REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALY DIVISION

CIVIL CASE NO. 560 OF 2013

TWIN BUFFALO SAFARIS LIMITED……....……..PLAINTIFF

Versus

BUSINESS PARTNERS INTERNATIONAL LIMITED…..….DEFENDANT

RULING

Two Applications: Dismissal of suit and amendment of plaint

[1] There are two applications before me for determination. The first application is made by the Defendant; it is dated 17th July 2014 and is seeking for this suit to be dismissed. The other application is dated 2/12/2014; it has been made by the Plaintiff and is seeking for injunctive relief, and amendment of the plaint to provide for a prayer for setting aside the purported sale of L.R No. Dagoretti/Ruthimitu/835- (hereafter ''the suit property''). I propose to start with the application to dismiss the suit for obvious reasons; it will determine whether I should determine the other application which is interlocutory and saddles upon the suit.

Dismissal of suit

[2] The Defendant has applied for this suit to be dismissed. The Motion is expressed to be brought under Order 2 Rule 1 Sub rule 1, Order 2 Rule 3 sub rules 4 and order 2 rule 15 sub rules 1(a), 1(b) and 1(c). It is supported by a Supporting Affidavit and a Supplementary Affidavit sworn by Sally Gitonga. The Defendant submitted that it granted the Plaintiff a facility totalling Kenya Shillings Fifteen Million (Kshs. 15,000,000), consisting in a loan of Kenya Shillings Ten Million (Kshs. 10,000,000); a Hire Purchase Loan of Kenya Shillings Five Million (Kshs. 5,000,000); and Royalties amounting to 0.5% of actual or projected monthly turnover for the full term of the Loan. The facility was secured by a legal charge for the amount of Kenya Shillings Twenty Million (Kshs. 20,000,000) on Title number **Dagoretti/Ruthimitu/835** [hereinafter Charged Property]. The Respondent defaulted in its loan repayment obligations and despite several indulgencies by the Applicant, the Respondent remained in default and did not redeem its property. As a result of the default, the Defendant issued a statutory notice of its intention to exercise its statutory power of sale. The debt and liability is admitted by the Respondent in its pleadings as well as letters written by it. Although the Respondent had made some payments towards settling the debt, it continued in breach of the Loan and Royalty Agreements and adamantly refused to pay the loan, interest and finance charges as agreed. The last payment made by the Respondent was on 8 October 2013 in the sum of KES 341, 000.00.

Arguments by the Defendant

[3] The Defendant argued that, the Plaintiff was denied injunction to stop sale of the suit property by this Court and the Court of Appeal. This denial of injunctive relief came after the Plaintiff failed to disclose reasonable cause of action, and so existence of this case is but a source of prejudice to this honourable court as well as the Applicant. The prayers have been overtaken by events. The Defendant in lawful exercise of its statutory power of sale instructed auctioneers who sold the property. Therefore, this suit should be dismissed with costs. The relief sought is injunction to stop the sale of the suit property. This suit is in the circumstances an abuse of the process of the court. Ironically, the Plaintiff in an email dated 5th February, 2014 sought a further accommodation of 150 days to find a suitable buyer of the property and committed itself to paying all outstanding amounts herein. But the Plaintiff did not fulfil the said promises or undertakings. The Plaintiff is, therefore, being dishonest in its quest for relief. The question on interest or reconciliation has never been raised for in issue. The rate of interest is subject to change under Clause 5.2 of the Loan Agreement and this is communicated in the monthly Statements produced by the Plaintiff among their supporting documents which bears the interest rate at 19%. Clause 13 of the Loan Agreement provides for default and states that upon the borrower failing to pay its dues, the loan shall become immediately due and payable together with interest and all other charges calculated up to the end of the term set out in clause 6, the repayment of loan clause.

[4] The Defendant went further to state that it is important to note that, several gratuitous adjournments were allowed in favour of the Plaintiff on the promise that it was securing a buyer of the suit property to pay off the debt. In fact the Respondent once presented a Sale agreement before the Hon Havelock J arguing that the same was pending execution. The adjournments were given on various dates including; on 17th January 2014, 19th February 2014, 25th February 2014, 5th March 2014 and on 4th of April 2014. On the 19th day of June, 2014 J. B. Havelock J delivered his Ruling on the Respondent's application for injunction in which he stated inter alia that the Respondent has not established a prima facie case with probability of success and that the balance of convenience leans towards the Applicant; the Honourable Judge declared the said application to be unmeritorious and dismissed the same with costs to the Applicant herein. The Plaintiff continued to file applications up to the Court of Appeal. It did not pay the sum ordered by the Court of Appeal of Two Million Kenya Shillings [Kshs. 2,000,000.00] and auctioneer charges by the 1st of September, 2014.

[5] Despite all the indulgencies, the Plaintiff has not paid the debt. The indulgences were extended upon the request by the Plaintiff, which is a trait of dishonourable behavior by the Plaintiff. The statutory notice is proper as it meets all the requirement of the law. The terms of the Loan Agreement expressly stated that upon default in payment and upon receipt of notice, the entire loan, interests and finance charges fell due and were immediately payable by the Plaintiff to the Applicant. According to the Defendant, the outstanding amount to date is Kshs. 19, 671, 368.53 plus interest at 19% p.a. The entire sum remains unpaid to date. The Plaintiff has not paid in court the said amount claimed as to warrant restraining of exercise of statutory power of sale. The injunction pending appeal expired and the auctioneers are lawfully and progressively working towards the sale of the charged property by public auction. Indeed there was an attempted auction of the charged property at Kshs. 32,500,000.00 which failed: the valuation thereto was done by Crystal Valuers Ltd. The supposed valuation by the Respondent at Kshs. 50,000,000.00 evinces the gimmicks employed to invoke and abuse the court's jurisdiction as they have not tendered any valuation thereto.

[6] The Defendant argued that the issues for determination in this application are;

a. ***Is the Applicant entitled to the facility amount, the interest accrued and finance charges on the Respondent's loan account?***
b. ***Does the Plaintiff's/Respondent's suit fail to disclose a reasonable cause of action known in law, as against the Defendant/Applicant?***
c. ***Is the Respondent's suit similarly scandalous, frivolous and vexatious and consequently an***

abuse of the process of Court?

d. ***Is the Respondent's response measuring up to a legitimate and justifiable ground warranting a denial of the dismissal of its suit?***
e. ***Is the alleged unlawful consolidation of accounts demonstrated by the Applicant in respect of the secured facility?***
f. ***Is there correspondence between the Parties acknowledging the debt, and pointing to the imminent sale of the subject property: by either the Respondent to repay the debt and in default by the Applicant to relies the financed sum?***
g. ***Doesn't the debt being acknowledged by the Plaintiff/Respondent and the request for sale being the two [2] primary prayers negate any supposed uncertainty or dispute on the debt due?***
h. ***Isn't the Respondent's suit; in light of the unquestioned realization process and acknowledged debt; scandalous, frivolous and vexatious and consequently an abuse of the process of Court?***
i. ***Is the Respondent's conduct including extraction of summons one [1] year later, an apparent indication of the lax and merely vexatious nature of the suit?***

[7] The Defendant cited the law and other specific clauses which support the position they have taken. According to clause 4.2 and 4.3 of the Royalty Agreement, the borrower is to immediately pay Business Partners an amount equal to the Royalty for the unexpired period of the full term of the loan together with all outstanding Royalties at the time of cancellation, which is calculated at 0.5% of the actual or projected monthly turnover. They relied on the case of **National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & Prof Samson K Ongeri [2001]eKLR** where the Court of Appeal judges quoted and analysed the case of **Harilal & Company & another vs. The Standard Bank Limited (1967) E.A. 512** and observed that:

> ***"... the case was a clear case in which the plaintiffs borrowed some money from the bank and defaulted in payment. They made use of this money and must surely pay back ... in these <u>transactions of borrowing and lending each party must comply with the conditions of contract</u> ... A <u>court of law cannot re-write a contract between the parties</u>. The <u>parties are bound by the terms of their contract</u>, unless coercion, fraud or undue influence are pleaded and proved."***

[8] The Defendant took the view that, on the basis of the foregoing, this suit does not disclose a reasonable cause of action; it has no chance of success. See what reasonable cause of action entails in **Time Magazine International Limited & 2 Others vs Rotich & Another (2000) KLR 544** and **D T Dobie Vs. Muchina Court of Appeal No 37 of 1978** where the Court of Appeal expressed itself *inter alia* as follows:

> ***"'Reasonable cause of action' means a cause of action with some chance of success when (as required by paragraph 2 of the Order 6 rule 1) only the allegations in the plaint are considered. <u>A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint</u>…"***

[9] They stated that this suit is merely scandalous, frivolous and vexatious and consequently an abuse of the process of Court. See what Ringera J (as he then was) said about a pleading or action that is frivolous and vexatious in the case of **Trust Bank Limited v Amin Company Ltd & Another** (2000) KLR 164 that:

> ***"A pleading or an action is <u>frivolous</u> when <u>it is without substance or groundless or fanciful</u>; and is <u>vexatious</u> when <u>it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses</u>. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or <u>which states immaterial matters and raises irrelevant issues which may involve expenses</u> which will prejudice the fair trial of the action"***

Further illumination was done in the case of **Kiama Wangai V John N. Mugambi & Another [2012] eKLR,** by ***G.V. Odunga J*** that:

> ***"…the word <u>"scandalous"</u> for the purposes of striking out a pleading under Order 2 rule 15 of the Civil Procedure Rules <u>is not limited to the indecent, the offensive and the improper</u> and THAT DENIAL OF A WELL-KNOWN FACT CAN ALSO BE RIGHTLY DESCRIBED AS SCANDALOUS. [Emphasis ours] See J P Machira vs. Wangechi Mwangi vs. Nation Newspapers Civil Appeal No. 179 of 1997… a pleading or an action is <u>frivolous</u> when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and <u>tends to cause the opposite party unnecessary anxiety, trouble and expense.</u> See <u>Bullen & Leake and Jacobs Precedents of Pleading (12thEdn.) at 145...</u> A pleading is an <u>abuse of the process</u> where it is frivolous or vexatious or both..."***

[10] According to the Defendant, the Plaintiff omitted to plead that it willfully sought a loan facility from the Plaintiff which was granted and the parties entered into a Loan Agreement. it avoided to plead that it defaulted on the repayments thereof, thus, breached the Agreement and to date has not repaid the sum claimed by the Plaintiff. this suit is vexatious and frivolous as it was instituted despite repeated admission of indebtedness herein and so was aimed only at delaying the lawful exercise of the Defendant's statutory power of sale of the charged property. The suit is also a source of prejudice and undue inconvenience to the Defendant. On the question of prejudice and undue inconvenience on a Party, see what the **Honourable F. Gikonyo J** observed in the case of **Ajit Singh Virdi v J.F. McCloy [2014] eKLR** that**:**

> ***"… Prejudice to the plaintiff entails <u>delayed benefits of the law and unnecessary costs being occasioned on the plaintiff.</u> Prejudice to the administration of justice entails <u>wasting of court's precious time and impediment to the court's ability to deliver on the overriding objective</u>; i.e. a fair, just, affordable, proportionate and expeditious resolution of disputes."***

They urged that, in whole, the suit is ultimately an abuse of the court's process and is aimed at prejudicing both the Applicant and this Honourable Court as it is prejudicial to the administration of justice. As such, Order 2 Rule 15 (1) of the Civil Procedure Act comes in handy when it provided that;

> ***"At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that it discloses no reasonable cause of action or defence in law, or if it is scandalous, frivolous or vexatious, or may prejudice, embarrass or delay the fair trial of the action or it is otherwise an abuse of the process of the court, and may order the suit to be stayed or <u>DISMISSED</u> or judgment to be entered accordingly, as the case may be."***

See the case of **E.M.S Vs Emirates Airlines [2012] eKLR Honourable G. V. Odunga** held that:

> ***"Whereas the essence of the said provisions (Order 2 Rule 15 of the Civil Procedure Act) is the striking out of a suit, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit tried by a proper trial ... However <u>where the suit is without substance or groundless or fanciful and or is brought or is instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process</u>, the court will not allow its process to be as a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases"***

And **<u>D.T Dobie & Co. Ltd v Muchina</u>** (supra) that;

> ***"…the Court of Appeal analyzed the issue of striking out of proceedings and deduced therefrom the principles that govern the Court's inherent and unfettered power to strike out a pleading which were: (a) that the remedy that should only be exercised in the clearest of cases, in plain and obvious cases where the pleadings in question were unsustainable; (b) it is a power to be exercised with extreme caution and that it is a strong power to be sparingly exercised."***

The Defendant took the view that, contrary to the submissions by the Plaintiff, the dismissal of this suit will not prejudice the Plaintiff. The Plaintiff has relied on misrepresentations in order to sustain this suit. The terms of the loan agreement herein were mutually agreed upon and executed. The prayer for an Order for accounts is a 'naked' averment devoid of substance. The Plaintiff is trying to re-write the agreement of the parties. The debt is admitted and the Plaintiff even sought in **Prayer (b)** of the plaint:

> ***"An Order directing that the Plaintiff herein be given time to sell the property Title number Dagoretti/Ruthimitu/835 by private treaty".***

The first sale aborted but the subsequent one was successful sale with due transfer of title to a bona fide purchaser for value. The sale lawfully took place on the 11th of November, 2014 by way of a public auction in tandem with a valuation report in respect of an inspection carried out on the 8th of October, 2014. The Plaintiff's contest on the value of the sale does not vitiate or otherwise invalidate the sale. Further, those contentions on value cannot be introduced in this suit by way of amendment as proposed in the Motion dated the 2nd of December, 2014; they form a completely different and unrelated cause of action for damages which cannot be combined with this suit. Their remedy is strictly in damages sought is a fresh suit. Therefore, this suit should be dismissed with costs.

The Plaintiff said suit should be sustained

[11] The Plaintiff stated that this suit should be sustained. The suit seeks for the following prayers:-

a. ***Permanent injunction retraining realization of L.R. No. Dagoretti/Ruthimitu/835 (hereafter referred to as the suit property).***
b. ***An order seeking time to sell the suit property by private treaty.***
c. ***An order for accounts to be taken.***

It application seeking a temporary injunction to stop sale of the suit property was heard and determined by **Havelock J.** who dismissed it on the 19/6/2014. The Plaintiff has appealed against the said order of **Havelock J.** and the appeal is pending hearing and determination. The Plaintiff took issue with the grounds of the application as advanced by the Defendants. They submitted that those ground do not meet the legal threshold for striking out a suit. See the case of **Kiama Wangai vs. John Mugambi (2012) eKLR** in which the court adopted the proposition in **Barclays Bank Of Kenya vs. Dominic Dufu & Others HCCC No. 2064 of 2000** that:-

> ***"…the power to strike out pleadings was draconian ought to be sparingly exercised and used only in exceptional cases."***

And the case of **D.T DOBIE V. MUCHINA & ANOTHER Civil Appeal No. 37/1978 (1980) eKLR** where the court stated that:-

> ***"If a suit show a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward a court of justice ought not to act in darkness without the full facts before it."***

And also Article 159 b of the Constitution 2010; "*Justice shall be administered without undue*

regard to procedural technicalities."

[12] The Plaintiff is convinced that the plaint in Paragraph 10 is clear it agreed *to sell the property to raise funds for settlement of the Defendants claim and sought time to find a suitable buyer of the property. The Plaintiff also claims taking and reconciliation of account as* Prayer C for *purposes of reconciling the penalties /interest against royalties."* Prayer 5 of the application dated 18/12/2013 – also seeks for *an order for accounts to be taken on the loan account, averred that the amount taken was Kshs. 15,000,000/- only and not Kshs. 20,000,000/-."* These are real issue in controversy which should be given an opportunity. In addition, the Plaintiff submitted that the pleadings are yet to close; the Defendants are yet to file its defence and the Plaintiff a reply to defence. And discovery and exchange of documents is yet to take place. Therefore, the Defendants application to dismiss the suit for being an abuse of court process and for being frivolous, vexatious and scandalous is premature and ill-conceived. At this stage, the court cannot be able to carry out an examination of the papers before the court, yet the Defendants arguments in support of its application dated 18/7/2014 are calling for such an inquiry, thus, this suit is not a clear, plain and obvious one which should be determined summarily.

[13] The Plaintiff believes that its appeal is pending and it has high chances of success. The instant application is therefore premature in view of the pending appeal and in view of the fact that the orders sought shall have the effect of determining the appeal. The court, therefore, lacks jurisdiction to hear and determine the appeal. Further under the doctrine of judicial precedent and seniority the matters pending before the appeal court ought to be heard and determined first. In any case, the Plaintiff submitted that the plaint raises a reasonable cause of action as per the test in **D.T Dobie V. Muchina & Another.** And according to the case of **Kiama Wangai vs. John Mugambi** the plaint is not scandalous at all as *Matters contained are not indecent; not offensive; not for mere purpose of abusing the other party; not immaterial or unnecessary containing imputations against other party; not degrading charges; are necessary and not accompanied by immaterial details; and do not deny existence of a well-known fact"*. Similarly, the Plaintiff averred that the pleadings are not or suit is not frivolous as it has *substance; is not fanciful or trifling or a waste of courts time or incapable of logical and well-reasoned argument. It is not hopeless or offensive or one that causes opposite party unnecessary anxiety trouble or expense"*. The suit is not also vexatious or one without *foundation or some chance of succeeding or brought merely for purposes of annoyance or to gain a fanciful advantage or one that can lead to no possible good"*. They also refuted that the suit is an abuse of the process of court. The remedies sought in the plaint/suit are not limited to preservation of the suit property. The remedies sought include a prayer for orders of account to be taken on the four separate and distinct loan accounts. This prayer was included in the plaint. The Plaintiff has raised a valid complaint of breach of the contract regarding **consolidation** of accounts and variation of interest which complaint ought to be heard on merit. The Plaintiff has raised a valid complaint on illegality of the contract and lack of express permission and authority by the Defendant under the Central Bank of Kenya Act to levy the specific interest and vary it. The Orders sought in the Plaint have neither been overtaken by events nor extinguished by the sale of the property. The permanent injunction sought as Prayer A in the Plaint is still capable of being granted as **no auction took place on 2/9/2014 as alleged**. The Plaintiffs equity of redemption as a remedy remains alive and has not been extinguished as no sale **occurred on 2/9/2014**. Further to the foregoing the Orders sought above are capable of enforcement. Any deficiencies in the pleadings can be rectified by amendment as per **D.T Dobie vs. Muchina & Another** case**.** Further, **SHAH, J.A** in the case of **Fina Bank Limited vs. Spares & Industries Limited (Nairobi Civil Appeal No. 51 OF 2000) (Unreported)** stated

> ***"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, …"*** this court has discretion to apply equity after due consideration of all the circumstances in this case, which circumstances can only be determined during a full hearing on merit.

[14] The Plaintiff asserted that, failure to serve summons to enter appearance does not warrant dismissal of a suit especially in this circumstances where Memorandum of Appearance and a

Statement of Defence has been filed. The Proper test is whether the Defendant has suffered any prejudice as was applied in both cases of **Tejprakasha Shem V. Petroafric Company Limited & 2 Others Nairobi High Court ELC 703 of 2011** and in **Kimonjo Family Court Limited V. Kimonjo Family & Partners Limited & 3 Others Nairobi Hccc 532 of 2003.** Notwithstanding paragraph II summons were duly extracted on 8/7/2014 served albeit late which does not prejudice the defendant. Therefore, the Defendants application dated 18/7/2014 has no merit and should be dismissed with costs.

COURT'S DETERMINATION OF APPLICATION FOR DISMISSAL OF SUIT

[15] Courts have said time and again that dismissing a suit summarily should be done sparingly and only on clearest of cases. See the case of **D.T. Dobie**. A clear case which should be a perfect candidate for striking out is one which, on examination of the averments in the plaint or counter-claim, obviously do not disclose any reasonable cause of action, or is frivolous, or vexatious, or scandalous or an abuse of the process of the Court. Discernment of such clear case should be readily easy and in plain sight of the Court by merely looking at the pleading. This approach has received sufficient judicial enunciation and the grounds I have stated have also been given sufficient interpretation. I need not re-invent the wheel or multiply the cases on the point, except to cite some few. Odunga J in **E.M.S Vs Emirates Airlines [2012] eKLR** gave a summary as follows:

> ***"Whereas the essence of the said provisions (Order 2 Rule 15 of the Civil Procedure Act) is the striking out of a suit, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit tried by a proper trial ... However where the suit is without substance or groundless or fanciful and or is brought or is instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be as a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases"***

[16] The Defendant has claimed that this suit has been overtaken by events especially after the suit property was sold. If all things remain constant, this could be a clear ground on which a suit can be dismissed. But, it must be shown without much probing of evidence that the sale of the suit property completely decimated the suit, and therefore, allowing the suit to proceed will be a waste of court's precious time and a source of great prejudice to the Defendant. Perusal of the plaint reveals that, it carries other prayers, to wit, taking and reconciliation of accounts in the various accounts within the facility granted. The request for accounts is not necessarily lost simply because the suit property was sold. Such are independent reliefs which will survive the sale of the suit property. I, therefore, agree with the Plaintiff that these orders are still capable of canvassing and enforcement despite the sale of the suit property. Other important complaints include allegations of illegal interest for failure to obtain the requisite permission to vary and charge such varied interest from the Central Bank of Kenya. These complaints are not overtaken by the sale of the suit property as they can be canvassed and resolved independently except depending on the evidence tendered. I do not, however, wish to express any opinions on these matters at this stage so as to avoid hurting a trial which may ultimately be had on the case.

[17] That notwithstanding, I will not close before I resolve a clear misconception on the part of the Plaintiff arising from their submission that the application to dismiss this suit is premature because there is a pending appeal arising out of an interlocutory decision on injunction by Havelock J. The appeal is on an interlocutory relief and cannot preclude the Court from exercising jurisdiction on the suit on such matters as application for dismissal of suit or hearing

the suit altogether. The only lawful prohibition from continuing with the suit in all respects is one occasioned by a stay of proceedings granted by the Court. Therefore, in the absence of an order for stay of proceedings, it is a fallacy to state that, by entertaining the application or granting the relief thereto, the Court will be determining the appeal filed herein. Accordingly, where good reasons and legal justification exist, there is absolutely no legal prohibition upon the power of the Court to dismiss the suit. Having stated the foregoing; I find that this is not a clear and obvious case which can be dismissed summarily. Accordingly, I dismiss the application for dismissal of suit. I sustain the suit. It is so ordered.

Application for amendment and injunction

[18] Now that the suit is not dismissed, I should determine the application dated 2/12/2014. The said application carries numerous prayers but which can be summarized as injunctive relief and amendment of plaint to provide for the setting aside of the sale conducted on 11th November, 2014. Their argument is that the Auction on 2/9/2014 aborted but on 11/11/2014 the defendant fraudulently and improperly proceeded to sell by public Auction the suit property when there were no bidders at all and to make matters worse, sold the suit property at a gross undervalue which prompted the plaintiff to move to court through its application dated 2/12/2014. The Plaintiff has formulated the issue it thinks fall for determination as follows;

a. ***Was the purported Auction conducted on 11/11/2014 fraudulent improper and illegal.***
b. ***Was the property sold at a gross under value?***
c. ***Was there a breach of section 89 and 97 of the Land Act No. 6 of 2014 Laws of Kenya?***
d. ***Is the plaintiff likely to suffer irreparable harm not compensable by an award of damages****?*

[19] The application dated 2/12/2014 is supported by two affidavits; the Supporting and Supplementary Affidavits sworn by Margaret Wamaitha Ruiyi on 2/12/2014 and 21/1/2015 respectively. The gist of the affidavits is that the purported sale was never conducted at all; no bidders were present and so the sale is, therefore, fraudulent, improper and illegal *ab initio*. Also, the sale is illegal as the suit property was sold at a gross undervalue for Kenya Shillings Twenty Four Million Five Hundred and Ten Thousand Only (Kshs. 24,510,000/-) instead of the current market value. In his Replying Affidavit the defendant has failed and deliberately omitted to state the details and particulars under which the Auction was conducted. They only admit having sold the property but remain economical with the truth for failing to disclose full details of the Auction and whether there was a bid and the 25% deposit was ever paid. The Plaintiff urged that the defendant's preliminary objection on the application on the ground that the issue is *res judicata* is misconceived and does not apply here as the matters being raised have not been determined in another or this suit. See Section 7 of the Civil Procedure Act Cap 21 and Halsbury's Laws of England Fifth Edition Volume 12 pp 56 to 75, especially paras 1168 & 1171. *Res subjudice* does also apply as matters of the purported sale by public auction on 11/11/2014 are not issues pending before the Court of Appeal. On this basis, the Plaintiff suggested that the plea for amendment of the plaint is necessary to bring the new facts occasioned by the defendant's actions by the auction sale into the suit so that all the issues in controversy may be dealt with in the same suit once and for all. See Order 8, rule 5 of cap 21. They relied on the provisions of the Land Act 2012 in section 97(2) which requires a forced sale valuation of property in order to establish the current market value to be undertaken before selling the property by auction. This current value should be the reserved price. The chargee owes the duty of care to the Plaintiff. Section 97 of the *Land Act, 2012* as read with Article 27(1) of the constitution 2010 shows that the Defendant violated this duty by attempting to sell the suit property at a price much below than its commercial and market value. Unless the Defendant is restrained, the property will be transferred yet the sale was fraudulent. There are improvements thereon which make the value huge than the one it was sold for. Conservatory orders are necessary to prevent transfer to a third party. They drew the attention of the Court to the case of J**oseph Giro Morsioma** ***vs*** **Housing Finance Company of Kenya (2008) eKLR** where it was held that damages are not automatic remedy when deciding whether to grant an injunction or not, and cannot be substitute for loss occasioned by a clear breach of the law. And the case of **Sharok Kher Mohamed Ali** ***vs*** **Southern Credit Banking Corporation**

Limited which was cited with approval in the case of **Kwanza Estates Limited *vs* Dubai Bank Kenya Limited (2013) eKLR** where the court held,

> ***"I am satisfied that a party deprived of his property through an illegal process would suffer irreparable loss and or damage. In any case a party entitled to a legal right cannot be made to take damages in lieu of his right. In essence the damages and or loss that would be suffered by the plaintiff would be significant if an injunction is not granted. My position is that a party in contravention of the law cannot be rewarded for his contravention"*. Such illegal sale should not be given a chance at all.**

See also the cases of **Alice Awino Okello *v* Trust Bank Ltd & Anor LLR No. 625 (CCK)** in which the Court of Appeal had declared: ***"the balance of convenience is in favour of the Applicant as the sale of one's property is a serious matter that deprives one of a right recognized in law and as such should not be allowed to proceed on doubtful circumstances."***

[20] In its conclusion, the Plaintiff submitted that it has established the 3 requirements for the granting of an interlocutory injunction pending the hearing and final determination of this suit. They also prayed for the Amendments of pleadings as prayed. The Plaintiff maintained that there is sufficient cause for the exercise of this Court's discretion in granting the orders sought.

The Defendant opposed amendment and injunction

[21] The Defendant urged the Court to decline the request for amendment of pleadings and for injunction. It took out a preliminary objection to the effect that the matters on which the application rests arise out of the lawful exercise of statutory power of sale after the Plaintiff fell into default on the facility herein. A statutory notice was properly issued and served upon the Applicant dated the 12th of June, 2013. Notification of Sale was served after several indulgencies to the Plaintiff. Consequently the proposed sale by way of Public Auction was variously advertised on the 27th of October, 2014 and thereafter a subsequent advertisement on the 10th of November, 2014 producing a successful sale. A professional valuation was carried out by Crystal Valuers Ltd and dated the 29th of November, 2013 which fixed the value of the property at Kshs 32.5 Million and a forced sale value at Kshs 24.5 Million. On the 11th day of November, 2014 the Respondent successfully completed the sale of property Title No Dagoretti/Ruthimitu/825/Ruthimitu/Township at the value of Kshs 24,510,000/=. The Plaintiff has now applied for injunctive relief against the transfer of the suit property to the purchaser on wrong and misconceived reasons, that:-

i. The property was supposedly sold concealing and secretly; and
ii. The property has supposedly been sold at an under value.

[22] The Defendant urged that the due process has been followed in completing the sale and the transfer is being unduly restrained; secondly to restrain a transfer on account of alleged undervalue is unavailable in law to the Applicant; the Application is littered with inconsistencies, tainted hands and untrue statements. Transfer is reserved to the Chargee under the Land Act, Cap 280 and further as contracted between the chargor and chargee. The issues, therefore, are;

1) Whether there is a legal right held by the Plaintiff in respect of Sale and Transfer:-

2) Whether the remedy of injunction is available to an alleged sale at an undervalue *vis-à-vis the protection of a purchaser.*

3) Without prejudice to issues no (i) and (ii) whether the Application is *Res sub judice*, by seeking to retry the exercise of the right to appropriate and dispose of the subject appropriate while the same is pending before the Court of Appeal in

Civil Application No 184 of 2014 [UR 143 of 2014]; and

4) Without prejudice to issues no (i), (ii) and (iii) whether the Application is Res Judicata by seeking to retry the injunction on the exercise of the right to statutory sale already heard and determined by the Hon Mr Justice JB Havelock in a Ruling delivered on the 19th June, 2014

[23] The Defendant submitted that the Plaintiff has made various allegations of fact which are not premised on any legal right [*express or inferred*]. The exercise of the statutory power of sale by the Defendant has previously been brought before the trial and appellate Courts. The sale is also lawful and beyond question having complied with all requirements imposed by law. Default was not purged at all necessitating the sale. All necessary notices were issued before sale. The Defendant observed Section 97(1) and procured a recent valuation in order to obtain the best possible price. Section 97(2) requires that the Chargee shall procure a forced sale valuation undertaken by a valuer before completing a sale. A valuation report dated 29th November, 2013 is produced as SG-6 to the Affidavit of Sally Gitonga dated the 20th of January, 2014. The consequent sale completed was above the forced sale value. Section 98 of the Land Act is important as it provides for the powers incidental to a Chargee once the power of sale has crystalized. Further Section 98(2) thereof provides that the sale by public auction must be publicly advertised. The Applicant has in its Affidavit dated 2nd December, 2014 attached true copies of the advertisements in the Daily Nation dated the 27th of October, 2014 and 10th of November, 2014 produced as marked **MR-3**. The advertisement having been preceded by a Notification of sale made on the 27th of June, 2014; well over the **forty [40] day** limit required under the Land Act, No 6 of 2012. The Plaintiff's averments in the affidavit sworn by Margaret Ruiyi at Paras 11, 12 and 14 demonstrates a good understanding of the events leading up to the sale and the allegation of "concealing" as against the Respondent is without basis. Paragraph 14 of the affidavit of Margaret Ruiyi dated 2nd December, 2014 averred that during the auction only two [2] bidders were present. This is affirmed by the Certificate executed by Mr Thomas A.K Rutto, Advocate, which at paras 1 he observes that there were two [2] bidders present. However, mischievously so, at paras 9 of the submissions the Plaintiff allege that there were no bidders present. This is dishonest averment aimed at misleading the Court. An injunction to restrain a transfer arising out of the sale on the 11th of November, 2014 is unjust as it would deny the Defendant the right to realize security. A sale which is alleged to be at an under value only gives rise to relief in damages and not a restraint of the transfer. See the decision by G.V. Odunga, J. in **Peter Kamau Ikigu Vs Barclays Bank Kenya Ltd & Another [2013] eKLR** in following the Court of Appeal in **Priscillah Krobought Grant Vs Kenya Commercial Bank Ltd & Others [1995] KLR 4098** observed that the sale of charged property in exercise of a statutory power of sale, at an undervalue is in law an irregularity that can only be remedied by way of damages and not an injunction. Also in **Kiran Ramji Kotedia vs. Trust Bank Ltd HCCC No 1319 of 1999(UR)** where the Hon Mulja J found that

> "…***non-compliance with the provisions of Rule 15 of the Auctioneers Rules would not invalidate a sale and would not by itself entitle the Applicant to an injunction***…"

Ringera J (as he then was) in **Jacob Ochieng Muganda vs. Housing Finance Company of Kenya Ltd HCCC 1436 of 1999** held that irregularity on the part of the auctioneer in respect of the timelines for notification cannot invalidate a sale and the remedy of a person who can prove he has been damnified by the irregularity would be damages against the auctioneer as per Section 26 of the Auctioneers Act.

[24] The Defendant cited section 99 of the Land Act on the protection of a bona fide purchaser for value without notice. Section 99(4) is instructive as it posits thus:

> ***"(4) A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising the power***."

The Court of Appeal rightly held in **Priscillah Krobought Grant Vs Kenya Commercial Bank Ltd** (supra) that,

> "***where a charge had exercised its statutory power of sale and caused the property to be sold by public auction the remedy of the Chargor was a claim for damages if she would prove that there was an improper or irregular exercise of the statutory power of sale".***

See also **John Mwenja Ngumba Vs Kenya Commercial Bank Ltd & Another [2006] eKLR** and **Ze Yu Yang Vs Nova Industrial Products Ltd [2003] 1 EA 362**, that *the sale of a charged property extinguishes the Plaintiff's equity of redemption and has no remedies touching on the charged property.* No injunction can therefore lie as against the sale or transfer of the subject property. Further, under **Section 104** of the Land Act, provides the power of the Court in respect of remedies and reliefs, none of which extends to the nature of **"restraining" or** in any way fettering the finalization of a sale and transfer.

[25] The Defendant also submitted on *Res Subjudice or Res Judicata.* They stated that the application is bad in law. They cited Nyarangi, JA. in **Owners of Motor Vessel "Lillian S"Vs Caltex Oil (K) Ltd [1989] KLR 1**

> ***I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.***

The Court does not have jurisdiction to restrain neither the sale nor the transfer. On this see also **Seven Seas Technologies Ltd Vs Eric Chege [2014] eKLR.** The Court is obliged to refrain from venturing into a retrial of issues already heard and determined by the Hon Mr Justice Havelock of equal jurisdiction and competence: which decision is the subject of the Appeal pending Hearing and determination. The power of sale has arisen and sale has taken place; cannot be restrained. The Plaintiff has remained in default and has deliberately misled the Court; it has tainted hands and is not in any position to file the application for injunction. **Giella Vs Cassman Brown [1973] EA 358** has not been satisfied. The objection should succeed and refuse the application. The proposed amendments constitute a new cause of action and should be canvassed in a fresh suit.

DETERMINATION ON AMENDMENT AND INJUNCTION APPLICATION

[26] The law on amendment of pleadings is now settled and cannot be called upon to justify itself. There is ample judicial authority on it but I am content to echo the words of Gicheru J.A in the case of **Central Kenya Limited vs. Trust Bank Limited and 5 Others, Civil Appeal NO. 222 OF 1998**:-

> ***"…that a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side".***

[27] Amendments of pleadings should be freely allowed except where the amendments introduce new or inconsistent cause of action, or affects or takes away a vested interest or accrued right or defence, or prejudices the other party. The Defendant has argued that the proposed amendment especially one that seeks to make provision for a prayer on the setting aside of the sale of the suit property introduces a new and inconsistent cause of action to the plaint. I agree that the amendment will introduce a new and inconsistent cause of action. The general rule is that, a

chargor who is damnified by an irregular or improper sale of the charged property will have a remedy in damages. See sections 99 and 104 of the Land Act. See also Section 69B (2) of the Transfer of Property Act (now repealed). The rationale behind these provisions is to protect the title of bona fide purchaser for value without notice from being impeached on irregularities committed by the chargee except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice lest rights of purchasers of charged property should always be at the mercy of chargors or absence of an application to set aside the sale by the chargor. Just in passing, I can make a shrewd guess at the wounded pride of a land owner who cannot fathom losing it to another who purchased it through a forced sale under the chargee's statutory power of sale. It is no new observation, I believe, that a purchaser of charged property in most cases has no rival so much to be feared as the chargor. I would liken the un-paralleled jealousy of a chargor in relation to his land to that of wounded pride of the father of the bride. See Charles Lamb in his superb literary writing, ***The Wedding.*** Therefore, the law averted placing the purchaser of the charged property in such awkward scheme of things by providing for some protections. These protections carry constitutional as well as statutory weight and should always bear on the decision of the court when determining matters affecting the rights of a bona fide purchaser for value. On the other hand, the law does not leave a damnified chargor without a remedy; it provides for a remedy and the manner of applying and against whom. Accordingly, allowing an amendment of the existing plaint which is between the chargee and the chargor in the manner proposed by the Plaintiff and in total disregard of the rights of the purchaser will be most unfair. In the circumstances; it the amendment is tantamount to introducing a new and inconsistent cause of action in the plaint. To allow it would be contrary to the law. The best course to follow is to file a fresh suit on the sale and or for damages wherein all the arguments advanced in support of proposed amendments will be canvassed and determined among the parties quite independent of the other issues in the plaint herein which are not related to the sale of the suit property. This course will not sow multiplicity of suits but rather will avoid difficulties or absurdities which may arise in trying to adjudicate upon causes of action that are irreconcilable or inconsistent. I decline to grant the amendment sought.

[29] As for injunctive relief, submissions on jurisdiction of court and other merit of the substantive relief itself were made. It was contended that the injunction was previously sought and denied. Also, it was argued that the refusal of injunction is now a subject of appeal in the Court of Appeal; hence, it is *subjudice* and *res judicata*. I am aware that jurisdiction is everything and this will always remain the sweetest canticle by courts before they undertake adjudication of any proceeding. See Lilian ''S'' case. The Court will not, therefore, preside on issues which are *subjudice* and *res judicata*. But we should be careful on application of the doctrine of *subjudice* and *res judicata* with regard to interlocutory reliefs including injunctions. Rules of *res judicata* and *subjudice* will not apply to an injunction application which is sought on grounds which are totally new and different from those of a previous application. In this sense, grounds that ought to have been disclosed or were subsumed in the earlier grounds are not new and different grounds for purposes of res judicata. New circumstances have been pleaded to have arisen here. I will, therefore, proceed to determine the injunction application on its merit.

[30] There have been allegations that the suit property was sold in utter undervaluation; and that there were concealment of salient matters in respect of the said sale. These are essentially matters on irregularity in the manner the sale was conducted, and are matters for fresh cause of action envisaged under section 99 and 104 of the Land Act. As a general rule, they cannot found injunctive relief against a purchaser for value without notice. I note that the Plaintiff admitted that there were two bidders at the auction but for reasons known to the plaintiff, argued that there was concealment of salient matters on the auction. And that reality takes away the sincerity of averments by the Plaintiff on the matter. On that basis, I hereby reject the application for injunction to stop the transfer of the land to the purchaser. I will not make an order for costs given the circumstances of this case. It is so ordered.

Dated, signed and delivered in court at Nairobi 20th day of April 2015

F. GIKONYO

JUDGE