TSS Investment Limited v National Bank of Kenya Limited & 2 others (Commercial Civil Suit 86 of 2016) [2022] KEHC 11 (KLR) (25 January 2022) (Ruling)

Neutral citation: [2022] KEHC 11 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL CIVIL SUIT 86 OF 2016

JM MATIVO, J

JANUARY 25, 2022

BETWEEN

TSS INVESTMENT LIMITED ..... PLAINTIFF

AND

NATIONAL BANK OF KENYA LIMITED ..... 1ST DEFENDANT

KAAB INVESTMENTS LIMITED ..... 2ND DEFENDANT

OCEAN GROUP TRADERS ..... 3RD DEFENDANT

RULING

1. This ruling determines two applications filed by the Plaintiff. First, is the application dated 29th November 2018 (the 1st application), and the application dated 5th March 2021 (the 2nd application). For the sake of brevity, I will address the two applications separately.

The 1st application

2. The 1st application is anchored on Article 35 of the Constitution and Order 40 Rule 1 of the *Civil Procedure Rules, 2010.* It seeks a temporary injunction pending the hearing and determination of the suit restraining the 1st defendant, its agents, servants or employees from advertising for sale, selling by public auction or private treaty, leasing, collecting rent, disposing or in any other way interfering with the Plaintiff's rights over Land Reference Number Mombasa/Block XXV1/658 (the property) and an order compelling the 1st defendant to provide it with copies of the documents listed in the Schedule at page 10 of the application. Lastly, it prays for costs of the application. Prayers (1) and (2) of the application are spent.

3. The core grounds in support of the application are that the Plaintiff is the registered owner of the said the property, and vide an application dated 17th August 2016 it sought an injunction to stop the 1st defendant from selling the property pending the hearing and determination of this suit. It avers that

vide a ruling dated 27th April 2018 this court (Mwangi J) granted an injunction limited to such time as the 1st defendant would supply the Plaintiff with correspondence and documentation informing it of default by the principal borrower, TSS Grain Millers Limited and copies of demand notices under sections 90(1), (2) and 96(2) of the *Land Act*[1] (the Act). It contends that the said documents have never been supplied as ordered nor has the order been appealed against.

4. It states that despite the non-compliance, it learnt that Garam Investment Auctioneers acting under the 1st defendant's instructions intended to auction the property. It contends that the intended advertisement and sale would be in breach of the said court order and a perpetuation of fraud and forgery between the 1st and 2nd defendant and its director, a one Aweys Mohamed who had been entrusted by Tahir Sheikh Said-deceased with the day to day running of the TSS Group of companies which include the applicant. It avers that in abuse of his position, the said director and or his various companies obtained numerous facilities from various banks and fraudulently used properties belonging to the various companies to secure the facilities advanced to the companies under KAAB Group of Companies.

5. Additionally, the Plaintiff states that for the facilities granted by NIC Bank Ltd on the security of property belonging to TSS Group of Companies, the applicant has filed Juja Coffee Exporters Ltd & another v NIC Bank PLC & another[2] which involves the following issues- (a) Aweys Mohamed and KAAB Investments Ltd by a letter dated 2nd February 2017 proposed to substitute the properties belonging to TSS Group of Companies with properties belong to KAAB Group of Companies; (b) the NIC Bank PLC forged charge documents and letters of offer; (c) a criminal case against Aweys Mohamed; (d) senior officers of NIC Bank Ltd have recorded statements with the Police; and (e) there is no documents from NIC Bank to show that the money was disbursed. It also states that the fraud was through collusion with the 1st defendant and the said Aweys Mohamed, so it is imperative that the correspondence and relevant documents be supplied.

6. The applicant also states that the documents will show that the 1st defendant never advanced money to TSS Grain Millers Ltd. Further, that the statements of account provided by the 1st defendant only demonstrate the alleged loan drawdowns without confirmation as required by the letter of offer. Also, that the documents ought to be presented to confirm their authenticity. Additionally, the applicant states that it believes that the sums claimed were the result of fraud and criminal activities which are the subject of criminal cases so, it is difficult for the 1st defendant to justify its claim to sell the property.

The 1st Defendant's Replying affidavit

7. The application is opposed. On record is the Replying Affidavit of Eustace Nyaga dated 13th December 2018, the 1st defendant's Head, Credit Remedial, Collections and Recovery. The substance of the 1st Respondent's opposition as I glean it from the affidavit is that the application is res judicata because the applicant had filed a similar application which was heard on merit and determined on 27th April 2018; that the prayer for an order compelling the 1st defendant to provide copies of the documents is not anchored on any averment in the Plaint; that in the applicant's application for injunction dated 17thAugust 2016, the Plaintiff admitted under oath in the supporting affidavit of Mohamed Tahir Sheikh Said that it had received demand notices dated 28th December 2015 and 8th April 2016 both of which were annexed thereto, but it contended that the said demand notices were illegal in so far as the amounts claimed were not covered by the charge and further charge. Also, in the ruling dated 27th April 2018, the court found that the Plaintiff secured the borrowing with the charge and further

1 Act No. 6 of 2012.

2 Mombasa HCC No. 107 of 2017.

charge but the loan advanced to the borrower had not been repaid. It is the 1st defendant's case that in compliance with the ruling of 27th April 2018, it issued the Plaintiff with a compliant 3 months' statutory notice dated 3rd May 2018.

8. It is also the 1st Respondent's case that that the statutory notice was limited to a claim for the outstanding principal sum of KShs. 1,451,325,661/= and KShs. 735,000,000/= secured by the charge and further charge respectively plus interests and costs, and, that, the notice stated that the facilities had been advanced to TSS Grain Millers Limited as the borrower. Additionally, the 1st defendant states that upon failing to comply with the Statutory Notice, in conformity with the court ruling, it served the Plaintiff with a 40 days' Notice of Intention to sell dated 23rdAugust 2018 for the outstanding loan of KShs. 1,491,538,576/= (inclusive of principal, interests and costs).

9. The 1st defendant contends that after the lapse of the notice, it engaged the Auctioneers to recover the outstanding amounts and the auctioneer served the Plaintiff with a 45 days' Redemption Notice and Notification of Sale both dated 17th October 2018. It states that the intended sale is legitimate and the Plaintiff's continued use of court process to frustrate the sale is inequitable and by these proceedings, the Plaintiff seeks to evade contractual obligations. It avers that the depositions at paragraphs 8 – 22 of the affidavit in support of the application are irrelevant because: -

    a. The generalized allegations of fraud and forgery are a complete departure from the Plaintiff's case as pleaded in the Plaint;

    b. None of the proceedings referred to relate to the creation of the subject security;

    c. In its ruling of 27/04/2018 this court found that the Plaintiff offered the property to secure the loan;

    d. The charge and the further charge only relate to the suit property and was created pursuant to the letter of offer dated 11/02/2014, so the allegation that the 1st defendant claims interest over any other property is without any foundation;

    e. That at paragraph 9 of the affidavit in support of the Plaintiff's earlier application, the Plaintiff averred that Tauhida Tahir Sheikh Said who has now sworn the affidavit in support of the instant application was the one entrusted with the running of the affairs of TSS Grain Millers Limited, the borrower and had confirmed that the borrower was unable to pay its loan facilities, so, it is an act of bad faith that the deponent purports to plead ignorance of the dealings and affairs of the borrower company;

    f. That the execution of the letters of offer and instruments of charge has never been contested; and

    g. The deponent of the supporting affidavit Tauhida Tahir Sheikh Said has previously confirmed under oath in an affidavit sworn and filed in a suit pending before this court involving among others the Plaintiff, the borrower TSS Grain Millers Limited and the 1st defendant being Msa HCCC COMM. No. 10 of 2016, National Bank of Kenya Limited v Kenya Commercial Bank Limited & 3 Others that the credit facilities granted to the borrower whose repayment it is common ground was secured under the charge and further charge over the suit property were disbursed by the 1st defendant and utilized

by the borrower, so, it is impermissible for the same deponent to now purport to take an inconsistent position on behalf of the Plaintiff.

Plaintiff's supplementary affidavit

10. Mr. Tahida Tahir Sheikh Said, a director of the Plaintiff swore the supplementary affidavit dated 28th December 2018 in reply to the 1st defendant's replying affidavit. The nub of the affidavit is that the 1st defendant has selectively read the orders of 27th April 2018 which it has never fully complied with. Also, that the Certificate of Posting dated 23rd May 2018 shows TSS Ltd as the addressee and there is no guarantee that the letter was addressed to the Plaintiff, that it shows 2 postal addresses so it's unclear whether it was sent. Lastly, it violated section 90(1) & (2) of the *Land Act*.

11. It is also the Plaintiffs reply that the notices issued by Garam Investment Auctioneers are in breach of the law because the auctioneer used his own figures contrary to rule 11(1) (b) of the *Auctioneers rules* and that the notices were not served upon the Plaintiff as required by Rule 15(c) of the Auctioneers Rules, 1997. Also, the Plaintiff questions why the property valued at Kshs. 900,000,000/= in 2014 could be valued at Kshs. 360,000,000/= in 2018 and that the 1st defendant is obligated to undertake a forced sale valuation.

12. Lastly, that the creation of the charge was fraudulent and illegal and it is only after the filing of the suit that the information in paragraphs 9 to 15 of the supporting affidavit came to the Plaintiffs knowledge and owing to the new information the applicant seeks an injunction on grounds that the intended exercise of the statutory power offends the law and court orders, so the application cannot be res judicata.

Plaintiff's further supplementary affidavit

13. Mr. Nurein Tahir Sheikh Said swore the further supplementary affidavit dated 16th February 2019 reiterating the contents of the affidavit dated 29th November 2018 and the supplementary affidavit sworn on 28th December 2018. He averred that the purported lending is replete with fraud which the Plaintiff keeps on discovering. He averred that the Plaintiff subjected the documents so far availed to forensic examination and the forensic report shows that some signatures do not resemble the specimens.

The 1st defendant's further Replying affidavit

14. Mr. Eustace Nyaga swore the further Replying Affidavit dated 25th February 2019 in reply to the above supplementary affidavits. He averred that the certificate of posting issued by the Postal Corporation of Kenya Limited confirms postage of 2 items on 23rd May 2018 addressed to Post Office Box Number 85039 – 80100 Mombasa and P.O Box 85039 – 80100 Mombasa. Also, he averred that the postal address to which the statutory notice was dispatched belongs to the Plaintiff and that in the earlier replying affidavit the Plaintiff does not dispute the 40 days' notice dated 23rdAugust 2018.

15. He also averred that he is aware that the said annexures confirm the 40 days' notice under section 96 of the *Land Act* was dispatched to the Plaintiff and therefore the 1st defendant fully complied with the law. Also, he deposed that the auctioneer's notification of sale and the 45 days' redemption notice have been referred to in the Plaintiff's supporting affidavit and that the allegation that these notices were not served is without any proper foundation. He averred that it is not true that the auctioneers' notices do not reflect the correct amount and that the Plaintiff has not presented a valuation report to back the allegation that the suit property was valued at Kshs. 900,000,000/=in 2014.

16. Responding to the further supplementary affidavit, he averred that the report referred to is of no probative value in backing the purported fraud because it was requested and prepared after written

arguments in respect of the application under consideration and that the court in the ruling dated 27th April 2018 found that the Plaintiff charged the property.

The 2nd application

17. In the 2nd application dated 5th March 2021, the Plaintiff prays for an order directing the 1st defendant to provide it and or the court within 30 days, certified copies of the internal forensic audit report relating to the loan advanced to the Plaintiff and referred to in Nairobi ELRC No. 1906 of 2016, Farouk Sultan Hirani v National Bank of Kenya. It also prays for costs of the application. Prayers (1) & (2) of the application are spent.

18. The grounds in support of the application are that the Plaintiff has now come across a reported case in which the 1st defendant's Director-Corporate Division refers to an internal forensic audit report which proves that the loan to the 1st defendant (sic) was fraudulent, but the document is not one of the documents sought by the Plaintiff in the application dated 29th November 2018 which document will help the court to fully and finally determine the issues between the parties.

The 1st defendant's replying Affidavit

19. Mr. Eustace Nyaga the 1st defendant's Head, Credit Remedial, Collections and Recovery swore the Replying Affidavit dated 23rd July 2021 in opposition to the application stating:

    a. The judgment in Nairobi ELRC No. 1906 of 2016, Farouk Sultan Hirani v National Bank of Kenya Limited does not refer to such an internal forensic audit report;

    b. From the said judgment, it is clear that the matters in dispute relate to loss of employment triggered by a special investigation report by Deloitte and Touche and review of audited accounts for the year 2015;

    c. the 1st defendant's books of account were audited by approved external auditors;

    d. the 1st defendant never carried out any internal forensic audit in relation to the matters adverted to in the application and such a report does not exist.

20. The 1st defendant also states that even if the reports by Deloitte and Touche are the ones referred to in the judgment of the Employment Court:- (a) the said reports related to actions taken in December, 2015; (b) such reports cannot be evidence of fraud because the facilities were granted as per the terms of letters of offer dated 22nd November 2013 and 11th February 2014; and (c) the said judgment is clear that the said reports focused on actions relating to restructuring of non-performing loans i.e. already existing banking facilities. He averred that it is quite evident from the judgment that the said reports covered not only the banking facilities subject of the dispute in this suit but also facilities owing from other customers and as such sharing the same with the Plaintiff would entail the bank breaching its duty of confidentiality to the other customers.

Analysis and determination

21. I will first address the 1st application. In his submissions, counsel for the applicant while acknowledging that the applicant had filed a similar application for injunction which was heard and determined on 27th April 2018 argued that res judicata does not apply to the peculiar facts of this case because res judicata has two exceptions. He cited *Housing Finance Company of Kenya v J. N. Wafubwa*[3]which described

[3] {2014} e KLR.

subsequent developments after institution of a suit as constituting special circumstances within the exception of "special case" referred to in *Henderson v Henderson*.[4] He argued that some facts which could not be availed by the Plaintiff notwithstanding due diligence include the order made on 27th April 2018; the defects in the Statutory Notices; the arraignment of the 1st defendant's officials and Mr. Aweys Mohamed in criminal courts; the competing interests between NIC Bank PLC and the 1st defendant over the suit property; the claim of close to Kshs. 500,000,000/= from the 1st defendant by Standard Chartered Bank Ltd for the same loan the 1st defendant purported to take over. In light of the foregoing, the applicant's counsel argued that res judicata cannot apply.

22. The second ground argued by the applicant's counsel is fraud. He argued that fraud if pleaded overrides all pleadings, admissions including the doctrine of res judicata. He relied on *Robert M. Muga v Muchangi Kiunga & 2 others*[5] in support of the proposition that fraud vitiates any solemn court proceedings. He also cited *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others*[6] which held that the bar created by res judicata is absolute unless fraud or collusion is alleged.

23. On his part, the 1st defendant's counsel submitted that the Plaintiff had in the instant suit filed an interlocutory application dated 17thAugust 2016 seeking an order that pending the hearing and determination of this suit, the 1st defendant be restrained from realizing the security comprised in the charge over the suit property and vide the ruling dated 27th April, 2018, this court determined the said application. He argued that the injunction application having been heard and determination by this court, the instant application is res judicata. He cited section 7 of the *Civil Procedure Act*[7] and John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others[8] in which the Court of Appeal stated: -

> " The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue."

24. He also cited the Court of Appeal in *Uhuru Highway Development Limited v Central Bank of Kenya & 2 others*[9] which held that the judge having decided the application on the principles laid down in *Giella v Cassman Brown* a similar application cannot be brought once again subsequently.

4 {1843-60} ALL ER 378.

5 {2007} e KLR.

6 {2015} e KLR.

7 Cap. 21 Laws of Kenya.

8 {2015} e KLR

9 {1996} e KLR.

25. Responding to the submission that the instant application falls within the exceptions to the doctrine of res judicata on the basis that there is new information, namely alleged fraud and forgery, he cited *Uhuru Highway Development Limited (supra)* in support of the holding that the exception must be on account of new facts that could not have been brought earlier even with exercise of due diligence. He argued that the material on record in the instant application does not support the Plaintiff's contention that the present application falls within any of the exceptions to the doctrine of res judicata.

26. He urged the court to consider that the dispute involves exercise of the chargee's statutory power of sale and submitted that the creation of the charge is admitted and, in the ruling, dated 27th April 2018, the court found that the Plaintiff created the charge and further charge. He argued that the 1st defendant has not claimed interest in any of the Plaintiff's other properties. He argued that the allegations of fraud were raised in paragraphs (i) to (l) of the grounds in support of the earlier application which was determined on 27th April 2018.

27. As for the criminal proceedings, he submitted that they have no relevance to the matters in dispute in this suit and that none of the charge sheets in which the Plaintiff or related parties are complainants relates to the charge and further charge or any of the letters of offer. He argued that the Plaintiff and or related parties were the complainants in the said cases and that the proceedings pursuant to the charge sheets commenced in February, 2017 yet the Plaintiff's earlier application dated 17thAugust 2016 was heard on 11th July 2017. He referred to this court's ruling in *Juja Coffee Exporters Limited & 3 others v Bank of Africa Limited & another*[10] and urged the court to find that it is impermissible to revisit an application for injunction because the issues could have been raised in the earlier application.

28. The first issue which distils itself for determination is whether the reasons cited by the Plaintiff qualify to be "special case" or "exceptional circumstances" to fall under the permissible exceptions for the doctrine of res judicata. Ture, courts have over the time expressed the view that the doctrine of res judicata should not be applied rigidly. There are limited exceptions which allow a party to attack the validity of the original judgment, even outside of appeals. These exceptions—usually called collateral attacks—are typically based on procedural or jurisdictional issues, based not on the wisdom of the earlier court's decision but its authority or on the competence of the earlier court to issue that decision. In addition, in matters involving due process, cases that appear to be res judicata may be re-litigated. Examples are establishment of a right to counsel or where a citizen's liberty is taken away.

29. In developing exceptions to the res judicata doctrine, it is instructive to look at the exceptions admitted by other jurisdictions. In Amtim Capital Inc[11] the Court of Appeal for Ontario, Canada, stated that the purpose of res judicata is to balance the public interest in finality of litigation with the public interest of ensuring a just result on the merits. The court found that the doctrine is intended to promote orderly administration of justice and is not to be mechanically applied where to do so would create an injustice.

30. In 2015, the Constitutional Court of South Africa in *Molaudzi v The State*[12] dealt with the question of when a court would be allowed to depart from its own earlier decision in the context of criminal law. Drawing from foreign jurisprudence, the court was able to reconsider its own previous final order by relying on the exceptions to the doctrine of res judicata. The relaxation of the doctrine effectively

10 {2018} e KLR.

11 *Amtim Capital Inc v Appliance Recycling Centres of America* 2014 ONCA 62.

12 (CCT42/15) [2015] ZACC 20; 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC) (25 June 2015).

started in *Boshoff v Union Government*[13] where it was held that the strict requirements for a plea of res judicata should not be understood literally in all circumstances and applied as an inflexible or immutable rule. Botha JA[14]added that in particular circumstances these requirements may be adapted and extended to avoid the unacceptable alternative that courts cling to old doctrines with literal formalism. Scott JA summarized the development of the law as follows: -

> " [T]he ambit of the exceptio rei judicata has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same . . . in both the case in question and the earlier judgment. . . Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. . . Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in Bertram . . . 'unless carefully circumscribed, [the defence of res judicata] is capable of producing great hardship and even positive injustice to individuals."[15] (Emphasis added)

31. In the United Kingdom, res judicata is known as cause of action estoppel or issue estoppel.[16] In rare instances the court may reconsider its own previous judgments. In Pinochet, the House of Lords observed: -

> " In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered....
>
> However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong."[42] (Emphasis added.)

32. In Singapore, the Court of Appeal distinguished between its powers regarding criminal and civil appeals. With regard to criminal appeals it appears to consider itself a creature of statute and not equipped with the power to revisit any final criminal decisions.[17] In respect of civil matters, it finds that it has inherent jurisdiction to achieve a variety of results.

13 Boshoff v Union Government 1932 TPD 345.

14 See also *Hyprop Investments Ltd and Others v NSC Carriers and Forwarding CC and Others* [2013] ZASCA 169; 2014 (5) SA 406 at para 14 and *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* [1994] ZASCA 19; 1995 (1) SA 653 (A) (Kommissaris) at 669F-H

15 *Smith v Porritt and Others* {2007} ZASCA 19; 2008 (6) SA 303 (SCA) at para 10.

16 A distinction is made between "cause of action estoppel" and "issue estoppel". In the first case— "the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter." (Arnold v National Westminster Bank [1991] 2 AC 93 (HL) at 104.) In the second case— "a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue." (Arnold at 105.)

17 Where significant or manifest injustice would result should the order be allowed to stand, the doctrine ought to be relaxed in terms of sections 173 and 39(2) of the Constitution in a manner that permits this Court to go beyond the strictures of rule 29[79] to revisit its past decisions. This requires rare and exceptional circumstances, where there is no alternative effective remedy. This accords with international approaches to res judicata. The present case demonstrates exceptional circumstances that cry out for flexibility on the part of this Court in fashioning a remedy to protect the rights of an applicant in the position of Mr Molaudzi.

33. In *Taylor and another v Lawrence and another*[18] the civil division of the Court of Appeal held that: -

> " The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations."

34. In India, Article 137 of the *Constitution* provides that "Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it."[19] The Supreme Court of India has held that this power is reserved for the correction of serious injustice. It is for the correction of a mistake, not to substitute a view.[20] The ordinary position is that a judgment is final and cannot be revisited. The power to review is statutory. It can be exercised when there is a patent and obvious error of fact or law in the judgment.[21] The injustice must be apparent and should not admit contradictory opinions.[22]

35. The High Court of Kenya in *Benjamin Koech v Baringo County Government & 2 others; Joseph C. Koech (Interested Party)* after reviewing decided cases stated: -

Exceptional circumstances may remove the bar of res judicata

26. I think that properly understood, Madan's dictum in Mburu Kinyua v. Gichini Tuti, supra, is that a situation which may give rise to res judicata may, for exceptional circumstances, have its application of removed. This was the same stance taken by the Court, of which I was a member, in Joho's degree case, Silas Make Otuke v. Attorney General & 3 Ors., Mombasa HC Pet. No. 44 of 2013, [2014] eKLR, where the Court found the allegation of fraud and illegality in a decision to be exceptional circumstances removing the application of the principle of res judicata as follows:

> " In a leading case on res judicata Arnold v. Westminster Bank (1991) AC 93 H.L., the House of Lords held that cause of action estoppel "is an absolute bar in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment." In the same decision, the Court agreed that the same considerations apply for reopening of the cause of action in the previous suit as with particular issues in the action which are the subject of issue estoppel. In acknowledging similarity of the principles applicable to both cause of action estoppel and issue estoppel, Lord Keith stated that:-
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> "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same

[18] {2002} EWCA Civ 90.

[19] Constitution of India, 1950.

[20] Choudhury "Review Jurisdiction of Supreme Court of India: Article 137" Social Science Research Network (4 April 2012), available at http://dx.doi.org/10.2139/ssrn.2169967.

[21] *A T Sharma v A P Sharma* AIR 1979 SC 1047.

[22] *M/s Northern Indian Caterers (India) Ltd v Lt Governor of Delhi* AIR 1980 SC 674.

parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to reopen that issue." Ibid at at p.105 parag. D-E"

And that:

"It thus appears that, although Henderson v Henderson (1843) 3 Hare 100, [1843-60] All ER Rep 378 was a case of cause of action estoppel, the statement there by Wigram V-C has been held to be applicable also to issue estoppel. That statement includes the observation that there may be special circumstances where estoppel does not operate." Ibid at at p.107 para. C

Lord Keith, with whom the other Law Lords concurred concluded that

"In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to Courts to recognise that in special circumstances inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the Carl-Zeiss case [1966] 2 All ER 536 at 573,[1967] 1 AC 853 at 947." -ibid at p.109 parag. A-B."

Similarly, the learned authors of Mulla, Code of Civil Procedure, 18th Ed. 2012 at p. 293 have observed that the principle of res judicata as a judicial device for finality of Court decisions is subject to the special circumstances of fraud, mistake or lack of jurisdiction –

"The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision."

Accordingly, we find that a determination on a particular point giving rise to issue estoppel is similarly open to challenge on the basis of fraud which vitiates the previous Court's finding on the point notwithstanding that the said Court's determination on the point is in the nature of a judgment in rem.

We think that in the present case, the Petitioner would be entitled to bring evidence, such as that which the Court in the Mbete lamented was not availed, to demonstrate that the 1st Interested Party's degree certificate was fraudulently obtained. Such evidence must, however, be of such nature as to convince the Court that there was actual fraud as pleaded, vitiating the judgment in the previous decision. As we understand it, this is the effect of the decision of the Court in Lazarus Estates Limited v. Beasley (1956) 1 ALL ER 340 where in declining a submission that a defence of fraud was time barred, the Court held that –

"No Court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever."

See also Mistry Amar Singh v Serwano Wofunira Kulubya (1963) EA 408.

> We agree that the finality of a decision is destroyed by an appeal. In our view, however, a Notice of Appeal is deemed an appeal for purposes only of applications for stay of execution or injunction pending appeal not for purposes of res judicata. We did not hear serious submissions as to whether a decision is res judicata when it is under review by the Court that made the decision. However, on the principle that the decision may be altered on review the matter cannot properly be said to have finally determined. In the present proceedings, however, nothing turns on the status of the decision as the Petitioner in this case though pursuing the same reliefs as the Petitioner in the Mbete is a different person and it has not been shown that the two are parties litigating under the same title or that one is a proxy of the other."
>
> 27. No such fraud, mistake or lack of jurisdiction in the proceedings and judgment of E& LR Court is alleged here. Are there any special circumstances to remove operation of the doctrine of res judicata"

36. Undoubtedly, decided cases acknowledge that there may be special circumstances which warrant departure from res judicata, allowing a rehearing on the merits. What emerges from decisional law is that the principle of res judicata must be carefully delineated and demarcated in order to prevent hardship and actual injustice to the parties. The general thrust is that res judicata is usually recognized in one way or another as necessary for legal certainty and the proper administration of justice. However, many jurisdictions recognize that the doctrine cannot be absolute. This is because to perpetuates an error is no virtue but to correct it is a compulsion of judicial conscience."[23]

37. In determining whether special circumstances exist, it is necessary to ask whether, taking into account all the circumstances, the application of the principle of res judicata would work an injustice. This position was stated in *Apotex Inc. v Merck & Co*.[24] that the doctrine of res judicata comprised two forms of estoppel which can be differentiated but are based on similar policies: (a) 'cause of action estoppel:' the need for finality in litigation; (b) 'issue estoppel:' an individual should not be sued twice for the same cause of action. However, special circumstances may restrict the application of the issue estoppel rule, and allow a party to re-litigate what would, absent those special circumstances, be estopped. Taking into account the entirety of the circumstances, the court must consider whether application of issue estoppel in the particular case would work an injustice. Any special circumstances which would give rise to an injustice would make the court reluctant to apply the estoppel.

38. The incremental and conservative ways that exceptions have been developed to the res judicata doctrine speak to the dangers of eroding it, hence the need for courts to exercise great caution and restraint. This is because the rule of law and legal certainty will be compromised if the finality of a court order is in doubt and can be revisited in a substantive way. The administration of justice will also be adversely affected if parties are free to continuously approach courts on multiple occasions in the same matter. However, legitimacy and confidence in a legal system demands that an effective remedy be provided in situations where the interests of justice cry out for one. There can be no legitimacy in a legal system where final judgments, which would result in substantial hardship or injustice, are allowed to stand merely for the sake of rigidly adhering to the principle of res judicata.

39. With the above caution in mind, it is important to point out that there are certain notable exceptions to the application of the doctrine. One well known exception is that the doctrine cannot impart finality to an erroneous decision on the jurisdiction of a court. Likewise, an erroneous judgment on a question

[23] The Indian Supreme Court in *M S Ahlawat v State of Haryana and Another* 1999 Supp (4) SCR 160.

[24] {2003} 1 FCR 243, 2002 FCA 210 (CanLII).

of law, which sanctions something that is illegal, also cannot be allowed to operate as res judicata. The applicant is not questioning the courts jurisdiction to determine the earlier application or the legality of the decision.

40. The core question is whether the grounds cited by the Plaintiff demonstrate exceptional circumstances to fall under the permissible exceptions. It is obviously impossible to identify in advance all circumstances that may qualify as exceptional. Ultimately, the determination of whether circumstances are exceptional depends on the trial judge's good sense and experience. The list is not closed. In determining this question, it is useful to understand the phrase "exceptional circumstances." I will profitably refer to the following points from a leading South African decision: -[25]

    i. What is ordinarily contemplated by the words "exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different...."

    ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

    iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.

    iv. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

    v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional. # In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.

41. Taking cue from the last paragraph above, where, established jurisprudence is in agreement that a doctrine shall be departed from only under "exceptional circumstances," effect will, generally speaking, best be given to the intention of the law by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional. In this regard, context is essential in the process of considering what constitutes exceptional circumstances. As the Supreme court of India held in *Reserve Bank of India v Peerless General Finance and Investment Co. Ltd. and others: -*[26]

> " Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."

[25] In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H.

[26] {1987} 1 SCC 424.

42. In considering the reasons cited by the applicant, it is inevitable that the circumstances and history of this dispute must be brought into full view. For starters, the allegations of fraud are pleaded in the Plaint at paragraph 57. They were also raised in the application dated 17th August 2016 at paragraphs (i) to (l) of the grounds in support of the application. It follows that the allegations of fraud are not new. Mere addition of more grounds alleging fraud as stated shortly does not oust the doctrine of res judicata.

43. The criminal proceedings appear to have commenced in February 2017. The Plaintiffs application is dated 17th August 2016 and it was heard on 11thJuly 2017. It is evident that by the time the said application was heard, the Plaintiff was aware of the criminal allegations. Additionally, in the ruling dated 27th April 2018, the court found that the Plaintiff created the charge and further charge. Additionally, in the affidavit of Mohamed Tahir Shaikh Said in support of the application averred on oath that he was running the affairs of TSS Group Ltd. From the foregoing, it clear that the issues raised by the Plaintiff are not new. Also, there is a clear court finding that the Plaintiff charged the premises and that it defaulted in repaying the loan.

44. The Plaintiffs argues that the 1st defendant failed to comply with the court orders issued on 27th August 2018. This is an attractive argument. But that is how far it goes. The authorities cited above are clear. Where an alternative remedy exists, the plea for special circumstances cannot apply. If at all there is a genuine case of disobedience of a court order, then nothing prevents the Plaintiff from enforcing the said order including instituting contempt proceedings. Even if the issues raised were new and they are not), there is nothing to show that they could not be discovered with the exercise of due diligence. Additionally, even if we were to apply a liberal meaning of the term exceptional circumstances (which is impermissible since decided cases are in agreement that a strict interpretation is to be preferred), the grounds cited do not qualify to be exceptional circumstances. From the foregoing, it is my finding that the plea to rely on the exceptions to the doctrine of res judicata fails because the grounds cited do not qualify to be "exceptional circumstances" or "a special case" as the Plaintiff calls it.

45. The Plaintiffs attempt to rely on the exceptions to the doctrine of res judicata having failed, I will now address the question whether the application surmounts the next hurdle, namely, whether the application offends the doctrine of res judicata. Simply defined, Res judicata[27] is the legal doctrine that bars continued litigation of the same case, on the same issues, between the same parties. As a rule of law – once a matter is adjudged it is accepted as the truth. The meaning of the rule is that the authority of res judicata includes a presumption that the judgment upon any claim submitted to a competent court is correct and this presumption being juris et de jure, excludes every proof to the contrary. The presumption is founded upon public policy which requires that litigation should not be endless and upon the requirements of good faith which does not permit of the same thing being demanded more than once.

46. The underlying rationale of the doctrine of res judicata is to give effect to the finality of judgments. Where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt by one party to proceed against the other party on the same cause of action should not be permitted. It is an attempt to limit needless litigation and ensure certainty on matters that have been decided by the courts.

47. Res judicata is provided for in Section 7 of the *Civil Procedure Act*.[28] Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same

[27] *Res judicata* is the Latin term for "a matter adjudged". It is usually raised as a defense in civil matters. In criminal matters the principle automatically applies once final judgment is given.

[28] Cap 21, Laws of Kenya.

parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The section contemplates 5 conditions which, when co-existent, will bar a subsequent suit. The conditions are:- (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.[29]

48. The court in *Qayrat Foods Limited v Safiya Ahmed Mohamed & 6 others*[30] cited *James Karanja alias James Kioi (Deceased)*[31] which stated: -

> " For the doctrine of Res Judicata to apply, three basic conditions must be satisfied. The party relying on it must show: - (a)That there was a former suit or proceeding in which the same parties as in the subsequent suit litigated;(b) the matter in issue in the latter suit must have been directly and substantially in issue in the former suit; (c)that a court competent to try it had heard and finally decided the matters in controversy between the parties."

49. The Supreme Court of Kenya in *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* stated the following regarding res judicata: -

> "(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights.
>
> (54) The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.
>
> (58) Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction
>
> (59) That Courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in E.T v. Attorney-General & Another, (2012) eKLR, thus: "The Courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing

[29] See *Lotta v Tanaki* {2003} 2 EA 556.

[30] {2020} e KLR.

[31] {2014} e KLR.

> new causes of action so as to seek the same remedy before the Court. The test is whether the plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction." (Emphasis added)

50. The basic requirements for res judicata are the same cause of action, the same relief involving the same parties was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment/ruling involved the 'determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.

51. Res judicata applies, except in special cases, not only to the points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. As is stated in Halsbury's Laws of England[32] the doctrine of res judicata is not a technical doctrine applicable only to records; it is a fundamental doctrine of all courts that there must be an end of litigation. Res judicata is a rule of universal law pervading every well-regulated system of jurisprudence, and is put upon two grounds, embodied in various maxims of the common law. One, public policy and necessity, which makes it to the interest of the State that there should be an end to litigation. Two, the hardship on the individual that he should be vexed twice for the same cause.

52. Res judicata is, thus, not a mere technical doctrine, but it is fundamental in our legal system that there be an end to all litigation. The obverse side of this doctrine is that, when applicable, if it is not given full effect to, an abuse of process of the court takes place. The rule of res judicata presumes conclusively the truth of the decision in the former suit.[33]

53. I have carefully read the applicants application dated 17th August 2016 and the ruling dated 27th April 2018. For starters, mere addition of a party in a subsequent suit or application or mere omission of a party or introducing a new ground or a new prayer(s) does not necessarily render the doctrine of res judicata inapplicable because a party cannot escape the wrath of res judicata by simply undertaking a cosmetic surgery to his pleadings or introducing new grounds to secure the earlier refused orders. If the added grounds, or parties or prayers peg the claim under the same title as the parties in the earlier suit, the doctrine will still be invoked.[34] Res judicata covers issues which could have been raised in the earlier proceedings. The test here as I see it is whether had the earlier application succeeded, the applicant would have filed the instant application. The prayer for injunction sought in the earlier application is substantially if not wholly a replica of the prayer sought in the instant application. I find no difficulty in concluding that the instant application is res judicata. On this ground alone, the Plaintiff's application is dismissed.

54. The other ground upon which the Plaintiff's application fails is closely related to the doctrine of res judicata. This is, complementary to the doctrine of res Judicata is the conception that, when a judicial tribunal becomes functus officio in respect of a particular case, its powers and jurisdiction are exhausted in respect of that issue. It is basic law that a judicial tribunal, after giving a decision as to the merits of

32 *Halsbury's Laws of England*, 3rd Ed., Vol. 15, para. 357, p. 185.

33 Ibid.

34 *Republic vs Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 others* [2017] e KLR.

a case, ceases to exist as an instrumentality in its previous form or at all, or is deprived of all the judicial functions it previously possessed, it is functus officio in respect of the issues decided.[35]

55. It is elementary law that a court which, after a trial, has given a valid decision determinative of right, liability or status, has no jurisdiction to recall it whatever mistakes may have been made in facts or law.[36]This test is applicable only if there happens to have been a "final" and "determinative" decision, after a trial; and that a judicial tribunal becomes functus officio in this sense only in relation to a particular matter, not in respect of all matters.

56. For a judicial tribunal to become functus officio, it must have delivered a valid judgment, decree or order of a final and conclusive nature and res judicata must have come into existence. The High court pronounced itself on 27th April 2018 on the issues raised in the instant application. This court is being invited to sit on appeal on its own decision. Its functus officio on the issues raised in the instant application touching on the injunction sought.

57. Notwithstanding my above findings, I now address the prayer for injunction on merit. The Plaintiffs'st defendant failed to comply with the ruling of 27th April 2018 which required it to supply the applicant with some documents. He cited *Soloh Worldwide Inter-enterprises v County Secretary, Nairobi County & another*[37] in support of the proposition that any act in violation of a court order is void ab initio.

58. Also, counsel submitted that Statutory Notices are defective because they did not comply with section 96(1) of the *Land Act*. He cited *Trust Bank Ltd v Eros Chemist Ltd*[38] which held that a statutory right to sell will not arise unless and until a 3 months' notice is given. He cited *Josiah Kamanja Njenga v Housing Finance Corporation of Kenya & another*[39] in support of the proposition that courts should not shy away from finding premature statutory notices to be invalid. He argued that the 3 months' notice was not addressed properly and that the Certificate of Posting shows two addresses. He cited *Co-operative Bank of Kenya Ltd v Patrick Kangethe Njuguna & 5 others*[40] which held that the Statutory Notice becomes operational upon service.

59. Further, counsel submitted that the 1st defendant never complied with Rule 15 (c) of the auctioneers Rules. He invited the court to be guided by *Simiyu v Housing Finance Company of Kenya Ltd*[41] which held that service of an adequate statutory notice and a notification of sale are necessary conditions precedent for a valid exercise of the statutory power of sale. Lastly, he submitted that the notification of sale dated 17th October 2018 and the 40-day notice disclose different amounts. He relied on *Koileken Ole Kipolonka Orumoi v Mellech Engineering Cons. Co Ltd & 2 others*[42] which held that any departure from the notices issued by the auctioneer renders the Redemption Notice and Notification of Sale invalid. He argued that the discrepancy in the two notices invalidates them.

35 See *Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation and Kenya Commercial Bank Group Limited Garnishee* Miscellaneous Civil Application No. 241 of 2019.

36 (1943-4) 68 C.L.R. at p. 590.

37 {2015} e KLR.

38 {2001} 2EA 550.

39 {2014} e KLR.

40 {2017} e KLR.

41 {2001} EA 540.

42 {2015} e KLR.

60. Additionally, counsel submitted that there is fraud in the creation of the security and relied on *Inid Tumwebaze v Mpweire Stephen & another*[43] which held that a court of law cannot sanction an illegality. He argued that the discovery of the fraud taints the validity of the charge. He referred to the criminal cases mentioned earlier and the takeover of the loan by the Standard Chartered Bank Ltd and argued that the property mentioned at paragraph 48 of the submissions is also subject to a charge to another company. He argued that the forced sale value is extremely low and cited *Mbuthia v Jima Credit Finance Corporation & another*[44]in support of the holding that a sale will be set aside if there is fraud or if the price is so low as to be in itself evidence of fraud. He argued that the applicant has disclosed a serious question of fraud, illegality and forgery to be tried. To fortify his argument, he cited *Irene Chepkoech Chumo v David Kipleting Rugut & another*[45] which held that an injunction will issue in an appropriate case to protect legal and equitable rights which are under threat of violation. He also cited *Elijah Kipn'geno Arap Bii v Kipyegon Rotich & another*[46] which held that whenever fraud is pleaded it should not be determined summarily but upon consideration of evidence and urged this not to summarily dismiss the allegations of fraud.

61. Counsel argued that the applicant has established that it will suffer irreparable harm because of the very existence of fraud. He argued that a court cannot allow a party to perpetuate fraud. He submitted that it is not enough to tell a party that it will be compensated by way of damages. He argued that the applicant has demonstrated violation of positive law and cited *Thomson Smith Aikman, Alan Malloy & Others v Muchoki & others*[47] which held that a court ought not to condone flouting of the law.

62. As for balance of convenience, he submitted that the property is a residential property and that if the 1st defendant's claim succeeds, it will still have the property and that the 1st defendant is still holding numerous other properties. He relied on *Mbuthia v Jimba Credit* which held that in disputes relating to land, it is usual to grant an injunction.

63. The 1st Respondent's counsel made reference to the earlier ruling in which this court faulted the earlier notices and argued that annexures EN 1 and EN 2 to the 1st defendant's Replying Affidavit confirm that statutory notices under sections 90 and 96 of the *Land Act* were served on the Plaintiff clearly stating the principal borrower had defaulted, that the 3 months' statutory notice is dated 3rd May 2018 and the certificate of posting in respect thereof confirms that it was dispatched on 23rd May 2018 while the 40 days' notice to sell is dated 23rd August 2018 and the certificate of posting in respect thereof shows that the same was dispatched by registered post on 31st August 2018.

64. Counsel argued that both notices clearly state that they were dispatched through the Plaintiff's postal address P.O Box 85039 – 80100 Mombasa, so, the 1st defendant demonstrated that the statutory notices were duly served upon the Plaintiff. He cited *National Bank of Kenya Limited v Isaac Malika Lubanga*

43 Uganda High Court Case No. HCT-05-CV-0039-2010.

44 {1988} e KLR.

45 {2009} e KLR.

46 {2015} e KLR.

47 {1982} e KLR.

& Another (Unreported)[48] where the court citing *Ibrahim Musa & Sons Limited & Another v First National Finance Bank & Another*[49] which held: -

> "...the applicant has discharged his duty by having demonstrated that the statutory notice was sent by registered post to the Chargor's last known address and as such the chargee discharged his duty on service as required by law and the burden of proof shifts to the chargor to demonstrate otherwise. In this case, the 1st Respondent failed to demonstrate that the address used for service was not his nor the one he had provided to the charge."

65. He also argued that the auctioneer's 45 days redemption notice and notification of sale were served upon the Plaintiff as confirmed by annexures "EN 3." He argued that there is a specific finding by the court that the Plaintiff had defaulted in repaying the loan and that the 1st defendant has demonstrated that it complied with the terms of the ruling.

66. Regarding the alleged fraud, forgeries and criminality, the 1st defendant's counsel argued that no evidence has been presented and that the court made a specific finding that the Plaintiff charged the properties. He argued that in the said ruling, this court found that money was advanced to the principal borrower and no appeal or review was preferred. He submitted that even if it was open for the court to re-consider the application for injunction, no prima facie case has been established and the court would still consider whether damages would be a sufficient remedy. (Citing *Nguruman Limited v Jan Bonde Nielsen & 2 others*[50]). He argued that the property is capable of being assigned a monetary value and there is no suggestion that the 1st defendant, a financial institution would not be in a position to pay damages should it ever be found to be wrong. He argued that the Statement of accounts clearly show that the amounts due and owing to the 1st defendant are substantial and the delay in realization of the security continues to expose the 1st defendant to loss. (Citing *John Kariuki t/a Johester Merchants v National Bank of Kenya Limited*.[51]

67. A useful starting point is to underscore that the purpose of an interlocutory injunction is to preserve the subject matter of a dispute and to maintain the status quo pending the determination of the parties' rights. In granting such an injunction, the court is concerned both with: (a) the maintenance of a position that will most easily enable justice to be done when its final order is made; and (b) an interim regulation of the acts of the parties that is the most just and convenient in all the circumstances. The jurisdiction to grant injunctions is discretionary and very wide. However, this power does not confer an unlimited power to grant injunctive relief. Regard must still be had to the existence of a legal or equitable right which the injunction protects against invasion or threatened invasion, or other unconscientious conduct or exercise of legal or equitable rights.

68. In interfering by interlocutory injunction, the court does not in general profess to anticipate the determination of the right, but merely gives it as its opinion that there is a substantial question to be tried, and that till the question is ripe for trial, a case has been made out for the preservation of the property in the meantime in status quo. A man who comes to the court for an interlocutory injunction, is not required to make out a case which will entitle him at all events to relief at the hearing. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and

48 Nairobi CA No. 10 of 2018.

49 {2002} e KLR.

50 {2014} e KLR.

51 {2006} 1 EA 96

can satisfy the court that the property should be preserved in its present actual condition, until such question can be disposed of.

69. For an interlocutory injunction to issue, the onus is on the applicant to satisfy the court that it should grant the injunction. The jurisdiction to grant an injunction may be exercised "if it is just and convenient to do so." In Giella v Cassman Brown and Co. Ltd[52] the court set out the principles for Interlocutory Injunctions as follows:-

    a. The Plaintiff must establish that he has a prima facie case with high chances of success;

    b. That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages;

    c. If the court is in doubt, it will decide on a balance of convenience.

70. The Canadian case of *R. J. R. Macdonald v Canada (Attorney General)*[53]laid down three-part test of granting an injunction as follows: -

    a. Is there a serious issue to be tried?

    b. Will the applicant suffer irreparable harm if the injunction is not granted?

    c. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").

71. Plat JA in Mbuthia v Jimba Credit Corporation Ltd[54] echoed the "serious question to be tried" test enunciated by Lord Diplockin American Cyanamid [55] and stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the party's cases. The seriousness of the question, like the strength of the probability, depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought. How strong that probability (or likelihood) needs to be depends, no doubt, upon the nature of the rights the plaintiff asserts and the practical consequences likely to flow from the order he seeks.

72. I can profitably recall Lord Hoffman in *Films Rover International Ltd v Cannon Film Sales Ltd*[56] who statedthat in determining whether to grant an interlocutory injunction, a court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong," in the sense of granting an injunction to a party who fails to establish his or her right at trial (or would fail if there was a trial) or in failing to grant an injunction to a party who succeeds (or would succeed at trial). In determining which course carries the lower risk of injustice, the court is informed by, among other things, the well-established interrelated considerations of whether there is a serious question to be tried and whether the balance of convenience or justice favours the grant.

52 {1973} E A 358.

53 {1994} 1 S.C.R. 311.

54 {1988} KLR 1

55 {1975} AC 396 at 407.

56 {1987} 1WLR 670 at 680-681.

73. To justify the imposition of an interlocutory injunction, the plaintiff must be able to show a "sufficient likelihood of success." The plaintiff's prospects of succeeding at the trial will always be relevant "as a necessary part of deciding whether there is a serious question to be tried" and as an almost invariable factor in evaluating the balance of convenience. The assessment of the strength of the probability of success is an essential factor in deciding which course - whether or not relief should issue and, if so, on what terms – carries the lower risk of injustice. While this is the case, it is suggested that there will be other factors which are relevant having regard to the nature and circumstances of the case.

74. By now it is beyond doubt that the prima facie case test represents the law in relation to the grant of interlocutory injunctions. A prima facie case in a civil application includes but not confined to a genuine and arguable case. Applying the principles discussed above to the instant case, it is necessary to recall that there is a court finding that the Plaintiff defaulted in repaying the loan. There is no evidence of payment. Instead, the Plaintiff has again approached this court arguing that the 1st defendant failed to comply with this court's orders issued on 27th April 2018 and claiming that it could not foresee the non-compliance, so, it's a new ground. If that is the case, one wonders why the Plaintiff has not taken steps to enforce the said order or cite the 1st defendant for contempt. It has also cited alleged criminal activities. As stated earlier, by the time the application dated 17th August 2016 was heard, the Plaintiff was already aware of the alleged criminal activities. There was no attempt to amend the Plaint to plead the alleged criminal activities if at all they relate to the creation of the charge. In fact, none of these activities have been shown to be connected to the creation of the security instruments. In any event, there is an unchallenged ruling by this court that the Plaintiff charged the properties.

75. Additionally, the alleged discovery criminal activities is not anchored on the Plaint. As stated elsewhere, at or about the time the earlier application was heard, going by the dates mentioned earlier, the Plaintiff was already aware of the alleged criminal activities. Even if the Plaintiff was unaware, there is nothing to suggest that the said information could not have been available to the Plaintiff after exercising due diligence. There is an unchallenged finding by the court that the funds were disbursed and that the Plaintiffs defaulted in repaying the loan. The argument that the accounts were mismanaged is an issue for trial.

76. The allegations that the Notices issued were defective has to my mind been adequately answered by the 1st defendant. The allegations of fraud are attractive. However, that is how far they go at this stage. At this stage I cannot delve into merits. However, it will suffice to state that these serious allegations are not recent discoveries as alleged. They are already pleaded in the Plaint. If there are new grounds, then, one wonders why the Plaint has not amended to include them. The Plaintiff is implicating some of its directors or directors in related companies in the fraud. The law is fraud requires a high standard of prove. For now, it will suffice to say that fraud must not only be pleaded, but must be strictly proved. This is the acid test to be surmounted at the trial. For now, the threshold for a prima facie case remains the test. Viewed from this perspective, the Plaintiffs' allegations cannot be said to have disclosed a prima facie case with a likelihood of success.

77. It has been argued that the Statutory Power of Sale cannot arise if the notices are defective. There is a counter argument that the notices were served and that they are valid. Without going into the merits of the case, this is a ground for trial. For now, viewed from the lens of what constitutes a prima facie case, I find no difficulty in concluding that the Plaintiff has not demonstrated a prima facie case with a likelihood of success.

78. The other test is whether the Plaintiff has demonstrated irreparable harm. In this regard, I refer to Halsbury's Laws of England [57] which defines what constitutes irreparable harm: -

> "It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question."

79. In order to demonstrate irreparable harm, an applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured.[58] Robert Sharpe, in "Injunctions and Specific Performance,"[59] states that "irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case." The Plaintiffs claim that the property will still be available should it lose the case. That may be so, but the test here as I see it is whether in the event the Plaintiff wins the case and the property has been sold it can be compensated by way of damages. To me, the answer is simple. To me, the Plaintiff's loss (if any) can be quantified into monetary terms. The Plaintiff has failed to demonstrate irreparable harm.

80. The third test is balance of convenience. Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right.[60] The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant.[61]

81. Essentially, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If an applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies.

82. If the court is satisfied that there is a serious question to be tried, (or that the plaintiff has made out a prima facie case) and that damages are not an adequate remedy, it must go on to consider whether the balance of convenience or justice favours the grant of an injunction. The balance of convenience is

57 *Halsbury's Laws of England, Third Edition*, Volume 21, paragraph 739, page 352.

58 Supra note 3.

59 Robert Sharpe, *Injunctions and Specific Performance, looseleaf*, (Aura, On: Cananda Law Book, 1992), P 2-27

60 See Halsbury's Laws of England, Third Edition, Volume 21, paragraph 766, page 366.

61 Ibid

the course most likely to achieve justice between the parties pending resolution of the question of the applicant's entitlement to ultimate relief, bearing in mind the consequences to each party of the grant, or refusal, of the injunction. The strength of the applicant's case is relevant in determining where the balance of convenience lies. Where an applicant has an apparently strong claim, the court will more readily grant an injunction even when the balance of convenience is evenly matched. A weaker claim may still attract interlocutory relief where the balance of convenience is strongly in favour of it. The assessment of the likelihood of the plaintiff being successful at trial is critical in determining the first element. I have carefully considered the material before me. It is my conclusion that the balance of convenience is in favour of refusing the injunction.

83. An injunction is a discretionary remedy. An application must also show he has a right legal or equitable, which requires protection by injunction. (See *Kenleb Cons Ltd v New Gatitu Service Station Ltd & another*.[62]) Lastly, as was held in *Njenga v Njenga*[63] "an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles."

84. Lastly, I will address the prayer for release of documents. The Plaintiff's counsel submitted that litigation is designed to do real justice between the parties and if the court does not have all the relevant information, it cannot achieve this object. (Citing *Barclays Bank of Kenya Limited v Christopher Orina Kenyariri & another*.[64]

85. The 1st defendant's counsel submitted that the subject of these proceedings is the charge dated 3rdMarch 2014 and further charge dated 14th April 2014. He argued that these two instruments are on record and were so introduced by the Plaintiff in the earlier application dated 17th August/2016. He argued that none of the documents sought have any relevance on the propriety of the subject security. He argued that the court has in the ruling of 27thApril 2018 made a specific finding that the Plaintiff created the security with the consent of its directors; and that the that money was advanced on the strength of the security which has not been repaid and that the Plaintiff has through its directors admitted that money was advanced and utilized.

86. For starters, the applicant filed a list of documents together with its application dated 17th August 2016. At that point, it did not mention inability to obtain any other documents. The tests for granting or refusing to grant applications seeking production of documents are discussed under the 2nd application. To avoid replication, I will for purposes of the 1st application adopt the tests I have deployed in determining the 2nd application. For now, it will suffice to state that I am persuaded by the 1st defendant's position that none of the documents sought have any relevance on the security documents which is reinforced by the court's finding in the ruling dated 27thApril 2018 that the Plaintiff created the security with the consent of its directors and that the that money was advanced on the strength of the security. Flowing from the findings herein above, the prayer for documents fails.

87. I now turn to the 2nd application. The applicant cite*d Oracle Productions Limited v Decapture Limited & 3 others*[65] which held that the function of discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or

62 {1990} K.L.R 557

63 {1991} KLR 401

64 {2017} e KLR.

65 {2014} e KLR.

at the trial. Additionally, counsel cited *Chase Bank (Kenya) Ltd v Cannon Assurance (K) Limited*[66] in which the Court of Appeal held that in determining whether a document should be disclosed by a party, two tests should be applied: (1) whether it is relevant; (2) whether it is or was in the possession, custody or power of the party or his agent.

88. Additionally, the applicant's counsel submitted that the 1st defendant has confirmed that he has possession of the documents. He argued that relevance is determined by looking at the pleadings. He relied on Oracle Productions Limited v Decapture Limited & 3 others[67] and argued that the gist of the Plaint was that he was not a party to the loans, that there was collusion between the 2nd and 3rd defendants to defraud the Plaintiff, that the documents supporting the lending are fraud on the Plaintiff, that the 1st defendant has mismanaged the loan account so the Plaintiff must be presumed to be discharged.

89. He argued that the Plaintiff has come across a reported decision which makes reference to an audit report which discloses possible fraud in the manner in which the 1st defendant handled certain accounts, the Plaintiffs included. He argued that if that is true, the information would not only be relevant, but it will also help the court to decide the dispute. Responding to the 1st Respondents argument that the report deals with restructuring of loans in December 2015 and the loans granted in 2013 and 2014, he argued that the Plaintiffs complaint only relates to the manner in which the loans were handled.

90. Additionally, counsel argued that the court in ELRC No. 1906 OF 2016 was prepared to find that there was fraud but it was denied the benefit of the report to arrive at the said conclusion. He also argued that the same report was the subject of discussions in *Edwin Beiti Kipchumba v National Bank of Kenya Ltd*.[68] Also, counsel argued that the limits of disclosure under section 31 of the *Banking Act*[69] is not absolute and that documents can be availed by an order of the court or where disclosure is under the compulsion of the law. (Citing *Kim Jong Kyu v Housing Finance Company Ltd & 2 others*[70] and *Erastus Kibiti Stephen v Euro Bank Limited & another*[71]).

91. The 1st defendant's counsel submitted that its depositions in the Replying affidavit have not been replied. (Citing *Kenya Reinsurance Corporation v R.M.Mutiso*[72]). He urged the court to find that the applicant's application lacks no merit. He cited *Crown Paints (Kenya) Limited v Dry Associates Limited*[73] in support of the proposition that discovery will not be ordered in respect of an irrelevant allegation in the pleadings, which, even if substantiated, could not affect the result of the action nor in respect of an allegation not made in the pleadings or particulars nor will discovery be allowed to enable a party to "fish" for witnesses or for a new case, that is to enable him frame a new case. The court in the

66 {2019} e KLR.

67 {2014} e KLR.

68 {2018} e KLR.

69 Cap 488, Laws of Kenya.

70 {2015} e KLR.

71 {2003} e KLR.

72 {2009} e KLR.

73 {2015} e KLR.

said case also cited New Zealand Case of *Kim Margaret Van Gog v Owen Grauman*[74] which held that in making a determination on an application for discovery the particulars must be in sufficient detail to allow particular documents to be identified.

92. He also cited *Cooperative Bank of Kenya Limited v Samuel Musau Ndunda*[75] which held that when a court is called upon to order discovery, it will carefully examine the respective claims of the parties to gauge whether the documents sought are relevant to the dispute. He submitted that in dealing with an application for discovery and production of documents, the court is bound to determine whether the documents sought are necessary and relevant for purposes of determination of the issues in dispute as framed by the parties in their filed pleadings.

93. He submitted that the issues before the Employment & Labour Relations Court revolved around the legality or otherwise of termination of the employment of the claimant on "account of gross misconduct and loss of confidence arising from non-adherence to the bank's policies and procedures as well as the prudential guidelines in the restructure or rebooking of loans for respective customers under his portfolio.

94. He submitted that that the document sought, even if the same existed, would have no relevance or bearing to the issues in dispute. Additionally, he submitted that there does not exist any internal forensic audit report because the 1st defendant never carried out any such internal forensic audit. To buttress his argument, he cited *Mulla Code of Civil Procedure*[76] and submitted that the decision of the Employment and Labour Relations Court cited as the basis for seeking production of the document dealt with reports prepared by the 1st defendant's external and statutory auditors, Deloitte & Touche, and that the said decision dealt with business dealings of the 1st defendant and its numerous customers, so, if produced it would breach the statutory duty of confidentiality imposed upon the 1st defendant by Section 31(2) of the *Banking Act*.[77]

95. Ordinarily, courts would look favorably on a claim of a litigant to gain access to documents or other information reasonably required to assess or protect a threatened right or to advance a cause of action. This is so because courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one's case is a time-honored part of a litigating party's right to a fair trial.

96. The whole object of discovery is to ensure that before trial both parties are made aware of all the documentary evidence that is available. Discovery has been said to rank with cross-examination as one of the mightiest engines for the exposure of the truth. Properly employed where its use is called for, it can be, and often is a devastating tool. But it must not be abused or called in aid lightly in situations for which it was not designed or it will lose its edge and become debased. The obligation to produce documents is however, subject to certain limitations. For example, if the document is not in possession of the party being asked to produce, and he cannot produce it, the court will not compel him to do so. Similarly, a privileged document will not be subject to production. A document which is irrelevant will also not be subject to production.

74 {2013} NZHC 406.

75 {2021} e KLR.

76 Vol. 2 at pages 2143 – 2144.

77 Cap 488, Laws of Kenya.

97. It is nevertheless implicit to the requirement for production of documents that there should be some limitation on their production. For example, as authorities suggest, the document sought must be relevant. It would be absurd to suggest that a party will be compelled to produce a document despite the fact that the document has no relevance to any of the issues in the case. It is not difficult to conceive examples of documents which are totally irrelevant. What is more difficult to decide is where the line should be drawn. A document which has no relevance whatsoever to the issue between the parties would obviously by necessary implication be excluded. The overriding principle is that disclosure should be restricted to that which is necessary in the individual case.

98. It seems to me that every document which relates to the matter in question, contains information which may - not which must - either directly or indirectly enable the party requiring the document either to advance his own case or to damage the case of his adversary. I have used the words "either directly or indirectly" because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the document either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences. The broad meaning ascribed to relevance is circumscribed by the requirement that the document relates to or may be relevant to "any matter in question." The "matter in question" is determined from the pleadings. In order to decide the question of relevancy, the issues raised by the pleadings must be considered.

99. Other than relevancy, there is also the question of confidentiality. The leading case on the disclosure of confidential information is *Science Research Council v Nasse*[78] in which the House of Lords held: -

    a. There was no principle of English law by which documents were protected from disclosure by reason of confidentiality alone.

    b. In the exercise of its discretion to order disclosure, the court or tribunal would have regard to the fact that the documents were confidential and that to order disclosure would involve a breach of confidence.

    c. Relevance is a necessary, but not automatically sufficient, ingredient for disclosure.

    d. The ultimate test is whether disclosure is necessary for disposing fairly of proceedings.

    e. The court should inspect the documents and, if it is impressed with the need to preserve confidentiality, it should consider carefully whether the necessary information has been or can be obtained by other means, not involving a breach of confidence.

    f. The court will consider whether justice can be done by special measures such as redaction, anonymizing or, in rare cases, hearing in camera.

    g. The court should decide this by adopting a process avoiding delay and unnecessary applications.

100. The above principles were echoed by the Court of Appeal in *Wallace Smith Trust Co Ltd (in liquidation) v Deloitte Haskins & Sells (a firm).*[79] Simon Brown LJ said 'Disclosure will be necessary if:

78 {1980} AC 1028.

79 {1997} 1 WLR 257 at pp 266 to 268.

(a) it will give 'litigious advantage' to the party seeking inspection... and (b) the information sought is not otherwise available to that party by, for example, admissions or some other form of proceeding (e.g. interrogatories) or from some other source... and (c) such order for disclosure would not be oppressive.'

101. In the instant case no argument was advanced that the cited documents cannot be available either through admission or other form of proceedings such as discovery and interrogatories. In particular, the applicant did not demonstrate that the documents cannot be availed under the provisions of Order 11 Rule 3 (a) of the Civil Procedure Rules, 2010. The parties are yet to comply with Order 11 which provides for Pre-trial Directions and Conferences. On this ground alone, the applicant has not demonstrated that the documents or information sought cannot be availed by deploying the said provisions.

102. Also, it is the 1st defendant's position that the issues before the Employment & Labour Relations Court revolved around the legality or otherwise of termination of the claimant's employment on account of gross misconduct and loss of confidence arising from non-adherence to the bank's policies and procedures as well as the prudential guidelines in the restructure or rebooking of loans for the respective customers under his portfolio whose full particulars were well within the claimant's knowledge. The authorities cited by the Plaintiff's counsel are clear. The documents sought must be relevant to the issues at hand. As stated in the above cited case, relevance is a necessary, but not automatically sufficient, ingredient for disclosure. The ultimate test is whether disclosure is necessary for disposing fairly of proceedings. This pertinent ground was not explored by the applicant.

103. Additionally, a court will not order a party to produce a document it does not have. The 1st defendant denies ever undertaking an internal forensic audit. The obligation to disclose documents extends to those that are or have been within a party's control. Control extends to documents which a party has, or had, physical possession, or to which they have, or had, a right to possession or to inspect or to take copies. This will include documents in the possession of an employee or agent, over which a party has control. It may, but does not necessarily, include documents held by subsidiary companies, professional agents and ex-employees. Relevant documents must be disclosed whether or not they are confidential, unless privilege applies. The pleadings, of course, play an important part in the disclosure exercise because it is only through the pleadings that the issues in the case to which disclosure is directed can be identified. Where the pleadings is not well particularized, the claimant may be more open to accusation of "fishing" than if he has a focused pleading. The Plaintiffs argument narrowed to the argument that it is challenging the manner in which the accounts were managed. None of the prayers in the Plaint touch on the manner in which the accounts were managed. The Particulars of fraud as pleaded only relate to the securities but not the alleged mismanagement of the accounts. Also, the other accusations pleaded in the Plaint relate to alleged failure to take proper and valid securities. They do not touch on alleged mishandling of the accounts.

104. The 1st defendant's counsel submitted that the cited decision dealt with reports prepared by the 1st defendant's external and statutory auditors, Deloitte & Touche, and that the said decision dealt with business dealings of the 1st defendant and its numerous customers, so, if produced it would breach the statutory duty of confidentiality imposed upon it by section 31(2) of the *Banking Act*.[80] Notably, the application is founded on Article 35 of the Constitution. However, the applicant said nothing about section 6 (1) (e) of the *Access to Information Act*[81](an act of Parliament enacted to operationalize Article 35). The said section provides that (1) Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose

80 Cap 488, Laws of Kenya.

81 Act No. 31 of 2016.

disclosure is likely to—(e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained. The question whether the report sought also includes other customers confidential information cannot be ignored.

Conclusion

105. Flowing from my analysis of the facts, the authorities and the law herein above, it is my finding that the both the 1st and 2nd application are unmerited. Accordingly, the application dated 29th November 2018 (the 1st application) and the application dated 5th March 2021 (the 2nd application) are hereby dismissed with costs to the 1st defendant.

106. I note with concern that this case was filed in 2016. Sadly, the main suit is yet to be heard. Trial delays are the bane of our legal system, a fact that should worry anyone who cares about speedy resolution of court disputes dictated by Article 159 of the Constitution. To move this case forward, I direct the parties to take steps to fix this suit for hearing before a judge in the Commercial Division within the next 120 days.

Orders accordingly. Right of appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH OF JANUARY 2022

JOHN M. MATIVO

JUDGE