 65,000,000.00/=.
3. Through his amended Complaint dated 13th February 2020, the Plaintiff claims that the Defendant breached the Facility Agreement, the Charge, the Further Charge, the Construction Agreement with the 2nd Defendant and a Performance Bond dated 10th April 2013. The Plaintiff accuses the Defendant of charging principal and interest before project completion, contrary to Clause 5.2 of the Offer Letter, and by failing to disburse funds timely and causing delays. That the 2nd Defendant failed to complete the project within 16 weeks, incurring liability for liquidated damages, that is, Kshs.15,000.00/= per week and the Performance Bond penalty of Kshs.2,300,000.00/=.
 4. The Plaintiff argues entitlement to remedies due to the Defendants' breaches, which caused significant delays between 2013 and 2017 and financial losses. He stated he was based in the UK and relied on the Defendants' expertise, but their mismanagement led to lost rental income of Kshs.192,000.00/= per month, totaling Kshs.12,544,000.00/= from January 2015 to August 2017. That the auction of the suit property at Kshs.19,200,000.00/= was a gross undervalue compared to the Kshs 65,000,000.00 valuation, breaching the Defendant's duty under section 97(2) of the Land Act (Chapter 280 of the Laws of Kenya) to obtain a fair market price.
 5. Based on the above claims, the Plaintiff is now seeking a permanent injunction to prevent the Defendant from interfering with the suit property; damages for fraudulent misrepresentation and general damages; an account from both Defendants; special damages of Kshs.12,544,000/= for lost rental income; interest and costs.
 6. In response, the Defendant filed an Amended Defence and Counterclaim dated 31st December 2021. It avers that the loan terms included monthly installments of Kshs.399,581.00/=, a repayment period of 15 years, and an 18% p.a interest rate. In case of default, the Defendant could exercise its statutory right under section 90(3) of the Land Act, including selling the suit property and that the Defendant would discharge the suit property upon full payment. The Defendant states that it is the Plaintiff who engaged the 2nd Defendant for the construction and that in May 2013, the Defendant's Project team prepared a Drawdown Schedule for loan disbursement to the 2nd Defendant. The Defendant states that it became aware on 5th November 2015, that its former advisor, Mr. AT was working with the 2nd Defendant.
 7. The Defendant claims that the Plaintiff defaulted on the loan and applied for an additional Kshs.5,500,000.00/= to complete the project, hence the Further Charge and since default continued, the Defendant issued a demand letter on 8th October 2015, a 3-month Statutory Notice on 20th November 2017, and a Notice to Sell on 8th March 2018. To recover the outstanding amount, Nishani Management valued the property on 2nd July 2018, at Kshs.24,500,000.00/= which was the open market value and Kshs.18,375,000.00/= which was the forced sale value. On 4th July 2018, the Defendant instructed Muga Auctioneers to sell the suit property and the Auctioneers served a 45-day Redemption Notice and Notification of Sale on 6th July 2018 and the suit property was advertised on 5th and 25th September 2018. The Defendant states that the first public auction was unsuccessful as bids were below the reserved price and the auctioneers re-advertised the property on 23rd January 2019, and 11th February 2019, and served a Notification of Sale dated 18th January 2019, through the Plaintiff's Advocates. That on 19th February 2019, the suit property was sold to the highest bidder for Kshs.19,200,000.00/=.



8. That as of 31st January 2019, the total outstanding balance was Kshs.44,798,296.41.00/= and after the sale, the Kshs.19,200,000.00/= was credited into the Plaintiff's account leaving a total outstanding loan amount of Kshs.29,601,819.23/= as at 31st December 2021. The Defendant seeks this amount together with general damages for the Plaintiff's breach of his obligations, costs and interest.
9. The matter was set down for hearing where the Plaintiff testified on his own behalf, relying on his witness statements dated 23rd March 2018 and 5th May 2022(PW 1). He also produced his Amended List and Bundle of Documents dated 15th February 2021 which include: the Charge; the Title Deed; the Further charge; the Valuation Report; the Letter of Offer; the Draw down Schedule and Email; Email About Mr. AT, Email Complaint 1; Letter from 2nd Defendant & second Complaint Email; Email Site Inspection; Email Complaint on Principal plus Interest and statement; Statutory Notice & Notification of Sale; First Notification of Sale & Redemption Notice and the Notification of Sale & Memorandum of Sale (PEXhibit 1-14)
10. On its part, the Defendant called its Head of Collection and Debt Management, Shelemiah Jalango who relied on his witness statement dated 29th March 2023 and he produced the Defendant's Lists and Bundle of Documents dated 4th December 2020 and 31st December 2021(DEXhibit 1-25 and DEXhibit 26-27). The documents include: the Borrowers' Loan Application form dated 22nd May, 2012, the Valuation Report by Claytown Valuers dated 14th June, 2012; the Letter of Offer; the Construction Agreement; the Draw Down Schedule; the Defendant's Letters to the Plaintiff ; the Defendant's Project Progress Report No. 1 dated 20th June, 2014; the Loan Application form dated 16th August, 2014; the Defendant's Form M7 - an analysis form for Plaintiff's Mortgage Account analysed on 16th September, 2014; the Letter of Offer dated 29th September, 2014; the Statutory Notice dated 20th November, 2017 and Certificate of Postage; Bank's Notice to Sell dated 8th March, 2018 and Certificate of Postage; the Valuation Report dated 2nd July, 2018 by Nishani Management; the Defendant's Letter to Muga Auctioneers dated 4th July 2018, Muga Auctioneers' Letter dated 12th July 2018; Muga Auctioneers' Letters dated 5th September 2018 and 25th September, 2018; the Defendant's Letter to Muga Auctioneers dated 17th January 2019, Muga Auctioneers' Letter dated 24th January 2019; Muga Auctioneers' Letters dated 23rd January 2019 and 11th February, 2019, respectively; Muga Auctioneers' Certificate of Sale dated 19th February 2019; Bidders List; Bids and Application for Funds Transfer; the Statement of Account for Account Number 75XXXXXX94 as of 13th June 2020; the Defendant's Letter to the Borrower dated 12th June, 2020; and the Defendant's Statement of Loan Account as of 1st August 2020.
11. The 2nd Defendant's attempt to participate in the hearing were thwarted by the court after it sought to file its pleadings and evidence without the leave of court. After the hearing, the court directed the parties to file written submissions which are on record and since they mirror the parties' positions, I have highlighted above, I will not rehash the same but make relevant references in my analysis and determination below.

Analysis and Determination

12. From the parties' submissions, I find the following issues arise for the court's determination, to wit:
 - a. Whether there was a contract amongst the parties and whether there was a breach of the contract
 - b. Whether the Plaintiff is entitled to any remedies
 - c. Whether the Defendant is entitled to any remedies



Existence and Breach of Contract:

13. It is common ground that the parties entered into various contracts including the Facility Agreement of 14th November 2012, the Charge of 13th March 2013, the Further Charge of 13th March 2015 and the Construction Agreement of 7th October 2014. The Plaintiff's position is that the Defendant breached the Facility Agreement by charging principal and interest before project completion, contrary to Clause 5.2 of the Facility Agreement and by failing to disburse funds timely, causing delays. Further, that the 2nd Defendant breached the Construction Agreement by failing to complete the project within 16 weeks, incurring liability for liquidated damages and a performance bond penalty
14. On its part, the Defendant asserted that it performed its obligation by disbursing all monies to the 2nd Defendant as per the Drawdown Schedule and that the Plaintiff admitted owing the Defendant outstanding sums. That the Defendant provided proper accounts and a progress report indicating project delays, which caused the last disbursement to be put on hold. It submits that the burden of proof is on the Plaintiff to show a breach of contract which he failed to adduce. The Defendant maintains it complied with all contractual obligations, including serving statutory notices and redemption notices.
15. The Defendant also submits that the Plaintiff's allegations of fraud through false misrepresentation must be specifically pleaded with particulars, and the Plaintiff has not provided such evidence. The Defendant also stated that it was unaware of its former advisor working with the 2nd Defendant until informed by the Plaintiff and that the Defendant was not obligated to account for amounts spent by the Plaintiff before loan issuance, and the Plaintiff provided no evidence to support this. The Defendant asserts that it exercised its Statutory Power of Sale legally, selling the suit property at Kshs.19,200,000.00/=, which was higher than the forced sale value of Kshs.18,375,000.00/= and that a lender is only required to attain the Forced Sale Value, not the Market Value.
16. In his testimony, the Plaintiff admitted that the Drawdown Schedule which indicated how funds were to be disbursed under the loan and that the said funds were to be disbursed in 4 installments within 12 months after certain milestones had been achieved. The Contract Agreement provided that "Interim payments to the contractor shall be based on the valuations prepared by the Quantity Surveyor. Final payments to the contractor shall be based on actual quantities carried out, measured and valued on completion based on the rates provided by the Quantity Surveyor and accepted by the Employer." The Plaintiff stated that the said Quantity Surveyor was appointed by himself and the 2nd Defendant and that it was the Defendant who had the legal obligation to supervise and monitor the construction on the Plaintiff's behalf.
17. The Plaintiff testified that his concern as to why there was late disbursement was clarified by the Defendant and that as per Clause 5.2 of the Facility Agreement, the Plaintiff was obliged to service the loan advanced together with interest. Whereas the Plaintiff stated that the delay in disbursements was caused by accusations and counter-accusations between the Defendants, he admitted that there was no evidence of the same. He also admitted that between 8th May 2013 and 1st December 2015, the amount of Kshs.6,384,689.14/= was credited to his account and that the project was completed and handed over to him. The Plaintiff also admitted that after the sale of the suit property, he was still indebted to the Bank to the tune of Kshs.28,647,360.23/=.
18. Going through the evidence above, I am inclined to agree with the Defendant that there is no evidence of its breach of the parties' contracts. The delays of disbursing the funds was explained to the Plaintiff and it appears satisfactorily so and there was no indication that this delay was due to the fault of the Defendant. The Facility Agreement also provided that the Defendant could charge interest on the



loan once it has been issued and it was not to be necessarily applied after the project was complete as argued by the Plaintiff. The Plaintiff also admitted to still being indebted to the Bank even after the suit property had been sold. It therefore follows that the Plaintiff's claim for breach of contract has no basis and it has not been demonstrated how the Defendant breached the contracts entered into by the parties.

Entitlement to Remedies by the Plaintiff

19. As I have found that the Defendant was not in breach of the contracts entered into by the parties, it follows that the Plaintiff is not entitled to any remedies arising from these unproven allegations. However, I note that the Plaintiff had stated that the auction of the suit property at Kshs.19,200,000.00/= was a gross undervalue compared to the initial valuation of Kshs.65,000,000.00/= breaching the Defendant's duty under section 97(2) of the *Land Act* to obtain a fair market price. However, the Defendant stated that the Kshs.19,200,000.00/=, was higher than the forced sale value of Kshs.18,375,000.00/= and that a lender is only required to attain the Forced Sale Value, not the Market Value.
20. The Defendant produced the valuation report of Nishani which indicated that the Forced Sale Value is Kshs.18,375,000.00/= whereas the open market value was Kshs.24,500,000.00/=. The parties also produced an earlier report by Claytown which indicated a market value of Kshs.65,000,000.00/= and a forced sale value of Kshs. 40,000,000.00/=. I am in agreement with the Defendant that it was not improper for it to apply the forced sale value rather than the market value in the exercise of its statutory right of sale as long as it is the "best price reasonably obtainable". It should also not be lost that a valuation report is based on the professional and expert opinion of a duly qualified valuer who assessed the value of properties based on accepted parameters. In order to displace a professional valuation, the Plaintiff must produce clear evidence that the valuation is wrong or at least doubtful. Mere assertions or statements are not sufficient (see *Palmy Company Limited v Consolidated Bank of Kenya Limited* [2014] KEHC 4811 (KLR)).
21. In this case, the Plaintiff did not impeach the competency or veracity of Claytown's valuation and I am unable to conclude that the said valuation was incorrect in the absence of cogent evidence. As the property was sold at a price higher than the forced sale value, it is presumed that this was the best price reasonably obtained for the suit property. The Plaintiff is therefore not entitled to any remedy on account that the suit property was sold at an undervalue. In summary therefore, the Plaintiff is not entitled to the remedies it sought in its amended plaint and at this point, its claim is dismissed in its entirety

Entitlement to the remedies by the Defendant

22. As I have found that the Plaintiff admittedly indebted to the Defendant, I find merit in the Defendant's quest for the sums outstanding. The Defendant annexed a statement indicating that the Plaintiff still owes it the sum of Kshs. 29,601,819.23. section 176 of the *Evidence Act* creates a presumption in favour of the Defendant's entries in its statements of accounts and since the Plaintiff has admitted to owing the Defendant and failed to challenge the entries therein, it follows that the statements of account issued by the Defendant are the true reflection of the Plaintiff's indebtedness. I find that the Defendant is owed Kshs.29,601,819.23/= and I enter judgment in its favour for the same.
23. As for general damages, whereas I agree that the Plaintiff has been in breach of his obligations under the subject contracts, I find that general damages are not typically the default remedy for a borrower's failure to repay a loan, as the lender's loss, that is the unpaid debt, is usually quantifiable and addressed through specific recovery mechanisms (see *Provincial Insurance Company of East Africa*



Ltd v Mordekai Mwanga Nandwa Civil Appeal No. 179 of 1995 [1995 – 1998] 2 EA 289]. I therefore decline this prayer by the Defendant.

Conclusion and Disposition

24. In conclusion, I now make the following dispositive orders:
- a. The Plaintiff's suit is dismissed.
 - b. The 1st Defendant's counterclaim dated 31st December 2021 is allowed.
 - c. Judgment be and is hereby entered for the 1st Defendant against the Plaintiff for the sum of Kshs. 29,601,819.23/=.
 - d. The 1st Defendant is awarded interest on c) above at the contractual rate from the date of filing suit.
 - e. The 1st Defendant is awarded costs of the suit and the counterclaim.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 1ST DAY OF SEPTEMBER 2025

J.W.W. MONGARE

JUDGE

In The Presence Of

Mr. Kawamara for the Plaintiff.

Mr. Abuya for the 1st Defendant.

Amos - Court Assistant

