



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
COMMERCIAL AND TAX DIVISION

HCCOMMM 605 OF 2003

WINFRED WAMBUI KING'ORI.....PLAINTIFF/APPLICANT

VERSUS

PARAMOUNT BANK LIMITED.....1STDEFENDANT/RESPONDENT

JOHN IRUNGU.....2NDDEFENDANT/RESPONDENT

DAVID SWAO.....3RD DEFENDANT/RESPONDENT

STEPHEN MURAYA KARIUKI.....4TH DEFENDANT/RESPONDENT

CHARLES NJUGUNA THONDU.....5TH DEFENDANT/RESPONDENT

RULING

**Introduction**

1. The factual matrix preceding the instant application is essentially uncontroverted or common ground. However, a concise account of the background is necessary in order to put the instant application into a proper perspective.
2. There is no contest that vide an application dated 27<sup>th</sup> November 2008, the Plaintiff applied for an injunction seeking to restrain the 1<sup>st</sup> Respondent, its servants, agents or employees from alienating, disposing, and/or selling **L.R. No. 13824** and **L.R. 14600**. It is common ground that the said application was heard on merits and dismissed vide a ruling dated 1<sup>st</sup> July 2009.
3. It is uncontested that aggrieved by the said ruling, the applicant filed Civil Application No. Nairobi **202** of 2012 in the Court of Appeal seeking *inter alia* an injunction restraining the 1<sup>st</sup> Respondent from disposing of the said property pending the hearing and determination of her intended appeal against the said ruling. Vide a ruling delivered on 12<sup>th</sup> February 2013, the Court of Appeal dismissed the said application. It stated:-

*“After considering all the material placed before us including the oral submissions of all counsel for the parties, we are not persuaded on the arguability of the appeal in question. Having so found, it will not even be necessary for us to delve into the nugatory aspect but we can justifiably state that if the appeal were to succeed, the applicant has a remedy in the realm of damages and the appeal would not therefore be rendered nugatory in the circumstances. In sum, we are not persuaded that this application meets the threshold required for such applications to succeed It must therefore fail and the same is dismissed with costs to the respondents.”*

4. By another application dated 18<sup>th</sup> July 2013, the applicant sought an injunction restraining the 1<sup>st</sup> Respondent, their agents, servants, employees or whomsoever from selling, alienating, transferring and/or disposing of the same property, i.e., **L.R. No 14600** pending the hearing and determination of this suit. The nub of the grounds relied upon are *inter alia* alleged failure to service the Statutory Notices. Vide a ruling dated 26<sup>th</sup> January 2015 the application was dismissed with costs. The court stated: -

*“Having considered the pleadings, affidavit evidence and the written submissions and the case law in respect of the parties’ case, the court found that the Plaintiff had not established any grounds under which it could reconsider the criteria that was set out in the case of American Cyanamid vs Ethicon Limited [1975] AC 396 that she relied upon to be granted an injunction pending the hearing and determination of this suit as this matter was res judicata. The court therefore did not find any value in analysing the case law that was submitted in respect of the granting of an injunction herein as same issues had previously been considered by Kimaru J and*

*the Court of Appeal” (Emphasis added).*

### **The instant application**

5. Vide the instant application dated 7<sup>th</sup> July 2020 the subject of this ruling, the applicant prays that this court grants injunctive orders against the 1<sup>st</sup> defendant and its agents restraining them from disposing or otherwise dealing with the same property, namely, L.R. No. **14600 (I.R 71664)** pending the hearing and determination of this suit. She also prays for costs of the application to be provided for.

6. The application is founded on the grounds enumerated on the face of the application, namely; that the 1<sup>st</sup> defendant intends to auction said property in exercise of its Statutory Power of Sale to the detriment of the applicant. She claims that the 1<sup>st</sup> Respondent did not issue her with any notices of the intended sale as required of it under Section 96 of the Land Act.<sup>[1]</sup> Further, she states that the said subject property is the subject matter of this suit and if it is sold or transferred prior to the determination of this suit, this case will be rendered nugatory.

7. The applicant also states that the earlier applications for injunctions before this court and the Court of Appeal were not allowed but that the same ought to be reviewed in light of the new circumstances on grounds that the 1<sup>st</sup> Respondent contravened the directives issued by the National Council of Administrative Justice and the Ministry of Health and that the applicant stands to incur pecuniary and emotional loss if the orders are refused. The above grounds are explicated in the applicant’s supporting affidavit dated 7<sup>th</sup> July 2020. It will add no value to rehash them here.

### **1<sup>st</sup> Respondent’s Notice of Preliminary Objection**

8. The 1<sup>st</sup> Respondent filed a Notice of a Preliminary Objection dated 18<sup>th</sup> September 2020 stating: -

a. ***That*** the application is *res judicata*.

b. ***That*** the application offends section 7 of the Civil Procedure Act.

c. ***That*** the application offends section 99 (4) of the Land Act.

d. ***That*** the application is grossly incompetent and a blatant abuse of the process of this court.

### **The 2<sup>nd</sup> to 5<sup>th</sup> Respondents**

The 2<sup>nd</sup>-5<sup>th</sup> Respondents did not file any responses to the application

### **Determination**

9. From the diametrically opposed positions presented by the parties, and upon carefully analysing the material before me, I find that the following issues distil themselves for determination. *One*, whether the instant application is *res judicata*; *Two*, whether the instant application is an abuse of court process; and, *three*, whether the applicant has established any grounds to warrant the orders sought.

10. M/s Kethi Kilonzo, the applicant’s counsel conceded that the Plaintiff had filed earlier applications seeking temporary injunctions from this court and the Court of Appeal which were not allowed. However, she submitted that a fresh application can be lodged and considered if there are new circumstances and issues because such new circumstances and issues are not covered by the principle of *res judicata*.

11. She argued that this matter was listed for hearing on 22<sup>nd</sup> April 2020, but it was taken out of the hearing because of the COVID19 mitigation restrictions put in place by the Ministry of Health and the National Council for the Administration of Justice, but while the COVID19 mitigation restrictions were in place the 1<sup>st</sup> Respondent engaged the services of Valley Auctioneers to auction the property. She argued that if the intended auction is not stopped, the auction will proceed during the ongoing COVID19 pandemic.

12. M/s Kilonzo argued that the Plaintiff has been placed in double jeopardy because the hearing of her claim has been delayed because of the COVID19 pandemic and the 1<sup>st</sup> defendant threatens to sell her home during this COVID19 period thus exposing her and her family to health risks not contemplated under the repealed Indian Transfer of Property Act and the Land Act. She submitted that if the applicant and her family are exposed to COVID19 as a result of the intended auction and eviction, the likely loss cannot be compensated by way of damages. She argued that COVID19 pandemic is unprecedented and unforeseen and it is a *force majeure* event.

13. She cited *Samuel Koech v Republic*<sup>[2]</sup> in which the court applying the Administrative and Contingency Management Plan to Mitigate COVID19 Guidelines issued by the National Council of Administrative Justice released the appellant from custody earlier than his prison term ended. Also, she cited *Kenya Aviation Workers Union v Kenya Airways PLC*<sup>[3]</sup> in which the court recognized the difficulties that COVID19 had presented to the aviation industry directed the parties to go to conciliation to try and resolve the issues between them. Additionally, M/s Kilonzo cited *Re Application for leave to hold the postponed Law Society of Kenya Annual General Meeting Virtually*<sup>[4]</sup> in which the High Court granted leave to members of the Law Society of Kenya to hold their Annual General Meeting virtually even though virtual meetings are not provided for in the Law Society of Kenya Act.<sup>[5]</sup>

14. She urged the court to temper justice and the law with mercy as has been done in the cited cases arguing that the Plaintiff could not foresee the postponement of her case because of COVID19 nor could she have foreseen her home being auctioned during the same period

thereby exposing her and her family members to health dangers.

15. Mr. Wafula, the 1<sup>st</sup> defendant's counsel cited Section 7 of the Civil Procedure Act[6] and argued that the section explicitly prohibits courts from trying matters between the same parties and over the same subject matter where the same issues have been tried and conclusively decided by a court of competent jurisdiction. To fortify his argument, Mr. Wafula cited *Omulele & Tollo Advocates v Mount Holdings Limited* [7] which held that:-

*“The statutory provision under section 7 of the Civil Procedure Act is clear and bars a court from hearing a suit or issue if the same was substantially in issue in a former suit between the same parties, if the issue was determined in the former suit after a hearing. In this application, the respondents are the applicants just as in the previous application. They have now sought the same reliefs as those they had sought in the former application yet the court (Omollo, J) and the Court of Appeal had already adjudicated on those issues. By virtue of Section 7 of the Civil Procedure Act, this application is barred by the doctrine of res judicata.”*

16. He submitted that a court cannot exercise jurisdiction where the facts in issue in the matter before it has been the subject of another suit in another court of competent jurisdiction between the same parties, over the same subject matter and where the latter court has made a final finding on the same issues. He submitted that the obligation of the court not to assume jurisdiction in such cases is mandatory and not subject to any judicial discretion as evidenced in the use of the term “shall” in section 7 of the Civil Procedure Act.

17. Mr. Wafula submitted that the applicant seeks an order to restrain the 1<sup>st</sup> Respondent from disposing off **L.R 14600**. He argued that the applicant had previously unsuccessfully sought an injunction to restrain the 1<sup>st</sup> Respondent from exercising its statutory power of sale against the same property which application was dismissed by Kimaru J dated 1<sup>st</sup> July 2009. He referred to the Court of Appeal ruling dated 12<sup>th</sup> February 2013 dismissing the applicant's second injunction application. He pointed out that the Court of Appeal was emphatic that the applicant's remedy lies in a claim for damages.

18. Also, he submitted that by a ruling dated 26<sup>th</sup> January 2015, Kimaru J dismissed with costs yet another application filed by the applicant seeking injunctive orders against the 1<sup>st</sup> Respondent pending the hearing and determination of this suit which the applicant admits in paragraph 10 of her Affidavit. He submitted that by dint of section 7 of Civil Procedure Act, this Court is devoid of jurisdiction to entertain the present application. To fortify his argument, he cited *Owners of The Motor Vessel “Lillian S”-vs-Caltex Oil (Kenya) Ltd* [8] and urged this court to dismiss the application.

19. I find it convenient to state that it is trite law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is *res judicata*. If in any subsequent proceedings (unless they be of an appellate nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

20. I can profitably recall the words of **Somervell L.J.** [9] that *res judicata covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.* It is trite law that a litigant will not be allowed to litigate a matter all over again once a final determination has been made. Generally, a party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue. [10]

21. The requirements for *res judicata* are that the same cause of action, for the same relief and 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 involved the ‘determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.

22. *Res Judicata* is one of the factors limiting the jurisdiction of a court. This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again. This doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions. *Res Judicata* can apply in both a question of fact and a question of law. Where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation. [11]

23. A judicial decision made by a court of competent jurisdiction holds as correct and final in a civilized society. *Res judicata* halts the jurisdiction of the court and that is why it is one of the factors affecting jurisdiction of the court. The effect of this is that the court is prevented from trying the case *in limine* i.e. from the beginning. [12] The rule of *res judicata* presumes conclusively the truth of the decision in the former suit. [13]

24. Also known in the US as claim preclusion, *res judicata* is a Latin term meaning "a matter judged." This doctrine prevents a party from re-litigating any claim or defence already litigated. The doctrine is meant to ensure the finality of judgments and conserve judicial resources by protecting litigants from multiple litigation involving the same claims or issues.

25. The doctrine of *res judicata* is provided for in Section 7 of the Civil Procedure Act [14] and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of Section 7 therefore contemplates five 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.[15]

26. In *Gurbachan Singh Kalsi v Yowani Ekori*[16] the former East African Court of Appeal stated as follows: -

**“Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”**

27. However, it is trite that the mere addition of parties in a subsequent suit or omission of a party or party's or introducing a new ground such as the claim the outbreak COVID19, or breach of section 44A of the Banking Act or the Duplum rule as has happened in this suit does not necessarily render the doctrine of *res judicata* inapplicable because a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings or introducing new grounds to secure the earlier refused orders. If the added parties peg the claim under the same title as the parties in the earlier suit, or if the added grounds still stands on the same core grounds to re-litigate the same issues, the doctrine will still be invoked since the addition of a party or citing a new ground would in that case be for the sole purpose of decoration and dressing and nothing else.[17] Perhaps aware of the wrath of the doctrine of *res judicata*, M/s Kilonzo alluded, albeit briefly to COVID19, breach of the Duplum rule and breach of section 44A of the Banking Act as being a grounds to warrant a review of the earlier orders. She stated: - “The applicant also states that the earlier applications for injunctions before this court and the Court of Appeal were not allowed but that the same ought to be reviewed in light of the new circumstances on grounds that the 1<sup>st</sup> Respondent contravened the directives issued by the National Council of Administrative Justice and the Ministry of Health and that the applicant stands to incur pecuniary and emotional loss if the orders are refused.” She also urged the court to consider breach of section 44A of the Banking Act and breach of the Duplum rule as grounds to warrant review.

28. The use of the word *review* by the learned counsel is worth noting. However, before me is not an application for review but a fresh application seeking the same injunction orders which have been refused three times before, twice by the High Court, and once by the Court of Appeal. The applicant cannot evade the wrath of *res judicata* by using the word “review” in an application seeking injunctive orders which have been declined three times. In any event, even if the instant application was seeking to review orders, (which is not the case), the ground(s) cited do not fit within the confines of section 80 of the Civil Procedure Act Order 45 Rule 1 of the Civil Procedure Rules, 2010.

29. The civil justice system depends on the willingness of both litigants and lawyers to try in good faith to comply with the rules established for the fair and efficient administration of justice. When those rules are manipulated or violated for purposes of delay, harassment, or unfair advantage, the system breaks down and, in contravention of the fundamental goal of the Civil Procedure Rules, the determination of civil actions becomes unjust, delayed, and expensive. The applicant’s application offends the doctrine of *res judicata*. On this ground alone, the applicant’s application collapses.

30. I now transit to the second issue, namely, whether, the application before me is a clear abuse of court process. Twice, the applicant unsuccessfully sought an injunction from the High Court seeking to stop auctioning of the same property and once in the Court of Appeal. The instant application is the fourth attempt seeking similar orders. The only new ground is COVID19 outbreak. The instant application presents a worrying trend on increase in cases of abuse of the judicial process.

31. The court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The Black’s Law Dictionary defines abuse as “Everything which is contrary to good order established by usage that is a complete departure from reasonable use. Abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use”.[18]

32. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[19]

33. In several of my determinations citing jurisprudence from various jurisdictions, I have stated that the situations that may give rise to an abuse of court process are indeed in exhaustive. They involve situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. Examples include: -

- a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.
- c. Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
- d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise

issue of fact already decided by court below.

e. Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action. [20]

f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

g. Where an appellant file an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent. [21]

34. Abuse of judicial process is a term generally applied to a proceeding which is wanting in *bona fides* and is frivolous vexations and oppressive. In the words of Oputa JSC, abuse of process can also mean abuse of legal procedure or improper use of the legal process. [22] As Justice Niki Tobi JSC [23]observed, abuse of court process creates a factual scenario where a party is pursuing the same matter by two court process. In other words, a party by the two-court process is involved in some gamble, a game of chance to get the best in the judicial process. [24]

35. A litigant has no right to pursue *paripasu* more than once processes which will have the same effect in two courts either at the same time or at different times with a view of obtaining victory in one of the process or in both. I have in previous decisions stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.

36. Multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. [25] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice. [26]

37. This obstacle to the efficient administration of justice is not immovable. Courts need not and should not wait for lawyers and litigants to initiate proceedings where there is substantial reason to believe that the processes of the court have been abused. Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistent with the good order of society.

38. The concept of abuse of process extends to the use of the court's processes in a way that is inconsistent with two fundamental requirements arising in court proceedings. These are, *first*, that the court protects its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The *second* is that unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence. The court's processes will be seen as lending themselves to oppression and injustice. [27]The concept of abuse of process overlaps with the obligation of a court to provide a fair trial. How can a fair trial be guaranteed when parties drag each other to court over issues which have been litigated and determined between the same parties? By now it's evident that the instant application fits the description of an abuse of court process as delineated in the decided cases discussed above. On this ground alone, the application is fit for dismissal.

39. However, before I exit the discourse on the first two issues discussed above, I wish to comment on the authorities cited by the applicant's counsel in her bid to persuade the court to allow the application citing COVID19 as an unforeseen circumstance which warrants consideration of the orders sought. Counsel cited *Samuel Koech v Republic* ( a criminal appeal), *Kenya Aviation Workers Union v Kenya Airways PLC* (an employment dispute) and *Re Application for leave to hold the postponed Law Society of Kenya Annual General Meeting Virtually*(an application seeking courts permission to hold an Annual General Meeting virtually). The precedential value if any of these cases is in doubt. The instant case is clear. The hurdle placed in front of the plaintiff's case is a doctrine of law, namely *res judicata* which precludes a litigant from re-litigating on a matter that has been judicially determined before. I am unable to find such a legal and highly dispositive issue in the three cases cited. In any event, it is settled law that a case is only an authority for what it decides. This is correctly captured in the following passage: -[28]

*"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides..." (Emphasis added)*

40. The ratio of any decision must be understood in the background of the facts of the particular case. [29] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. [30] A little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. [31]Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. [32]In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. [33] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

41. Not with standing my finding on the above issues, I turn to address the application on merits. M/s Kilonzo submitted that the 1<sup>st</sup>defendant violated, and continues to violate the in Duplum rule under Section 44 A of the Banking Act. [34] She relied on *Scholastica Nyaguthi Muturi*

*v Hosing Finance Company of Kenya Ltd and another*<sup>[35]</sup> in which the Court of Appeal held that a lender cannot recover more than twice the amount loaned for loans that have become non-performing. She submitted that the Plaintiff borrowed **Kshs. 10.5** million from the 1<sup>st</sup> defendant in June 2001, that the loan became non-performing for purposes of Section **44 A** of the Banking Act on 2<sup>nd</sup> November 2005 and the interest and the principal on this date is **Kshs. 20,778,793/-**. She submitted that the 1<sup>st</sup> defendant continued to levy interest until March 2012 when the non-performing loan stood at **Ksh 129,646,330.40**.

42. Ms Kilonzo submitted that the 1<sup>st</sup> defendant claims over **Ksh 129** Million from the Plaintiff arising from a loan of **Kshs. 10.5** Million even after selling part of her assets, namely, Land Reference No. **13824**, and motor vehicle registration no. **KAK 047R** in realization of the **Kshs. 10.5** Million. She argued that whereas Section **44 A** of the Banking Act limits the recoverable amount of a loan to **200%** of the principal and interest from the date the loan became non-performing, the **Ksh. 129** million claimed by the Plaintiff is over **1000%** of the principal and interest borrowed by the Plaintiff after her loan became non-performing. She submitted that the Statements of Accounts are deliberately exaggerated, in violation of the in Duplum rule so that they can be used by the 1<sup>st</sup> defendant as a pretext for the public auction of **LR No. 14600**.

43. She urged the court to consider the ongoing COVID19 pandemic and the contravention of Section **44A** of the Banking Act by the 1<sup>st</sup> defendant as issues of law meriting fresh consideration by this Court and justifying conservatory orders for maintenance of *status quo* until this matter is heard and determined. She argued that Section **44 A** of the Banking Act is a matter of law that does not require pleading and that it can be raised at any time, and, that, it is an issue of law that was not before the High Court or the Court of Appeal when the Plaintiff earlier applied for temporary injunctions.

44. Mr. Wafula was of a different opinion. He cited *Giella v Cassman Brown*<sup>[36]</sup> in which the former East African Court of Appeal held that: -

*“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (E.A. INDUSTRIES -VS- TRUFOODS (1972) EA 420.”*

45. He also cited *Mrao Ltd v First American Bank of Kenya Ltd & 2 others*<sup>[37]</sup> which defined a *prima facie* case in the following terms: -

*“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”*

46. Regarding the alleged contravention of the National Council of Administrative Justice and the Ministry of Health directives, Mr. Wafula submitted that they were not attached to the application, hence it is not clear which one was contravened or the manner in which the said directive has been contravened. He nevertheless, he argued that the general ban on all execution proceedings was lifted long before the applicant filed the instant application.

47. On the alleged failure to serve the Statutory Notice, he submitted that the said issue was addressed by M Kimaru J in his ruling dated on 1<sup>st</sup> July 2019 hence the issue is *res judicata*.

48. Mr Wafula submitted that the applicant's grounds do not meet the threshold of irreparable harm because once property is offered as security it becomes commodity which can be quantified and damages are capable of being awarded. (*Citing Andrew M. Wanjohi-Vs-Equity Building Society & 7 Others (2006) eKLR*).

49. Lastly, he submitted that since the applicant filed this case, she has not repaid the outstanding debt. He argued that the balance of convenience in the circumstance's tilts in favor of declining to grant the orders sought.

50. I have already held that the alleged failure to serve a Statutory Notice is a matter which was raised or ought to have been raised in the earlier applications, hence, its *res judicata*. Similarly, the alleged breach of the Duplum rule suffers the same fate. I will nevertheless address the tests for granting injunctions. The failure to surmount the *res judicata* hurdle means that the applicant's application cannot meet any of the three tests for granting an injunction. The foregoing notwithstanding, I will proceed to examine the whether the grounds cited meet the threshold for the court to grant the order sought.

51. 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.

52. The interlocutory injunction is merely provisional in its nature, and does not conclude a right. The effect and object of the interlocutory injunction is merely to keep matters in *status quo* until the hearing or further order. 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 can satisfy the court that the property should be preserved in its present actual condition, until such question can be disposed of.

53. The onus is on the applicant to satisfy the court that it should grant an 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*[38] the court set out the principles for Interlocutory Injunctions. The principles as laid down in the said case are: -

- 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.

54. The Canadian case of *R. J. R. Macdonald v Canada (Attorney General)*[39] 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”).

55. In *Mbuthia v Jimba Credit Corporation Ltd*[40] Platt JA echoed the “serious question to be tried” test enunciated by Lord Diplock in *American Cyanamid* [41] 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.

56. Perhaps I should recall Lord Hoffman in *Films Rover International Ltd v Cannon Film Sales Ltd*[42] who stated that 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.

57. 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 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.

58. 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. It is sufficient that the plaintiff shows a sufficient likelihood of success to justify in the circumstances the preservation of the *status quo* pending the trial rather than demonstrating that it was more probable than not that the plaintiff would succeed at trial. In *Mbuthia v Jimba Credit Corporation Ltd* (supra) Platt JA 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 parties cases.

59. I can usefully cite *Interlocutory Injunctions: Practical Considerations*[43]:-

*“With some exceptions, the first branch of the injunction test is a low threshold. As stated by the Supreme Court in R. J. R. Macdonald v Canada (Attorney General)*[44]“Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at the trial. Justice Henegham of the Federal Court explained the review as being “on the basis of common sense and a limited review of the case on the merits.”[45] It is usually a brief examination of the facts and law.

*In certain circumstances, the court will impose a more restrictive standard and require the moving party to demonstrate that it has a stronger prima facie case. If the injunction will likely end the dispute between the parties, then the court may hold the plaintiff to this higher standard. Similarly, where the nature of the relief sought is mandatory, or when the question is a question of mere law alone, then this higher standard will apply...”*

60. Applying the principles discussed above to the instant case, it is necessary to recall that the Plaintiff admits having loan arrears. She even gave a figure for the amount due. Her contest I interests levied. This allegation of is attractive. However, that is how far it goes. She will have to prove the allegation at the trial. She will have to prove the alleged breach of the provisions of the Banking Act. This acid test will be surmounted at the trial. Viewed from this perspective, her allegations cannot be said to have disclosed a *prima facie* case with a likelihood of success.

61. The other issue is whether she was served with the Statutory Notice. I have already stated that the said issue is *res judicata*. Viewed from the lens of what constitutes a *prima facie* case, and the available material tendered by both parties, I find no difficulty in concluding that the

applicant has not demonstrated a *prima facie* case with a likelihood of success.

62. The other test is whether the applicant has demonstrated irreparable harm. The following excerpt from *Halsbury's Laws of England*<sup>[46]</sup> 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”*

63. In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured.<sup>[47]</sup> **Robert Sharpe**, in *"Injunctions and Specific Performance,"*<sup>[48]</sup> states that *"irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."* In my view, the applicant has not established that should his case succeed, he cannot be adequately compensated by way of damages. In fact, the contrary is true. In the event of his case succeeding, his loss (if any) can be quantified into monetary terms. Infact the Court of Appeal stated so in clear terms. The applicant has failed to demonstrate irreparable harm.

64. 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.<sup>[49]</sup> 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.<sup>[50]</sup>

65. Thus, 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.

66. 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 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 applied the foregoing tests to this case. It is my conclusion that the balance of convenience is in favour of refusing the injunction.

67. Lastly, as was held in *Njenga v Njenga*<sup>[51]</sup> "an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles."

68. Lord Diplock's re-formulation of the threshold test for an injunction in *American Cyanamid* is so well known that it is pointless reproducing it here. Malaysian courts have interpreted Lord Diplock's speech as involving three steps. In *Keet Gerald v Mohd Noor Abdullah*,<sup>[52]</sup> it was held that a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines. *First*, he must ask himself whether the totality of the facts presented before him discloses a *bona fide* serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand, if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry.

69. *Second*, having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. If after weighing all matters, he comes to the conclusion that the Plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the Plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages.<sup>[53]</sup>

70. *Third*, the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the *status quo*, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board*.<sup>[54]</sup> Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the Plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial.

71. Flowing from my analysis of the facts and the law discussed above and the issues discussed and the determinations arrived at, the conclusion becomes inevitable that the applicant's application is fit for dismissal. It is my finding that the applicant's application is unmerited. Accordingly, I dismiss the applicant's Notice of Motion dated 7<sup>th</sup> July 2020 with costs to the 1<sup>st</sup> defendant.

72. I note that this case has been in court since 2003, a period of 18 years. To me this is unacceptable and goes against the constitutional dictate which requires expeditious resolution of cases. I note that the applicant states that the hearing was disrupted by the COVID19 outbreak. That may be so, but many cases have proceeded to hearing during the pandemic. This case is not an exception. In order to move the case forward, I direct that the parties do fix a date for hearing virtually within 90 days from today.

Orders accordingly

**SIGNED, DATED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 31ST DAY OF MARCH, 2021**

**M. MATIVO**

**JUDGE**

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[1] Act No. 6 of 2012.

[2] {2020} e KLR.

[3] {2020} e KLR.

[4] {2020} e KLR.

[5] Act No. 21 of 2014.

[6] Cap 21, Laws of Kenya.

[7] {2017} e KLR.

[8] 1989 KLR 1.

[9] In *Greenhalgh vs Mallard* (1) (1947) 2 All ER 257.

[10] *Caeserstone Sdot-Yam Ltd vs World of Marble and Granite 2000 CC and others* 2013 (6) SA 499 (SCA) paras 20-21.

[11] <http://www.kenyalawresourcecenter.org/2011/07/res-judicata.html> -Accessed on 16 December 2017.

[12] Ibid.

[13] Ibid.

[14] Cap 21, Laws of Kenya.

[15] See **Lotta vs. Tanaki** {2003} 2 EA 556.

[16] **Civil Appeal No. 62 of 1958.**

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

[18] Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11.

[19] *Public Drug Co V Breyerke cream Co*, 347, Pa 346, 32A 2d 413, 415.

[20] *Jadesimi vs. Okotie Eboh* (1986) 1NWLR (Pt 16) 264.

[21] (2007) 16 NWLR (319) 335.

[22] In the Nigerian case of *Amaefule & other Vs The State*.

[23] *Agwusin vs Ojichie*

[24] *Ibid.*

[25] *Ibid.*

[26] *Ibid.*

[27] *Clark vs R* {2016} VSCA 96 at [14].

[28] *State of Orissa v Sudhansu Sekhar Misra* MANU/SC/0047/1967

[29] *Ambica Quarry Works v State of Gujarat and Ors.* MANU/SC/0049/1986

[30] *Ibid*

[31] *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59)

[32] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, *Prashant Vats v University of Delhi & Anr.* (Citing Lord Denning).

[33] *Ibid*

[34] Cap 488, Laws of Kenya.

[35] {2017} e KLR.

[36] {1973} EA 358.

[37]{2003} e KLR.

[38] {1973} E A 358.

[39] {1994} 1 S.C.R. 311.

[40] {1988} KLR 1

[41] {1975} AC 396 at 407.

[42] {1987} 1WLR 670 at 680-681.

[43] Steven Mason & McCathy Tetrat , available at [www.mccarthy.ca](http://www.mccarthy.ca).

[44] *Supra*

[45] *Dole Food Co. Vs Nabisco Ltd* {2000}, 8 C.P.R. (4<sup>TH</sup>) 461, (F.C.T.D.)

[46]Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.

[47] *Supra* note 3.

[48] Robert Sharpe, *Injunctions and Specific Performance*, looseleaf, (Aura, On: Canada Law Book, 1992), P 2-27

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

[50] *Ibid*

[51]{1991} KLR 401

[52] {1995}1 MLJ 193.

[53] See *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 ).

[54] {1984} AC 130; {1983} 2 All ER 770; {1983} 3 WLR 143.

