



**Muga & another v Consolidated Bank of Kenya Limited (Commercial Case E165 of 2022)  
[2024] KEHC 4504 (KLR) (Commercial and Tax) (18 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 4504 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E165 OF 2022  
DO CHEPKWONY, J  
MARCH 18, 2024**

**BETWEEN**

**BENEDICTA MWENDWA MUGA ..... 1<sup>ST</sup> APPLICANT**

**OLE POLOS CONSTRUCTION CO. LIMITED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**CONSOLIDATED BANK OF KENYA LIMITED ..... RESPONDENT**

**RULING**

1. By way of a Notice of Motion application dated 16<sup>th</sup> May, 2022, the Applicants have sought the following orders;
  - a. Spent.
  - b. Spent.
  - c. Pending the hearing and determination of this suit the Defendant through Regent Auctioneers whether by themselves, agents, servants or otherwise howsoever be restrained from advertising, offering for safe, auctioning, selling, transferring, alienating and/or otherwise dealing with properties land title numbers Ngong/Ngong/ S54556, Ngong/Ngong/54558, Ngong/Ngong/954561, Ngong/Ngong/54563 and Ngong/Ngong/954564.
  - d. Costs of this Application be provided for.
2. The Applicants' application is anchored on the grounds set out on its face and supported by the affidavit sworn by Benedicta Mwendwa Muga, the 1<sup>st</sup> Applicant herein on even date.



3. In the said affidavit, she has deposed that the Respondent extended a loan facility to the 2<sup>nd</sup> Applicant vide a charge instrument dated 28<sup>th</sup> July, 2015. The facility was secured by her five properties being Land Title numbers Ngong/Ngong/54556, Ngong/Ngong/54558, Ngong/Ngong/ 54561, Ngong/Ngong/94563 and Ngong/Ngong/54564 respectively.
4. She stated that as the director of the 2<sup>nd</sup> Applicant, she is aware that the 2<sup>nd</sup> Applicant has faithfully been adhering with the terms of the charge and repayments have never fallen due as the loan has been serviced to a sum of Kshs.51,985,743.23 out of the disbursed sum of Kshs. 55,000,000/=. She has further stated that she was astonished to learn that Regent Auctioneers, acting under the instructions of the Respondent advertised the suit properties for sale vide the Daily Nation Newspaper dated 21<sup>st</sup> April, 2022.
5. According to her, the Defendant never served her with any Statutory Notices and the scheduled sale of the suit properties to justify the advertisement. The failure by the Respondent to serve Statutory Notices as envisaged under Sections 90 (1) and 90 (3) both of the Land Act renders the impending auction null and void.
6. Also, the 1<sup>st</sup> Respondent has averred that Regent Auctioneers did not serve any notice upon her or the 2<sup>nd</sup> Applicant as required by the Auctioneers Act and she beseeches this Court to protect her interest in the suit properties and grant the injunction sought herein as that is her only home with her children. Lastly, she contends that her property rights are about to be infringed by the Respondent without following due process of the law.
7. In opposition to the application, the Respondent filed a Replying Affidavit dated 30<sup>th</sup> May, 2022 and sworn by Lilian Ntongai who described herself as working in the Respondent's Debt Recovery Unit. In the said affidavit, she deposes that on 14<sup>th</sup> June, 2021, the Applicants filed Milimani CMCC No 321 of 2021 between Benedicta Mwendwa Muga and Ole Polos Construction Co. Ltd v Consolidated Bank of Kenya, Limited and Regent Auctioneers where the same Applicants sought injunctive orders restraining the Respondent from realizing its securities on it account of default over Property Title No Ngong/Ngong/54556, Property Title No Ngong/Ngong/54558, Property Title NoNgong/Ngong/54561, Property Title NoNgong/Ngong/54563 and Property Title NoNgong/Ngong/ 54564.
8. Upon hearing the said suit and through the Respondent's application, the court rendered its ruling on 10<sup>th</sup> May, 2021 dismissing the Applicants' suit and injunctive application on the grounds that the Chief Magistrate's Court lacked the requisite pecuniary jurisdiction to hear and determine the matter under Section 7 of the Magistrate's Act.
9. According to the Respondent, the Applicants are vexatious litigants that intend to abuse the court process with the intention of causing the Respondent great anxiety and costs through the institution of multiple suits.
10. The Respondent has stated that the 1<sup>st</sup> Applicant is a director of the 2<sup>nd</sup> Applicant Company and further guaranteed the facility issued to her company where she is the Chargor of the suit property and her company the borrower and beneficiary of the facility therein. That on 23<sup>rd</sup> June, 2015, the Respondent entered into an Agreement with the Applicants vide a Letter of Offer whose terms were, inter alia:
  - a. That the Bank would cumulatively advance to the 2<sup>nd</sup> Applicant Kshs. 55,900,000.00 which included a Term Loan Facility, an LPO Financing and a continuing facility;



- b. That the facility would be secured by a First joint legal Charge over Property Title No Ngong/Ngong/54556, Property Title No Ngong/Ngong/54558, Property Title No Ngong/Ngong /54561, Property Title No Ngong/Ngong/54563 and Property Title No Ngong/Ngong/54564 all registered in the name of the 1<sup>st</sup> Applicant.
11. According to the Respondent, a Legal Charge was created over the suit properties and registered in favour of the Bank to secure the said financial facility advanced and where the pertinent terms of the Charge Instrument were as follows: -
  - a. That the failure to pay the stipulated monthly installments by the due date would be considered as an event of default and a breach of the terms of the respective Charge Instruments and Letter of Offer; (as per Clause 7); and
  - b. That in the event of default, the Bank would have the right to exercise its Statutory Power of Sale over the suit properties as provided for in law;
12. The Respondent has gone on to state that on 28<sup>th</sup> February, 2019 and 16<sup>th</sup> July, 2019, following default on the loan, the 1<sup>st</sup> Applicant in her capacity as the Director of the 2<sup>nd</sup> Applicant Company, admitted the debt owing and sought for the repayment to be restructured to allow her to instead repay a quarterly sum of Kshs. 5 Million.
13. The Bank agreed to the request and restructured the Facility vide a Letter of Offer dated 9<sup>th</sup> September, 2019 where the facility was to be repaid within 24 months in equal quarterly instalments of Kshs. 5,298,655.00.
14. Further, that the restructured facility would be secured by Personal Guarantees from the 1<sup>st</sup> Applicant and the directors of the 2<sup>nd</sup> Applicant.
15. Despite the accommodation and restructure by the Respondent Bank, the 2<sup>nd</sup> Applicant continued to make irregular and sporadic payments towards the loan facility in breach of their contractual obligations.
16. Subsequently, the 2<sup>nd</sup> Applicant slipped into its usual pattern of consistent default where it remitted nominal to nil repayments on its loan account hence being in breach of the Facility Letter.
17. Further, the last time any payment was made by the 2<sup>nd</sup> Applicant was in November, 2021, which is more than 6 months ago, and being a credit of Kshs. 165,600.00 to the loan account, an amount that is way below the agreed and proposed Kshs. 5, 298,655.00.
18. That resulting from the 2<sup>nd</sup> Applicant's incessant loan defaults, the Respondent's Bank issued the 2<sup>nd</sup> Applicant with demand notices demanding for the immediate repayment of the outstanding arrears and that failure to do so would lead to the Bank issuing Statutory Notices.
19. Consequently, and thereafter, Bank having granted the 2<sup>nd</sup> Applicant sufficient time and opportunity to regularize the loan account on 29<sup>th</sup> January, 2020, the Respondent Bank in the lawful exercise of its Statutory Power of Sale under Section 90 (2) of the *Land Act* No 6 of 2012, issued the 1<sup>st</sup> and 2<sup>nd</sup> Applicants with a three (3) months (90 days) Statutory Notice to regularize the loan default contrary to the misleading averments of the Applicants.



20. On 2<sup>nd</sup> June, 2022, parties agreed to canvass the application by way of written submissions. The Applicants complied and filed their written submissions dated 20<sup>th</sup> July, 2022 while the Respondent's submissions are dated 18<sup>th</sup> July, 2022.

### **Analysis and Determination**

21. I have read through the application together with the response thereto alongside the rival submissions and the authorities cited by both parties. I find the following issue relevant for determination by this court;

- a. Whether the application is *res-judicata*;
- b. Whether the Applicants have met the threshold for granting the orders being sought; and
- c. Who bears the costs of this application?

22. On whether the application before court is *res judicata*, the guiding law is provided for under Section 7 of the [Civil Procedure Act](#). It provides thus;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally by such court.”

23. From the aforementioned provision of the law, it is clear that the doctrine of *res judicata* is founded on public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and that an individual should not be harassed twice with the same account of litigation. Similar position was echoed in the case of [Nicholas Njeru v Attorney General and 8 Others](#) (2013) eKLR.

24. In the case of [Independent Electoral and Boundaries Commission v Maina Kiai and 5 Others](#) [2017] eKLR, the Court of Appeal held that:-

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

25. Again, in the case of [Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others](#) (*supra*), the court went on to state that:-

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an



endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

26. It is not in dispute that the parties in Milimani CMCC No 321 of 2021 are the similar to the parties in the present suit. It is equally not in dispute that the prayers sought in Milimani CMCC No 321 of 2021 are similar to the ones in this present application.
27. I have had the opportunity to peruse through the application together with the response by the Respondent and the annexed lower court pleadings in Milimani CMCC No 321 of 2021. It is confirmed that the prayers in the application in the suit before the lower court are indeed similar to those in the present application.
28. The Respondent has urged that the lower court suit was dismissed for want of jurisdiction vide a ruling delivered on 10<sup>th</sup> May, 2021.
29. For a party to successfully plead the doctrine of res judicata, such a party must prove that the suit or issue was directly and substantially in issue in the former suit, that former suit was between the same parties or parties under whom they or any of them claim, those parties were litigating under the same title, the issue was heard and finally determined in the former suit and the court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
30. Having read through the proceedings in all matters, this court finds that although the parties and issues in the application in the matter before the lower court are similar to those in the instant application, the same was not heard and determined to finality as the same was dismissed for want of jurisdiction, and hence it cannot be said to be res judicata. It is trite law that a court without jurisdiction cannot make any move or step to hear a matter. It therefore follows that the court in Milimani CMCC No 321 of 2021 could not have made any step to hear and determine the matter for want of jurisdiction.
31. In the circumstances, and for the reasons observed above, the court finds that the application before it is not res judicata as claimed by the Respondent.
32. On the second issue of whether the Applicants have met the threshold for granting of an interlocutory injunction being sought, the principles to be considered in determining an application were outlined in the case of *Giella v Cassman Brown and Co. Ltd* [1973] 358 at P.360 as follows:-

“First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience (*E.A. Industries v Trufoods* [1972] E.A. 420.)”
33. The Court of Appeal then went on to define what a prima facie case in the case of *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR, as follows:-

“That a prima facie case is one which on the material presented in court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the Respondent.



34. In the present case, the Applicants have urged that before exercising a Statutory Power of Sale, a Chargee must ensure that the Chargor is duly notified of the intention to sale through service of a Statutory Notice as required or provided for under Section 90(1) of the Land Act. The said Section provides thus;
- “If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be”.
35. It was submitted for the Applicants that the 90 day notice is a prerequisite for the exercise of the chargee’s remedies including the power of sale, which must be served upon the chargor in order to give him/her the opportunity to remedy the breach or otherwise redeem the property as security.
36. The Applicants submitted that in the absence of a notice to sale under Section 96(2) of the Land Act, the sale of the suit property is illegal, null and void and so are the transactions thereof. And since the Respondent did not comply with the provision of Section 90 of the Land Act, it could not issue a 40 day notification of sale under Section 96 of the Land Act.
37. The Applicants have urged that the Responder has established a prima facie case against them since no Statutory Notice was served upon them and therefore the intended sale of the 1<sup>st</sup> Applicant’s property is tainted with mala-fides as they are overly eager to sell the suit properties.
38. On the other hand, the Respondent submitted that a prima facie case is more than an arguable case and it is not sufficient to merely raise issues. The Applicants are required to demonstrate the infringement of a right by the Bank. It has been urged for the Respondent that the Applicants have not advanced the infringement of any of their rights. The Respondent has further submitted that following the default on the loan by the 1<sup>st</sup> Applicant in her capacity as Director of the 2<sup>nd</sup> Applicant, admitted the debt owing and sought for the repayment to be restructured to allow her repay a quarterly sum of Kshs. 5 Million and 28<sup>th</sup> February, 2019 and 16<sup>th</sup> July, 2019 respectively. The Bank agreed to the request and restructured the facility vide a letter of offer dated 9<sup>th</sup> September, 2019 where the facility was to be repaid in 24 months in equal quarterly instalments of Kshs. 5,298,655/= which obligation on repayment, the 2<sup>nd</sup> Applicant failed to honor by failing to remit the agreed quarterly instalments.
39. According to the Respondent, the Applicants sought to negotiate on account of the 1<sup>st</sup> Applicant’s proposal where it was agreed that it would deposit Kshs. 1,000,000/= by 14<sup>th</sup> April, 2022, failure to which the Bank would proceed to advertise the charged suit property so as to recover the outstanding amount.
40. Again, the Respondent submitted that it served the 2<sup>nd</sup> Applicant with a 3 Months Statutory Notice in conformity with Section 90(2) of the Land Act, valued the suit property in conformity with Section 97 of the Land Act and Rule 11 (b) (x) of the Auctioneers Rules, 1997, served the Applicants with a 40 days’ Notice Of Intention to Sale in line with Section 96 of the Land Act, served the Applicants with 45 Days Redemption Notice and Notification of Sale in conformity with Rule 15(d) of the Auctioneers Rules, 1997.
41. On the second requirement where the Applicants are required to prove that they will suffer irreparable harm, the Respondents submitted that an interlocutory injunctive relief can only be granted where an award of damages for harm is inadequate. The outstanding loan facilities continue to accrue a contractual and default interest and the 2<sup>nd</sup> Applicant has demonstrated an inability to settle what is



contractually due. Therefore, if the Respondent is precluded from exercising its statutory power of sale, the 2<sup>nd</sup> Applicant's debts shall further escalate causing irreparable loss to the Respondent.

42. The Applicants have submitted that the 1<sup>st</sup> Applicant guaranteed a loan of Kshs. 55,000,000/= to the 2<sup>nd</sup> Applicant which they have serviced to a tune of Kshs. 51,985,743.23. The Respondent demands a further sum of Kshs. 54,874,722.77 being interest on the loan facility a sum which is highly exaggerated. It has been urged that if it is not clear how the computation of the amount owed was arrived at, courts have ruled that the Chargor has a right to know how the said amount was arrived at.
43. I have had the opportunity to read through the pleadings and note that there is a statutory notice on record and demand to pay as agreed by both parties vide the loan restructure agreement. It is therefore this court's considered view that the Applicants have fallen short of meeting the threshold set for grant of interlocutory injunction. However, on a balance of convenience and so as not to render this suit completely nugatory, this court proceeds to grant the Applicants an interim relief pending hearing and determination of this suit with regard to the competing exact amount owed and how the same was arrived at.
44. The Applicants had a duty to establish a prima facie case before this court as was decided in the case of *Nguruman Limited v Jan Bonde Nielsen and 2 Others* [2014] eKLR, the Court of Appeal held thus:-

“We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation.”

45. In conclusion:-
- a. The Application dated 16<sup>th</sup> May, 2022 is allowed in terms of prayer No3 pending the hearing of the suit with regard to the amount owed by the Respondent.
  - b. The matter to be placed before the Honourable Deputy Registrar on privity basis for pre-trial directions to be confirmed by the parties.
  - c. Costs to be in the cause.

It is so ordered.

**RULING DATED AND SIGNED AT KIAMBU THIS 15<sup>TH</sup> DAY OF MARCH, 2024.**

**D. O. CHEPKWONY**

**JUDGE**

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MARCH, 2024.**

**ALFRED MABEYA**

**JUDGE**

