



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. E001 OF 2021

MARY JUSTER CHEPLETING.....PLAINTIFF

-VERSUS-

AGRICULTURAL FINANCE CORPORATION.....1ST DEFENDANT

BENJAMIN KISOI SILA T/A LEGACY AUCTIONEERING SERVICE...2ND DEFENDANT

EVANS KEMBOI KOECH.....3RD DEFENDANT

SPACELER COMPANY LIMITED.....4TH DEFENDANT

EMILY TARUS.....5TH DEFENDANT

RULING

[1] Before the Court for determination is the Notice of Motion dated **20 January 2021**. It was filed by the plaintiff/applicant pursuant to **Section 1A, 1B and 3A** of the **Civil Procedure Act** as well as **Order 40 Rules 1 and 2** and **Order 51 Rule 1** of the **Civil Procedure Rules** for orders that:

[a] Spent

[b] Spent

[c] A temporary injunction be issued restraining the defendants/respondents by themselves, their servants, agents, employees and/or contractors or whosoever is acting on their behalf, from trespassing onto, encroaching, gaining entry, ploughing, tilling, planting, destroying properties, trees or stocking animals or in any way carrying out any activity on all that parcel of land known as **LR No. 3209/1** measuring 305 Acres situated in **Arbabuch Area**, Moiben, Uasin Gishu County, pending the hearing and determination of the main suit.

[d] A declaration be issued that the exercise of the statutory power of sale by the mortgagee (1st defendant/respondent) conducted on 9 September 2016 and subsequent sale of the suit land **LR No. 3209/1** was a nullity for failing to meet the requirements of **Section 90(2) and 96** of the **Land Act, No. 6 of 2012**.

[e] The suit land **LR No. 3209/1** be valued by an independent valuer to ascertain its current market value.

[f] That the 1st and 2nd defendants/respondents do supply the plaintiff with account statements in respect of Account No. 115351 and verification of the sum charged therein by a Certified Public Accountant.

[g] That the costs of the application be borne by the defendants/respondents.

[2] The application was premised on the grounds that the plaintiff is the legal owner of the suit property; and that it was wrongfully sold by the 1st and 2nd defendants on **9 September 2016** to the 3rd, 4th and 5th defendants pursuant to the 1st defendant's statutory power of sale. It was the plaintiff's contention that the sale was tainted with illegalities and irregularities for failure to comply with the statutory requirements set out in **Sections 90 and 96** of the **Land Act, No. 6 of 2012** and the **Auctioneers Rules, 1997**. The plaintiff further complained that the 3rd

and 5th defendants have forcefully entered the suit land and have hired goons who have invaded the property and commenced destruction of the buildings and other property on the land. It was therefore her prayer that the defendants be restrained by way of an injunction from interfering, ploughing, planting, destroying the farm and the property thereon pending the hearing and determination of this suit.

[3] The grounds aforesaid were expounded on by the plaintiff in her Supporting Affidavit sworn on **20 January 2021**, wherein she averred that she is the registered proprietor of all that parcel of land known as **LR No. 3209/1 Uasin Gishu**, measuring 305 acres (hereinafter, “the suit property”). In proof of her ownership thereof, she annexed a copy of the Certificate of Search as of **29 March 2017 (marked Annexure MJC ‘8’)**. She further averred that she applied for and was advanced two loan facilities by the 1st defendant; and that, although she had been servicing the facilities, the 1st defendant, in total disregard of the law, instructed the 2nd defendant to sell the suit property to the 3rd, 4th and 5th defendants. She denied that she was served with the requisite statutory notices and averred, per paragraph 9 of her Supporting Affidavit that:

“...it is until recently that I learnt with utter shock and consternation that on/or about the 09/09/2016 the 1st Defendant/Respondent with the assistance of the 2nd Defendant/Respondent in exercising their Statutory power of sale caused the subject property to be sold by way of Public Auction to the 3rd and 4th Defendants/Respondents without my knowledge contrary to my proprietary rights as the legal owner.”

[4] The plaintiff further averred that at the time of the purported auction, the lease tenure had expired; and hence the mortgagee’s statutory power of sale was not available to him. Thus, it was her contention that no good title passed from the 1st defendant to the 3rd, 4th or 5th defendant, granted the doctrine of *Nemo dat quod non habet*. Given the foregoing, it was the plaintiff’s stance that the 3rd and 5th defendants are trespassers on the suit property, having taken possession of it without any colour of right. She annexed copies of the Mortgage Deed and related correspondence as **Annexures “MJCB”, “MJC2” and MJC3”**. The Agreement for Sale and the Memorandum of Sale, both dated **9 September 2016** in respect of the sale by public auction conducted by the 2nd defendant, were marked **Annexure “MJC5” and “MJC6”**. The plaintiff also annexed copies of photographs and correspondence to demonstrate the ongoing destruction of property on the suit land.

[5] The application was resisted by the defendants; and on behalf of the 1st defendant, an affidavit was filed herein on **11 February 2021**, sworn by its Legal Officer, **Mr. John K. Mutuma**. He reiterated the fact that the plaintiff applied for and obtained a loan of **Kshs. 10,100,000/=** from the 1st defendant for the purpose of purchasing the suit land as well as a tractor and its implements. He further confirmed that the facility was secured by a mortgage over the suit property; and that upon default by the plaintiff, the 1st defendant exercised its statutory power of sale and caused the suit property to be sold, through the 2nd defendant, to the 3rd, 4th and 5th defendants. He was categorical that, in disposing of the suit property, all the legal requirements were followed to the letter by the defendants; including the issuance of the requisite notices.

[6] Thus, it was averred on behalf of the 1st and 2nd defendants that the present proceedings do not only amount to abuse of the process of the Court, but are also **res judicata**; granted that the plaintiff has filed previous suits before Kisumu High Court being **Kisumu HCCC No. 108 of 2006: Mary Juster Chepleting vs. Agricultural Finance Corporation, Eldoret HCCC No. 50 of 2006: Mary Juster Chelating vs. Agricultural Finance Corporation** and **Eldoret ELC No. 151 of 2015: Mary Juster Chepleting vs. Agricultural Finance Corporation**; which cases have been adjudicated to conclusion.

[7] In addition to the Replying Affidavit aforementioned, Grounds of Opposition were filed herein on **16 July 2021** by **Mr. Mabonga**, learned counsel for the 1st and 2nd defendants. He set forth the following four grounds in opposition to the plaintiff’s application dated **20 January 2021**:

[a] That the application is without merit and does not meet the grounds for the grant of the orders sought;

[b] That the issues raised in the Notice of Motion can only be determined at the hearing of the main suit and not at an interlocutory stage;

[c] That the issues raised in the instant application are the same issues raised in **Eldoret HCCC No. 50 of 2006, Eldoret HCCC No. 151 of 2015, Kisumu HCCC No. 108 of 2016** and **Eldoret ELD No. 124 of 2017**.

[d] That it is in the interest of justice that the application be dismissed with costs.

[8] The 3rd, 4th and 5th defendants relied on the Replying Affidavit sworn on **29 January 2021** by the 3rd defendant, **Evans Kemboi Koech**. He averred that all the issues raised in this suit were litigated in **Eldoret ELC No. 124 of 2017** in which Judgment was given on **11 January 2019**. He also pointed out that, prior to the filing of **Eldoret ELC No. 124 of 2017**, the plaintiff had litigated the same issues and sought same orders since the year 2006 in other suits, namely:

[a] **Eldoret HCCC No. 50 of 2006**

[b] **Eldoret HCCC No. 151 of 2015**

[c] **Kisumu HCCC No. 108 of 2016**

[9] The 3rd defendant further averred that there has been inordinate delay in challenging the exercise of the statutory power of sale; pointing out that the interest of the 3rd, 4th and 5th defendants over the suit property was created in **2016**. He consequently posited that if the plaintiff is aggrieved thereby then her relief is in a suit for damages and not vacant possession, injunction or ownership. He accordingly prayed that

the suit be dismissed *in toto* with costs; and that the plaintiff be censured for perjury and abuse of the court process.

[10] The plaintiff respondent to the assertions by the 3rd defendant in her Supplementary Affidavit sworn on **2 February 2021**. She pointed out the **Eldoret ELC No. 124 of 2017** was filed by the 3rd defendant for injunction with a view of having her restrained from trespassing on the suit land. She further averred that, during the trial, the 3rd defendant was challenged as to his participation in the public auction held on **9 September 2016**; whereupon the 3rd defendant opted to withdraw his suit and to pay her costs thereof. She annexed a copy of the Court Order as **Annexure "MJC1"** to support her assertion that the defendants could not, in the circumstances, purport that the present suit is a duplication of **Eldoret ELC No. 124 of 2017**.

[11] In a rather belated manner, the 3rd defendant filed a Supplementary Replying Affidavit on **16 May 2021** and thereby annexed several documents to buttress his averments in his Replying Affidavit of **29 January 2021**. The documents include the Judgment delivered in **Eldoret ELC No. 124 of 2017** by which the 3rd defendant was declared the *bona fide* purchaser of **LR No. 3209/1** as well as title documents in his favour. He consequently reiterated his stance that the Court lacks the jurisdiction, in view of the doctrine of *res judicata*, to entertain not only the application, but also the entire suit. He consequently prayed that the entire suit be dismissed.

[12] Pursuant to the directions given herein on **16 March 2021**, the application was canvassed by way of written submissions. In the plaintiff's written submissions dated **28 April 2021**, the following issues were proposed by **Mr. Omboto** for determination:

[a] Whether the plaintiff has met the threshold required for granting of an injunctive order for purposes of **Giella vs. Cassman Brown** [1973] EA 358;

[b] Whether the purported sale by public auction conducted on **9 September 2016** was consistent with the provisions of **Sections 90(2) and 96 of the Lands Act, 2012**;

[c] Whether good or a valid title passed to the purported bidders during the auction and/or even to date;

[d] Whether an independent valuer can be appointed to ascertain the current market value of the suit property.

[13] According to **Mr. Omboto**, the plaintiff has demonstrated, vide her Supporting Affidavit dated **20 January 2021** that she is the registered owner of the suit property; that she was never served with the requisite Redemption Notice; that she stands to suffer irreparable harm unless the orders sought are granted; and that the balance of convenience is in favour of the plaintiff, who in his view, stands to suffer injustice should his application be dismissed. Counsel placed reliance on **Mrao Ltd vs. First American Bank of Kenya & 2 Others** [2003] KLR 125 and **Kenleb Cons Ltd vs. New Gatitu Service Station Ltd & Another** [1990] KLR 557 in urging the Court to find in favour of the plaintiff.

[14] On whether the purported sale of the suit property was consistent with the provisions of **Sections 90(2) and 96 of the Land Act, Mr. Omboto** made reference to **East Africa Ventor Co. Ltd vs. Agricultural Finance Corporation Ltd & Another** [2017] eKLR for the proposition that the statutory notices provided for under the **Land Act** are mandatory requirements; and that the right to exercise the statutory remedies, such as the mortgagee's power of sale, accrues only after full compliance with the legal framework on such notices. He relied on **David Ngugi Ngaari vs. Kenya Commercial Bank Ltd** [2015] eKLR for the holding that a notice under the **Auctioneers Rules** can never be a substitute for the Redemption Notice contemplated under **Section 96(2) of the Land Act**. Counsel consequently urged the Court to find that, in the absence of proof of compliance with **Section 96(2) of the Land Act**, the purported sale was irregular.

[15] It was further the submission of **Mr. Omboto** that the purported sale of **9 September 2016** was marred with a lot of other inconsistencies and irregularities. He singled out the following for mention:

[a] Misrepresentation on who participated in the public auction as between the 3rd defendant, **Evans Kemboi Koech**, and the 4th defendant, **Spaceler Company Ltd**.

[b] Failure to account or tender any evidence on the amount payable to the 1st defendant during the public auction.

[c] The auction was conducted in Nakuru County and not Uasin Gishu County where the subject property is situated.

[d] The lease had expired as at the time of alleged sale.

[16] Lastly, the Court was urged to find that no valuation was done before the sale and therefore that the sale was conducted in disregard of the provisions of **Section 97(2) of the Land Act**. In this regard, **Mr. Omboto** relied on **David Gitome Kuhiguka vs. Equity Bank Ltd** [2013] eKLR for the proposition that compliance by a chargee/mortgagee with **Section 97(2) of the Land Act** before exercising the statutory power of sale is obligatory. Thus, it was the submission of **Mr. Omboto** that the plaintiff has met the legal threshold for the issuance of the orders prayed for by her in the application dated **20 January 2020**.

[17] On behalf of the 1st and 2nd defendants, written submissions were filed herein on **16 July 2021** by learned counsel, **Mr. Mabonga**. He submitted that the injunctive relief being sought does not affect his clients; and that whether the auction was properly conducted or not has been severally litigated and determined; and therefore that the current suit is *res judicata*. He further argued that the orders sought by the plaintiff cannot be granted at this stage of the proceedings as they would otherwise amount to final orders. He relied on the Indian cases of **Deoraj vs. State of Maharashtra & Others**, Civil Appeal No. 2084 of 2004 and **Ashok Kumar Bajpai vs. Dr. (Smt) Ranjama Baipai**, AIR 2004, All 107, 2004(1) AWC 88, among other decisions, for the holding that final interlocutory orders are bound to work an injustice to the party adversely affected by it.

[18] It was further the submission of **Mr. Mabonga** that the plaintiff's suit is *res judicata* for purposes of **Section 7** of the **Civil Procedure Rules**. He added that, the sale by public auction conducted by the 2nd defendant on **9 September 2016** had the effect of passing a valid title to the 3rd, 4th and 5th defendants, and is therefore indefeasible. He pointed out that the land has already been transferred to the 4th defendant and possession thereof taken by it; and therefore that it would be pointless to grant the prayers sought by the plaintiff. Counsel relied on **Diocese of Eldoret Trustees (Registered) vs. Attorney General (on behalf of the Principal Secretary, Treasury) & Another** [2020] eKLR to support his submission that even those issues that are germane but were not raised in the previous suits are deemed *res judicata* because parties are expected to bring forward the whole of their case at once.

[19] On the merits, it was the submission of **Mr. Mabonga** that the plaintiff has not satisfied the triple requirements of *prima facie* case, irreparable damage and balance of convenience. In his view, the plaintiff did not demonstrate infringement of her right and/or the probability of success at the conclusion of the suit. He added that since all the requisite notices were served, he plaintiff has no cause for complaint. On irreparable loss, **Mr. Mabonga** took the stance that, once offered as security, land becomes a commodity for sale and therefore the plaintiff cannot now allege sentimental value of the suit property. In the premises, **Mr. Mabonga** prayed for the dismissal of the entire suit; and that costs thereof be awarded to the 1st and 2nd defendants.

[20] **Mr. Katwa**, learned counsel for the 3rd, 4th and 5th defendants, also opposed the application dated **20 January 2021** vide his written submissions dated **24 May 2021**. He pointed out, at the outset, that the 3rd and 4th Defendants have been in occupation and use of the parcels since the year **2016**. He made reference to the letter from AFC/ 1st Defendant, and the Judgment of the Environment and Land Court, Eldoret, dated **11 January 2019** in **Eldoret ELC No. 124 of 2017**; as well as the plaintiff's letter, acknowledging that the 3rd and 4th defendants are already in occupation of the parcel. He reiterated the arguments earlier advanced by him in support of the preliminary objection; particularly the grounds that, this Court has no jurisdiction in the matter placed before it on account of the suit being *res judicata* and that it essentially an Environment and land Court matter.

[21] On the basis of the aforementioned judgment, **Mr. Katwa** submitted that all the issues raised in this suit and upon which the applicant relies to show *prima facie* case for injunction were already litigated on before Competent Courts, between same parties in previous cases including **Eldoret H.C No. 124 of 2017**. He accordingly proposed the following issues for determination:

[a] Whether a *prima facie* case has been made for an injunction and whether a party with a title in its name and in occupation acquired through exercise of statutory power can be restrained by injunction.

[b] Whether a chargor whose land is sold is entitled to monetary compensation or to land in law.

[c] Whether the plaintiff would suffer irreparable damage if the 3rd, 4th, and 5th defendants are allowed to retain possession and ownership of the suit property.

[d] Whether balance of convenience tilts in favour of 3rd, 4th and 5th defendants.

[e] Whether the suit is founded on criminal perjury under *inter alia* **Section 108** of the **Penal Code** and **Sections 5 and 11** of the **Oaths and Statutory Declarations Act, Chapter 15** of the **Laws of Kenya**.

[22] On whether the plaintiff has made out a *prima facie* case, **Mr. Katwa** made reference to the three conditions set out in case of **Giella vs. Cassman Brown** [1973] EA 358 and submitted, on the authority of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others** [2014] eKLR; Civil Appeal No. 77 of 2012 (Nairobi), that all the three conditions are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. The case of **Mrao Ltd. V. First American Bank of Kenya Limited & 2 Others** [2003] KLR 125 was also cited for the definition of a *prima facie* case and to demonstrate that, in this case, the plaintiff has failed to make out such a case to warrant the issuance of the injunctive orders she is seeking, as the equity of redemption was extinguished when the hammer fell and therefore the chargee was by law entitled to complete the transfer to the highest bidder.

[23] Counsel further argued that, the plaintiff is guilty of laches; and therefore is not entitled to the orders sought. His posturing was that, injunctive orders being discretionary are not due in cases of inordinate delay. He pointed out that the delay of over six (6) years, being inexplicable, the applicant is culpable for coming to Court with dirty hands; hence not eligible for Court's discretionary powers. He relied on the cases of **Kawaljeet Singh Rekhi vs. Peter Wainaina Kamau & 2 others** [2016] eKLR and **Ochola Kamili Holding Limited vs Guardian Bank Limited** [2018] eKLR in support of the proposition that it requires one who seeks equity to be of clean hands in line with the maxim that 'he who comes to equity must come with clean hands'. In his submission, the plaintiff's conduct smacks of ill motive and mischief.

[24] The property having been properly sold, the option suggested by **Mr. Katwa** was for the plaintiff to sue for damages. He relied, *inter alia*, on **Bomet Beer Distributors Limited & another vs. Kenya Commercial Bank Limited & 4 others** [2005] eKLR and **Marco Munuve Kieti v Official Receiver and Interim Liquidator Rural Urban Credit Finance & Another** [2010] eKLR in this regard.

[25] **Mr. Katwa** refuted the assertions that the plaintiff stands to suffer irreparable harm if her prayer for injunction is not granted. He urged the Court to take into account the fact that the 3rd, 4th and 5th defendants have already taken possession of the suit property; and that the title has long been vested in the name of the 4th defendant. He also submitted that the balance of convenience, in the circumstances, is in favour of his clients; there being a risk of the Defendants being prejudiced if the injunction is allowed. He cited **Amir Suleiman vs. Amboseli Resort Limited** [2004] eKLR, for the proposition that the Court in responding to prayers for interlocutory injunctive reliefs, should always opt for the lower rather than the higher risk of injustice. Thus, **Mr. Katwa** urged for the dismissal of the plaintiff's application with costs.

[26] I have given careful consideration to the application dated **20 January 2021**, the averments set out in the parties' respective affidavits filed in respect thereof, as well as the written submissions filed by learned counsel. I have likewise perused the pleadings thus far filed by the

parties as well as the proceedings had to date, with a view of placing the application in its proper perspective. Principally, the application seeks a temporary injunction to preserve the subject matter pending the hearing and determination of this suit. Hence, one of the enabling provisions cited by the plaintiff is Order 40 Rules 1 and 2 of the Civil Procedure Rules. Rule 1 thereof provides that:

Where in any suit it is proved by affidavit or otherwise--

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

[27] The conditions that must be met by such an applicant were well explicated in **Giella vs. Cassman Brown & Co. Ltd** [1973] EA 358, to be: whether the applicant has made out a *prima facie* case with probability of success; whether the applicant stands to suffer irreparable harm unless the orders sought are issued; and finally, if the Court is in doubt as to the first two, whether the balance of convenience tilts in the applicant's favour. These are the conditions that the plaintiff must prove herein. But before delving into a merit consideration with a view of determining whether the aforementioned conditions have been satisfied herein, there is need to address the jurisdictional issues raised by learned counsel. Both **Mr. Mabonga** and **Mr. Katwa** pitched the argument that the entire suit is *res judicata*, for the reason that the issues in contest have been the subject of previous suits between the same parties and have been determined with finality. They therefore submitted that the application for injunction dated **20 January 2021** and indeed the entire application cannot stand and ought to be dismissed *in limine*. **Mr. Katwa** raised a second ground on jurisdiction, contending that this is a matter that falls under the jurisdiction of the Environment and Land Court; and therefore that this Court ought not to entertain it; including the subject application.

[28] With all due respect to **Mr. Katwa**, the Court has had occasion to reflect and rule on the question as to whether this is a matter falling under the exclusive jurisdiction of the Environment and Land Court for purposes of **Article 162(2)(b)** of the **Constitution**. At paragraphs 14 to 19 of the ruling dated **16 March 2021**, the Court took the view that this suit, as framed, is properly before this Court as the predominant issue is not ownership or use of land, but the question whether the 1st defendant properly exercised its statutory power of sale; and therefore is a commercial dispute between the plaintiff and the 1st defendant. The Court relied on, and quoted extensively, from the decision of the Court of Appeal in **Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 Others** (supra). I reiterate my conclusion and need no belabor the point, seeing as that ruling has been appealed.

[29] On *res judicata*, although this is one of the issues raised in the preliminary objection that was the subject of the ruling of **16 March 2021**, it was not given a merit consideration. I took the view then that the issues raised did not arise from the pleadings; and neither were they agreed on by the parties; and therefore that they could not be determined without a consideration of the evidence alluded to by **Mr. Katwa**. A detailed Supplementary Affidavit has since been filed on behalf of the 3rd, 4th and 5th defendants, sworn by the 3rd defendant to which he annexed several documents. There is therefore a proper basis for considering whether or not the application and the entire suit is *res judicata*.

[30] **Section 7** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, does provide that:

"No Court shall try any suit or issue in which the matter in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title...and has been heard and finally decided by such Court."

[31] Needless to mention that the *res judicata* principle is as applicable to mains suits as it is to interlocutory applications. Hence, in **Uhuru Highway Development Ltd vs. Central Bank of Kenya & 2 Others) Civil Appeal No. 36 of 1996**), the Court of Appeal held that:

"There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of a similar nature; that is to say further, wider principles of *res judicata* apply to applications within the suit. If that was not the intention we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation..."

[32] In so far as applications are concerned, the application dated **20 January 2021** is the first such application in this matter. It cannot therefore be true that the issues raised therein have been raised herein before and determined with finality on their merits. Reference was made by **Mr. Katwa** to previous suits in which applications of a similar kind were allegedly raised and determined. In this connection, he made reference to the following suit:

[a] **Eldoret HCCC No. 50 of 2006**

[b] **Eldoret H.C ELC 151 of 2015**

[c] **Kisumu H.C 108 OF 2016 and**

[d] **Eldoret H.C 124 of 2017**

[33] It is noteworthy however that, other than **Eldoret HCCC No. 124 of 2017**, the 3rd defendant did not avail copies of the final decisions made in the other suits. In any event, a perusal of the Plaintiff filed herein leaves no doubt that plaintiff's cause of action arises from the sale of the suit property on **9 September 2016**. Hence, the subject matter could not have been an issue in **2006**. The reference by the 3rd defendant to **Eldoret HCCC No. 105 of 2016** and **Kisumu HCCC No. 108 of 2016** at paragraphs 3 and 4 of his Replying Affidavit sworn on **29 January 2021** plainly show that the matters were instituted before the impugned sale. It is consequently my finding that the occurrence of the sale, in itself, conferred on the plaintiff a fresh cause of action and therefore that it cannot be justifiably argued that her application is *res judicata*.

[34] However, a different picture emerges from the judgment passed in **Eldoret ELC Case No. 124 of 2017**. It shows that, although the suit was filed by the 3rd defendant against the plaintiff, the plaintiff had occasion to file a counterclaim therein, raising the very issues she has raised in this suit. This is manifest at paragraphs 7, 8 and 9 on page 3 as well as pages 4 and 5 of the judgment dated **11 January 2019**. For instance, at paragraphs 2 and 3 on page 6 of the judgment, the plaintiff is reflected as having challenged the sale on the basis of the *Nemo dat* doctrine. At paragraph 5 on the same page of the judgment, the plaintiff is shown as having challenged the sale itself on the grounds of connivance, conspiracy and flagrant disregard of the applicable law, legal procedures and the constitutional rights of the applicant, among other grounds.

[35] By way of prayers, the judgment shows, at paragraphs 2, 3 and 4 on page 4 thus:

“The defendant seeks compensation for the general wanton destruction of the property (flora/fauna) killing and poisoning of animals, psychological trauma visited upon the defendant during the heinous exercise.

The defendant prays...for a declaration that she is the lawful and absolute owner of the suit land together with all the developments thereon comprising the livestock, homestead and/or other properties apartment thereto [sic] and an order of injunction restraining the plaintiff/interested party and/or any other party claiming on their behalf over the suit land.

The defendant further prays for a declaration that the public auction conducted on the 09.09.2016 be declared null and void as it was vitiated by irregularities and/or fraud. General damages for wanton destruction of properties and killing of animals. Plus, costs and interest.”

[36] It is further plain from the judgment that, although the 3rd defendant withdrew his suit in **Eldoret ELC Case No. 124 of 2017**, the plaintiff's counterclaim was proceeded with and was determined on its merits. At paragraph 2 on page 9, **Hon. Ombwayo, J.** remarked thus:

“It is important to note that the plaintiff withdrew the suit before the filing of submissions and therefore what is pending in this court is the counter claim by the defendant, the plaintiff's defence to counter claim and the interested party statement of defence and reply to counter claim.”

[37] Thus, **Hon. Ombwayo, J.** proceeded to make findings in **Case No. 124 of 2017** to the effect that the 1st Defendant, **Agricultural Finance Corporation**, properly exercised its statutory power of sale in auction of **9 September 2016**. At pages 10 and 11 of the said judgment, the court found, as a matter of fact that the plaintiff defaulted in servicing the loan; that the requisite notices were duly issued and served notifying the plaintiff of the 1st defendant's intention to realize the security through the 2nd defendant. Hence, the court was satisfied that the conduct of the sale was above board. To this end Paragraph 4 on page 12 of the judgment reads:

“I have looked at the memorandum of sale and do find that there was a sale by public auction on 9th September 2016 of the suit land and that Evans Kemboi Koech emerged as the highest bidder and was declared the purchaser at a price of Kshs.100, 000,000 and paid a deposit of Kshs. 25,000,000 and a further Shs.75, 000,000 was paid. The interested party has admitted having received kshs.100, 000,000 from the plaintiff and the evidence of payment through the receipts indicate that the plaintiff paid the entire amount.”

[38] And, at paragraphs 6 and 7 on pages 13 and 14, the court held that:

“The defendant has failed to demonstrate that the public auction was carried out irregularly. The court finds that the defendant still owes the interested party the principal sum and interest more than 20 years since the mortgage deed was executed and therefore it will be unfair to the interested party for this court to issue an injunction against the interested party...The defendant's prayer for injunction cannot be granted as an injunction is an equitable remedy to be issued where the person who seeks it comes to court with clean hands. The defendant does not come to court with clean hands as she has failed to demonstrate that she paid the interested party the money owed...The upshot of the above is that the suit having been withdrawn by the plaintiff with costs, the counterclaim having not been proved on a balance of probabilities the same is dismissed with costs to the plaintiff and the interested party...”

[39] As against the foregoing background, the plaintiff filed this suit on **21 January 2021**, vide her Plaintiff dated **20 January 2021**, praying for the following reliefs:

[a] A declaration that the exercise of the statutory power of sale by the 1st defendant conducted on **9 September 2016** and the subsequent sale and any dealings by the defendants in respect of that parcel of land known as **LR 3209/1** situated at **Arbabuch Area**, Moiben in Uasin Gishu County, was null and void and ought to be set aside.

[b] An injunction restraining the defendants by themselves, their servants, agents and/or employees or whosoever is acting on their behalf from trespassing, encroaching, selling, tilling, ploughing, planting, wanton destruction of trees, crops, stocking of animals

and doing acts which are inconsistent with the plaintiff's rights over **LR No. 3209/1** situated at **Arbabuch Area**, Moiben in Uasin Gishu County.

[c] An eviction order against the 3rd and 5th defendants, their agents, servants and/or employees, evicting them from the suit land **LR 3209/1** measuring 305 acres.

[d] An order that land title **LR No. 3209/1** be valued by an independent valuer to ascertain its current market value.

[e] An award of damages and compensation for loss of income from the suit parcel of land from **2016** to date.

[f] Costs of the suit together with interest at court rates.

[g] Any other relief the Court may deem fit to grant.

[40] It is indubitable therefore that the entire suit as pleaded, including the application dated **20 January 2021**, is indeed *res judicata* and ought not to be countenanced. Indeed, in **John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport and Infrastructure & 3 Others** [2015] eKLR the Court of Appeal pronounced itself as follows on the issue:

“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”

[41] Having found that both the entire suit, including the application, is *res judicata*, a merit consideration of the application dated **20 January 2021** is unwarranted. Hence, the orders that commend themselves to me are as hereunder:

[a] **That the plaintiff’s application dated 20 January 2021 be and is hereby struck out with costs; and,**

[b] **That the plaintiff’s suit be and is hereby struck out with costs.**

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28TH DAY OF FEBRUARY, 2022

OLGA SEWE

JUDGE