REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERCIAL AND ADMIRALITY DIVISION

CIVIL SUIT NO 566 OF 2013

MWAMBEJA RANCHING COMPANY LIMITED…………………….........PLAINTIFF

Versus

KENYA NATIONAL CAPITAL CORPORATION

LIMITED (KENYAC)..1ST DEFENDANT

NATIONAL BANK OF KENYA LTD…………….…………….....PROPOSED 2ND DEFENDANT

Title by Way of Counterclaim

KENYA NATIONAL CAPITAL CORPORATION LIMI……..………………..PLAINTIFF

Versus

MWAMBEJA RANCHING COMPANY LIMITED..............…1ST DEFENDANT

MAJANI MINGI SISAL ESTATE LIMITED……………….…….2ND DEFENDANT

LOMOLO (1962) LIMITED………...……………………..……….3RD DEFENDANT

HARRIS HORN JUNIOR…………..…………………...……….4TH DEFENDANT

PROJECT ADVISORY SERVICES LIMITED..............…...…5TH DEFENDANT

RULING

[1] I have before me the Plaintiff's application dated 3rd June 2014. The significant orders sought are inter alia;

1. ***Pending the hearing and determination of this suit, an order do issue inhibiting the registration of any transfer, lease, charge or any other instrument whatsoever in respect of Land Reference Number 16659 CR No 22939 currently registered in the name of Shimbaland Ranching Company Limited or any other person that may have registered and interest prior to registering***

this order.

2. ***Leave be granted to the Plaintiff to amend the Plaint in the manner shown in the draft Amended Plaint exhibited to the affidavit and join National Bank of Kenya and Shimbaland Ranching Company Limited as the 2nd Defendant and 3rd Defendant respectively.***
3. ***The firm of Rachuonyo & Rachuonyo Advocates do forthwith cease appearing as an advocate for Kenya National Capital Corporation.***
4. ***The Defendant to produce evidence of payment regarding the sum of Kshs 305,000,000/- a reflected in the summary of the statement of account dated 30th November 2012.***
5. ***Damaris Wanjiku Gitonga be summoned to be cross examined on her Supporting Affidavit sworn on 31st March 2014 in support of the Notice of Motion dated 31st March 2014.***
6. ***Costs of this application to be borne by the Defendant.***

[2] The application is expressed to be brought under Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 1 Rules 3 & 10, Order 8 Rules 3 & 5 and Order 19 of the Civil Procedure Rules, Rule 9 of the Advocates (Practice) Rules, Section 177 of the Evidence Act, Sections 25 and 36 of the Land Registration Act, 2012, Section 97, 98 and 106 of the Land Act, 2012 and all other enabling provisions of the law. The application was predicated upon the grounds adduced therein. Parties agreed the points for determination are on inhibition of suit property and joinder of parties. I will consider those two points and deliver a determination.

[3] The major arguments offered in support of the application are: 1) That Land Reference Number 16659 CR No 22939 (hereinafter the referred to as the suit property) was sold at a gross under value; 2) That the said sale was in contravention of the provisions of the Land Act, thereby making the sale illegal, null and void ab initio; 3) That in the interest of justice, the Plaintiff should be allowed to amend the Plaint to enjoin Shimbaland Ranching Company Ltd and the National Bank of Kenya as parties to the suit; and 4) That the deponent in the affidavit sworn and filed on 31st March 2014 Damaris Wanjiku Gitonga, be summoned to court and be cross examined on the same.

[4] The application was supported by the affidavit of Harrison Horn Junior sworn and filed on 3rd June 2014. The affidavit reinforces the above grounds. It is deposed that the National Bank of Kenya and Kenya National Capital Corporation (hereinafter referred to as KENYAC), had recklessly, negligently and carelessly sold off and transferred the suit property to Shimbaland Ranching Company Ltd. Therefore, they were in breach of the mandatory obligations and contravened the Land Act as pertains to exercise of statutory power of sale. Further, it was averred that the sale of the suit premises had discrepancies, whose particulars have been set out.

[5] The Plaintiff also filed submissions dated 23rd June 2014 on 24th June 2014. With regards to issues, the Plaintiff submitted that the court had the power under Section 68(1) of the Land Registration Act to issue an order of inhibition. On this they relied upon the dicta in the case of **Falcon Properties Ltd v Tom Chore Odiara & 2 Others [2013] eKLR** where the court held that:-

> ***This application is brought under the provisions of the Land Registration Act of 2012 which provided as follows in section 68:***
>
> ***(1) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.***
>
> ***(2) A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.***
>
> ***(3) An inhibition shall not bind or affect the land, lease or charge until it has been***

registered.

It is clear from these provisions that the power granted to the court are discretionary, and is to be exercised when there is good reason to preserve, or stay the registration of dealings, with respect to a particular parcel of land for a temporary period. There is no requirement that the Plaintiff must show a prima facie case before an inhibition can issue, and the general principle that will apply is that the discretion is exercised judicially by being exercised in good faith, for a proper purpose, takes into account all relevant factors and is reasonable in the circumstances of the case.

[6] The Plaintiff in an attempt to demonstrate that joinder of the proposed parties is feasible, gave a brief background of the dispute. They submitted that the Plaintiff's land was charged to the Defendant who never executed an assignment or transfer of charge in favour of the National Bank of Kenya Ltd. In the absence of any assignment or transfer of charge, the National Bank of Kenya Ltd purportedly and thus, illegally sold the Plaintiff's land to Shimbaland Ranching Company Limited. In the absence of a duly executed assignment/transfer of charge, NBK had no legal capacity to sale a property charged to KENYAC. Again, the charged property which was valued at Kshs. 550 million was purportedly sold for Kshs. 305 million and which price was later was unilaterally reduced to Kshs. 256 million. The sale was about 50% of the market price contrary to Section 97 of the Land Act 2012. A sale by private contract under Section 97(3) of the Land Act 2012 can only at market value. No valuation report has been produced to counter the Plaintiff's valuation by Lloyd Masika that put the market value at Kshs. 550 million. Therefore, under Sections 97 & 98 of the Land Act the court is permitted by law to declare such a sale a nullity ab initio. They relied on the case of **Ben Mwangi Kihia v National Bank of Kenya [2005] eKLR** where Kasango J held as follows at page 6:

''I therefore find and hold that the defendant has failed to show on a balance of probability that the Plaintiff's debt with KENYAC was assigned to it. That being my finding I also find that there is no contractual relationship between the plaintiff and the defendant and the defendant has no legal power to sell the plaintiff's property.''

The Plaintiff also submitted that no evidence of receipt of the sale proceeds has been exhibited. Also, such other issues as whether a statutory notice was issued arises which makes it is necessary to enjoin National Bank of Kenya and the purchaser Shimbaland Ranching Company Limited in order to enable the court determine the issues fully. Upon being satisfied that joinder of the proposed parties is meritorious, the court should allow amendment of Pleadings in order for the parties to bring forth the whole of their case in court. On amendment and joinder of parties, the Plaintiff relied on the case of **John Gitau Mungai v Stephen Kabebe & Others [2014] eKLR**.

[7] On res judicata, the Plaintiff submitted that the Plaintiff's land had never been sold in the past. The issues being raised in the Plaint and the draft Amended Plaint have never been canvassed in the past. They cannot, therefore, be res judicata. They relied on the case of the Court of Appeal **Kenya Hotel Properties Limited v Willisden Investments Limited & 6 others [2013] eKLR.** And also the decision by Ringera J (as he then was) in the case of **Kanorero River Farm Ltd & 3 Others v National Bank of Kenya Ltd [2002] 2 KLR 207** where he held as follows:

a. ***A fresh injunction application grounded on new facts is not precluded by the doctrine of res judicata- see page 20.***
b. ***No party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages.***

THE DEFENDANT'S CASE

[8] The Defendants opposed the application and filed three (3) replying affidavits; the first one is sworn and filed on 9th June 2014, the second sworn and filed on 1st July 2014 and the third

sworn and filed on 2nd July 2014 by the 1st Defendant (hereinafter referred to as KENYAC), Proposed 2nd Defendant (hereinafter referred to as NBK) and intended 3rd Defendant (hereinafter referred to as Shimbaland Ranching) respectively.

1st Defendant's Case

[9] KENYAC in a Replying Affidavit of Paul Chelang'a sworn and filed on 1st July 2014 averred that the matter of the sale of the suit property had been fully adjudicated upon by both this Court and the Court of Appeal. It stated that enjoining the intended parties to the suit will not serve any purpose as the Plaintiff had already sought and claimed its remedies against the disclosed principal, who executed the transfer and continues to exist as a legal entity. It was further deposed that there was no requirement of assignment of security as alleged by the Plaintiff.

The 2nd Proposed Defendant's Case

[10] The NBK filed a Replying Affidavit by Samuel Wanjohi Mundia sworn and filed on 9th June 2014. They averred that the Plaintiff has continuously engaged NBK in extremely hopeless, vexatious, spurious a piece-meal and multiple litigation; whose sole purpose is to avoid the debt rightly and justly due to NBK. NBK was of the view that there is no legal basis for enjoining NBK and the purchaser of the suit property. They also argued that the issue of joinder had already been previously determined by both this Court and the Court of Appeal. Further, it was averred that the Plaintiff had not disclosed any cause of action or culpability in any illegality against the parties it seeks to enjoin, which in any event would unnecessarily escalate the costs of litigation.

[11] Joint submissions were filed for both KENYAC and NBK on 1st July 2014. It was submitted that there was no legal or equitable interest or justification for the prayer sought for injunction. They reiterated that there is no cause of action as against the disclosed principal and relied on the cases of the Court of Appeal in **Civil Appeal No 247 of 2005 Victor Mabachi & Another v Nurtun Bates Ltd (2013) (Unreported)** and **Civil Appeal No 2 of 2007 Keiran Day & 5 Others v Ceres Estates Ltd (In Receivership) (Unreported)** to buttress their contentions.

Intended 3rd Defendant's Case

[12] Shimbaland Ranching filed a Replying Affidavit of Mohamed Adan sworn on 2nd July 2014. it was deposed that NBK had taken over the management and control of the affairs of the KENYAC through Gazette Notice No 3481 of 25th June 1999 and that by Clause (c) of the sale agreement, NBK had the capacity and authority to enter the sale of the suit property on behalf of KENYAC. It further deposed that Shimbaland Ranching was a *bona fide* purchaser for value; paid the required purchase price and the suit property was transferred to its name free of any encumbrances. It was further reiterated that the Plaintiff had not disclosed any reasonable cause of action against Shimbaland Ranching Ltd and that the application was not only frivolous, but also vexatious and scandalous and ought to be dismissed.

[13] Shimbaland Ranching Limited filed submissions dated 12th September 2014 on 17th September 2014. In those submissions, Shimbaland Ranching Ltd argued that the Plaintiff had neither fulfilled the conditions in **Giella v Cassman Brown & Co. Ltd (1973) EA 358** on interlocutory injunction, nor the grounds reiterated in **Suleiman v Amboseli Resort Ltd (2004) 2 KLR 589** on irreparable loss. They submitted that the sale of the suit property was conducted in exercise of a statutory power of sale, and that as such the only remedy available to the Plaintiff was damages. In this connection, they relied upon the cases of **Simon Njoroge Mburu v Consolidated Bank of Kenya Ltd (2014) eKLR** cited in the case of **Bomet Beer Distributors v Kenya Commercial Bank Ltd & 4 Others (2005) eKLR** and **Ze Yung Yang v Nova Industrial Properties Ltd (2003) 1 EA 363**.

THE DETERMINATION

Questions to be determined

[14] With the consent of the parties, the Court, on 10th June 2014, directed that the only issues to address were two. These issues were; (1) the prospects of issuance of an inhibition on the suit property; and (2) joinder of parties. The Court will, therefore, determine those two issues.

[15] I have considered all the arguments by parties in their written as well as oral submissions to Court. I have also considered all the judicial authorities and other legal materials presented before me. And I take the following view of the matter. The Plaintiff relied on the provisions of law as set out in the face of the application, and on Section 68 of the Land Registration Act. Of great significance on the request for an order of inhibition is Section 68(1) of the Land Registration Act which reads as follows;

> ***The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.***

The case of **Japhet Kaimenyi M'ndatho v M'ndatho M'mbwiria [2012] eKLR** dealt with the threshold for granting orders of inhibition in aa pointed manner as follows;

> ***"In an application for orders of inhibition, in my understanding, the applicant has to satisfy the following conditions:-***

a. ***That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless Preservatory orders of inhibition are issued.***
b. ***That the refusal to grant orders of inhibition would render the applicant's suit nugatory.***
c. ***That the applicant has arguable case."***

[16] Orders of inhibition envisaged under section 68 of the Registration of Land Act are in the nature of prohibitory injunction and act to preserve the suit property just as an interlocutory injunction would do. This comparison of the tenor and core of inhibition order to an injunction is important in this case as it shall become clear shortly when I shall be discussing the defence of *res judicata*. On this, I am content to refer to the decision by Okwengu, J (as she then was) in the case of **Philip Mwangi Githinji v Grace Wakarima Githinji (2004) eKLR** when she rendered herself *inter alia*;

> ***"An order of inhibition issued under section 128 of the Registered Land Act is akin to an order of prohibitory injunction for it restricts the registered owner and any other person from having their transaction regarding the land in question registered against the title. Before the court can issue such an order it must be satisfied that the person moving the court for such orders has good grounds for requesting such an inhibition, such grounds would normally be in the form of a sustainable claim over the suit land."***

Therefore, as an inhibition restrains any dealings in the suit property, res judicata would preclude an applicant from re-litigating on a future application for injunction or inhibition based on similar facts as previous injunction applications which had been dealt with by the Court conclusively. Is this application *res judicata?*

[17] The Defendants contended that the Plaintiff had filed similar applications which were canvassed and determined by the Court. Section 7 of the Civil Procedure Act reads;

> ***No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the***

same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. *(Emphasis added).*

[18] Both KENYAC and NBK in their replying affidavits reiterated that the issue of injunction had been conclusively determined in previous matters that had been instituted between the parties and the Plaintiff. This was in relation to **HCCC No 225 of 1998** in which the Plaintiff made several applications for injunction, to wit; Chamber Summons dated 10th June 1998, Chamber Summons application dated 4th February 1999, Chamber Summons application dated 26th July 1999 and Chamber Summons dated 10th April 2002. Okwengu, J (as she then was) determined Chamber Summons application dated 13th October 2006, and she dismissed the Plaintiff's prayer for injunction. The decision by Okwengu J (as she then was) was upheld by the Court of Appeal in **Civil Application No 40 of 2008 (U/R 22 of 2008)**. The learned judges of the Court of Appeal noted that the Plaintiff had filed several suits being **HCCC No 693 of 1996 (OS)**, and **HCCC No 619 of 1999** which were similar in nature to **HCCC No 225 of 1998** and in which the Plaintiff sought similar orders which were dismissed by both Ransley, J (as he then was) and Okwengu, J (as she then was). The Court of Appeal also noted that the Plaintiff had come under different provisions of the law but seeking the same orders that had been denied in other earlier applications by the Court. Of great importance here, please note the sentiments of the Court of Appeal on the incessant and numerous applications that the Plaintiff had made when it stated;

"It will not escape anybody's observation that although this application was brought under several provisions of the law, the main thrust is that it was essentially an application seeking another injunction order. A rose flower by any other name will smell the same. The application was heard by the superior court (Okwengu, J) who in a ruling dated and delivered on 29th February 2008 dismissed it with costs stating inter alia as follows:-

"To date, almost (10) years after the Plaintiff's suit was filed, the Plaintiff has made no effort to have this suit finalized nor has it made any payment. The upshot of the above is that the Plaintiff has failed to establish a prima facie case with a probability of success. The Plaintiff has also proved unworthy of any equitable relief. The Plaintiff's prayer for an interlocutory injunction must therefore fail. As regards the prayer to withdraw the suit against the 2nd Defendant, the same was not opposed and is accordingly granted. The upshot of the above is that the Plaintiff's application dated 13th October 2006 is dismissed except prayer 3 which is granted.""

Now; a reading of the provisions of Section 7 of the CPR, together with the decisions by the various Courts of concurrent and appellate jurisdiction, calls the principle of *res judicata* into play. The facts on which this application is sought are substantially the same as those on which injunction was sought previously. The fact that there has been a sale of the suit property does not change the core argument that NBK did not have a charge over the suit land. I will, however, address that issue later in detail. And in such case, the court is barred from hearing a matter or issue which it considers *res judicata*. This was the gist of the ruling of Ogola, J in the Preliminary Objection application dated 19th January 2008 in opposition to the Plaintiff's application dated 18th October 2011 in **Civil Case No 486 of 2010 (O.S)**. In the circumstances, it will be contrary to the law to grant an order of inhibition. I decline to grant it. See the decision of Nyamweya J in **Wilson Waithaka Gitau v Kenya Winston Company Limited [2013] eKLR.**

[19] Again, res judicata has been pleaded as a defence against the application for joinder of parties. I note that the Court of Appeal conclusively dealt with the issue of joinder in its rendition supra. Also, Okwengu, J (as she then was) allowed prayer no 3 for the dismissal of the suit against the 2nd Defendant in Civil Suit No 225 of 1998; the 2nd Defendant in that case was NBK. The present application seeks to enjoin NBK as a party to the suit. I will fall back to Order 1 Rule 3 of the Civil Procedure Rules which provides that;

All persons may be joined as defendants against <u>whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist</u>, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise. *(Emphasis added).*

[20] NBK and Shimbaland Ranching submitted that the application to enjoin them is ill timed and misguided, and that in any event, no benefit whatsoever would be derived from such enjoining. In accordance with the provisions of Order 1 Rule 3 of the Civil Procedure Rules, as read together with Rule 10 sub-rules (1) and (2) thereof, the Court may order for the enjoining of a party, or substituting a wrongfully enjoined party to a suit, if it is deemed to be appropriate in the circumstances. The proposed parties especially NBK pleaded that it acted on behalf of a disclosed principal, i.e. the Defendant which is a party in the suit and still in existence. I agree. The law as I understand it is that, where the principal is disclosed you cannot sue the agent. See the decision of the Court of Appeal **Victor Mabachi & Another Vs. Nurtum Bates Limited [2013] eKLR, Civil Appeal No. 247 of 2005 (unreported).** All issues in this case will be resolved as between the Plaintiff and the Defendant. Redress on improper exercise of statutory power of sale shall be obtained against the Defendant. The cause of action and relief due to the Plaintiff on the entire circumstances of this case is complete as against the Defendant and it is does not at all cry for completeness which only can be found in the joinder of NBK or the purchaser of the suit property. Courts have expressed themselves in a great number of cases that s*ection 99 of the Land Act now statutorily encompasses the right of the chargor prejudiced by unauthorized, improper or irregular exercise of the power of sale to have a remedy in damages against the person exercising the power. And that it is prudent for aggrieved chargors to always refer to the powers of the Court in respect of remedies and relief as set out under section 104 of the Land Act, 2012.* See the decision by Havelock J in **Simon Njoroge Mburu v Consolidated Bank of Kenya Ltd [2014] eKLR.** The same view was taken by the court of appeal in **Jacob Ochieng Muganda v. Housing Finance Company Limited Civil Application No. NAI 453 of 2001** and **Princillah Krobought Grant v. Kenya Commercial Finance Company Limited & 2 others Civil Application No NAI 227 of 1995.** The Plaintiff has not really shown the intended parties are necessary parties and that their joinder in the suit would enable the Court to determine the real issues in question completely and effectually. In any event, the issues of joinder of parties were conclusively adjudicated upon and decided by Okwengu, J (as she then was) and the Court of Appeal. They are moot and fall foul of the principle of *res judicata* under Section 7 of the Civil Procedure Act.

[21] To say the least, although the Plaintiff has been zealous to seek justice, but the filling of numerous applications under different provisions of the law seeking same relief is not appropriate way of exerting a *bona fide* zeal by a litigant. Such path may be interpreted to be an attempt to confuse the Court and circumvent its clear intellect on justice in this matter. As was reiterated by the Court of Appel, a rose by any other name will smell the same. The Plaintiff is attempting to re-litigate a matter that has on several occasions been canvassed before, and determined by this Court and the Court of Appeal. I too as a court of law must exert the noble desire to bring litigation to a closure as part of administration of justice. Res judicata serves a noble cause in the administration of justice- brings finality to litigation and avoids parties vexing others on the same matter over and over again under craft of pleadings. See the case of **Kenya Hotel Properties Limited v Willisden Investments Limited & 6 others.** The proposed amendment of plaint in so far as they relate to joinder of parties fall by the way side as joinder has been declined. That is perfectly the case here. The upshot of all the foregoing is that, the application by the Plaintiff dated 3rd June 2014 in so far as it relates to inhibition, joinder of parties and the proposed amendment thereto of the plaint, is not meritorious and is hereby dismissed with costs to the Respondents.

Dated, signed and delivered in court at Nairobi this 25th day of March 2015

F. GIKONYO

<u>JUDGE</u>