

Defendant with a request that the property be sold by way of private treaty to a ready buyer at the price of Kshs.14,000,000.00 in which Kshs.11,500,000.00 would be channeled towards repayment of the debt which request was rejected by the 1st Defendant. Subsequently, the applicant received notices from the 3rd Defendant acting under the instructions of the 1st Defendant, wherein the applicant was cited to repay the outstanding amounts, auctioneers cost and charges failing of which the 3rd Defendant would advertise and sell the property by way of public auction.

4. The applicant avers that he has now discovered that the property was by way of public auction allegedly sold to the 2nd Defendant under the instructions of the 1st Defendant sometime in April 2018 for Kshs.8,000,000.00, yet the market value of the property is estimated to be over Kshs.25,000,000.00. The Applicant contends that the purported sale of the property was marred by illegalities or at the very least, was improper and irregular on account of grave breaches of the statutory duty of care that attend the exercise of the statutory power of sale. That the 2nd Defendant entered into the property early November 2018, poured sand and is demanding vacant possession. The applicant states that his elderly father also lives on the property and there are other rent paying tenants on the property. The applicant states that he has suffered enormous loss, damage and faces irreparable disenfranchisement on account of the impugned sale of the property.

5. In the supplementary affidavit, the applicant states that sometime in November 2018, he instructed M/s Valueconsult Limited to inspect and value the property and the same was valued and found to have a current market value of Kshs.30,000,000.00 and a forced sale value of Kshs.22,500,000.00. The applicant further states that the entries indicating that Certificate of Lease was issued to Gabriel Ngigi Kinyanjui on 21/5/2018 and charge dated 16th May 2018 to Equity Bank (Kenya) Limited for Kshs.8,000,000.00 on 21st May 2018 were backdated and the register falsified with the sole purpose of scuttling the applicant's quest for justice. The applicant states that he is following up with investigative agencies to get to the bottom of those acts.

6. In opposing the application, the 1st Defendant filed a notice of preliminary objection and grounds of opposition dated 21st November 2018 and a replying affidavit sworn by James Gakundi on 11th January, 2019. The 1st Defendant states they indulged the applicant but he defaulted in payment forcing the Defendant to exercise its statutory power of sale. That at one point, the bank offered to connect the applicant to a buyer, one Mr. Kibatia, for purposes of selling the property vide private treaty but the prospective purchaser withdrew upon realizing that the compound of the property was flooded. That thereafter the property was sold for Kshs.11 million and not Kshs.8,000,000.00 as alleged by the applicant. The 1st Defendant denies that the property was valued at Kshs.25,000,000.00 at the time of sale. That prior to the sale, the bank undertook a valuation on the property. The 1st Defendant has given a breakdown of how the sum of Kshs.11,000,000.00 realized from the sale was utilized and states that the property was subsequently registered in the name of the buyer.

7. The 1st Defendant avers that the suit and application is res judicata for raising the same issues in **HCCC No.442 of 2010** and **Mombasa CMCC No.1281 of 2016**, adding that the applicant has come to court with unclean hands by failing to disclose those previous suits. The 1st Defendant avers that there is still an outstanding amount of Kshs.4,962,092.73 as at 20th September, 2018 and want the applicant ordered to deposit the same in court or in a joint interest earning account as security plus an undertaking as to damages for Kshs.2,000,000.00 on account of charges incurred by the 1st Defendant while instructing the auctioneer and valuer.

8. It is further the 1st Defendant's contention that the application has been overtaken by events, and urged the court to dismiss it as the applicant has not satisfied the legal threshold for interlocutory injunctions.

9. The application was canvassed by way of written submissions which were duly filed and highlighted by the advocates for both parties. It was the plaintiffs' submission that the 1st Defendant's preliminary objection is not properly taken. First, that no statement of defence was filed by the 1st Defendant and therefore the objection is not anchored on any pleading. He relied on case of **Fredrick Idiama Emojong –v- Seferio Mangeni Manyuru(2017)eKLR**. Secondly, the Plaintiff took the view that a plea of res judicata is not proper candidate to be raised by way of a preliminary objection as such a plea calls upon the court to interrogate the concerned pleadings and satisfy itself that the current suit is res judicata. Relying on the case of **George Kamau Kimani & 4 Others –v-County Government of Trans- Nzoia & Another (2014)eKLR**, and **Yusuf Salim Katwaa –v-Riziki Kassim Masudi (2016)eKLR**, the plaintiff submitted that a plea of res judicata is best raised by way of a notice of motion where pleadings are properly tendered in evidence for the court's consideration. The plaintiff's counsel also relied on the case of **Esther Nyambura Waweru –v- Andrew Waiganjo Muiruri (2017)eKLR** and submitted that the 1st Defendant's Preliminary Objection on the plea of res judicata is distinctly improper and fails to satisfy the settled threshold. It was the plaintiff's submissions that none of the previous cases were heard and determined as contemplated by Section 7 of the Civil Procedure Act and relied in the case of **Cosmas Mrombo Moka –v- Cooperative Bank of Kenya Ltd & Another (2018)eKLR**.

10. The Plaintiff's counsel further submitted that the plaintiff has established a prima facie case with a probability of success as his grievance is principally that the sale of the suit property by the 1st Defendant was marred by illegality and the 1st Defendant breached its statutory duty of care in carrying out the sale. The plaintiff cited the provisions of Section 99 (2) & (5), 97 (1) of the Land Act and Rules 15 and 16 of the Auctioneers Rules and submitted that the property was not valued and was sold at less than its market value. The plaintiff concluded by submitting that the 1st Defendant has stolen a match against him by manipulating records at the Mombasa Lands Registry.

11. On their part, counsel for the 1st Defendant submitted that this suit is res judicata and ought to be struck out at the first instance. That the doctrine of res judicata also applies to applications, and therefore because an application for injunction against the Defendant was heard and determined in HCCC No. 422 of 2010 and CMCC No.1281 of 2016, the applicant is inhibited from seeking similar orders. They cited the case of **Uhuru Highway Development Ltd –v- Central Bank of Kenya & Others Civil Appeal No.36 of 1996**. The 1st Defendant submitted that the court should not issue injunctive orders in favour of a party who is guilty of material breach of contract and cited **Benjoh Amalgamated Limited & Another –v- Kenya Commercial Bank Limited (2014) eKLR**. They further also submitted that the plaintiff has not established a prima facie case with a probability of success and the applicant has not shown that it will suffer irreparable injury not compensable by way of damages. That the balance of convenience favours the 1st Defendant because the subject matter of this suit is a non-performing loan that is accruing interest.

12. I have considered the application, the affidavits in support and against as well as the rival submissions. It is not in contention that the plaintiff was advanced financial accommodation which was secured by the suit property. It is also not in dispute that the plaintiff defaulted in payment and the property was sold by public auction by the 1st Defendant in exercise of its statutory power of sale. The property was bought by the 2nd Defendant and the same has been transferred and registered in his name. The plaintiff has admitted receiving notices before the property was sold. What is for determination is whether or not the 1st Defendant had fully complied with provisions of the law before it purported to exercise its statutory power of sale as regards valuation of the property.

13. The plaintiff contends that the property was sold for a paltry sum of Kshs.8,000,000.00 yet the market value of the property was estimated at Kshs.25,000,000.00. The 1st Defendant has however shown that the property was sold for Kshs.11,000,000.00 and not Kshs.8,000,000.00 as stated by the plaintiff. The court also notes that whereas the plaintiff had alleged the estimated market price of Kshs.25,000,000.00 in the supplementary affidavit the plaintiff attached a valuation that put the current market value at Kshs.30,000,000.00. There was no explanation for these discrepancies given by the plaintiff.

14. Nonetheless, it suffices to state that under Section 97 of the Land Act, a chargee is expected to exercise a duty of care towards a chargor, failing which it would be liable for breach of duty of care. The court also agrees with the plaintiff's submissions that a chargee could not rely on a valuation report that was more than 12 months old as required under Rule 11 (b) (x) of the Auctioneers Rules. The 1st Defendant has placed before the court a valuation report dated 28th March 2017. The plaintiff admits that he received notice indicating that the property would be sold on 20th December 2017. That in my view, was within the 12 months period stipulated. The plaintiff did not provide any evidence to demonstrate that the property was sold after 12 months from the date of valuation.

15. In the celebrated case of Giella – v- Cassman Brown Ltd (1973)EA, 358 it was held that an applicant must show a prima facie case with a probability of success; secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

16. Having admitted to being indebted to the 1st Defendant, the plaintiff has clearly not made out a prima facie case with of success at trial. It is not in dispute that the property was sold upon the terms of the charge. The question of the plaintiff suffering loss that could not be compensated by way of damages cannot arise. The balance of convenience tilts in favour of the 1st Defendant who was expected to recover its monies from the sale of the security offered. Indeed it is admitted that the property has been sold and is now registered in favour of the 2nd Defendant. In view of the said indebtedness, and the property having been sold, the court is not inclined to grant an injunction to restrain the 2nd Defendant who offered to purchase property that was up for sale in a public auction. The court also notes that there were previous proceedings in the matter. On the whole, the court finds that the plaintiff has failed to satisfy the requirements for an injunction.

17. The upshot is that the Notice of Application of motion dated 14th November 2018 is not merited and the same is hereby dismissed with costs.

DATED, SIGNED and DELIVERED at MOMBASA this 2nd day of October 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Mureithi holding brief for Miller for plaintiff

Lutta for 1st & 2nd defendants

No appearance 3rd & 4th defendants

Yumna Court Assistant

C.K. YANO

JUDGE