



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Equip Agencies Limited v I & M Bank Limited & 2 others (Civil Case 87 of 2019)
[2022] KEHC 13525 (KLR) (Commercial and Tax) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13525 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 87 OF 2019
DAS MAJANJA, J
SEPTEMBER 30, 2022**

BETWEEN

EQUIP AGENCIES LIMITED PLAINTIFF

AND

I & M BANK LIMITED 1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS 2ND DEFENDANT

**LUCAS KIIRU MBUGUA, PAUL MBUGUA & MARY WANGARI GATHUME
(SUED ON THEIR BEHALF AND AS THEIR CAPACITY AS THE
OFFICE BEARERS OF GIL GIL TOTAL INVESTORS SELF HELP
GROUP) 3RD DEFENDANT**

RULING

1. There are three applications before the court for determination.
2. The first is the plaintiff's notice of motion dated March 23, 2022 made, *inter alia*, under Order 8 rules 3 of the *Civil Procedure Rules* ("the rules") where it seeks leave to amend its amended plaint and that the annexed draft amended plaint be deemed as duly filed upon payment of the requisite fee. The application is supported by the affidavit of the plaintiff's Managing Director, Divyesh Indubhai Patel sworn on March 23, 2022 and opposed by the 1st defendant ("the bank") through the replying affidavit of its Senior Manager, Legal Department, Andrew Muchina sworn on June 8, 2022.
3. The second application is the plaintiff's notice of motion dated April 6, 2022 made, *inter alia*, under Order 40 rules 1, 2, 4 and 10, sections 82, 84, 90, 96, 97, 98, 103, 104(3), 105 and 106 of the *Lands Act*, 2012 and sections 56, 68, 69, 70, 106 and 107 of the *Land Registration Act* and seeks the following orders:



1. Spent
2. Spent
3. That this honorable court be pleased to grant a temporary order of injunction restraining the defendants whether by themselves, their employees, servants, agents or auctioneers from doing any of the following acts that is to say from advertising for sale, selling whether by public auction or private treaty, subdividing, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging, entering into or otherwise howsoever interfering with the plaintiff's possession and ownership or title to land reference LR No gilgil Township Block 2/210 pending hearing and determination of this suit.
4. That in the alternative, this honorable court be pleased to set aside and/or review its ruling dated and delivered on July 26, 2019 by granting a temporary order of injunction restraining the defendants whether by themselves, their employees, servants, agents or auctioneers from doing any of the following acts that is to say from advertising for sale, selling whether by public auction or private treaty, subdividing, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging, entering into or otherwise howsoever interfering with the plaintiff's possession and ownership or title to land reference LR No gilgil Township Block 2/210 pending hearing and determination of this suit.
5. That an order be made under section 106 of the Land Registration Act, No 3 of 2012 that during the pendency of this suit that all further registration or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right, title or interest in all that parcel of land known as LR No Gilgil Township Block 2/210 with any Land Registry, Government Department, and all other registering authorities be and is hereby prohibited.
6. That costs of this application be provided for
4. This application is supported by the affidavit of Divyesh Indubhai Patel sworn on April 6, 2022 and is opposed by the 1st and 2nd defendants' notice of preliminary objection dated June 9, 2022.
5. The last application is by the 1st and 2nd defendants' and is the notice of motion dated June 7, 2022 made, *inter alia*, under Order 25 rule 5 (1) and (2), Order 11 rule 3 (h) and (i) and Order 51 rule 1 of the rules and seeks the following orders:
 1. Spent*
 2. Spent*
 3. Spent*
 4. This case be consolidated with the following cases:
 - i. HCC No 417 of 2018: Equip Agencies Limited & Another v I&M Bank Limited.
 - ii. HCC No 418 of 2018: Gil Gil Treatment Industries Limited v I&M Bank Limited & Another.
 - iii. HCC No 327 of 2016: Unicom Limited v I&M Bank Limited,
 - iv. HCC No 183 of 2019: Ubunifu Fundi Limited v Unicom Limited & Another.



- v. HCC No 420 of 2016: Equip Agencies Limited v I&M Bank Limited.
- vi. HCC No 355 of 2016: Grishma Kumari Patel & 2 Others v I&M Bank Limited
- vii. HCC No E943 of 2021: Equip Agencies Limited & 5 Others v I&M Bank Limited & Another.
- 5. This honorable court do order this case to be the lead case.
- 6. The plaintiff's suit against the defendants be marked as adjusted wholly and/or compromised in the following terms of the deed of settlement dated June 10, 2021:
 - i. In consideration of the chargee [hereinafter referred to as "the bank"] waiving interest on the outstanding debt of Kenya Shillings 1,936,548,732.71 as at September 22, 2020, the chargee, the borrower, chargor and mortgagor have reached reached a compromise and settlement of the outstanding loan owed to the chargee at a discounted amount of Kenya Shillings Eight Hundred and Seventy-Five Million [Kshs 875,000,000.00] with each party agreeing to bear its own litigation costs. Any costs relating to the discharge of the securities shall be paid by borrower, chargor and mortgagor
 - ii. The borrower, chargor and mortgagor shall pay the sum of Kenya Shillings One Hundred Million [Kshs 100,000,000.00] within 15 days from the date of execution of this agreement. Upon confirmation of receipt by the chargee of the sum of Kenya Shillings One Hundred Million [Kshs 100,000,000.00], the chargee shall immediately thereupon procure the removal of the negative customer credit information of the borrower, chargor and/or mortgagor from the Credit Reference Bureaus.
 - iii. The borrower, chargor and mortgagor shall pay the sum of Kenya Shillings Fifty million [Kshs 50,000,000.00] within 120 days from the date of execution of this agreement.
 - iv. The borrower, chargor and mortgagor shall pay the sum of Kenya shillings Seven Hundred and twenty-Five million [Kshs 725,000,000.00] within 180 days from the date of execution of this agreement
 - v. Upon confirmation of receipt by the chargee of cleared funds equivalent to the settlement amount on the due date, the chargee shall immediately thereupon cause such action to be executed as may be required to;
 - a. Discharge the various securities forthwith with costs relating to the discharge to be borne by the borrower, chargor and mortgagor
 - b. Record consents in the High Court, Court of Appeal and Supreme Court to mark as settled, all pending cases particularized in clause 6 [a] to [m] above in accordance to the terms of this settlement deed and that this deed be filed as an order of the court.
 - vi. Subject to the consents for all pending cases particularized in clause 6 [a] to [m] being signed by all respective parties, the chargor shall, inform the Directorate of Criminal Investigation [DCI] on the property known as Title Number Gil Gil Township Block 2/210 [leasehold] by writing a formal letter to the DCI confirming that all pending cases particularized in clause 6 [a] to [m] have been settled officials.
 - vii. In the event of default in the payment of the settlement amount within 14 days from the due date of payment, the chargee's entire original debt shall be reinstated together with accrued interest and all outstanding legal costs that shall be taxed and the bank shall be at liberty to



forthwith proceed with the realization of the charged properties after giving a seven [7] days' notice of default.

7. This honorable court do make any further orders necessary for the implementation and execution of the terms of the decree.
8. Costs of this application be borne by the plaintiff.
6. This application is supported by the affidavit of Andrew Muchina sworn on June 7, 2022 and is opposed by the plaintiff through its notice of preliminary objection dated June 16, 2022 and the replying affidavit of Divyesh Indubhai Patel sworn on June 17, 2022. The parties have also filed written submissions in support of their respective positions.

Litigation history and background

7. In resolving and contextualizing the applications, a brief and historical background of this dispute is apposite as it has been the subject of protracted litigation as was highlighted by the Court of Appeal in *Equip Agencies Limited v I & M Investment Bank & 2 others* NRB CA Civil Appeal (application) No 412 Of 2019 [2019] eKLR.
8. Between 2007 and 2015, the plaintiff from time to time sought and was granted various facilities by the 1st defendant ("the bank"). One of those facilities was a term loan of Kshs 324,000,000.00 secured by a charge dated April 22, 2013 over the property; Gilgil Township Block 2/2010 ("the suit property") that the plaintiff intended to purchase at the time.
9. Sometime in 2015, the various facilities were restructured and were to continue to be secured by the existing securities including the charge over the suit property. In 2016, the plaintiff fell into arrears in servicing the facilities prompting the bank to begin recovery of the debt by evincing its intention to sell the suit property.
10. To forestall the sale of the suit property, the Plaintiff filed HCCC No 9 of 2016 at the High Court in Naivasha seeking *inter alia*, to restrain the bank from exercising its statutory power of sale and for a true account of the status of its loan. That suit was based on the assertion that the plaintiff had fully repaid the loan, that the statutory notice was invalid, usurious and illegal interest rates and unlawful consolidation of the plaintiff's loan accounts. After the hearing, Meoli J, dismissed the application by a ruling dated December 9, 2016.
11. By a ruling dated March 24, 2017, the court declined to grant an injunction to enable the plaintiff proceed to the Court of Appeal but in the interest of justice, the court granted the plaintiff an injunction for seven days to enable it move the Court of Appeal. By a ruling dated April 19, 2017, the court denied the plaintiff an extension of the injunction. By the judgment dated September 27, 2017, the Court of Appeal heard and dismissed the plaintiff's appeal from the ruling of Meoli J, dated December 9, 2016 in *Equip Agencies Limited v I & M Bank Limited* NKR CA Civil Appeal No 2 of 2017 [2017] eKLR.
12. Undeterred, the plaintiff moved the Court of Appeal in Civil Application No Sup 5 of 2017, seeking a certification of its intended appeal to the Supreme Court. It also prayed that the certificate do operate as an injunction restraining the sale of the suit property. By a ruling dated September 26, 2018, the Court of Appeal dismissed the application by finding that the matter did not raise any matter of general public importance.
13. Earlier, on February 1, 2018 the plaintiff had gone back to the High Court at Naivasha seeking an injunction to restrain the sale of the suit property and a 24-month period within which to rectify its



- default in the loan repayment or suspension of the bank's power of sale for 24 months to enable the plaintiff redeem the suit property. Those orders were sought on the basis that the plaintiff expected payment in excess of Kshs 34 billion by the Government of Kenya, with which it intended to settle its indebtedness to the bank. By a ruling dated May 17, 2018, Mwongo J, dismissed the application.
14. The plaintiff appealed against that ruling of Mwongo J, to the Court of Appeal in Civil Appeal No 101 of 2018 and simultaneously filed Civil Application No 73 of 2018 seeking an injunction to restrain the bank from selling the suit property pending the hearing and determination of its appeal. By a ruling dated October 23, 2018, the Court of Appeal dismissed the application.
 15. In the meantime, Gilgil Treatment Industries Ltd, claiming to be a tenant of the plaintiff filed a suit in the Environment and Land Court at Nakuru. It sought an injunction restraining the bank from selling the suit property on the grounds that the tenant had its properties on the suit premises and had also substantially developed the suit property. Ohungo J, dismissed the application on May 25, 2018. The suit was subsequently transferred from Nakuru to Naivasha as HCCC No 6 of 2018.
 16. On November 29, 2018, Gilgil Treatment Industries Ltd, made a similar application for injunction in the High Court at Naivasha and sought a further injunction pending appeal to the Court of Appeal against the ruling of Ohungo, J On December 6, 2018, Mwongo J, dismissed the application after finding, *inter alia*, that it was *res judicata*.
 17. On the same November 29, 2018, the plaintiff filed an application in the High Court at Naivasha, seeking an injunction to stop the sale of the suit property on the basis that the suit property had not been valued as required by law, that the intended sale included assets that did not form part of the suit property, and that the provisions of the [Auctioneers Act](#) and the [Auctioneers Rules](#) had not been complied with. The application was dismissed by Mwongo J, on December 6, 2018 after he found that there was a valid valuation report dated April 12, 2018 and that the failure to comply strictly with the [Auctioneers Act](#) and [Rules](#) did not justify stopping the sale by an order of injunction. Ultimately the learned judge directed as follows:
 - a) the sale by public auction shall be conducted on the basis that the reserve price shall be the forced sale value indicated in the valuation by Dunhill Africa Surveyors Ltd of Kshs 352,500,000/=
 - b) the reserve price shall be a condition for sale.
 18. On January 1, 2019, the plaintiff filed yet another application in NVS HCCC No 9 of 2016 which later became NRB HCCC No 417 of 2018 to among other things, stop the auction of the suit property, which was scheduled for January 24, 2019. This time round, the plaintiff applied for consolidation of some suits and settlement by the court, of a litany of issues touching on the relationship between itself and the bank. Pending the settlement of the issues, the plaintiff applied for an interim injunction to restrain the bank from selling the suit property. By a ruling delivered on the day of the auction, Tuiyott, J, (as he was then) dismissed the prayer for injunction, paving the way for the auction to proceed. The plaintiff thereafter filed a Civil Application No 31 of 2019 in the Court of Appeal seeking an injunction but that application was dismissed by a ruling dated May 8, 2020.
 19. On January 24, 2019, the bank sold the suit property to the 3rd defendant by public auction. On February 20, 2019 the plaintiff filed the instant suit impugning the sale of the suit property stating that the same was fraudulent, illegal null and void and sought an injunction to restrain the transfer of the suit property to the 3rd defendant. Contemporaneously with the suit, the plaintiff filed an application seeking an injunction restraining the defendants from completing the transfer of the suit property to the 3rd defendant or taking possession of the suit property or otherwise dealing with or interfering with



the plaintiff's ownership of the suit property. On July 26, 2019, the court dismissed the application. The plaintiff once again moved the Court of Appeal in Civil Appeal No 412 of 2019 filed together with an application for interim injunction pending the hearing and determination of that appeal. On December 6, 2019, the Court of Appeal, dismissed the application by holding that even though the plaintiff had presented an arguable appeal, it did not demonstrate that the appeal will be rendered nugatory if it succeeds.

20. On June 10, 2021, the plaintiff together with other parties signed a deed of settlement ("the deed of settlement") with the bank whose terms included that in consideration of the bank waiving interest on the outstanding debt of Kshs 1,936,548,732.71 as at September 22, 2020, the plaintiff would pay the bank a discounted amount of Kshs 875,000,000.00 with each party agreeing to bear its own litigation costs. Any costs relating to the discharge of the securities were to be paid by the plaintiff. The plaintiff was to pay the sum of Kshs 100,000,000.00 within 15 days from the date of execution of the deed of settlement and upon confirmation of receipt of the same by the bank, the bank was to immediately procure the removal of the negative customer credit information of the plaintiff from the Credit Reference Bureaus.
21. The plaintiff was then to pay Kshs 50,000,000.00 within 120 days from the date of execution of the deed of settlement and a further Kshs 725,000,000.00 within 180 days from the date of execution of the deed of settlement and upon confirmation of receipt by the bank of cleared funds equivalent to the settlement amount on the due date, the bank was to immediately thereupon cause such action to be executed as may be required to discharge the various securities forthwith with costs relating to the discharge to be borne by the plaintiff and record consents in the High Court, Court of Appeal and Supreme Court to mark as settled, all pending cases particularized in clause 6 [a] to [m] of the deed of settlement including this suit in accordance to the terms of the deed of settlement and that the deed of settlement was to be filed as an order of the court. That in the event of default in the payment of the settlement amount within 14 days from the due date of payment, the bank's entire original debt was to be reinstated together with accrued interest and all outstanding legal costs shall be taxed and the bank shall be at liberty to forthwith proceed with the realization of the charged properties after giving a seven [7] days' notice of default.
22. The plaintiff has now challenged the deed of settlement by filing HCCC E943 OF 2022 where the court has since dismissed the plaintiff's application for an injunction.
23. With the above historical and litigation rendition in mind, I now turn to outline the parties' applications.

The Plaintiff's Notice of Motion dated March 23, 2022 for amendment

24. The plaintiff seeks to amend its amended plaint to bring into perspective developments that have taken place since the suit was filed in 2019 especially on the issue of transfer of the suit property to the 3rd defendant. It states that since it filed the suit, it has offset part of the debt that is the subject of the present suit and that the amendment is necessary for determination of the real issues in controversy between the parties. It urges that the defendants do not stand to suffer any prejudice and that in event they do, they can be compensated by an award for costs.
25. The 1st and 2nd defendants ("the defendants") oppose the application on the ground that the suit against the bank by the plaintiff was compromised by the deed of settlement and that the plaintiff has performed part of the terms of the deed of settlement and that the following cases have since been marked as fully settled by filing consents in the Court of Appeal in compliance with clause 1.5 [b] of the deed of settlement;



- i. Civil Appeal No 111 of 2018: Equip Agencies Limited v I & M Bank Limited being an appeal against the ruling delivered by Nzioka J, on November 1, 2017 in HCCC No 420 of 2016: Equip Agencies Limited v I&M Bank Limited.
 - ii. Civil Appeal No 165 of 2018: Unicom Limited v I&M Bank Limited being an appeal against the ruling delivered by Nzioka J, on May 7, 2018 in HCCC No 327 of 2016: Unicom Limited v I & M Bank Limited.
 - iii. Civil Appeal No 110 of 2018: Grishma Kumar Patel & 2 Others v I & M Bank Limited being an appeal against the ruling delivered by Nzioka J, on November 15, 2017 in HCCC No 355 of 2016: Grishma Kumar Patel & 2 Others v I&M Bank Limited.
 - iv. Civil Appeal No 101 of 2018: Equip Agencies Limited v I&M Bank Limited being an appeal against the Ruling delivered by Mwongo J, on May 17, 2018 in HCCC No 417 of 2018: Equip Agencies Limited v I&M Bank Limited.
26. The defendants aver that the plaintiff has paid the bank's first installment of Kshs 100,000,000.00 in compliance with clause 1.2 of the deed of settlement but that it has admitted breach of the same as it defaulted in payment of the second instalment of Kshs 50,000,000.00 in breach of clause 1.3 of the deed of settlement. That on October 14, 2021, the bank wrote to the plaintiff demanding payment of the said instalment failure of which the bank shall proceed with realization of the securities in compliance with clause 1.6 of the deed of settlement and that on October 22, 2021, the plaintiff wrote to the bank admitting the said default and promised to pay the second Instalment on or before October 31, 2021
27. The bank states that on October 25, 2021, the bank agreed to the plaintiff's request for extension to pay the second instalment on or before October 31, 2021 on the following conditions which are also contained in clause 1.4 and clause 1.6 of the deed of settlement: That the bank shall proceed with the realization of the securities should it not receive the second instalment payment by October 31, 2021, that should the said second instalment be paid by October 31, 2021 aforesaid, the third and last instalment payment shall be due on or before December 10, 2021 and for avoidance of doubt, the letter dated October 25, 2021 shall operate as the seven [7] days default notice envisaged under clause 1.6 of the deed of settlement.
28. The defendants point out that despite the admission of default and the promise to regularize the default, the plaintiff has refused, failed and/or neglected to do so. The bank restated that addition to realization of the securities, another consequence for the above breaches was that its entire original debt in the sum of Kshs 1,936,548,732.71 as at September 22, 2020 shall be reinstated together with accrued interests and all outstanding legal costs.
29. The defendants contend that despite several reminders to the plaintiff to execute and file consents to withdraw the cases in the High Court as agreed in the deed of settlement, it has refused, failed and/or neglected to do so and in view of the foregoing, the application to amend the plaint has been filed in bad faith contrary to the terms of the deed of settlement which clearly stipulates that this suit ought to be marked as fully settled by being withdrawn. That instead of settling the suit as earlier agreed in the deed of settlement, the plaintiff intends to prolong the matter by purportedly amending the plaint and proceeding to full trial in violation of the deed of settlement. The defendants therefore pray that the application dated March 23, 2022 be dismissed.

The plaintiff's notice of motion dated April 6, 2022 seeking injunctions



30. The plaintiff's application is grounded on the facts that it was the registered owner of the suit property which is developed in three parts and measures approximately 16.73 hectares or 41.34 acres and that it was sold illegally to the 3rd defendant on January 24, 2019 by 2nd defendant under instructions from the bank.
31. The plaintiff restates that by the application dated March 6, 2019, it sought an injunction to restrain the defendant from interfering with the suit property which application was dismissed on July 26, 2019 primarily because, "none of the new issues were raised in the plaint and each one of them would be, or ought to have been, within the knowledge of equip at the time of presentation of the suit. The plaintiff did not seek to amend his plaint or motion and cannot be permitted to argue an application for interlocutory injunction on grounds not consistent with the case it has presented for determination."
32. The plaintiff depones that the court did not consider the grounds raised herein including the fact that it has discovered that the 3rd defendant is a self-help group registered by the Ministry of Labour and Social Protection but without corporate identity and thus lacking any power to hold and own property. That the 3rd defendant is neither a natural person, nor an artificial person as envisaged by the law but an amorphous organization unknown to law and the same cannot purport to lawfully hold property and the intended transfer of the suit property to it is null and void and of no effect.
33. The plaintiff states that by clause 'C' of the recital to the charge dated April 22, 2013, the chargor agreed to charge all its right, title and interest in and to the suit property and that in the absence of a debenture, the security given was simply that of land and building. The plaintiff states that in purported exercise of statutory power of sale and through the 2nd defendant, the bank fraudulently sold the suit property at the gross under value of Kshs 353,000,000 when the same was at the said time valued at over Kshs 700,000,000.00. The plaintiff states that it has discovered glaring fraudulent transactions leading to the illegal and stage-managed auction on January 24, 2019. The plaintiff narrates the incidents of fraud as follows. The 3rd defendant was registered as a self-help group on January 8, 2019 which was two weeks to the auction with no other purpose but to purchase the suit property, the 3rd defendant obtained bankers cheques prior to the auction in favor of the bank and which were presented to the 2nd defendant at the stage managed auction venue contrary to the requirement contained in the advert, that whereas in auction sales, there is usually the memorandum of sale issued after the mandatory 25% of the purchase price at the fall of the hammer and which acts as the sale agreement, the memorandum of sale was issued before the said amount was paid. Further, once the purchaser pays the full purchase price, a certificate of sale, which is akin to a certificate of completion, is ordinarily issued. In this case, the plaintiff contends that it was issued even before the 25% deposit was paid and that by the time the auction was conducted, the facility had been fully amortized.
34. The plaintiff further contends that the illegal sale of the suit property to the 3rd defendant, an entity incapable of acquiring title to property, purported to include and transact in movables outside the scope of the charge and not subject of the auctioneer's advert and the valuation report and that whereas the advertisement of the auction specifically stated that a deposit of 25% must be paid in cash or banker's cheques at the fall of the hammer and the balance will thereafter be payable within (90) days to the bank's advocate, the mandatory requirements were not complied with. The plaintiff alleges that the 2nd defendant did not positively identify in its advert, what constituted the sale and the subject matter of the auction and that the assessment and valuation of a running factory and machines and equipment does not fall within the purview and function of a valuer licensed under the Valuers Act but in the purview of assessment by mechanical engineers. The plaintiff contends that this equipment have been separately claimed by Gilgil Treatment Industries.



35. In any event, the plaintiff holds that the purchase price is too low as to be evidence of fraud in itself and that the purported sale of the said factory is fraudulent and illegal for reasons that; the advertisement and the charge do not included machinery and equipment, the machinery and equipment were never valued as required under the law, the sale was not conducted by the Auctioneer who advertised the same or by a licensed auctioneer at all and that the same was conducted by Walter Odhiambo Milanya who is not a licensed auctioneer and was not a proprietor of the Garam Investments Auctioneers at the impugned auction.
36. The plaintiff further pleads that the lack of proper valuation of the suit property is a flagrant breach of the defendants' duty of care under section 97 of the Land Act and that the plaintiff has duly amended its pleadings to include the newly discovered fraudulent and illegal transactions that makes the sale null and void ab initio. That despite of the glaring fraud and illegality, the bank hastily pushed for the transfer and charged the suit property to cover-up for the fraud and illegality. Further, that the 3rd defendant has initiated the process of eviction of the plaintiff and subdivision of the suit property for further transfer to third parties and thus, the further amended plaint presents an arguable case with higher probability of success and no damages will be sufficient to remedy the loss.
37. The plaintiff depones that the further transfers to third parties will be irreversible should the court finally find in favor of the plaintiff and the orders sought are intended to maintain the *status quo* and preserve the substratum of the suit to prevent further depletion as intended by the defendants. The plaintiff further contends that the balance of convenience lies in safeguarding the substratum of the suit which essentially favors all the parties.
38. The plaintiff states that it has duly issued an undertaking supported by a deed of assignment apportioning Kshs 1 billion of the decree in Nairobi Judicial Review Application No 55 of 2017; In the matter of the Principle Secretary, Ministry of Health ex parte Equip Agencies Limited to the defendants.
39. The plaintiff admits that although the court has previously dealt with an application for injunction, it still has jurisdiction to entertain the present application which is not premised on grounds previously determined by the court and on different circumstances as the 3rd defendant is now registered as the owner of the suit property. The plaintiff avers that the defendants do not stand to suffer any prejudices and in the event that they do, the same can be adequately compensated by damages and it is in the interest of justice that the orders sought be granted.
40. In response, the state that the application is *res judicata* on account of several decisions delivered in respect of the subject matter as follows: the rulings delivered by Meoli J, on December 9, 2016, on March 24, 2017 and on April 19, 2017 and the judgment of the dated September 27, 2019 by the Court of Appeal in Civil Appeal No 2 of 2017, the ruling of Mwongo J, dated May 17, 2018, the ruling of the Court of Appeal dated September 26, 2018 in Civil Application [Sup] No 5 of 2017, the ruling of the Court of Appeal dated October 23, 2018 in Civil Application No 73 of 2018, the rulings delivered by Mwongo J, in both HCC No 417 of 2018 and HCC No 418 of 2018 on December 6, 2018, the ruling of Tuiyot J, dated January 24, 2019 in HCC No 417 of 2018, the ruling of Tuiyot J, dated April 25, 2019 in HCC No 417 of 2018, the ruling of Tuiyot J, dated July 26, 2019 in HCC No 87 of 2019, the ruling of the Court of Appeal dated May 8, 2020 in Civil Application No 31 of 2019, the ruling of the Court of Appeal dated December 6, 2019 in Civil Appeal [application] No 412 of 2019, the ruling of the Supreme Court dated March 17, 2021 in Civil Application No 13 of 2020 and the ruling of Mwita J, dated June 3, 2022 in HCC No E943 of 2021.
41. The defendants further argue the plaintiff's equity of redemption has been extinguished, the suit property sold and transferred to the 3rd defendant and the only remedy available to the plaintiff is an



award of damages. Further that the damages are also not available to the plaintiff because parties have agreed to settle the case through the deed of settlement. The defendants state that the plaintiff filed a similar application for injunction challenging the deed of settlement which was rejected in a ruling delivered on June 3, 2022 in HCC No E943 of 2021: Equip Agencies Limited & 6 others v I & M Bank Limited & Another. The defendants pray that the application should be dismissed with costs.

The Defendants' Application to record the Deed of Settlement

42. The defendants' application restates their position that the deed of settlement has settled all matter concerning the subject suit and the suit property. They reiterate the averments in their pleading and depositions in response to the plaintiff's applications and pray that the court grants the orders in their application.
43. The plaintiff faults the defendants' application and opposes the plea for consolidation as the application is made in a vacuum as the pleadings in the other cases have not been furnished. That the parties in those suits are different and represented by different law firms who have not been served with the current application. It accuses the defendants of forum shopping as they seek to have all the files relating to their purported debt heard by single judge with the possibility of manipulation of the justice system contrary to the existing practices in place where files are heard by judges appointed randomly by the system in place.
44. The plaintiff states that the only nexus in the matters cited is the purported debt that was either borrowed or guaranteed by various parties but the case files are different in the following material particulars.
 - i. HCCC NO E 943 OF 2021 is based on the impugned deed of settlement and seeks to quash the said deed of settlement and that the same be declared null and void
 - ii. HCCC No E 943 of 2021 does not involve some of the parties sought to be now roped into this dispute including Gilgil Treatment Limited, Ubunity fundi Limited , Gilgil total Investment self-help group, Lucas Kiiru Mgigi, Paul Mbugua, Mary Wangari Gathur and John Gikonyo t/a Garam Investments
 - iii. The parties enumerated in (ii) above are represented by the following different law firms who are not involved in this dispute; Frank Mwangi & Co Advocate for the 3rd defendant in HCCC No 87 of 2019 and Gichuki Kimere & Co Advocate representing the plaintiff in HCCC No 418 of 2018.
 - iv. The current suit seeks orders for the nullification, cancellation of transfer and sale of the suit property and damages as against the parties therein and that these issues are not germane in any of the other suits.
 - v. In this suit, the propriety of the auction process, the purported payments of the purchase price, the remittance of auction funds, the transfer to an unregistered and amorphous organization are germane issues for trial and these should be tried separately so that the trial is not unduly bogged down.
 - vi. HCCC No 417 of 2018, is already a consolidation of 2 suits, that is NKU HCCC No 348 of 2016 and HCCC No 420 of 2016 and that the orders of the Judge who consolidated these suits have not been reviewed and/or set aside and the suit involves LR No Msa Mainland/ North VI/3075 and LR No 209/4535 which cases are currently on going at different stages of progression.



- vii. HCCC No 418 of 2018 is a suit by a Tenant in the suit property seeking conservatory orders to remain on the premises in view of its existing tenancy. The issues raised therein are on the legitimacy of the lease and the effect of the sale and what was exactly sold in view of the tenant's investments of equipment worth more than Kshs 120,000,000 in the premises.
 - viii. HCCC No 327 of 2016 is a suit filed by a purported guarantor of the debt borrowed from the bank and that this suit primarily deals with LR No 214 /172 Muthaiga and seeks discharge and release of the plaintiff therein from its purported obligation under a series of security documents. That this suit will require a minute examination of the charge, account statement, examination of various Acts of parliament, and other documents which are only germane to this suit
 - ix. HCCC No 183 of 2019 (Ubunifu fundi limited) is a suit filed by a tenant on LR No 214 /172 Muthaiga seeking conservatory orders on the tenancy and damages as against the registered owner (Unicom) and I&M Limited. That all the other parties are not involved and the plaintiff is yet to prosecute its application therein dated July 20, 2018.
 - x. HCCC No 355 of 2016 is a suit by various guarantors of the purported debt seeking discharge and release based on various scenarios set out in diverse documents. It involves only 1 property; LR No 209/8755 Pate Road Nairobi. The plaintiff avers that the charge and guarantees are different documents as well as the amounts purportedly guaranteed and the suit will be bogged by consolidation.
45. The plaintiff states that the prayer for stay of proceedings in the various suits is unmerited in that it is sought prior to consolidation and without affording the court pleadings in the respective cases. That no proper grounds have been laid for either consolidation of suits or stay of suits, the application does not meet the criteria set out for stay of proceedings under the law and that the application for stay is self-defeating and confusing in view of the prayer which seeks that the instant suit be the "lead case" upon consolidation.
46. The plaintiff further impugns the prayer for consolidation for not conforming with the set out criteria for consolidation of suits and that Prayer 6 is totally misconceived as the suit is not consolidated and the deed of settlement did not involve various parties whose cases are being sought to be marked as settled and that the impugned deed of settlement is already the subject matter of HCCC E943 OF 2022 pending before Mwita J and that there is a pending appeal in the Court of Appeal in respect of the said suit, being Civil Appeal No E361 of 2022.
47. The plaintiff further depones that the deed of settlement has never and was intended to be recorded in court as an order of the court and that the same has lapsed. For these reasons, the Plaintiff urges the court to dismiss the application with costs.

Analysis and Determination

48. As stated, there are three applications for consideration. In my view, the success or otherwise of the plaintiff's applications for injunction and amendment depend on whether this suit or the issues therein have been compromised by the deed of settlement which settled all the matters in issue between the parties.
49. The plaintiff does not deny the existence of the deed of settlement but impugns it by alleging that it was executed using undue influence and threats to sell the suit property. The plaintiff has challenged the deed of settlement in HCCC E943 OF 2022 where the court has dismissed the plaintiff's application for an injunction. Even though there is a pending appeal in respect to the said ruling, there is no order



either from this court or the Court of Appeal staying, varying or setting aside the implementation of the deed of settlement meaning its import is still alive and applicable to the executing parties.

50. While the plaintiff denies that the deed of settlement was never intended to be recorded in court as an order of the court, a reading of clause 1.5 thereof indicates that the parties intend to file the deed of settlement as an order of the court and further record various consents in this court and other superior courts with the effect of marking different cases including this one as having been settled once the plaintiff pays the settlement amount and the bank confirms receipt. The parties to the deed of settlement also agreed that the same constituted a full and final settlement of all disputes arising in the pending cases particularized therein, including the instant one.
51. The defendants have demonstrated and the plaintiff has not denied that the deed of settlement has been implemented in part as shown in the various documents indicating part compliance with the deed of settlement including consent orders of the Court of Appeal withdrawing various appeals, part payment of the settlement amount by the plaintiff and draft consents awaiting execution by the parties.
52. I have no doubt that the deed of settlement, having been executed by the plaintiff and the bank, having been partly performed by the parties and having not been set aside, varied or stayed is binding upon the executing parties. The parties agreed to mark this suit as having been settled and withdrawn, therefore the parties have no option but to follow through with their agreement, unless they both decide otherwise or the said agreement is invalidated, set aside or varied by the court.
53. The defendants' application is premised on Order 25 rule 5(1) of the *Civil Procedure Rules* which provides that:
 - 25 (1) Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.
 - (2) The court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree.
54. The aforesaid provision empowers the court to record a lawful compromise of the suit reached by the parties. In this case, the compromise has been reached and recorded in the deed of settlement as this suit concerns the subject facilities and the suit property covered by the deed of settlement. I therefore find and hold that the parties are bound by the terms of their own agreement which for avoidance of doubt states at paragraph 1.8 as follows:
 1. 8 The chargee, borrower, chargor and mortgagor agree that this deed of settlement is in full and final settlement of all disputed arising in the pending cases particularized in clause 6(a) to (m) and that neither party shall have any claim against each other, now or in the future in respect of any matter whatsoever arising out of the various lending agreements executed, the suit filed in court, the mortgages and debentures or any other matter whatsoever and for this purpose the parties bind themselves, upon fulfilment of the terms set out in clause 1.4, to file appropriate process in the aforesaid suit.
55. The aforesaid clause could not be clearer that the deed of settlement is in full and final settlement of all disputes regarding the subject matter which includes this suit which is listed at clause 6(c). I therefore



find that the suit was duly compromised and this court is duly bound to enforce the agreement of the parties by recording the appropriate order.

56. Having found that this suit has been settled, the inexorable conclusion is that the plaintiff's application for amendment of the plaint and for an injunction pending the hearing and determination of the suit must fail. Likewise, it is not necessary to proceed on a discourse whether this suit is res judicata. A full consideration of both applications would meet the wall erected by the deed of settlement.

Disposition

57. For the foregoing reasons, I now make the following orders:
- a. The plaintiff's notices of motion dated March 23, 2022 and April 6, 2022 are dismissed.
 - b. The 1st and 2nd defendants' notice of motion dated June 7, 2022 is allowed on terms that judgment is entered for the 1st and 2nd defendants on terms that this suit is marked as settled in accordance with terms set out in the deed of settlement dated June 10, 2021.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr King'ara instructed by Gichuki King'ara and Company Advocates for the Plaintiff.

Mr Wawire instructed by Wamae and Allen Advocates for the 1st and 2nd Defendant.

