



**Infinite Quest Marketing Limited v Choudhy & another (Environment & Land Case E210 of 2023) [2023] KEELC 20862 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20862 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E210 OF 2023**

**JO MBOYA, J  
OCTOBER 19, 2023**

**BETWEEN**

**INFINITE QUEST MARKETING LIMITED ..... PLAINTIFF**

**AND**

**JANE NJERI CHOUDHY ..... 1<sup>ST</sup> DEFENDANT**

**ECOBANK KENYA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction and Background**

1. The Plaintiff/Applicant filed the instant suit vide Complaint dated the 13<sup>th</sup> June 2023; and in respect of which same has sought for a plethora of reliefs, inter-alia, a declaration that the 2<sup>nd</sup> Defendant's purported auction of the Plaintiff's Property, namely, L.R No. Nairobi Block 93/33, is vitiated by collusive conduct between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and is thus null and void.
2. Contemporaneous with the filing of the suit, the Plaintiff/Applicant also filed the Application dated the 13<sup>th</sup> June 2023; and in respect of which same has sought for the following reliefs;
  - i. ....Spent
  - ii. Pending the hearing and determination of this Application, the Interested Party herein be barred from releasing the sum of Kes.21, 000, 000/= Only, to the 1<sup>st</sup> Defendant herein or any other Party.
  - iii. Pending the hearing and determination of this Application, the 2<sup>nd</sup> Defendant herein either by itself, agents, employees or any one acting on its behalf be barred from transferring Land Reference Number Nairobi Block 93/33; to the 1<sup>st</sup> Defendant herein or any other Party.



- iv. Pending the hearing and determination of this suit, the Interested Party be barred from releasing the sum of Kes.21, 000, 000 Only, to the 1<sup>st</sup> Defendant or any other Party.
  - v. Pending the hearing and determination of this suit, the 2<sup>nd</sup> Defendant herein either by itself, agents, employees or any one acting on its behalf be barred from transferring Land Reference Number Nairobi Block 93/33; to the 1<sup>st</sup> Defendant herein or any other party.
  - vi. The costs of this Application be provided for.
  - vii. This Honorable court be pleased to issue any other orders in the Interests of Justice
  - viii. Costs of this Application be provided for.
3. The instant Application is premised on various grounds which have been enumerated in the body thereof. Furthermore, the Application is supported by the affidavit of Fredrick Busolo Simiyu; and further affidavit of the same deponent sworn on the 25<sup>th</sup> July 2023, respectively.
  4. Upon being served with the instant Application, the 1<sup>st</sup> Defendant/Respondent responded thereto vide Replying affidavit sworn on the 4<sup>th</sup> July 2023; whereas the 2<sup>nd</sup> Defendant filed a Replying affidavit sworn on the 27<sup>th</sup> June 2023.
  5. Additionally, the 2<sup>nd</sup> Defendant herein also filed own Application. For good measure, the Application by the 2<sup>nd</sup> Defendant is dated the 27<sup>th</sup> June 2023; and in respect of which same has sought for the following reliefs;
    - i. That the suit herein vide the Plaintiff dated the 13<sup>th</sup> June 2023 be and is hereby struck out.
    - ii. The costs be borne by the Plaintiff
  6. Instructively, the Application under reference is anchored and premised on various grounds, which have been enumerated in the body thereof; and furthermore, same is supported by an affidavit of one, Edith Wanjiku.
  7. Suffice it to point out that the Applications under reference came up for hearing on the 27<sup>th</sup> of June 2023, whereupon the advocates for the Parties covenanted to canvass and dispose of the two (2) Applications simultaneously. Furthermore, the advocates for the Parties also agreed to file and exchange written submissions.
  8. Pursuant to and in line with the agreement by the Parties, the advocates for the Plaintiff proceeded to and filed written submissions dated the 3<sup>rd</sup> October 2023; whereas the 1<sup>st</sup> Defendant filed written submissions dated the 9<sup>th</sup> October 2023. Similarly, the 2<sup>nd</sup> Defendant also filed written submissions dated the 9<sup>th</sup> October 2023.

**Parties' Submissions:**

**a. Plaintiff's/Applicant's Submissions:**

9. The Applicant herein filed written submissions dated the 3<sup>rd</sup> October 2023; and in respect of which same has raised, highlighted and canvassed two (2) salient issues for consideration by the Honourable court.
10. Firstly, Learned counsel for the Applicant has submitted that the dispute before the court relates to a sale agreement dated the 17<sup>th</sup> February 2021; which was entered into and executed between the Plaintiff and the 1<sup>st</sup> Defendant, respectively.



11. Furthermore, Learned counsel for the Plaintiff/Applicant has contended that the named sale agreement contained the terms and conditions which were agreed upon between the Parties. In any event, Learned counsel has added that pursuant to the terms of the sale agreement, the 1<sup>st</sup> Defendant was obligated to pay and/or liquidate the purchase price within 90 days.
12. On the other hand, Learned counsel for the Plaintiff/Applicant has also submitted that the sale agreement also contained a clause which allowed the Plaintiff to rescind the sale agreement, in the event that the 1<sup>st</sup> Defendant did not pay the entire purchase price/ consideration within the 90- day period.
13. Despite the terms of the Sale Agreement, learned counsel for the Plaintiff has contended that the 1<sup>st</sup> Defendant failed to comply with and or abide by the terms of the sale agreement and thus same was entitled to rescind the sale contract.
14. Arising from the foregoing, Learned counsel for the Plaintiff/Applicant has therefore contended that the substratum of the dispute before the court relates to breach of the terms of the sale agreement which was entered into between the Plaintiff and the 1<sup>st</sup> Defendant. Consequently and in this regard, counsel has contended that the dispute beforehand is therefore not a Commercial dispute, either in the manner contended by the Defendants or at all.
15. In view of the foregoing, Learned counsel for the Plaintiff/Applicant has therefore invited the court to find and hold that the dispute rightfully falls within the Jurisdiction of the Environment and Land Court in accordance with the provisions Article 162(2) (b) of *the Constitution* 2010; as read together with Section 13(2) of the *Environment and Land Court Act*.
16. Secondly, learned counsel has submitted that the 2<sup>nd</sup> Defendant herein purported to sell and/or dispose of the suit property in exercise of her statutory power of sale, but which sale was vitiated by collusion, fraud and illegality.
17. Furthermore, Learned counsel has submitted that the Public auction which was allegedly held and/or conducted by the 2<sup>nd</sup> Defendant on the 13<sup>th</sup> April 2023; was botched and thus the resultant sale was invalid and therefore incapable of conferring title to and in favor of the 1<sup>st</sup> Defendant.
18. To the extent that impugned Public auction was illegal and unlawful, Learned counsel for the Plaintiff/Applicant has therefore contended that the Applicant herein, who was the lawful proprietor, has therefore established and demonstrated a prima facie case to warrant the grant of the orders of Temporary injunction.
19. In support of the contention that the Plaintiff/Applicant has demonstrated a basis to warrant the grant of orders of Temporary injunction, Learned counsel for the Applicant has cited and relied on inter-alia the case of Makatiat Ltd vs Liquidation Agent, Trade Bank Ltd (in liquidation) (UR); Maina Wanjigi & Another vs Bank of Africa Kenya Ltd & 2 Others (2015)eKLR and National Bank of Kenya Ltd & 2 Others vs Sam-corn Ltd (2003)eKLR, respectively.
20. Premised on the foregoing, counsel for the Applicant has thus implored the court to find and hold that the Application by the Applicant is meritorious and thus ought to be allowed.
21. Conversely, Learned Counsel for the Applicant has submitted that the Application by and on behalf of the Second Defendant herein and which seeks to strike out the instant suit, is bereft of merits and ought to be Dismissed with costs.



**b. 1<sup>ST</sup> Defendant's Submissions:**

22. The 1<sup>st</sup> Defendant filed written submissions dated the 9<sup>th</sup> October 2023; and in respect of which same has raised and canvassed three (3) issues for consideration by the Honourable court.
23. First and foremost, Learned counsel for the 1<sup>st</sup> Defendant has submitted that the dispute beforehand touches on and/or concerns the suit property which was duly and lawfully charged to and in favour of the 2<sup>nd</sup> Defendant; and which property the 2<sup>nd</sup> Defendant proceeded to dispose of vide Public auction in exercise of her statutory power of sale.
24. To the extent that the subject suit touches on and or concerns the issue of Charge and the manner in which the statutory power of sale was exercised, learned counsel for the 1<sup>st</sup> Defendant has therefore contended that the issue beforehand does not fall within the Jurisdiction of the Environment and Land court.
25. In support of the submissions that the question of Jurisdiction is paramount and thus ought to be dealt with at the onset, learned counsel for the 1<sup>st</sup> Defendant has cited and relied on inter-alia the case of Owners of Motor Vessel Lilian S vs Caltex Oil Kenya Ltd (1989)eKLR, Kalpana H Rawal & 2 Others vs Judicial Service Commission & 2 Others (2016)eKLR and Samuel K Macharia & Another vs Kenya Commercial Bank Ltd & 2 Others (2014)Eklr, respectively.
26. Secondly, Learned counsel has also submitted that the Plaintiff/Applicant had previously filed Nairobi HCCCOM E948 of 2021 between Infinite Quest Marketing Ltd vs Ecobank Ltd and Jane Njeri Choudhy, which suit is still pending before the Commercial Division of the High Court.
27. Furthermore, Learned counsel has contended that the Applicant herein also proceeded to and filed an Application dated the 8<sup>th</sup> December 2021, wherein same sought for inter-alia, orders of temporary injunction with a view to restraining the sale of the suit property by way of public auction in exercise of the 2<sup>nd</sup> Defendant's statutory power of sale.
28. Besides, it has been contended that the Application filed by the Applicant herein was consolidated with an Application filed by the 1<sup>st</sup> Defendant; and both were disposed off vide Ruling dated the 22<sup>nd</sup> December 2022, whose details are well known to both Parties.
29. Based on the foregoing, Learned counsel for the 1<sup>st</sup> Defendant has submitted that the current Application by and on behalf of the Plaintiff/Applicant is therefore prohibited by the Doctrine of Res-Judicata and in particular, the provisions of Section 7 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya.
30. In support of the contention that the Application is barred by the Doctrine of Res-Judicata, Learned counsel has cited and relied on inter-alia the case of Njangu versus Wambugu & Another Nairobi HCC 2340 of 1991(UR); and Kennedy Mokuia Ongiri versus John Nyasende Mosioma & Another (2022)eKLR.
31. Thirdly, Learned counsel has submitted that the Plaintiff/Applicant has neither established nor demonstrated the requisite ground to warrant the grant of an order of temporary injunction, either as sought or at all.
32. Additionally, Learned counsel for the 1<sup>st</sup> Defendant has submitted that the Plaintiff/Applicant has not demonstrated that same has a prima facie case against the Defendant herein to enable same procure an order of injunction.



33. Further and in any event, Learned counsel has contended that the Plaintiff/Applicant has approached the court with uncleaned hands insofar as same has hitherto sought for similar reliefs before the High Court and when the court allowed the said Application and set terms to be complied with.
34. On the other hand, it was also contended that the Plaintiff/Applicant has disregarded the Ruling of the High Court and in particular, failed to comply with the said terms. In this regard, counsel has thus contended that the Plaintiff/Applicant has approached the court with uncleaned hands.
35. In support of the submissions that the Plaintiff/Applicant has not met and/or satisfied the requisite ingredients to warrant the grant of orders of Temporary Injunction, same has cited and relied on inter-alia the case of Caliph Properties Ltd vs Barbel Sharma & Another (2015)eKLR, Mohamed Shally Sese vs Fulson Company Ltd & Another (2006)eKLR, John Njue Nyaga vs Nicholas Njiru Nyaga & Another (2013)eKLR and Peter Kairu Gitu vs Kenya Commercial Bank Ltd & Another (2021)eKLR, respectively.

**c. The 2<sup>nd</sup> Defendant's Submissions:**

36. The 2<sup>nd</sup> Defendant herein filed written submissions dated the 9<sup>th</sup> October 2023; and in respect of which same has similarly raised, highlighted and canvassed three (3) issues for consideration by the Court.
37. Firstly, Learned counsel has submitted that the substratum of the dispute before the court touches on the charge of the suit property to the 2<sup>nd</sup> Defendant and the consequential exercise of the statutory powers of sale by the 2<sup>ND</sup> Defendant over and in respect of charged property.
38. Furthermore, Learned counsel has contended that the Plaintiff/Applicant herein concedes that the suit property was indeed sold vide public auction on the 13<sup>th</sup> April 2023, but contends that the exercise of statutory power of sale was wrought with and fraught of fraud and illegality; and hence same ought to be impeached.
39. Other than the foregoing, Learned counsel for the 2<sup>nd</sup> Defendant has also pointed out that even on the face of the application, the Plaintiff/Applicant is indeed seeking that the 2<sup>nd</sup> Defendant be restrained/prohibited from effecting the transfer and registration of the suit property, which was sold vide Public auction, to the 1<sup>st</sup> Defendant herein.
40. Premised on the foregoing, Learned counsel for the 2<sup>nd</sup> Defendant has therefore submitted that the dispute beforehand is a Commercial dispute which falls within the Jurisdiction of the High Court and not the Environment and Land Court.
41. In support of the submissions that the dispute herein does not fall within the Jurisdiction of the Environment and Land court, Learned counsel for the 2<sup>nd</sup> Defendant has cited and relied on inter-alia Cooperative Bank of Kenya Ltd vs Patrick Kange'eth Njuguna & 5 Others (2017)eKLR and Diamond Trust Bank of Kenya Ltd vs Fatma Hassan Hadi Mombasa Civil Appeal No 18 of 2020(UR).
42. Secondly, Learned counsel has also submitted that the Plaintiff/Applicant herein had filed a previous suit, namely, Milimani HCCCOM No. E948 of 2021; and wherein same also filed an Application seeking orders of Temporary injunction.
43. It is the further submissions of Learned counsel for the 2<sup>nd</sup> Defendant that the Application for temporary injunction filed by and on behalf of the Plaintiff/Applicant was heard and disposed of vide Ruling rendered on the 22<sup>nd</sup> December 2022, whereupon the court allowed the Application and granted various reliefs in favor of the Plaintiff/Applicant.



44. Nevertheless, it has been contended that despite having procured favorable orders from the High Court, the Plaintiff/Applicant herein failed to comply with the terms thereof and thereafter, the default clause which was inserted by the High Court took effect, culminating into the 2<sup>nd</sup> Defendant selling/ disposing of the suit property vide Public auction on the 13<sup>th</sup> day of April 2023.
45. In view of the foregoing, Learned counsel has thus contended that the current Application for Temporary injunction, pertaining to and concerning the same suit Property, is therefore prohibited by the Doctrine of Res-Judicata and in particular, the Provisions of Section 7 of the [Civil Procedure Act](#), Chapter 21, Laws of Kenya.
46. Thirdly, learned counsel for the 2<sup>nd</sup> Defendant has also contended that the issues raised and canvassed at the foot of the instant suit mirror and resemble the issues which are pending before the High Court vide Nairobi HCCCOM No. E948 of 2021; between Infinite Quest Marketing Ltd vs Ecobank Ltd and Jane Njeri Chuodhy.
47. Consequently and in the premises, counsel has therefore invited the court to find and hold that the current suit is also prohibited by the Doctrine of Res-sub-judice; and in particular, the provisions of Section 6 of the [Civil Procedure Act](#), Chapter 21, Laws of Kenya.
48. To highlight the submissions pertaining to and concerning the doctrine of Res-sub-Judice, Learned counsel for the 2<sup>nd</sup> Defendant has cited and relied on, inter-alia, Republic versus Paul Kihara Kariuki, Attorney General & 2 Others Ex-party Law Society of Kenya (2020)Eklr; and Kenya National Commission of Human Rights vs Attorney General; IEBC & 16 Others (Interested Parties) (2020)eKLR, respectively.
49. Arising from the foregoing, Learned counsel for the 2<sup>nd</sup> Defendant has therefore implored the court to find and hold that the suit by and on behalf of the Plaintiff/Applicant is therefore premature, misconceived and otherwise legally untenable. In this respect, counsel has sought to have the suit struck out with costs.

#### **Issues For Determination:**

50. Having reviewed Pleadings filed herein, as well as the various Applications; and upon taking into consideration the written submissions filed by and on behalf of the Parties, the following issues do emerge and are thus worthy of determination;
  - i. Whether the Environment and Land Court is seized of the requisite Jurisdiction to adjudicate upon the subject dispute.
  - ii. Whether the suit beforehand constitutes and or amounts to an abuse of the Due process of the court.
  - iii. Whether the Application for Temporary Injunction is barred by the Doctrine of Res-Judicata.

#### **Analysis And Determination**

##### **Issue Number 1**

#### **Whether the Environment and Land Court is seized of the requisite Jurisdiction to adjudicate upon the subject dispute.**

51. It is common ground that the Plaintiff/Applicant herein approached the 2<sup>nd</sup> Defendant for a banking facility, which facility was duly granted to and in favor of the Plaintiff/Applicant. Furthermore, it was



a condition that prior to the disbursement of the banking facility, the Plaintiff herein was to charge and indeed charged the property known as L.R No. Nairobi/Block 92/33 (hereinafter referred to as the suit property).

52. Upon the disbursement of the banking facility, it was incumbent upon the Plaintiff/Applicant to liquidate same vide instalments in the manner stipulated and/or captured in the charge instrument.
53. Nevertheless, it appears that the Plaintiff/Applicant herein fell into arrears and thereafter the 2<sup>nd</sup> Defendant sought to exercise her statutory powers of sale over and in respect of the suit property. Further and in any event, it is common ground that the suit property has since been sold vide public auction which was undertaken on the 13<sup>th</sup> April 2023, which position has been adverted to by the Plaintiff herself.
54. For good measure, the fact that the suit property has since been sold to and in favor of the 1<sup>st</sup> Defendant is conceded and acknowledged by the Plaintiff/Applicant and hence the various reliefs which are calculated to invalidate both the sale and the consequential transfer of the suit property to the 1<sup>st</sup> Defendant.
55. Suffice to point out that it has been necessary to reproduce the foregoing brief, so as to demonstrate that the dispute before the court actually touches on and concerns the charge which was registered over the suit property; and by extension the exercise of the statutory power of sale by the 2<sup>nd</sup> Defendant.
56. Additionally, it is also important to underscore that the gravamen of the Plaintiff's suit is the desire to challenge/ impeach the entire process culminating into the exercise of the statutory power of sale by the Second Defendant herein.
57. Consequently and from the foregoing, the question that the court must now grapple with, is whether the dispute beforehand is predominantly one that touches on the charge and exercise of the statutory power of sale; and if so, whether such a dispute falls within the Jurisdiction of the Environment and Land court.
58. To my mind, the question of whether issues of charge and exercise of statutory power of sale ought to be adjudicated by the Environment and Land court or otherwise, has been the subject of two notable decision by the Court of Appeal, wherein the court underscored that questions of charge do not constitute use of land; and hence same fall outside the Jurisdiction of the Environment and Land court.
59. Pertinently, the issues of Jurisdiction as pertains to charges and exercise of statutory power of sale was elaborated upon in the case of Co-operative Bank of Kenya Limited versus Patrick Kangethe Njuguna & 5 others [2017] eKLR, where the court held thus;

“41. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land as discussed herein above. Such contracts, in our view, ought to be incidental to the 'use' of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.”

60. Furthermore, whilst discussing whether a charge entails the “Use” of land, the Court of Appeal proceeded to and stated as hereunder;

35. Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land



use entails the application or employment of the surface of the land and/or the air above it and/ or ground below it according to the purpose for which that land is adapted. Neither the *cujus doctrine* nor Article 260 whether expressly or by implication recognizes charging land as connoting land use.

36. By definition, a charge is an interest in land securing the payment of money or money's worth or the fulfillment of any condition (see Section 2 of the *Land Act*). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money's worth. The rights so acquired are limited to the realization of the security so advanced (see Section 80 of the *Land Act*). The creation of that relationship therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor.
37. Further, Section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use. The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be 'using' his land simply by virtue of having a floating charge/disposition over the property.
38. Consequently, the assertion that a charge constitutes use of land within the meaning of Article 162 of *the Constitution* fails. In addition, the cause of action herein was not the validity of the charge, but a question of accounts.
39. Another contention advanced by the appellant was that the dispute fell under the jurisdiction of the ELC on account of Section 13 (2) (d) of the ELC Act. The said section provides that;
  2. In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes-
    - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land;
61. Other than the foregoing decision, the issue beforehand was re-visited by the Court of Appeal in the case of Mombasa, Civil Appeal No. 18 of 2020, Diamond Trust Bank Kenya Limited versus Fatma Hassan Hadi (Unreported), where the court stated as hereunder;

“In the present case, although the Respondent is not privy to the instrument of the legal charge, there is no doubt that what the Respondent is seeking before the ELC is to restrain the Bank from exercising its statutory power of sale. That in our view, following the decision of this Court in *Co-Operative Bank of Kenya Limited vs. Patrick Kang'ethe Njuguna & 5 others* (above), is a commercial matter for adjudication before the High Court. In our view therefore, the judge erred in holding that the ELC was the correct forum and that it was properly seized of the matter.



62. Understandably and even though there is a raging discourse revolving around the import, tenor and scope of Section 13(2) of the *Environment and Land Court Act*, 2011 as well as Section 150 of the *Land Act*, 2012(2016); as pertains to whether Charges constitutes contracts for disposition of an Interests in land; the obtaining position is to the effect that the Environment and Land court is divested of Jurisdiction to entertain and adjudicate upon disputes pertaining to and concerning Charges, Mortgages and by extension, the exercise of Statutory Power of Sale.
63. Instructively, there is no gainsaying that decisions of the Court of Appeal are binding on this Honorable court, unless there is a contrary decision by the Supreme Court of Kenya; (which is not the case), in which event the decision of the Supreme Court becomes overall by virtue of Article 163(7) of *the Constitution* 2010.
64. Additionally, it is important to underscore that the Doctrine of Stare Decisis calls upon this Court to respect and to abide by decisions of Superior Courts, which are hierarchically above same as provided by dint of the Provisions of Articles 163 and 164 of *the Constitution*, 2010.
65. Significantly, the import, tenor and scope of the Doctrine of stare decisis was succinctly enunciated *Dodhia versus National & Grindlays Bank Limited and Another* [1970] EA 195, where Duffus, V.P; expounded the principle as hereunder;

“The adherence to the principle of judicial precedent or stare decisis of utmost importance in the administration of justice in the Courts in East Africa, and thus to the conduct of the everyday affairs of its inhabitant; it provides a degree of certainty as to what is the law of the country, and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of the Court of Appeal and, subject to these decisions, also to the decisions of the High Court in the particular State.”

66. Furthermore, the importance of the Doctrine of stare decisis, was further expounded by the Supreme Court of Kenya,( which is the Apex Court under *the Constitution*, 2010), in the case of *Jasbir Singh Rai & 3 Others Versus. Tarlochan Singh Rai & 4 Others* Supreme Court Petition No. 4 of 2012, [2013] eKLR, where the court held thus;

“Adherence to precedent should be the rule and not the exception ....; the labour of judges would be increased almost to breaking-point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”

67. Arising from the foregoing position, I come to the conclusion that the dispute beforehand, ( which relates to and concerns the Issue of Charge and the Exercise of Statutory Power of Sale), does not fall within the Jurisdictional mandate of the Environment and Land Court.
68. Put differently, this Honourable court is devoid and bereft of Jurisdiction.



## Issue Number 2

### **Whether the suit beforehand constitutes and or amounts to an abuse of the Due Process of the Court.**

69. Notably, the Plaintiff/Applicant herein had previously filed and/or lodged civil proceedings vide Nairobi HCCOM E948 of 2021, between Infinite Quest Marketing Ltd vs Ecobank Kenya Ltd & Another, which suit is still pending hearing and determination.
70. Furthermore, there is no gainsaying that the suit before the High Court, Commercial Division; touches on and concerns the Charge registered over the Suit Property and the consequential exercise statutory power of sale by the Second Defendant herein.
71. To the extent that the Plaintiff/Applicant had previously filed and/or commenced the named civil suit vide Plaint dated the 8<sup>th</sup> December 2021; and coupled with the fact that the said suit is still pending, it was incumbent upon the Plaintiff/Applicant, if need be, to approach the same court for further redress arising from the same subject matter.
72. Nevertheless, despite being aware that there exists the said suit, the Plaintiff/Applicant herein has knowingly filed and/or commenced the instant suit, yet same is knowledgeable of the fact that the substratum/ crux of the subject suit replicates the one that is pending in the previous suit which had been filed before the High Court.
73. Consequently and in this respect, what comes out is the fact that the Plaintiff is keen to file a multiplicity of suits, spread across the various of cadres of courts, namely, the High Court and the Environment and Land Court, (sic) with a view to procuring conflicting orders.
74. Nevertheless and to my mind, once a litigant, the Plaintiff/Applicant not excepted, has filed a suit concerning a particular cause of action before one court, then it behooves the litigant to make the appropriate application before the said court; and more particularly, where the previous court, is seized of and bestowed with the requisite Jurisdiction.
75. Put differently, it would be a legal anathema for a litigant, the Plaintiff/Applicant not excepted, to mount a previous suit before a court with jurisdiction and when same is denied orders, same knowingly proceeds to and files a separate and distinct suit before another court.
76. Clearly, the conduct of filing a multiplicity of suits, denotes and indeed amounts to an abuse of the Due process of the court. Consequently and when the court discerns that her process is being misused and/or otherwise abused, then the court is called upon to stop such a litigant in his/her tracks.
77. Suffice it to point out that what constitutes abuse of the Due process of the court has variously been elaborated upon. In this regard, it is imperative to take cognizance of dictum in the case Muchanga Investments Ltd Versus Safaris Unlimited (Africa) LTD & 2 others [2009] eKLR, where the Court of Appeal observed and held thus;

“In *Beinosi V Wyley* 1973 SA 721 [SCA] at page 734F-G a South African case heard by the Appeal Court of South Africa, Mohomad CJ, set out the applicable legal principle as follows:-

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process.” It can be said in general terms, however, that an abuse of process takes place where the proceedings



permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”

Again the Court of Appeal in Abuja, Nigeria in the case of *Attahiro V Bagudo* 1998 3 NWLL pt 545 page 656, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice.

It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

In the Nigerian Case of *Karibu-whytie J Sc in Sarak V Kotoye* (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-

“The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ...”

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

- (a) “Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action 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 courts 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 a respondent’s notice.
- (d) (sic meaning not clear))
- (e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness.”

We are of the view that the circumstances of the case before us, falls squarely in illustration (e) above, in that there was no valid law supporting the process followed by the respondent.

78. Additionally, the Concept of abuse of the Due process of the court was also amplified by the court in the case of *Satya Bhama Gandhi versus Director of Public Prosecutions & 3 others* [2018] eKLR, where the court held thus;

22. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation 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.[12]
23. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-



- (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.[13]
- (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- (g) Where an appellant files 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.[14]

24. In the words of Oputa J.SC (as he then was)[15] 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 his words abuse of process can also mean abuse of legal procedure or improper use of the legal process.”

25. Justice Niki Tobi JSC observed:-[16]

“that abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants by the two court process were involved in some gamble a game of chance to get the best in the judicial process.”

79. Surely, the Plaintiff/Applicant herein cannot be allowed to propagate and maintain the current suit, whilst at the same time sustaining the previous suit, namely, Nairobi HCCCOM No. E948 of 2021; which touches on the same cause of action. To do so would amount to play lottery with the Due process of the Court and to ridicule the Rule of Law.

80. Before departing from the issue herein, it is also important to point out that vide the Ruling rendered by the Honourable Judge in the cases which was filed before the High Court, namely, the Ruling rendered on the 22<sup>nd</sup> of December 2022; the court allowed the Second Defendant herein to proceed and exercise her Powers of Sale, in the event of default by the Plaintiff and the Interested Party to comply with the terms of the said Ruling.



81. Furthermore, it has been stated by the Second Defendant and there is no denial, that the Plaintiff and the Interested Party failed to comply with the terms of the named Ruling and thus the Second Defendant proceeded to and indeed exercised her Statutory Power of Sale vide Public Auction on the 13<sup>th</sup> of April 2023.
82. Arising from the foregoing, there is no gainsaying that the sale of the Suit Property vide Public Auction, which is now the subject of the instant Proceedings, was actually authorized and sanctioned by the Court in terms of a Court Order, which has neither been varied nor rescinded, whatsoever.
83. Consequently and in the premises, what becomes evident and apparent is that the current suit appears to be calculated to defeat the express Orders issued by the Honourable High Court, albeit through the backdoor and contrary to the established procedure.
84. To my mind, the instant suit is a stark reminder of how Litigants and many a times the Legal Counsel, endeavor to procure conflicting, nay, contradictory Orders from various Courts and thereafter occasion a travesty to Justice, which should be eschewed at all times.
85. Finally, I wish to add that the grant of favourable Orders in this matter may culminate into a situation, where it can be perceived and correctly so; that the Judge of the Environment and Land Court is attempting to superintend a Judge of the High Court by countermanding Orders therefrom.
86. In a nutshell, it is my finding and holding that the instant suit by and on behalf of the Plaintiff/Applicant constitutes an abuse of the Due process of the court, irrespective of the nuance and/ or perspective applied while looking at the Issues raised therein.

### **Issue Number 3**

#### **Whether the Application for Temporary Injunction is barred by the Doctrine of Res-Judicata.**

87. Additionally, there is no dispute that the Plaintiff/Applicant herein had previously filed an Application for temporary injunction dated the 8<sup>th</sup> December 2021; before the Commercial Division of the High Court and in respect of which same sought for, inter-alia, orders of Temporary Injunction to restrain the 2<sup>nd</sup> Defendant herein from selling and/or disposing of the suit property in exercise of her statutory powers of sale.
88. Subsequently, the Application dated the 8<sup>th</sup> December 2021, was heard and disposed of vide Ruling rendered on the 22<sup>nd</sup> December 2022; whereupon the Honourable court issued various orders.
89. Given the significance of the orders that were granted by the Honourable court at the foot of the Ruling delivered on the 22<sup>nd</sup> December 2022, it is appropriate to reproduce same.
90. Consequently same are reproduced as hereunder;
  - i. The Completion period of the Sale Agreement dated the 17<sup>th</sup> February 2021; be and is hereby extended for a further 60 days.
  - ii. That an order be and is hereby issued compelling the Plaintiff (Infinite Quest Marketing Ltd) and/or its advocates (Chepkwon Paul Elkington) to transfer Kes.21, 000, 000/= Only, held on behalf of the Interested Party on account of sale of the suit property to Escrow Account Number 6580010707 within 14 days from the date hereof.



- iii. That the Interested Party is directed to facilitate the payment of the remaining Kes.39, 000, 000/= Only, to be deposited in the Escrow Account Number 6580010707 within 30 days from the date hereof.
  - iv. Thereafter, the Defendant Bank shall apply the proceeds of the sale to the Loan Account and forthwith render a Statement of Accounts to the Plaintiff.
  - v. That if the orders (1, 2 and 3) above are not complied with, the Bank shall be at liberty to exercise its power of sale. Underlining Supplied.
91. Notably and for the avoidance of doubt, the foregoing orders were issued in respect of inter-alia, an Application for temporary injunction which had been filed by and on behalf of the Plaintiff/Applicant herein. In addition, the Orders in question were also made over and in respect of the same suit Property herein.
92. Consequently and in the premises, the issue that then emerge is whether the Plaintiff/Applicant herein can re-agitate an Application for Temporary Injunction over and in respect of the same dispute; and if so, whether the current application is prohibited by the Doctrine of Res-Judicata.
93. Be that as it may and in my humble view, the issues that underpin the current Application replicate; and are substantially the same, as the ones which informed the previous Application for temporary injunction.
94. In the circumstances, once the previous court dealt with and adjudicated upon the issue of Temporary injunction, then it suffices to point out that the same question and or issue of Temporary Injunction, cannot be re-agitated in a subsequent suit.
95. Nevertheless, if the issue of Temporary injunction, which had been canvassed and adjudicated upon in a previous suit is raised afresh; then the issue must be confronted with the Doctrine of Res-Judicata, which bars the re-litigation of a matter that has hitherto been adjudicated upon by a court of competent Jurisdiction.
96. To underscore the significance of the Doctrine of Res-Judicata, it suffices to cite and reiterate the holding of the Court of Appeal in the case of Kenya Commercial Bank Limited versus Benjoh Amalgamated Limited [2017] eKLR, where the court observed and stated as hereunder;
- “To our mind, there is no better case in which the Court ought to invoke the doctrine of constructive res judicata than in the present appeals. Constructive res judicata is broader and encompasses all the issues in a dispute which, a party employing due diligence ought to have raised for consideration. To allow Benjoh to relitigate, re-agitate and re-canvass any issues, no matter how crafted or the legal ingenuity and sophistry employed and in spite of the plethora of cases already conclusively determined by competent courts on the question of accounts, would be tantamount to throwing mud on the doctrine of res judicata and allow a travesty of justice to be committed to a party. The specific issue the respondent raises of rendering true and proper accounts to a customer’s accounts, has been or could have been raised before the High Court in the previous suits.”
97. In view of the foregoing, I hold the firm view that the current Application for Temporary Injunction is indeed barred by the Doctrine of Res-Judicata and by extension the provisions of Section 7 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya.



**Final Disposition:**

98. Arising from the discussion in terms of the preceding paragraphs, I come to the conclusion that the suit beforehand has not only been mounted before a court devoid and bereft of the requisite Jurisdiction; but same also amounts to an abuse of the Due process of the court.
99. Consequently and in view of the foregoing, I find and hold that the 2<sup>nd</sup> Defendant's Application dated the 27<sup>th</sup> June 2023; is meritorious, whereas the Plaintiff's Application dated the 13<sup>th</sup> June 2023, is stillborn.
100. In view of the foregoing, I now make the following orders;
- i. The Plaintiff's Application dated the 13<sup>th</sup> June 2023; be and is hereby Dismissed with costs.
  - ii. The 2<sup>nd</sup> Defendant's Application dated the 27<sup>th</sup> June 2023; be and is hereby allowed.
  - iii. The Plaintiff's suit be and is hereby struck out.
  - iv. The Plaintiff shall bear the costs of the Application dated the 27<sup>th</sup> June 2023; as well as the costs of the suit.
101. Finally and for the sake of clarity, the orders of Status Quo which had hitherto been granted in favor of the Plaintiff, be and are hereby vacated, set aside and/or discharged.
102. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF OCTOBER 2023.**

**OGUTTU MBOYA,**

**JUDGE.**

In the Presence of:

Ms Esther An'gawa holding brief for Mr. Nelson Havi for the Plaintiff/Applicant.

Mr. Kimiti for the 1<sup>st</sup> Defendant/Respondent.

Mr. Dache for the 2<sup>nd</sup> Defendant/Respondent.

