



Yurub Investments Limited v Diamond Trust Bank Kenya Limited & another (Environment and Land Case Civil Suit E203 of 2024) [2024] KEELC 6439 (KLR) (3 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6439 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E203 OF 2024
JO MBOYA, J
OCTOBER 3, 2024**

BETWEEN

YURUB INVESTMENTS LIMITED PLAINTIFF

AND

DIAMOND TRUST BANK KENYA LIMITED 1ST DEFENDANT

LAVINGTON HOUSING INVESTMENT LIMITED 2ND DEFENDANT

RULING

Introduction And Background

1. The Plaintiff/Respondent herein approached the court vide Plaint dated the 21st May 2024; and in respect of which same sought for various reliefs including [verbatim]:
 - a. A declaration that the sale of L.R No. 209/1063 – L.R 84749 by the 1st Defendant to the 2nd Defendant is null and void.
 - b. An order that the registration of the 2nd Defendant as the proprietor of L.R No. 209/1063 be cancelled and the register be rectified to reflect as the Plaintiff as the owner.
 - c. An order that the certificate of title of L.R 84749 be delivered to the Plaintiff.
 - d. A temporary and or permanent injunction do issue restraining the 1st and 2nd Defendants by themselves, their servants or agents or otherwise howsoever from evicting the Plaintiff or in any manner whatsoever interfering with the Plaintiff's occupation of L.R No. 209/1063 – L.R 84749 until the determination of this suit.
 - e. A temporary and or permanent injunction do issue restraining the 1st and 2nd Defendant from dealing with the property L.R No. 209/1063 – L.R 84749 and in particular, not to sell, dispose or alienate the same in any manner whatsoever until the determination of the suit.



- f. General damages plus interests thereof.
 - g. Costs and interest thereof.
 - h. Any further or other relief which this honourable court may deem fit and expedient.
2. Upon being served with the Plaint and summons to enter appearance, the 1st Defendant/Applicant duly entered appearance and thereafter proceeded to and filed the application dated the 13th June 2024 and wherein the Applicant has sought for the following reliefs;
- i.Spent
 - ii.Spent.
 - iii. That this Honourable Court be pleased to strike out this suit as this Honourable Court lacks the jurisdiction to hear and determine this matter.
 - iv. That this Honourable Court be pleased to strike out this suit for being sub-judice in contravention of Section 6 of the *Civil Procedure Act* and an abuse of the court process.
 - v. That the cost of this Application and the suit be borne by the Plaintiff.
3. The subject application is premised on various grounds which have been enumerated in the body thereof. Furthermore, the application is supported by the affidavit of one, namely, Faith Ndonga, who is the Legal manager, debt recovery department with the 1st Defendant/Applicant. In addition, the deponent has exhibited a total of 19 documents, including assorted rulings emanating from previous proceedings involving the same parties herein.
4. On the other hand, the 1st Defendant/Applicant also filed a notice of preliminary objection dated the 12th June 2024 and wherein the 1st Defendant/Applicant has highlighted various grounds including lack of jurisdiction as well as the contention that the subject suit is prohibited by the provisions of Section 6 and 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.
5. The Plaintiff/Respondent herein upon being served with the application dated the 13th June 2024 as well as the notice of preliminary objection filed a response to the preliminary objection and contended that the suit beforehand is legitimate. Furthermore, the Plaintiff/Respondent also contended that this court is seized of the requisite jurisdiction to entertain and adjudicate upon the subject dispute.
6. The matter herein came up before the court on the 11th July 2024 for the hearing of the Application and the Preliminary Objection, respectively; whereupon the advocates for the respective parties covenanted to canvass the application the 13th June 2024 and the notice of preliminary objection together. Furthermore, it was also agreed that the preliminary objection and the notice of motion shall be canvassed by way of written submissions.
7. Arising from the foregoing, the 1st Defendant/Applicant filed written submission dated the 21st July 2024 whereas the Plaintiff/Respondent filed and relied on the written submissions [Response] dated the 8th July 2024. Evidently, the submissions by the Plaintiff/Respondent preceded the ones by the 1st Defendant/Applicant.

Parties' Submissions:

A. 1st Defendant's/applicant's Submissions:

8. The 1st Defendant/Applicant herein filed written submissions dated the 21st July 2024 and in respect of which the Applicant adopted the ground contained in the body of the application and reiterated the



- averments in the body of the supporting affidavit. Furthermore, the Applicant herein has also reiterated the grounds contained at the foot of the notice of preliminary objection.
9. Additionally, learned counsel for the Applicant has highlighted, raised and canvassed three salient issues for consideration by the court. Firstly, learned counsel for the Applicant has submitted that the dispute beforehand stems and arises from the exercise of statutory power of sale by the 1st Defendant/Applicant.
 10. Besides, it has been posited that the sale of the suit property was underpinned on a charge instrument which had been executed by the Plaintiff/Respondent in favour of the 1st Defendant/Applicant and which charge secured the banking facilities which had been given to the Plaintiff/Respondent herein.
 11. Arising from the fact that the dispute beforehand touches on and concerns the exercise of the chargee's statutory power of sale, learned counsel for the 1st Defendant/Applicant has contended that such a dispute ought to have been filed before the high court and not the environment and land court.
 12. Learned counsel for the 1st Defendant/Applicant has thereafter posited that the dispute beforehand, which touches on the exercise of statutory power of sale has been filed before a court which is devoid and divested of the requisite jurisdiction. In this regard, counsel has posited that without the requisite jurisdiction, this court ought to down its tools.
 13. In support of the submissions that the environment and land court is not seized of the requisite jurisdiction to entertain and adjudicate upon the issues touching on exercise of statutory power of sale, learned counsel for the 1st Defendant/Applicant has cited and referenced inter-alia Co-operative Bank of Kenya Ltd v Patrick Kang'ethe Njuguna & 7 Others [2017]eKLR, Diamond Trust Bank Ltd v Fatuma Hasan Hadi Malindi Court of Appeal Civil Appeal No. 18 of 2020 [UR] and Bank of Africa Kenya Ltd & Another v TSS Investment Ltd & 2 Others [2024] KECA 410 [KLR], respectively.
 14. Secondly, learned counsel for the Applicant has submitted that the Plaintiff/Respondent herein had hitherto filed proceedings vide Nairobi HCC No. 139 of 2018 and which matter was consolidated with Nairobi HCC No. 451 of 2017, touching on and concerning the same suit property.
 15. Furthermore, learned counsel for the Applicant has submitted that following the filing of Nairobi HCC No. 139 of 2018, the Plaintiff/Respondent herein proceeded to and filed an application wherein same sought for orders of temporary injunction to restrain the 1st Defendant/Applicant herein from exercising her statutory power of sale in respect of the suit property.
 16. It was contended that the application by the Plaintiff/Respondent seeking for orders of temporary injunction was thereafter heard and disposed of vide ruling rendered on 5th June 2020. For good measure, counsel contended that the application beforehand was dismissed.
 17. It was the further submissions of learned counsel for the applicant that following the dismissal of the application by the Plaintiff/Respondent which sought for orders of temporary injunction, the Plaintiff/Respondent herein proceeded to and filed yet another application wherein same sought for injunction pending the hearing and determination of the intended appeal.
 18. It was contended that the application for injunction pending the hearing and determination of the intended appeal was subsequently heard and disposed of, whereupon same was allowed albeit on terms. Nevertheless, it was posited that the Plaintiff/Respondent failed to comply with the conditions and thereafter the interim orders lapsed.
 19. Arising from the foregoing, learned counsel for the Applicant has submitted that following the lapse of the interim orders, the Applicant herein proceeded to and advertised the suit property and thereafter same was duly sold vide public auction on the 10th November 2021. Furthermore, it has also been



contended that the suit property was subsequently transferred and registered in the name of the 2nd Defendant on the 23rd November 2021.

20. Premised on the foregoing, learned counsel for the Applicant has therefore submitted that the issues being raised and canvassed at the foot of the suit herein are not only pending before the high court and the court of appeal, but same have also been disposed off before the high court. In this regard, learned counsel for the Applicant has posited that the current suit is therefore barred by the doctrine of res-sub-judice and res-judicata, respectively.
21. In support of the contention that the suit beforehand is barred by the doctrine of res-judicata, learned counsel for the Applicant has cited and referenced various decisions including Gladys Nthuku Nthuki V Lesshego Kenya Ltd; Mueni Charlse Maingi [Intended Plaintiff] [2022]eKLR and John Florence Maritime Ltd v The Cabinet Secretary Transport, & Infrastructure & 3 Others [2021] KESC 39.
22. In view of the foregoing, learned counsel for the Applicant has thus contended that the suit beforehand ought to be struck out on the basis of lack/want of jurisdiction and on account of the provisions of Section 6 and 7 of the Civil Procedure Act, Chapter 21 Laws of Kenya.

B. Plaintiff's/respondent's Submissions:

23. The Plaintiff/Respondent filed written submissions and wherein same has raised and canvassed three [3] salient issues for consideration by the court. First and foremost, learned counsel for the Plaintiff/Respondent has submitted that the preliminary objection which has been canvassed by the Applicant herein does not raise pure issues of law to warrant same being canvassed as a preliminary objection.
24. Additionally, learned counsel for the Respondent has posited that there exist various factual issues which are in dispute and which the court will be called upon to interrogate with a view to determining the veracity or otherwise thereof. In this regard, learned counsel for the Respondent has posited that the preliminary objection adverted to by the Applicant is therefore misconceived and legally untenable.
25. In support of the submissions that the preliminary objection cannot be raised and canvassed where facts are in dispute, learned counsel for the Respondent has cited and referenced the decision in the case of Mukisa Biscuit Ltd v Westend Distributors Ltd [1969] EA 696.
26. Secondly, learned counsel for the Respondent has submitted that the dispute beforehand touches and concerns the manner in which the suit property was sold and disposed of by the 1st Defendant/Applicant. In any event, it has been contended that the impugned sale is vitiated by fraud and illegality and that such issues can only be interrogated by the environment and land court and not otherwise.
27. In addition, learned counsel for the Respondent has submitted that the Respondent herein is primarily seeking to invalidate the impugned sale and consequential transfer of the suit property to the 2nd Defendant herein. In this regard, it has been posited that the dispute touches on and concern a claim of ownership and title to land.
28. Based on the foregoing, learned counsel for the Respondent has submitted that the environment and land court is thus seized of the requisite jurisdiction to entertain and adjudicate upon the subject dispute. In any event, it has been posited that the factual matrix obtaining in the instant matter is separate and distinct from the issues that were canvassed in the case of Co-operative of Bank of Kenya v Patrick Kang'ethe Njuguna & 5 Others [2017]eKLR.
29. Simply put, learned counsel for the Respondent has submitted that the honourable court herein is seized of the requisite jurisdiction to adjudicate and entertain the subject matter. In this regard, the Counsel has cited and referenced the Provisions of Section 13[2] of the Environment and Land Act.



30. Thirdly, learned counsel for the Respondent has submitted that the suit beforehand is not prohibited by the doctrine of res-sub-judice. For good measure, it has been contended that the suit herein challenges the sale that was undertaken on the 10th November 2021, which event took place long after the filing of Nairobi HCC No. 175 of 2018 and 176 of 2018, respectively.
31. Owing to the foregoing, learned counsel for the Respondent has therefore posited that the doctrine of res-sub-judice cannot therefore be invoked and applied in a situation where the cause of action in the subsequent suit is not the same as the cause of action in the previous/earlier suit.
32. Finally, learned counsel for the Respondent has submitted that the suit herein is also not prohibited by the doctrine of res-judicata insofar as the issue beforehand has never been adjudicated upon and/or determined by a court of competent jurisdiction. In this regard, learned counsel has posited that the invocation and reliance on the doctrine of res-judicata is therefore irrelevant.
33. Premised on the foregoing submissions, learned counsel for the Respondent has therefore invited the court to find and hold that the preliminary objection canvassed by and on behalf of the Applicant herein is premature and misconceived. In any event, it has been contended that this honourable court is seized of the requisite jurisdiction to entertain and adjudicate upon the subject suit.

Issues For Determination:

34. Having reviewed the Complaint filed by the Plaintiff/Respondent; the Notice of Preliminary Objection; the Application beforehand and the response thereto and upon taking into account the submissions filed on behalf of the respective parties, the following issues emerge [crystallise] and are thus worthy of determination;
 - i. Whether this honourable court is seized of the requisite jurisdiction to entertain and adjudicate upon the subject dispute.
 - ii. Whether the instant suit is prohibited by the doctrine of res-sub-judice
 - iii. Whether the instant suit constitutes and amounts to an abuse of the due process of the court or otherwise.

Analysis And Determination

Issue Number 1 Whether this honourable court is seized of the requisite jurisdiction to entertain and adjudicate upon the subject dispute.

35. The Plaintiff/Respondent herein filed the suit vide Complaint dated the 21st May 2024 and wherein same [Plaintiff/Respondent] contended that the suit property was charged to and in favour of the 1st Defendant/Applicant herein. Furthermore, the Plaintiff/Respondent conceded that the 1st Defendant thereafter advertised the suit property for sale in exercise of her [1st Defendant's] statutory power of sale.
36. Furthermore, the Plaintiff/Respondent contended that following the advertisement of the suit property by the 1st Defendant/Applicant in exercise of her statutory power of sale, the suit property was subsequently sold vide public auction on 10th November 2021.
37. Additionally, the Plaintiff/Respondent contended that arising from the public auction, the suit property was sold to and thereafter transferred to the 2nd Defendant herein. For good measure, it has been conceded that the suit property is currently registered in the name of the 2nd Defendant.



38. Other than the foregoing, the Plaintiff/Respondent has also posited that the 2nd Defendant procured and obtained a banking facility from the 1st Defendant and thereafter proceeded to charge the suit property in favour of the 1st Defendant.
39. From the foregoing, background, what becomes evident and apparent is that the dispute beforehand stems and arises from the exercise of the Applicant's statutory powers of sale premised/predicated upon the charge instrument which was duly registered over and in respect of the suit property.
40. To the extent that the subject dispute flows from the exercise of the Applicant's statutory power of sale, the question that does arise and which the court must grapple with is whether or not the court has jurisdiction to interrogate the propriety or otherwise of the exercise of the Applicant's statutory power of sale.
41. On the other hand, the incidental question that also does arise is whether in an endeavour to entertain the subject suit this court would be called upon to superintend on the powers of the high court and more particularly, the orders that have hitherto been issued vide Nairobi HCC No. 139 of 2018.
42. To start with, there is no gainsaying that the suit property was charged to and in favour of the 1st Defendant/Applicant. Furthermore, there is also no dispute that the 1st Defendant subsequently proceeded to and exercised her statutory power of sale and thereafter sold or caused the suit property to be sold vide public auction.
43. Having sold and disposed of the suit property in exercise of her statutory power of sale and which powers of sale emanates from the charge instruments, it is my finding and holding that the crux of the dispute beforehand touches on and concerns the power of sale and whether or not the Applicant complied with the terms of the charge instrument or otherwise.
44. To my mind, the issues touching on and concerning the exercise of statutory power of sale, which culminated into the sale/transaction, which is sought to be impugned does not fall within the purview/jurisdiction of the environment and land court. Instructively, the question as to the validity or otherwise of the exercise of the statutory power of sale has various been stated to fall within the jurisdiction of the high court.
45. To this end, it suffices to cite and reference the holding in the case of Co-operative Bank of Kenya Ltd v Patrick Kang'ethe Njuguna & 5 Others [2017], where the Court of Appeal stated and held as hereunder;
 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.
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.

In *Paramount Bank Limited vs. Vaqvi Syed Qamara & another* [2017] eKLR, this Court while discussing the jurisdiction of the Employment and Labour Relations Court over a claim of malicious prosecution expressed itself thus,

“The origin of the dispute between the 1st respondent and the appellant was presented as a dispute arising from an employee/employer relationship, where the appellant accused the 1st respondent of theft followed by a criminal charge of stealing by servant. This was further followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under Section 12 of the *Employment and Labour Relations Court Act*, the court could entertain the dispute in all its aspects and award damages appropriately.”

By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender.

46. Furthermore, the jurisdiction to deal with and adjudicate upon a matter pertaining to the exercise of statutory power of sale was re-visited by the Court of Appeal in the case of *Bank of Africa Kenya Limited & another v TSS Investment Limited & 2 others (Civil Appeal E055 of 2022)* [2024] KECA 410 (KLR) (26 April 2024) (Judgment), where the court stated and held thus;

In view of the foregoing, the only question that falls to be determined is whether the respondents’ suit against the appellants involved “... matters relating to environment and the use and occupation, and title to land”. We do not think so. In our considered view, the issues in contention in the suit, and the purpose for which the respondents moved the trial court for the injunctive relief sought and granted in the impugned ruling, were intended to forestall the 1st appellant’s exercise of its statutory power of sale over the suit properties on the basis of the alleged tenancy relationship with the 3rd respondent.

19. Accordingly, we do not share the learned Judge’s view that the issues in contention between the respondents and the appellants were matters relating to “... the environment and the use and occupation, and title to land” as contemplated in Article 162 of *the Constitution*, section 13 of the Environment



& Land Court Act, and in section 150 of the *Land Act*. To our mind, such matters could only be subject to litigation between the 1st and 2nd respondents as lessees, and the 3rd respondent as lessor.

20. We form this view taking to mind this Court’s decision in the afore-cited case of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others (supra)* where it was held that the ELC only has jurisdiction to deal with disputes connected to “use” of land and contracts incidental to the “use” of land, which do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court. Moreover, a charge is a disposition that has no direct contractual relation to “use” (by a tenant or licensee) as in this case, of a chargor’s land. In view of the foregoing, we agree with learned counsel for the appellants that the learned Judge had no jurisdiction to entertain the respondents’ suit as pleaded.
47. Flowing from the ratio decidendi in the decision [supra], there is no gainsaying that question pertaining to and concerning the exercise of the statutory power of sale and the propriety thereof, do not fall within the jurisdiction of the environment and land court.
48. In the premises, I come to the conclusion that even though the suit herein touches on and concerns the sale and subsequent transfer of the suit property to the 2nd Defendant, the investigations to ascertain the propriety or otherwise of the impugned sale would turn onto the question/issue of the exercise of statutory power of sale, which falls outside the jurisdiction of this court.
49. Simply put, it is my finding and holding that the environment and land court is not seized and/or possessed of the requisite jurisdiction to entertain and adjudicate upon the dispute beforehand. In this regard, it suffices to posit that the Plaintiff/Respondent is non-suited.
50. Before departing from this issue, it suffices to underscore that jurisdiction is critical, central and determinative. Consequently, where a court of law is divested of jurisdiction then such a court must not continue to engage with the matter in question. At any rate, where a court that is divested of jurisdiction entertains further proceedings and even makes determinations, the proceedings and resultant orders, if any, are vitiated and void.
51. To buttress the foregoing position, it suffices to take cognizance the holding in the case of *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR*, where the court stated as hereunder;
 1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?
 2. In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae. It is for this reason that this Court has to deal with this appeal first as the result directly impacts Civil Appeal No.6 of 2018 which is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context.



52. The centrality of jurisdiction and its legal implications was also elaborated in the case of *In the Matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR) (20 December 2011) (Ruling)*, where the court stated thus;
29. Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1*, which bears the following passage (Nyarangi, JA at p.14):
- “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.”
30. The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.
53. Consequently, my answer to issue number one, is therefore twofold. Firstly, the dispute beforehand essentially touches on and concern the exercise of the statutory powers of sale by the Applicant and in particular, the propriety of the said exercise. In this regard, such an issue does not fall within the jurisdiction of the environment and land court.
54. Secondly, without the requisite jurisdiction, this honourable court is not mandated to entertain and/or continue with further proceedings. For good measure, jurisdiction is so central and determinative that where same is raised it must be determined at the onset. In addition, where the court finds that same is divested of jurisdiction, the court must down its tools. [See also the holding of the Court of Appeal in the case of *Kakuta Maimai Hamisi versus Peris Pesi Tobiko and Others [2014] eklr*]

Issue Number 2 Whether the instant suit is prohibited by the doctrine of res-sub-judice

55. It was contended that the Plaintiff/Respondent herein had filed various proceedings inter-alia Nairobi HCC No. 139 of 2018, which was consolidated with Nairobi HCC No. 451 of 2017. Furthermore, it was also averred that subsequent to the filing of the said suit, the Plaintiff/Respondent filed a plethora of applications wherein same sought to restrain the 1st Defendant/Applicant from exercising her statutory powers of sale.
56. Additionally, it was contended that arising from the failure by the Plaintiff/Respondent to abide by and or comply with the conditions which were granted at the foot of the orders issued on the 23rd September 2020, the Applicant herein proceeded to and advertised the suit property for sale vide public auction.
57. Other than the foregoing, it was also posited that the suit property was indeed sold vide public auction held on the 10th November 2021. However, upon the sale of the suit property, it was stated that the Plaintiff/Respondent herein filed an application dated the 28th December 2021 wherein same sought to bar and/or prohibit the transfer of the suit property in favour of the 2nd Defendant herein.
58. Suffice it to point out that the application by the Plaintiff/Respondent and which essentially seeks to bar the transfer and registration of the suit property to the 2nd Defendant is still pending hearing



before the high court. In any event, it is also worth pointing out that the hearing of the said application and other related application are the subject of an order of stay of proceedings issued by the court of appeal vide Civil Appeal No. E051 of 2022.

59. To my mind, the question pertaining to the propriety of the exercise of statutory power of sale, the validity of the sale and by extension the validity of the transfer of the suit property to the 2nd Defendant, are actually issues that are live before the high court.
60. Furthermore, given that the issues touching on and concerning the exercise of the statutory powers of sale are live before the high court vide Nairobi HCC No. 139 of 2018 as consolidated with Nairobi HCC 451 of 2017, there is no gainsaying that the issues being raised at the foot of the instant suit and the orders being sought herein can very well be obtained in the earlier suits touching on the same suit property.
61. In my humble view, the fact that the sale of the suit property took place on the 10th November 2021 long after the filing of the previous suit does not take the dispute outside the purview of the previous suit. In fact, the exercise of the statutory power of sale which underpins the impugned sale is a matter that is pending before the high court.
62. In short, it is my finding and holding that the subject suit replicates the previous suits namely, Nairobi HCC No. 139 of 2018 between Yurub Investment Ltd & Another v Diamond Trust Bank Ltd & Another. Consequently, the cause of action is substantially the same and, in this regard, the instant suit ought not to have been filed.
63. As pertains to the import and tenor of the doctrine of res-sub-judice, it suffices to reference the holding of the supreme court in the case of Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) where the Court had occasion to pronounce itself on the subject of res-sub-judice. It aptly stated: -
 - (67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.
64. Arising from the foregoing analysis, my answer to issue number two [2] is to the effect that the subject suit raises similar or substantially similar issues as the ones which are live in the previous suits filed by the Plaintiff/Respondent. Besides, there is no gainsaying that the parties in the subject matter are also parties either directly or through their representative in the previous suit and hence the doctrine of res-sub-judice suffices.



Issue Number 3 Whether the instant suit constitutes and amounts to an abuse of the due process of the court or otherwise.

65. The 1st Defendant/Applicant herein supplied an elaborate background pertaining to and concerning the various suits that have hitherto been filed by the Plaintiff/Respondent and her affiliate companies. To this end, it is imperative to take cognizance of paragraph 8 of the supporting affidavit sworn on the 13th June 2024, and wherein the details of the proceedings have been highlighted.
66. Additionally, the Applicant herein has posited that the Plaintiff/Respondent also proceeded to and filed a plethora of applications seeking for orders of temporary injunction. In particular, the Applicant has highlighted the application dated the 27th November 2017 and 6th April 2018, which applications were heard and dismissed vide ruling rendered on the 5th June 2020.
67. Other than the foregoing, the Applicant has also adverted to the ruling of the court which was rendered on the 23rd September 2020 and wherein an application for temporary injunction pending the hearing and determination of an intended appeal was allowed albeit on conditions.
68. Nevertheless, the Applicant has posited that even though the application for temporary injunction was allowed on conditions, the Plaintiff/Respondent herein failed to comply with and/or abide by the stipulated conditions. In this regard, it was contended that the orders of temporary injunction lapsed culminating into the advertisement of the suit property and the subsequent sale thereof vide public auction.
69. On the other hand, the Applicant has also posited that the Plaintiff also proceeded to and filed yet another application dated the 28th December 2021 wherein same [Plaintiff/Respondent] seeks inter-alia to bar the transfer of the suit property to the 2nd Defendant herein.
70. Arising from the foregoing, what becomes apparent is that the Plaintiff/Respondent has filed the instant suit with a view to circumvent and/or defeat the proceeding[s] and orders which were issued vide Nairobi HCC No. 139 of 2018 and 451 of 2017, respectively, which orders the Plaintiff/Respondent failed to comply with.
71. Put differently, the filing of the instant suit and the application thereunder is intended to confer upon the Plaintiff/Respondent collateral advantage and in particular to enable the Plaintiff to circumvent the import and tenor of the orders whose terms same [Plaintiff/Respondent] failed to comply with.
72. Further and at any rate, it is also evident that the Plaintiff is using the instant suit in a bid to create and/or generate a situation where the environment and land court would be seen to superintend the orders of the high court. Quite clearly, if any orders were to issue in respect of the instant matter, such orders obviously will be in conflict with the orders which have been issued by the high court and which orders are said to have been disregarded.
73. To my mind, the Plaintiff/Respondent is not using the court process in an endeavour to pursue a genuine grievance and/or justice. To the contrary, what becomes evident is that the Plaintiff herein is keen to deploy every mechanism, to delay, obstruct or better still defeat the exercise of the statutory power of sale and by extension the activation of the provisions of Section 99 of the *Land Act* 2012[2016].
74. In my humble view, the filing of a plethora of suits across the high court, as well as before the environment and land court constitutes an abuse of the due process of the court and thus this court is called upon to intervene and in particular, to stop the Plaintiff in her tracks. In any event, there is no



gainsaying that a court of law should not countenance a scenario where its process is being deployed for collateral purposes other than for pursuit of justice.

75. What constitutes abuse of the due process of the court has been variously considered. The Court in the case of *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR, had this to say about the meaning and import of abuse of the Due process of Court:

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.”

26. It's settled law that a litigant has no right to pursue paripatua two processes which will have the same effect in two courts either at the same time or at different times with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.

76. Likewise, the concept of abuse of the due process of court was also highlighted by the Supreme Court of Kenya [the Apex Court] in the case of *Rutongot Farm Ltd v Kenya Forest Service & 3 others (Petition 2 of 2016)* [2018] KESC 27 (KLR) (19 September 2018) (Ruling), where the court stated and observed thus;

27. In Kenya Section of the International Commission of Jurists v Attorney General & 2 Others Criminal Appeal No. 1 of 2012; [2012]eKLR, this Court, on the issue of abuse of the process of the Court, held inter alia:

“The concept of “abuse of the process of the Court” bears no fixed meaning, but has to do with the motives behind the guilty party’s actions; and with a perceived attempt to manoeuvre the Court’s jurisdiction in a manner incompatible with the goals of justice. The bottom line in a case of abuse of Court process is that, it “appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak to be beyond redemption...”....Beyond that threshold, lies an unlimited range of conduct by a party that may more clearly point to an instance of abuse of Court process.”

77. From the foregoing, it is common ground that the subject suit was filed with a view to circumventing the various orders that have hitherto been granted vide Nairobi HCC No. 139 of 2018 as consolidated with No. 451 of 2017 and which orders were never complied with by the Plaintiff/Respondent. In this regard, there is no gainsaying that the Plaintiff/Respondent is indeed guilty of gross misuse and abuse of the due process of the court.

Final Disposition:

78. Flowing from the analysis [details in terms of the preceding paragraphs], there is no gainsaying that the Application dated the 13th June 2024 as well as the preliminary objection dated the 12th June 2024, are merited.

79. In the premises, the orders that commend themselves to the court are as hereunder;



- i. The application dated the 13th June 2024 be and is hereby allowed.
- ii. The Plaintiff's suit vide Plaint dated the 21st May 2024 be and is hereby struck out.
- iii. The 1st Defendant/Applicant be and is hereby awarded costs of the preliminary objection; costs of the application and costs of the suit. Same to be borne by the Plaintiff/Respondent.

80. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2024.

OGUTTU MBOYA

JUDGE.

In the Presence of;

Benson Court Assistant.

Mr. Jackson Kisinga for the 1st Defendant/Applicant.

Mr. Oigara for the Plaintiff/Respondent.

N/A for the 2nd Defendant/Respondent.

