Emining Quarry Limited v Access Bank Kenya & another (Civil Suit E012 of 2024) [2025] KEHC 6070 (KLR) (14 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6070 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL SUIT E012 OF 2024

PN GICHOHI, J

MAY 14, 2025

BETWEEN

EMINING QUARRY LIMITED ..... PLAINTIFF

AND

ACCESS BANK KENYA ..... 1ST DEFENDANT

PURPLE ROYAL AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. The subject of this Ruling are two applications. The first is the Plaintiff's application dated 26th March, 2024 and filed pursuant to Section 90 [1]and [2], 96 [2] and 204 [1] [b], [2] [b] and [c] of the *Land Act*, Rule 15 of the Auctioneers Rules 1997, Section 3A of the *Civil Procedure Act*, Order 8 Rule3, Order 51 Rule 1, Order 40 Rule 1[a] and [b], 2[1] &[2], 10 [1] [a] of the Civil Procedure Rules seeking for Orders:-

    1. Spent.

    2. Spent.

    3. Pending hearing and determination of the suit, a temporary injunction be issued retraining the 2nd Defendant/ Respondent by themselves, their agents, servants and or employees from selling by public auction or completing any conveyance or transfer of any sale conducted by auction of the Plaintiff/Applicant's properties namely; L.R No. 12806/3, L.R No. Kajiado/ Kitengela76271, 76272 & 76273 & Motor vehicles Registration Nos. KCM 307Y, KCM 306Y, KCM305Y and KCM 951Y.

    4. Spent.

5. Pending hearing and determination of this suit, a temporary injunction be issued restraining the 1st Defendant/Respondent from any subsequent debit or otherwise transactions and/ or interference with the Plaintiff/ Applicant's loan account No. 099CTLA230190002.

6. An order be issued to the 1st Defendant/ Respondent herein to render a complete, true and accurate statement of accounts of the plaintiff/ Applicant's purported loan account No. 099CTLA230190002 showing the exact indebtedness, if any, of the Applicant to date.

7. The costs of this Application be in the cause.

2. The grounds are on face of the application supported by Affidavit of Michael Kipruto Kandie, the director of the Applicant. He states that at all material times, the Applicant was the customer of 1st Respondent and that on 7th December, 2022, the Applicant successfully applied for a loan facility of Kshs. 32,649,616 which was deposited to its Account No. 099CTLA230190002 domiciled at its Nakuru Branch.

3. Subject to the loan offer of 7th December, 2022, the 1st Respondent registered the following properties as security for the said loan:- A further charge, 2nd further charge and 3rd further charge over, L.R No. 12806/3 in the name of Rosoga Limited & Emining Quarry Limited, Existing legal charge over properties; L.R No. Kajiado/Kitengela76271, 76272 & 76273 & continuation of specific debentures over the Applicant's Motor vehicles Registration Nos. KCM 307Y, KCM 306Y, KCM305Y and KCM 951Y.

4. He states that as per laws of Kenya, the 1st Respondent cannot exercise statutory power of sale before issuing statutory notice in line with section 90 and 96 of the *Land Act*.

5. The Applicant deposes that it has been servicing its loan regularly. However, on 25th January, 2024, he requested for a copy of his loan statement only to be supplied with a statement that indicating a loan balance of Kshs. 94,897,726.

6. Upon review of the said loan statement, the Applicant discovered that there were three entries entered on 19th January, 2023, each of Kshs. 33 Million, characterized as Loan disbursement case credit of Kshs. 33,041,411.39, Disbursement Related Charges fees of Kshs. 33,367,907.55 and Excise Duty of Kshs. 33,106,710.62 all totalling to Kshs. 99, 516, 029. 56.

7. He contends that interest was charged from these flawed entries, resulting to an erroneous debit sum of Kshs. 94,897,726. That despite requesting for an accurate copy of its loan statement none was forthcoming.

8. The Applicant states that the 1st Respondent has even instructed the 2nd Respondent to issue proclamation of attachment dated 20th August, 2021 attaching the Applicant's properties, which were only called off, when it threatened them with legal action.

9. Further he states that on 20th July, 2023, the 2nd Respondent made a further attempt to reposes the Applicant's movable properties and demanded fictitious arrears of Kshs. 4,869,602 allegedly due and owing when they were based on false entries aforesaid.

10. He maintained that the Respondents' threat to realize the charged securities and or seize its assets are fraudulent, illegal and irregular. Moreover, that due procedure under Section 90 and 96 of the *Land Act* was not followed.

11. It is his position that unless the orders sought are granted, the 1st Respondent will continue to modify, obstruct and or engage in additional transactions within its account with the intent to manipulate its

loan account at its bank. Further that the 2nd Respondent will proceed to auction its properties on an illegal, invalid, patently defective exercise by the 1st Respondent's purported statutory power of sale.

12. The Defendants/ Respondents did not reply to this application. Instead, they filed an application dated 18th April, 2024, under section 3A and 7 of the *Civil Procedure Act*, Order 2 Rule 15 [1] [b][c] and [d] and Order 51 Rule 1 of the Civil Procedure Rules, seeking for the following Orders: -

    1. Spent.

    2. The plaintiff's Notice of Motion dated 26th March, 2024 and the plaint dated 28th March, 2024 be Struck on account of Res Judicata and Res Sub-judice respectively.

    3. Costs of the Application and suit be borne by the Plaintiff.

13. The grounds of the application are set out on the face of it and supported by the Affidavit sworn on 18th April, 2024 by Valence Mmuka, the acting head of legal and company secretary of the 1st Respondent.

14. He stated that the Plaintiff's application runs afoul of section 7 of the *Civil Procedure Act*. He elaborated that the 1st Defendant herein advanced to the Plaintiff's company a term loan of Kshs. 5,000,000 and an asset finance of Kshs. 11,782,059 adding up to Kshs. 16,782,059 with clear terms as captured in the loan offer letter dated 30th November, 2020.

15. He depones that this loan was obtain to restructure an existing overdraft facility that had earlier been granted and secured by the following securities; an existing legal charge of Kshs 17,000,000 over charged property known as LR No. Kajiado/Kitengela76271, 76272 and 76273, a charge dated 23rd November, 2009 secured by legal charge over LR. No. 9399/32, 9399/34 and 9399/36 registered in the name of Michael Kipruto Kandie, Existing further charge of Kshs 5,000,000 over Title No. 12806/3 registered in the name of Rosoga Investment Limited and Specific debentures over 5 units of Ashok Leyland Tipper 20-tone Registration Nos; KCM 307Y, KCM 306Y, KCM 305Y, KCM 304Y and KCM 951Y for Kshs 10,875,000.

16. He states that the Plaintiff failed to repay the said money as per the loan offer letters, causing the 1st Defendant to attempt to exercise its statutory power of sale to recover the outstanding amount. However, the Plaintiff filed a suit at the Chief Magistrate Court at Milimani under CMCC No. E10791 of 2021- Emining Quarry Limited v Access Bank Kenya PLC & Purple Royal Auctioneers, seeking injunctive order and raising similar issue as those raised in the current Application, which Application was heard and dismissed for lacking in merit by the court ruling of 10th June, 2022.

17. Following that ruling, dismissing the application for Injunction, the Plaintiff abandoned the said suit, which is still pending before the Magistrate Court and approached the 1st Defendant seeking restructuring of its loan facility, which was once again allowed and granted a sum of Kshs. 32,649,616 by the offer letter of 7th December, 2022, which was to be repaid in 36 equal monthly instalments of Kshs. 1,134,338.

18. Despite being accommodated, the Plaintiff defaulted once again, prompting the 1st Defendant to instruct its Auctioneers to issue to the Plaintiff's Director's the requisite Orders under the debentures and over the security motor vehicles Registration numbers; KCM 307Y, KCM 306Y, KCM 305Y, KCM 304Y and KCM 951Y.

19. In total disregard to the suit already filed in the Chief Magistrate Court at Milimani, the Plaintiff filed this suit between the same parties, seeking similar Orders, when another suit is pending before the Court, therefore the application is res judicata and the suit is sub-judice.

20. The Plaintiff opposed this application by its Replying Affidavit sworn by Michael Kipruto Kandie on 16th July, 2024 stating that the allegation of the current application being res judicata and the suit sub-judice is based in misapprehension of the facts and the law.

21. He explained that the Chief Magistrate Case No. E10791 of 2021 filed at Milimani, sought to inter alia restrain the Defendants from attaching, repossessing, alienating, transferring and or disposing by public auction, all vehicles bearing registration numbers; KCM 307Y, KCM 306Y, KCM 305Y, KCM 304Y and KCM 951Y. That the said application was heard and indeed disallowed on 10th June, 2022 by Hon. M.W Murage[SRM]

22. Conversely, this suit is borne out of the Plaintiff's realisation that the 1st Respondent has undertaken three grossly irregular and questionable debits with respect to its loan account No. 099CTLA230190002. Moreover, that the cause of action arose in January, 2023 during the pendency of the Chief Magistrate Case and therefore, the prayers sought in the Chief Magistrate Court and the prayers in this suit are different and not res judicata and the suit is not sub judice as alleged.

23. He prayed for orders sought in the Application to be granted as prayed in the interest of justice.

Plaintiff/ Applicant's Submissions

24. The Applicant submitted on three issues:-

    1. Whether or not the plaintiff has met the threshold for granting interlocutory injunction Orders.

    2. Whether or not the plaintiff's Application is Res-judicata and his Plaint sub judice

    3. Who should bear costs of these applications.

25. On the first issue, the Applicant submitted that they have met the threshold for the grant of injunction orders as laid out in the celebrated case of Giella v Cassman Brown & Company Limited [1973] E A 358 that the 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.

26. Regarding prima facie case, it was argued that what amounts to a prima facie case was succinctly defined by the Court of Appeal, in Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123 in the following terms:

> " A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case in which on the material presented to, the court or a tribunal properly directing itself, will conclude that there exists a right that has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

27. Similarly, that in the instant case, the Applicant has presented before this honourable court an arguable case against the defendants. He contends that while there existed a contractual relationship between the plaintiff and the 1st Defendant arising from the charge agreement, the 1st Defendant grossly infringed the rights of the plaintiff by making fraudulent entries in the plaintiff's loan account to reflect a false debt not owed by the plaintiff. Despite seeking clarification on the said entries, no explanation was given. It was argued that it's upon the fault figures that interest was computed and applied.

28. The Applicant argued that in lumping fraudulent figures on its loan account, the 1st Respondent was in breach of its terms indicated in the letter of offer, the consequent charge documents, contract and banking laws.

29. Moreover, that the 1st Respondent failed to serve the plaintiff with the required statutory notices under Section 95 of the *Land Act* and instead conducted a forced sale valuation of the property prior to engaging the Auctioneers in exercise of its statutory power of sale. In addition, that the 1st Respondent has failed to serve the notification of sale and redemption notice on the Applicant as required by law in the exercise of its statutory power of sale.

30. He argued that all these depicts the infringement of the Applicant's right by the Respondents under the charge instrument which calls for an explanation and hence a demonstration of a prima facie case.

31. On irreparable injury, he relied on the decision in Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018]eKLR where the Court stated hat ; -

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

32. Correspondingly, that in this case, the Applicant risks losing both immovable and movable properties in the exercise of the already commenced illegal statutory power of sale, which arise out of inaccurate loan lumped up to his account without any explanation therefrom. Thus, in the absence of the interlocutory injunction orders, the Applicant will be exposed to irreparable loss as the same cannot be sufficiently compensated by way of damages in the event the claim against the defendants succeeds.

33. On balance of convince, it was submitted that the court comprehensively explained the concept of balance of convenience in the case of Pius Kipchirchir Kogo [Supra]: -

> " The meaning of balance of convenience will favour of the Plaintiffs is that if an injunction is not granted and the suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. inconvenience be equal, it is the Plaintiff who will suffer. In other words, the plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which i.e likely to arise from granting."

34. Further, he cited the case of Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 Others [2016] EKLR, where the Court dealing with the issue of balance of convenience expressed itself thus:-

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately tum out

to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If the Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favor of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

35. Based on the above case law, the Applicant submitted that having established a prima facie case against the Defendants with a high chance of success and demonstrated that it will suffer irreparable injury in the event the interlocutory injunction orders are not granted, the balance of convenience in considering the application for grant of interlocutory injunction orders tilts towards the Applicant. In any event that the Respondents will not be prejudiced in any way in the event the said orders are granted.

36. On whether the Application is res judicata or sub judice, the Applicant submitted that the Respondents' allegations are misleading to this Court as the same is premised upon misconceived positions and gross misinterpretations of key edicts of the law related to the institution and maintenance of suits viz the devices of res sub judice and res judicata.

37. On res judicata, the Applicant cited section 7 of the *Civil Procedure Act* and the case of Omar tla Sabrin Shop v Highrise Commodities Ltd [Civil Appeal E291 of 2023] [2024] KEHC 6177 [KLR] where the Court noted-

> " In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction."

38. He submitted that, that in order for the doctrine of res judicata to apply in a given set of circumstances, the suit must bear similar parties with respect to the same subject matter in which a decision has already been entered by the said court.

39. It is his submissions that on the contrary, the orders sought in the application and the suit in CMCC No. E10791 of 2021, Emining Quarry Limited v Access Bank Kenya PLC & Purple Royal Auctioneers, were injunctive orders to prevent the defendants, agents, proxies among others from attaching, repossessing, alienating, transferring and/or disposing of or in any way advertising for sale by public auction, all those vehicles bearing the registration numbers KCM 951Y, KCM 3024Y, KCM 305Y, KCM 306Y and KCM 307Y.

40. The said Orders were denied by Hon. M.W Murage on 10th June 2022. While, their current application and plaint dated 28th March 2024 was borne from the plaintiff's realization that the 1st Respondent had undertaken three grossly irregular and questionable debits with respect to its loan account, which cause of action arose in January 2023 and cannot therefore be the same subject matter as the initial suit.

41. On whether the Plaint is sub judice, the Applicant submitted that this doctrine is enshrined in Section 6 of the *Civil Procedure Act*. He then placed reliance on the case of Republic v Paul Kihara Kariuki, Attorney General & 2 Others ex parte Law Society of Kenya [2020] eKLR where Mativo J [as he then was] elaborated on the doctrine of sub judice by stating as follows:-

> " ...there exists the concept of sub judice which in Latin means "under judgment." It denotes that a matter is being considered by a court or judge. The concept of sub judice is that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a Situation,

order is passed by the subsequent court to stay the proceeding and such order can be made at any stage."

42. Correspondingly, the Applicant submitted that at the time of filing the said plaint, there was no other suit between either the parties herein or parties that they may be claiming from and litigating from the same title where such suit or proceeding is pending in the same or any other court having jurisdiction to grant the claimed relief. Thus, the claim by the Respondents is malicious and only aimed at convoluting the proceedings herein. In any event that Section 7 of the *Civil Procedure Act* contemplates not the striking of suit but staying to allow the court to comprehensively enquire into the issues raised in the various suits.

43. On costs, the Applicant argued that cost follow event, on that note, he prayed to be awarded costs of the two Applications.

Respondents' Submissions

44. Regarding res judicata, the Respondents maintained that the current Application is similar to the one filed at the Chief Magistrate Court in Milimani Under CMCC No. E10791 of 2021 , which Application was heard and dismissed, thus the current Application is res judicata as contemplated under Section 7 of the *Civil Procedure Act*.

45. The Respondent defined Res judicata as per 10th Edition of the Black's law dictionary to mean; -

> " An issue that has been definitely settled by judicial decision... the three essentials are [1] an earlier decision on the issues, [2], a final judgement on merits and [3] the involvement of the same parties in privity with the original parties."

46. In further support of this, reliance was placed on the case of Luka & 3 Others v Chairman Land Adjudication Committee, Leshuta Land Adjudication, section & 3 others [2023] KECA 1232[KLR], where the learned Judges of the Court of Appeal observed thus:-

> " It is trite that a person may not commence more than one action in respect of the same or a substantially similar cause of action and the court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions."

47. Further reliance was placed on the case of Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR where the Court of Appeal enumerated the ingredients of res judicata as follows;-

> " Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;
>
> a. The suit or issue was directly and substantially in issue in the former suit.
>
> b. That former suit was between the same parties or parties under whom they or any of them claim.
>
> c. Those parties were litigating under the same title.
>
> d. The issue was heard and finally determined in the former suit.

e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

48. It was therefore submitted that the doctrine of res judicata allows a litigant only one bite of the cherry and prevent such a litigant from returning to Court to claim further reliefs not claimed in the earlier action. They argued that this Doctrine serves the cause of order and efficacy in the adjudication process and prevents multiplicity of suits which would ordinarily clog the Courts and ensures litigation comes to an end.

49. Based on the foregoing, the Respondents submitted that both Applications seek the same prayers and revolve around the same issue on the outstanding loan facility owed to the Bank and the Banks' exercise of its statutory power of sale over the securities offered including subject motor vehicles registration numbers KCM 304Y, KCM 305Y, KCM 306Y & KCM 951Y. Additionally, that the said Applications are between the same parties herein. Further that the application in Chief Magistrate Court was determined by a court of competent jurisdiction, which rendered itself dismissing the Application on 10th June, 2022. Therefore, the Application is res judicata.

50. In support of its case, the Respondent relied on the case of Luka & 3 others v Chairman Land Adjudication Committee, Leshuta Land Adjudication Section & 6 others [Supra], where the Court of Appeal held:-

> "A perusal of the application shows that indeed that applicants filed an application before this Court dated December 10, 2021seeking an order of stay of execution of the Decree and Orders of Mbogo J., issued in Narok ELC Constitutional Petition No. E001 on 30 November 2021. The application was filed pursuant to the provisions of section 3A of the *Appellate Jurisdiction Act*, Rules 5[2][b], 41, 42 & 47 of the Court of Appeal Rules, 2010 and articles 22, 23, 35 and 40 of *the Constitution*. It has also not escaped our keen eye that the grounds and the affidavit in support of the application herein are similar to the application dated December 10, 2021. This court, in the ruling dated April 28, 2022 made a determination with respect to the said application. The court determined that the application lacked merit and dismissed the same with costs. Addressing our minds on the orders sought in this application, we hold the considered view, that regardless of the terms or words employed thereunder, the same were ultimately geared towards stopping the 7th respondent from acquiring title and from taking possession of the suit and; and also from developing it. Whether the applicants sought an injunction or an order for stay of execution, we hold the view that the substratum of the applications had been determined conclusively. Therefore, the issue of a preservative order under Rule 5[2][b] was directly and substantially in issue in the ruling dated April 28, 2022 hence could not be raised again, even with the use of judicial craftsmanship. The present application is between the same parties over the same subject matter, supported by the same grounds. It is our considered view that this matter is res judicata. The application before us is frivolous and an abuse of the court process."

51. It was submitted further that the suit in the magistrate's court is still active and thus the filling of the current suit in pendency of the said suit is sub judice and an abuse of Court Process.

52. Regarding the injunctive Orders sought, the Respondent submitted that the principle for granting injunctive orders were laid out in the celebrated case of Giella V Cassman Brown & Co Ltd [1973] EA 358 and reiterated by the Court of Appeal in the case of Nguruman Limited V Jan Bonde Neilsen & 2 Others [2014] eKLR, where the Court listed the three principles as follows:-

a. Establish his case only at a prima facie level.

b. Demonstrate irreparable injury if a temporary injunction is not granted.

c. Allay any doubts as to[b] by showing that the balance of convenience is in his favour."

53. It was submitted that the above conditions are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially.

54. On prima facie case, the Respondents placed reliance on the case of Mrao Limited [Supra], and argued that the Applicant has not demonstrated any right that has been infringed by the Respondents. On the contrary, that the Applicant has failed to service its loan facility in breach of its obligation under the loan agreement, causing the 1st Respondent to exercise its right under statutory power of sale in recovery of the money loaned.

55. They further cited the case of Woodcraft Industries Ltd & 3 Others v East African Building Society HCCC 602 of 2000, where the Court held that:-

> " To give an injunction to restrain a party from exercising a statutory power of sale which has arisen and is exercisable on the basis that it would be harsh to the borrower for whatever reason, in whichever circumstances would be, to my mind, shirk judicial responsibility to enforce contractual rights. It would be to render securities useless."

56. It was then submitted that the Applicant has not made out a prima facie case with any chances of success to warrant the grant of the Orders sought. It is elaborated that the Applicant has not paid any single cent from the year 2021 when the primary suit was filed. Therefore, that he should not seek refuge from this court when he defaulted in the repayment of the loan facility.

57. Consequently, that having failed to establish any prima facie case, he has not demonstrated any irreparable harm it will suffer if the injunctive Orders are not granted. To support this, reliance was placed on the case of Grant v Kenya Commercial Finance Ltd 7 Others Civil Appeal No. 227 of 1995 and the case of Kitur V Standard Chartered Bank Ltd & 2 Others [2002] 1KLR, where the Court held that:-

> " It must also be noted that when a chargor lets loose its property to a chargee as security for a loan or any other commercial facility on the basis that in the event of a default it be sold by a chargee, the damages are foreseeable. The security is thenceforth a commodity for sale or possible sale, with the prior concurrence and consent of the chargor. How then can he, having defaulted to repay loan arrears prompting a chargee to exercise its statutory power of sale, claim that he is likely to suffer loss or injury incapable of compensation by an award of damages? Such an argument is definitely misplaced and has no merits."

58. On balance of convenience, the Respondents submitted that it has demonstrated that the loan facility granted to the Applicant has not been paid to date and he has failed to submit any monies towards repayment of the said loan to reduce the exposure in place. Hence convenience does not tilt towards the Applicant.

59. In conclusion, the Respondents urged this Court to find its Application with merit and allowed it as prayed with costs and then dismiss the Applicant's Application with costs.

Analysis and determination

60. The issues that fall for determination in these two Application are:-

    1. Whether the current Application is res judicata

    2. Whether the suit is sub judice.

    3. Whether the Applicant has met the threshold for grant of injunctive Orders sought in the Notice of motion dated 23rd March, 2024.

    4. Who should bear costs of these Applications.

61. On Res judicata, the substantive law, as rightly submitted by the parties herein, is found in section 7 of the *Civil Procedure Act*, which provides that:-

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

62. The elements to be established in a case of res judicata are as listed the case of Independent Electoral and Boundaries Commissions v Maina Kiai & 5 Others [Supra], cited by the Respondents herein above. These elements include: -

    a. The suit or issue was directly and substantially in issue in the former suit.

    SUBPARA b.

    That former suit was between the same parties or parties under whom they or any of them claim.

c. Those parties were litigating under the same title.

d. The issue was heard and finally determined in the former suit.

e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

63. In the present case, it is noted that indeed the parties in the former suit and the current suit are similar, the Applicant in the former Application was seeking for injunctive Order restraining the Respondents from exercising its statutory power of sale on the securities motor vehicles above. The parties were also litigating under the same title and the issue of Injunction was addressed by the Court by dismissing the Application of 3rd September, 2021 with costs to the 1st Defendant as captured in the Order issued on 20th June, 2022.

64. It is thus evident that the first three elements have been established, however, on the last element, whether that court was competent to try this subsequent suit, this Court finds that the current application and the suit revolve around the loan restructuring facility dated 7th December, 2022 for a loan of Kshs. 32,649.616, which amount is obviously higher than the pecuniary jurisdiction of the Chief Magistrate Court and that court does not have jurisdiction to handle.

65. Further, the cause of action in the current suit arose on 19th January, 2023 after the application in the former court had been heard and determined. On these grounds alone, this Court finds that the claim of the Application being res judicata fails.

66. On whether the suit is sub judice, Section 6 of the *Civil Procedure Act* states that: -

> " No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

67. Further, the Supreme Court in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others [Interested Parties] [Advisory Opinion Reference 1 of 2 017] [2020] KESC 54 [KLR] elaborated on sub judice in the following terms:-

> " 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."

68. A perusal of the Plaint in the Chief Magistrate Court and the present Plaint shows that in the Chief Magistrate's Court, the Applicant sought Mandatory Injunctive Orders and an Order directed to the 1st Respondent to supply it with a comprehensive statement of loan.

69. In as much as similar prayers were made in his suit, the first prayer in the current Plaint dated 28th March, 2024 seeks a declaration that the statutory notice served on the Applicant is flawed and illegal having emanated from an erroneously loan figure of Ksh. 99 Million instead of Kshs 32 Million.

70. Secondly, that Plaint seeks payment of general damages for breach of contract based on the first prayer. All these prayers are anchored on the restructured loan facility of 7th December, 2022 , which subsumed former loan agreement as captured in Clause 1[A] [iv] of the said loan agreement. Accordingly, the chief magistrate suit, to the extent that they are based on former loan agreement, is overtaken by events, following the restructuring of the loan and execution of a new loan agreement dated 7th December, 2022. The Magistrates case is therefore mute and on that ground and in the circumstances of this case, the claim of the matter being res sub judice is unfounded.

71. On whether a temporary injunction order against the Defendants should issue pending the hearing and determination of this suit, the law on granting of interlocutory injunctions is set out under Order 40 Rule[1] [a] and [b] of the Civil Procedure Rules which provides that:-

> " Where in any suit it is proved by affidavit or otherwise;
>
> a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."

72. As restated by the parties herein, the Court's power to grant injunctive Orders is discretionary and on the principles established in the case of Giella v Cassman Brown & Company Limited [Supra] are that:-

> " First, 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."

73. On the first limb, the Applicant based its claim on the fact that the 1st Respondent has demanded through the 2nd Respondent a sum of Kshs. 4, 869, 602, which amount is erroneous. That the said arrears accumulated through a wrongful principal sum indicated as Kshs. 99,516,029. 56 instead of Kshs 32,649,616. He argued that the interest demanded accrued from the fictitious amount, therefore that the alleged arrears [if any] have not been ascertained and the demand is not justified, neither has its statutory power of sale crystallised.

74. The record indeed shows a restructuring loan facility dated 7th December, 2022 for the sum of Kshs. 32, 649,616, which is to be paid within 36 months at the rate of Kshs. 1,134,338 per month. The restructuring facility as per Clause 1[A] [iv] was to amalgamate existing facility for Emining Quarry limited and buy off facilities for Rosoga Investment which is a sister company and director loan into one term loan.

75. The loan statement issued to the Applicant by the 1st Respondent for the period between 19/1/2023 and maturity date of 19/1/2026, indicate that save for the loan Facility Disbursed of Kshs. 33,041,411.39, the Respondent charged disbursement fees of Kshs. 33,367,907,55 and Excise Duty of Kshs. 33,106,710,62 all on 19th January, 2023. The disbursement fees and Excise duty together is double the loan facility given to the Applicant. The Applicant argued that the Respondent based its arrears on this erroneous figure of 99 Million. In fact, that it paid more than 10 Million of the loan within 1 year and thus is not in arrears. The Respondent has not addressed the said issue of the erroneous figure in this Application, they rather maintained that the Applicant is in arrears and their statutory power of sale is ripe.

76. The issue of the exact arrears owing is in dispute and cannot be ascertained at this stage based on the loan statement exhibited. This therefore is an issue that should be determined by the Court during hearing, as such, the Applicant has established a prima facie case.

77. The Court of Appeal in Nguruman Limited case [supra] expressed itself as hereunder: -

> " On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate,

prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

78. The Applicant argued that it will lose its properties and motor vehicles, which double up as tools of trade for his business, if they are sold by public Auction, when the alleged arrears are based on an erroneous figure. Indeed, I find that the Applicant has established that if the subject motor vehicles are sold at this juncture his business will be paralyzed when the principal sum has glaring errors. On that ground, the Applicant has satisfied the second condition.

79. Flowing from the above, the balance of convenience tilts in favour of the Applicant. Therefore, that the Injunctive Order sought is merited but he shall continue servicing the loan as per the loan agreement dated 7th December, 2022.

80. As regards the Applicant's prayer that this Court directs the Respondent to render a complete and true and accurate statement of account of his loan Account, that prayer is predicated that the 1st Respondent has lumped up its loan account with fictitious fees and excise duty. He flagged out two entries of disbursement fees and excise duty both of 19th January, 2023.

81. The Respondent did not oppose the said application in their affidavit or submissions and therefore. Faced with similar issue, D.S Majanja J [as he then was] held in Muga Developers Limited v Equity Bank of Kenya Limited & 4 others [2020] eKLR:-

> "..the statement of account provided by the Bank is one that it usually provides in the ordinary course of business. In the interactions between the Company and Bank supported by correspondence forwarded to the Bank by the Company, it has never contended that the statements of account are, "sketchy, erroneous and inaccurate" or even shown which of the entries in the statements are incorrect. On the contrary, the Company has always been seeking to find ways to liquidate the debt. I therefore decline to make the order at this stage as the accounts provided by the Bank are complete, true and accurate."

82. Accordingly, it is only fair in the circumstances herein that the prayer be granted.

83. In conclusion, the Defendants'/Respondents' application dated 18th April, 2024 is disallowed.

84. The Plaintiff's application dated 26th March, 2024 is allowed in the following terms:-

    1. A temporary injunction be and is hereby issued retraining the 1st Respondent by themselves, their agents, servants and or employees from selling by public auction or completing any conveyance or transfer of any sale conducted by auction of the Plaintiff/Applicant's properties namely; L.R No. 12806/3, L.R No. Kajiado/Kitengela76271, 76272 & 76273 & Motor vehicles Registration Nos. KCM 307Y, KCM 306Y, KCM305Y and KCM 951Y, pending the hearing and determination of this Suit.

    2. The 1st Respondent is hereby directed to render a complete, true and accurate statement of accounts of the Plaintiff/ Applicant's loan account No. 099CTLA230190002 showing the exact indebtedness [if any] to date.

    3. The costs of this application abide the outcome of the suit.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 14TH DAY OF MAY , 2025.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Chemng'etich for Mr. Kisila for Plaintiff

Ms. Kimorna holding brief for Ms. Mathenge for Defendants

Ngéno , Court Assistant