



REPUBLIC OF KENYA



**Ruluti v Kingdom Bank Ltd (Civil Appeal E120 of 2022)  
[2024] KEHC 2138 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2138 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E120 OF 2022  
EM MURIITHI, J  
FEBRUARY 29, 2024**

**BETWEEN**

**STANLEY MBAABU RULUTI ..... APPELLANT**

**AND**

**KINGDOM BANK LTD ..... RESPONDENT**

*(Being an appeal from the Judgment and decree of the Hon. P. Wechuli  
(SRM) delivered on 25/8/2022 in Tigania PMCC No. 85 of 2021)*

**JUDGMENT**

1. By a plaint dated 9/8/2021, the Appellant sued the Respondent seeking:
  1. That the entire outstanding loan balance be restructured in a manner that will enable the plaintiff repay the same in equal monthly installments of Ksh 50,000/= till payment in full.
  2. An order of permanent injunction restraining the defendant, whether by themselves, their agents, assigns, employees, servants, legal representatives and/or anybody else acting on their behalf or behest from trespassing, advertising for sale, selling, auctioning, disposing, alienating and/or interfering with the plaintiff's land parcel No Nyambene/Kitheo/1813.
  3. Costs of this suit.
2. The Appellant's claim was that on diverse dates to wit 28<sup>th</sup> March 2018, 31<sup>st</sup> May 2018 and 3<sup>rd</sup> August 2018, he applied and was advanced three (3) credit facilities by the Respondent herein amounting to Ksh.3,127,700/=, which were thereafter consolidated into one. He serviced the said loan faithfully and on 15/6/2019, he was advanced a further Ksh.2,000,000 by the Respondent. The two credit facilities were secured by a charge over his land parcel No. Nyambene/Kitheo/1813. In 2020, he fell into arrears after his business drastically went down owing to the outbreak of the Covid – 19 pandemic, and he engaged the Respondent for purposes of re-structuring the said loan but his efforts did not



yield much fruits. Consequently, he engaged the Central Bank of Kenya in their capacity as the banks supervisors and negotiations on restructuring the said commenced. As these negotiations were still on going, the Respondent commenced the process of realizing the security for the said facility through Nairobi Channels Auctioneers. The said auctioneers have now served him with a notification of sale, a 45 days redemption notice and have slated the purported public auction date to be 31/8/2021. The auction of the charged property will be unlawful and illegal because the Respondent, having engaged him on negotiations for restructuring the loan facility, is estopped from disposing his property while negotiations are under way. His contractual relationship with the Respondent was frustrated by the Covid-19 pandemic which brought his business to a near halt. He prays for a suitable restructured loan arrangement that will enable him source for funds and repay the outstanding loan which as at 21/6/2021 stood at Ksh. 4,049,887.09.

3. The Respondent denied the case vide its statement of defence dated 18/8/2021 and prayed for its dismissal.
4. Upon full hearing, the trial court rendered thus, “From the evidence on record both parties are in agreement that indeed the defendant did accommodate the plaintiff with four loan facilities as alleged. Those facilities were secured by a charge over the plaintiff’s land parcel no Nyambene/Kitheo/11813. There is also no doubt that the plaintiff has defaulted in the payment of the loan facility. Both parties are in agreement over this fact. It is on that premises that the plaintiff has now moved the court seeking to defray the due amounts by way of installments of Ksh 50,000 per month. In determining that issue I noted that Order 21 Rule 12 of the Civil Procedure Rules, 2010 empowers the court to order that monies due and pursuant to the judgment of the Court, be paid in installments where sufficient reason is given...Its is in common knowledge that the effects of covid 19 were mostly felt in the year 2020 when measures such as a lockdown affected most businesses. However the situation eased and most businesses have now resumed their operations. That being so it was important for the defendant to prove that his businesses and sources of income are still affected. He ought to have produced in court a financial statement of his position. However he did not do so. This court cannot therefore determine his inability to pay the due amounts since he has not discharged his duty to adduce sufficient cause of why these orders should be granted to him...The evidence on record shows that there was correspondence between the defendant the plaintiff and CBK. The last correspondence, annexed by the defendant is a letter dated 30.4.2021 fro, the defendant to the CBK. It shows that the defendant faulted the plaintiff for presenting proposals which he failed to make good. It stated that it is ready to consider a reasonable proposal from the plaintiff. Meanwhile it would proceed with its statutory right under the charge. There is no evidence of any further communication or action from the CBK after that from either party. Further even if there are still negotiations ongoing I note that CBK is not a party to the loan agreement between the plaintiff and the defendant. The fact that CBK has stepped in to assist the parties reach a settlement does not vitiate the loan agreement between the parties herein and does not deny any of the parties its right under the said agreement...In this matter I have already found that the plaintiff has not proved his inability to repay the accrued loan arrears since he did not avail any financial statement herein. Further any negotiations before CBK do not make the CBK a party to the agreement between the parties herein...Prayer a and b of the plaint are dismissed. No orders as to costs.”

## **The Appeal**

5. On appeal, the Appellant filed his memorandum of appeal on 1/9/2022 setting out 6 grounds as follows:
  1. The Learned Senior Resident Magistrate erred in law and fact in dismissing the appellant’s suit against the weight of evidence.



2. The Learned Senior Resident Magistrate erred in law and fact by disregarding the fact that the appellant's businesses were facing serious hardships due to the emergence of Covid 19 pandemic which rendered him unable to repay the Respondent's loan facility as earlier agreed.
3. The Learned Senior Resident Magistrate erred in law and fact by failing to appreciate that the Appellant had demonstrated his bona fides by arranging prompt payment for fair payment proportions of suitable monthly installments of Kshs 50,000/= till payment in full.
4. The Learned Senior Resident Magistrate erred in law and fact by disregarding the evidence of the Appellant in respect of the on-going negotiations with the Respondent through the central bank of Kenya.
5. The Learned Senior Resident Magistrate erred in law and fact in finding that the appellant's claim had failed when the same had been proved to the required standards.
6. The Learned Senior Resident Magistrate erred in law and fact in failing to find for the Appellant and therefore occasioning him great injustice.

### **Duty of the Court**

6. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

See also *Peters v. Sunday Post Limited* [1958] EA 424.

### **Evidence**

7. PW1 Stanley Mbaabu Ruluti, the Appellant herein and a business person testified that, “I wrote a statement. I wish to adopt it. (Statement adopted). I have a list of documents. I wish to produce them. (PEx 1-PEx 1). I pray for a restrictive of the loan and stop execution of my homestead.”
8. On cross examination, he stated that, “I wrote a letter to the CBK. I wrote several. I got a reply. Last one was April, 2020. Its not among my list of documents, I am not aware CBK responded to the defendants. I am not aware that the defendant replied to CBK. I don't know the letter you are referring to. Yes, I owe the bank money. Since I got the order I haven't paid any payment. After I filed the suit I haven't done any letter to the bank proposing payment. My land was charged as a security.”
9. DW1 Samuel Murimi and the Respondent's debt recovery manager testified that, “Yes, I recorded a statement. I wish to adopt it. (Statement adopted). I have my list of documents 1 to 11 annexed on replying of affidavit. (DEX 1- DEX 11). I pray that plaintiff's case be dismissed and defendants to recover amount owed.”
10. The witness was not cross examined.



## Submissions

11. The Appellant urges that his financial situation has been dire and the operations of Stans Chemist Ltd are still below par otherwise he would have resumed regular repayment of the loan. He faults the Respondent for refusing to engage in any meaningful negotiations with him with a view to a reasonable restructuring mechanism to enable him service the said credit facility. He urges that if the Respondent is allowed to realize the security, he will be impoverished and rendered homeless and destitute. He urges that he is and has all along been willing to repay the said loan but for the harsh economic situations that affected most businesses in Kenya. He urges the court to exercise its discretionary powers and allow him to defray the said loan in suitable and affordable monthly installments of Kshs 50,000 till payment in full. He urges that he has never denied nor refused to pay the said loan and all he seeks is reasonable restructure of the same in terms of the amount and the repayment period.
12. The Respondent urges that the Appellant deliberately reneged on servicing the loan despite having acceded to restructuring of the loan facilities. It urges that the pandemic the Appellant is touting was not unique catastrophe to him alone, as it too unfavourably interacted with the infamous outbreak. It urges that if every party was to approach the court with a defence or a shield of a pandemic, then this country would come to a standstill and the rule of law and good governance would just be a chimera. It urges that to date, the Appellant, whose hands are dripping of dirt has never attempted to clear the outstanding loan balances and cites Masai Kenya Limited v Hardware & Steel Centre Ltd & Another (2013) eKLR. It urges that the Appellant is asking the court to re-write the contract between the parties, as he knew the import of the charge and acknowledged his indebtedness, and cites Jamii Bora Bank Limited v Wapak Developers (2018) eKLR. It urges that the Appellant failed on his part of the bargain as he had been granted all the avenues to redeem himself only for him to snub them. It urges that the issue of negotiations was taken into consideration and dealt with substantively by the trial court. It urges that a property offered as a security becomes a commodity for sale in the event of a default, and cites John Nduati Kariuki t/a Johester Merchants v National Bank of Kenya Ltd (2006) eKLR. It urges that the Appellant has not taken any steps to redeem the property or clear the outstanding arrears and continues to neglect his obligation to repay the loan amount, and the only recourse available to it under the statute is to dispose the security. It urges that the transaction between the Appellant and itself is covered under the doctrine of conversion and constructive trust, and cites Pomeroy on Equity Jurisprudence 3<sup>rd</sup> Edition General Books London 1941 and Ibrahim Seikei T/A Masco Enterprises v Delphis Bank (2004) eKLR. It urges that the appeal is annoying, scandalous, frivolous and a total waste of precious judicial time, and prays for its dismissal with costs.

## Analysis and determination

13. The issue for determination is whether the Appellant proved his case against the Respondent on a balance of probabilities.
14. The Appellant admits his indebtedness to the Respondent but cites the alleged ongoing negotiations between him, the Respondent and CBK and the adverse effects of Covid 19 pandemic on his businesses as the reasons for his failure to repay the loan.
15. The Appellant acknowledged that he had defaulted in repayment of the loan and he indeed admitted his indebtedness to the Respondent when he stated that:

“Yes, I owe the bank money. Since I got the order I haven’t paid any payment. After I filed the suit I haven’t done any letter to the bank proposing payment. My land was charged as a security.”



16. Dw1 recorded in his statement, which he adopted as his evidence in chief that:

“The Plaintiff blatantly failed, ignored and neglected to settle the outstanding amount of Kenya shillings four million and forty nine thousand, eight hundred and eighty seven and nine cents (Kshs. 4,049,887.09/=); the amount as at 21<sup>st</sup> June, 2021, despite several demands and notices by the defendant. Thereafter, the plaintiff proceeded to unnecessarily whisk the Central Bank of Kenya into the issue through his letters dated 27<sup>th</sup> November, 2020 and 8<sup>th</sup> December, 2020. That as a result of the aforementioned letters, the regulator of the Central Bank of Kenya wrote a letter dated 12<sup>th</sup> December, 2020 to the defendant, seeking to be put on the know regarding the steps the defendant was taking towards resolving the issue of indebtedness of the plaintiff to the defendant. The defendant responded through its letter dated 14<sup>th</sup> December, 2020. The fundamental gist of the defendant’s letter dated 14<sup>th</sup> December, 2020 is that it accommodated the plaintiff in terms of loan restructuring only for him to blatantly refuse to service the facility. That further, on 12<sup>th</sup> April, 2021, the Plaintiff wrote a letter to the Central Bank of Kenya; which letter is futile under the circumstances, in the sense that the Plaintiff acknowledges his indebtedness and concedes his failure to service the facilities as a result of what he calls ‘unforeseen logistical impediments’. That as a result of the aforesaid letter, the Central Bank of Kenya wrote to the Defendant via the letter dated 28<sup>th</sup> April, 2021, which the Defendant responded to through its letter dated 30<sup>th</sup> April, 2021. The essence of the letter dated 30<sup>th</sup> April, 2021 is that it inter alia reiterates the proposals made by the plaintiff geared towards settling the defaulted loan. The upshot of the negotiations is that the Plaintiff failed to honour his own proposals. As such, the letter dated 30<sup>th</sup> April, 2021 closed the subject of negotiations in so far as Central Bank of Kenya was involved.”

17. The court notes from the correspondences on record between the Appellant, the Respondent and CBK spanning from November 2020 to April 2021 that the Appellant was adequately accommodated by the Respondent and his request for restructuring was acceded to.

18. Of relevance is the Respondent’s letter dated 14/12/2020 which reads in part that:

“Client requested for consolidation and restructure and the facilities were consolidated and restructured into a facility of Kes. 3,006,862.97 on 25<sup>th</sup> January, 2019 payable over a period of 24 months at Kes. 142,951.75 per month...Considering delayed payments, client requested for a further restructure which he was granted and the facilities were consolidated on 11<sup>th</sup> November, 2019 payable over a period of 72 months on a termly basis with a termly installment of Kes. 135,327/-. Since then client has not made any efforts to repay the facility and no payment has been received...As a remedy to amicably resolve the matter, the Bank has taken initiative to further invite the customer for a meeting with a view to engaging him to clear the outstanding arrears amounting to Kes. 496,232.63 as at the date of this letter and continue servicing the facility outstanding at a total of Kes. 3,744,082.14 as per current terms and conditions. Failure to which we will progress with the recovery process as is required in these circumstances.”

19. On 14/4/2021, the Appellant wrote to CBK that:

“We had promised to pay 50% of the outstanding but due to unforeseen logistical impediments, we would not fulfill out intended promised. One of the impediments was closure of courts due to corona, which was to facilitate the sale of some property but due to



the standoff, we have not been able to. The Courts are now open, albeit not fully, and we expect to finalize this sale, hence settle the outstanding. We need therefore, plead for more time.”

20. It is clear from the excerpts of the conversation between the parties herein that the Appellant’s purported promises to repay the loan are empty and thin in substance, and the Respondent cannot be faulted for throwing the baby out with the bath water.
21. In *A. Rajabali Alidina v Remtulla Alidina & Anor* (1961) E.A 565, cited by the Respondent, Law J held that:
  - i. A debtor must show sufficient reason for indulgence and the matters to be taken into consideration by the court are the circumstances in which the debt was incurred and the financial position, conduct and bona fides of the debtor.
  - ii. The High Court has jurisdiction to interfere, in its appellate capacity, where the exercise by a magistrate in his discretion to grant installments constitutes a virtual denial of the decree-holder’s right.”
22. The Appellant has acknowledged that after the institution of this case, no single cent was expended towards the repayment of the loan. This court sadly finds that the conduct of the Appellant throughout his entire engagement with the Respondent negates the exercise of discretion to defray the loan in installments in his favour.
23. With the admitted indebtedness by the Appellant to the Respondent, and in the absence of any effort by the Appellant to rectify the default by diligently servicing his loan, despite having been accorded numerous opportunities to do so, this court finds that the Respondent is justified in realizing the security in order to recover its money.
24. In *Jopa Villas Llc v Overseas Private Investment & 2 Others* (2009) eKLR, the Court (Isaac Lenaola J as he then was) said:

“I am clear in mind that the Applicant is running away from obligations lawfully imposed and with its full knowledge and participation. Courts should not aid it in that quest but will instead uphold the rights of the 1<sup>st</sup> Defendant to recover its monies lawfully advanced. That is a tradition that I cannot depart from and as was advised in *Aiman vs Muchoki* (1984) KLR 353. Our courts must uphold the sanctify of lawful commercial transactions.”
25. This court in *Stephen Michuki Kiunga v National Bank of Kenya Ltd* [2018] eKLR observed thus:-

“Suffice it to state the his having offered the suit property as a security for the loans, the applicant must be deemed, as in *Isaac O. Litali v. Ambrose W. Shubai & 2 Ors*, to have been ready for the eventuality that befalls it upon default of loan repayments and the Bank is entitled to realize its security in those circumstances, to give effect to certainty of commercial lending transactions.”

## Orders

26. Accordingly for the reasons set out above, this court finds the appeal is without merit and it is dismissed.
27. In the interest of justice, the Court, however, grants a stay of its order for a period of thirty (30) days to permit the appellant opportunity to seek private sale of the suit property at market value or to obtain



by agreement any further accommodation from the respondent in respect of this matter, as the case may be, in default whereof the respondent shall be at liberty to exercise its power of sale without need to give any fresh notices.

28. The appellant shall pay to the Respondent the costs of this appeal to be agreed or taxed in default of agreement.

Order accordingly.

**DATED AND DELIVERED ON 29<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances

Ms. Gitonga for Frank Gitonga & Co. Advocates for the Appellant.

Ms. Wafula for Kiunga Kingirwa & Co Advocates for Respondent.

