Mohamed v Diamond Trust Bank Kenya Limited (Commercial Case E029 of 2023) [2024] KEHC 766 (KLR) (18 January 2024) (Ruling)

Neutral citation: [2024] KEHC 766 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL CASE E029 OF 2023

DKN MAGARE, J

JANUARY 18, 2024

BETWEEN

FUAD MAHAMOUD MOHAMED ..... PLAINTIFF

AND

DIAMOND TRUST BANK KENYA LIMITED ..... DEFENDANT

RULING

1. The principle of election has been used in various matters for centuries. In its most rudimentary, it involves picking one bad leader against the worst leader. In a more sophisticated form, it involves making a decision on competing rights. In more existential levels, it involves living or dying, going to heaven or hell, studying or remaining ignorant. Whichever side one chooses, choices have consequences and consequences have ramifications.

2. However, nature has decided that choice remains eternal. Once you are on one side you cannot go to the other. The principle of election thus requires parties to choose one cause of action or another. The choices involved in an election are inconsistent and paths divergent. Choices have inconsistent rights and remedies. Choice does not always involve good and bad or evil and good. Sometimes it involves choosing from two bad situations or two good decisions. When confronted with such an election, parties must choose which right or remedy to pursue. Choices have to be explicit. Once the choice is made, it is generally binding, and the party is precluded from pursuing the alternative option.

3. In succession, elections are also given. You may decide to take a burdened property but must bear the consequence of such an election. The principle of election serves several purposes, including promoting clarity and finality in legal disputes. It helps avoid contradictory legal positions and ensures that parties cannot take advantage of inconsistent legal positions. the principle of election is applied to prevent a party from taking unfair advantage of a situation. It is seen as a means to promote fairness and prevent a party from cherry-picking the legal positions that best suit them and avoiding the consequences of their choice.

4. For the first time in several years, I have seen res judicata being used as a sword and not a defence. The doctrine of election has been brought to the fore in this matter in a more profound way than usual. The court has been called upon to decide a question that is simple yet profound. Both parties have agreed that there have been a plethora of cases involving them in court. The Defendant says that by dint of those cases, this suit should be struck out. On the other hand, the plaintiff says that by dint of those cases, the court should call the defendant to order.

5. The court has started in the most unusual way to write this ruling. This is because it is not usual.

6. In this matter I shall use plaintiff and defendant since the parties have an application each. The plaintiff field a notice of Notice of Motion Application dated 30th under Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules and Section 1A, 1B and 3A of the *Civil Procedure Act* and is based on the grounds on the face of the application and the supporting affidavit of Fuad Mahamoud Mohamed dated 10th November 2023seeking the following orders: -

    a. Spent.

    b. That an order of injunction do issue restraining the Defendant by itself, its servants and/or Agents or otherwise howsoever from alienating, selling, disposing off or in any other manner dealing with the property known as L.R. No. MN/I/3420 (the suit property) pending the hearing and determination of the suit.

    c. Spent.

    d. That the cost of this Application be provided for

7. This was responded to by the Respondent though the Affidavit of Faith Ndonga. The also filed an application of even date seeking the following orders: -

    a. That this Honorable Court be pleased to strike out this suit as the issues raised are res judicata and Sub Judice having been litigated in Mombasa HCCC No.16 of 2011 – Fuad Mahmoud Mohamed ~vs~ Diamond Trust Bank Kenya Limited ~consolidated with~ Mombasa HCCC No. 72 of 2012 – Fuad Mahamoud Mohamed ~vs~ Diamond Trust Bank Kenya Limited & Diamond Trust Insurance Agency Limited, Mombasa Court of Appeal Civil Appeal No. E074 of 2021 – Diamond Trust Bank Kenya Limited ~vs~ Fuad Mahamoud Mohamed & Diamond Trust Bank Insurance Agency Limited and Mombasa Court of Appeal Civil Application SUP No. E001 of 2023 - Fuad Mahamoud Mohamed ~vs~ Diamond Trust Bank Kenya Limited & Diamond Trust InsuranceAgency Limited.

    b. That the Plaintiff's suit be struck out as against the Defendant for being scandalous, vexatious, frivolous and an abuse of process.

    c. That the cost of this Application and the suit be borne by the Plaintiff.

8. The Application is opposed by the Plaintiff via a Replying Affidavit dated 27th November 2023 sworn by the Plaintiff, Fuad Mahamoud Mohamed, the plaintiff herein. Parties filed length submissions, one of which is 111 pages, when counting authorities.

9. This made me wonder, what Ronald Dworkins meant by his thesis, how judges decide. Each of the parties has with great conviction addressed me on what their cases are. For this, I am forever indebted to the parties and their advocates.

10. The Defendant submitted that given that this case has been heard by courts of competent jurisdiction, it cannot be reheard. The Plaintiff on the other hand is stating that given that the matters have been

heard by courts of competent jurisdiction, the Defendant cannot take the course he is taking and as such this court should restrain him.

Plaintiff's submissions

11. On the Application dated 10/11/2023 the Plaintiff submitted that by a counter claim in commercial Case No. 16 of 2011, the Defendant sued the Plaintiff for the money due under the charge. There is thus a decree for the said money. Through Dalali Traders the Defendant has sought to advertise the property for sale.

12. They state that Dalali had not served a statutory notice. Secondly, that the Plaintiff elected to sue and cannot now exercise the statutory power of sale. To them, they have a prima facie case. Reliance is placed on the decision in Mrao Ltd v First American Bank of Kenya Ltd& 2 others [2003] eKLR, where the court of Appeal stated as doth: -

> " But as I earlier endeavoured to show, and I cited ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

13. They stated that there is a money Decree for Kshs. 35,940,514.49 and Kshs. 877,753.68. Pursuant to the Judgment of 25/1/2021 which was aggrieved by the Court of Appeal.

14. They rely on the case of David Karanja Kamau v Harrison Wambugu Gaita & another [2020] eKLR, which they state that is in all fours with this case.

> 89. There is also no doubt that the 2nd defendant sued the plaintiff in HCCC No. 53 of 2004 and obtained judgment against him for Kshs. 450,000 together with interest. That meant the 2nd defendant could only execute against the plaintiff for the amount in the decree and interest as ordered by the court in that suit. The action of suing both the principal borrower and the plaintiff as the guarantor discharged the plaintiff from his obligations under the charge. He became a debtor under the decree and the 2nd defendant could only execute against him in terms of the decree. It could not sell his charged property purporting to exercise the statutory power of sale that it lost the moment is elected to sue for the amount.
>
> 90. The 2nd defendant did not address itself to section 90(3) of the *Land Act* at all but maintained that it had its statutory power of sale was intact even after electing to sue for the outstanding loan amount. The view this court takes is that the 2nd defendant was aware of the law but was skating around the issue.
>
> 91. In that regard, I agree with the court's observation in Dinesh Kumar Zaverchand Jetha v Guaranty Trust Bank (Kenya) Limited (supra), that:
>
> > [49]. Among the remedies of the chargee against a "defaulting chargor" is the power of sale. It targets the charged property and not the chargor on his personal covenants. Therefore the chargee cannot sue the Principal Debtor and at the same time "exercise power of sale" [over] the Guarantor's charged property. But cannot sue the Guarantor personally and at the same time sell the charged property."
>
> 92. The 2nd defendant had no residual remedy available once it elected to sue. Any other action taken in the form of selling the property in exercise of statutory power of sale was not

permissible in law. The verdict I return in respect to this issue is that the 2nd defendant could not exercise the right of statutory power of sale since it had been distinguished following its election to sue for the loan amount."

15. On res judicata and sub judice, they state that they do not understand how a suit can be sub judice and res judicata.

16. They state that the only issue is whether a Defendant who has obtained a decree can exercise statutory power of sale.

17. They stated that Dalali had not prepared a statutory Notification of sale under Rule 15. They state that instructions were given to Garan Investment but along the way instructed Dala traders auctions for the auction of 16/11/2023.

18. They state that though the bank may be in a position to pay damages, then the court cannot continuance an illegality. Reliance is placed on the case of Joseph Mbugua Gichaga vs Cooperative Bank of Kenya Ltd (2005) eKLR, where the Court, Maraga J as then he was stated as doth:

> A party shouldnot be allowed to maintain an advantageous position he has gained by flouting the lawsimply because he is able to pay for it. Support for this view is to be found in the Courtof Appeal decision in the case of Aikman Vs Muchoki [1984] KLR 353.

19. Reliance is also placed on the judgment in Aikman-vs-Muchoki (1984) KLR 353 where the Court of Appeal held that

> "My understanding of the Court of Appeal decision in Giella case is that the court proceeds to consider the second condition of irreparable harm which cannot be adequately compensated for an award of damages only if it entertains some doubt on the first condition of the probability of success, like when the court thinks that the plaintiff has a fifty /fifty chance of success, however where going by the material placed before it at an inter parties hearing of an application for injunction it appears to the court that the plaintiff has a strong case like where it is clear that the defendant's act complained of is or may be unlawful the issue whether or not damage can be adequate remedy for the plaintiff does not fall into consideration. A party should not be allowed to maintain an advantageous position by flouting the law simply because he is liable to pay for it"

20. They pray that the Court holds the Defendant is in the track to flouting the law.

Defendant's submissions

21. Despite ordering that the Defendant was to file submissions by 11/12/2023, they filed on 9/1/2024 giving the court very limited time to scour through 111 pages of submissions.

22. They relied on the case of David Karanja Kamau v Harrison Wambugu Gaita & another [2020] eKLR as follows:

> " 89. There is also no doubt that the 2nd defendant sued the plaintiff in HCCC No. 53 of 2004 and obtained judgment against him for Kshs. 450,000 together with interest. That meant the 2nd defendant could only execute against the plaintiff for the amount in the decree and interest as ordered by the court in that suit. The action of suing both the principal borrower and the plaintiff as the guarantor discharged the plaintiff from his obligations under the charge.

He became a debtor under the decree and the 2nd defendant could only execute against him in terms of the decree. It could not sell his charged property purporting to exercise the statutory power of sale that it lost the moment is elected to sue for the amount.

90. The 2nd defendant did not address itself to section 90(3) of the *Land Act* at all but maintained that it had its statutory power of sale was intact even after electing to sue for the outstanding loan amount. The view this court takes is that the 2nd defendant was aware of the law but was skating around the issue.

91. In that regard, I agree with the court's observation in Dinesh Kumar Zaverchand Jetha v Guaranty Trust Bank (Kenya) Limited (supra), that:

> [49]. Among the remedies of the chargee against a "defaulting chargor" is the power of sale. It targets the charged property and not the chargor on his personal covenants. Therefore the chargee cannot sue the Principal Debtor and at the same time "exercise power of sale" [over]the Guarantor's charged property. But cannot sue the Guarantor personally and at the same time sell the charged property."

92. The 2nd defendant had no residual remedy available once it elected to sue. Any other action taken in the form of selling the property in exercise of statutory power of sale was not permissible in law. The verdict I return in respect to this issue is that the 2nd defendant could not exercise the right of statutory power of sale since it had been distinguished following its election to sue for the loan amount.

23. They submit that the Plaintiff submitted that there were the following cases: -

a. Mombasa HCCC No. 16 of 2011 – Fuad Mahmoud Mohamed versus Diamond Trust Bank Kenya Limited where judgment Judgement entered on the 25/01/2021

b. Mombasa HC No. 72 of 2012 – Fuad Mahamoud Mohamed versus Diamond Trust # Suit consolidated with MBS HCCC No. 16 of 2011

c. Mombasa Court of Appeal Civil Appeal No. E074 of 2021 – Diamond Trust Bank Kenya Limited ~vs~ Fuad Mahamoud Mohamed & Diamond Trust Bank Insurance Agency Limited # Appeal allowed via a judgement entered on the 14/04/2023

d. Mombasa Court of Appeal Civil Application SUP No. E001 of 2023 - Fuad Mahamoud Mohamed ~vs~ Diamond Trust Bank Kenya Limited & Diamond Trust Insurance Agency Limited # Application seeking certification that the intended appeal raises issues of public importance and leave to appeal to the Supreme Court of Kenya. # Application scheduled for ruling on the 24/11/2023. # Ruling was delivered on the 15/12/2023 dismissing the application with costs.

24. In other words as regards the amount payable, they submit that all the courts in the land have certified that the Plaintiff ought to pay a certain money decree. This decree arose from moneys under a charge.

25. They stated that the Plaintiff failed and/or neglected to pay the aforementioned term loan as and when the same fell due hence the Bank commenced the exercise of its statutory power of sale which resulted in the Plaintiff instituting two suits as follows: -

    a. Mombasa HCCC No. 16 of 2011 – Fuad Mahamud Mohamed ~vs~ Diamond Trust Bank Kenya Limited. (See annexure "FN 1" of the Replying Affidavit)

    b. Mombasa HCCC no. 72 of 2012 – Fuad Mahamoud Mohamed ~vs~ Diamond Trust Bank Kenya Limited & Diamond Trust Insurance Agency Limited. (See annexure "FN 2" of the Replying Affidavit)

    c. Via a Consent on the 05/07/2012 the two suits were consolidated with Mombasa HCCC No. 16 of 2011 being designated as the lead file. 12. The Plaint dated 12th April 2012 was amended via the Amended Plaint dated 10th December 2015 filed on the 14th December 2015 the Plaintiff sought the following reliefs from this Honourable court: - (See annexure "FN 3" of the Replying Affidavit) a) The sum of Kshs. 103,000,000/= as particularized above.

    d. b) Damages for loss of business as the rate stated in paragraph 36A above.

    e. A declaration that the notification of sale dated 23rd May 2011 is invalid and/or unlawful and that circumstances have not arisen for realization of the security comprised in LR. 3420 Sec. 1 MN d)

    f. A permanent injunction restraining the Defendant by itself, agents and/or otherwise from disposing of property namely LR 3420 Sec. 1 MN on the basis of the circumstances subsisting on the date of the purported notice. e) Costs of this suit. f) Interest on (a), (b) and (c) above at the rate of 14% per annum.

26. That the said Plaint was opposed by the Defendant's Statement of Defence dated 6th June 2012 and amended via the Defendant's Amended Statement of Defence and Amended Counterclaim dated 27th January 2016 and filed on the 12th February 2016 wherein the Appellant sought the following by way of counterclaim: -

    i. The sum of Kshs 37,099,091.60 comprising of the said sums of Kshs 35,940,514.49 together with interest thereon at the rate of 27.75% per annum, Kshs 877,753.68 together with interest thereon at the rate of 25.75% per annum and Kshs 280,823.43 together with interest thereon at the rate of 16% per annum from 2nd August 2011 until payment in full.

    ii. A declaration that the Notification of Sale dated 23rd May 2011 is valid and/or lawful and that the Plaintiff to the Counterclaim took all the necessary procedures in exercising its Statutory Power of Sale.

    iii. The temporary injunction restraining the 1st Defendant by itself, agents or otherwise howsoever from selling, disposing of, advertising for sale or in any other way dealing with the property known as L.R. MN/1/3420 Sec 1MN be lifted.

    iv. Costs of both suits together with interest thereon at court rates from the date of judgment until payment in full.

    v. Such other or further relief that this Honourable Court may deem fit to grant. 14.

27. That the matter proceeded and judgement was entered on the 25th January 2021 as follows: -

i). For the plaintiff against the 1st defendant Kshs. 82,129,963 with interest thereon at 16.25%, p.a. being the benefit the1st defendant would derive from the contract between the parties, from the date of the suit till payment in full.

ii). The suit against the 2nd defendant is dismissed for lack of proof with no orders as to costs.

iii) for the 1st defendant against the plaintiff in terms of the counter claim;

a. Kshs. 35,940,514.49 with interest thereon at 16.25 % p.a, from the 2/8/2011, and subject to section 44 D of the *banking Act*, till payment in full. (b) Kshs. 877,753.68 with interest thereon at 16.25% p.a from 2/8/2011 and subject section 44d of the *banking Act*, till payment in full. (c) On costs between the plaintiff and the 1st defendants, and because each has succeeded in equal measure, I direct that each shall bear own costs.

b. Being dissatisfied with the judgement of the Honourable judge the Defendant appealed to the Court of Appeal at Mombasa in Mombasa Court of Appeal Civil Appeal No. E074 of 2021 – Diamond Trust Bank Kenya Limited ~vs~ Fuad Mahamoud Mohamed & Diamond Trust Bank Insurance Agency Limited. (See annexure "FN 6" of the Replying Affidavit)

28. Via a judgment delivered on the 14th April 2023 the Court of Appeal duly allowed the Defendant's Appeal and set aside the award of Kshs. 127,036,215/= as against the Bank, as follows: -

a) We set aside the award in favour of the 1st respondent against the appellant in the amount of Kshs. 82,129,963.00.

b) The cross appeal fails.

c) We set aside the decision of the trial court dismissing the Bank's counterclaim for claim of Kshs 280,823.43 with interest at 16% pa in respect of premium financing and substitute therefore judgment in favour of the Bank for the said amount.

d) We uphold the awards in favour of the Bank of Kshs. 35,940,514.49 with interest thereon at 16.25 % from the 2/8/2011, and subject to section 44D of the 2/8/2011, and subject to section 44D of the *Banking Act*, till payment in full and Kshs. 877,753.68 with interest thereon at with interest thereon at 16.25% p.a from 2/8/2011 subject section 44 of the of the *Banking Act*, till payment in full e) The appellant shall have the costs of the appeal.

29. They added that The Honourable judge at pg. 31 – 32 of the Judgement dated 25/01/2021 resolved the issue of whether the notices issued were valid and enforceable in favour of the Defendant as follows: -

> " 96. I have found that no evidence was led to show that the plaintiff met and satisfied his obligation to pay the facilities as covenanted. The evidence led is that there was a default and indeed statutory notices were issued on 21/06/2010 and 23/09/2010 before the restructuring letter of offer was issued.
>
> That to this Court is enough evidence that there was compliance with the requirement of the transfer of property Act, then in force. There was also on the face of the letter dated 23/09/2010 a stamp showing that the letter was indeed posted.
>
> I do find that there was, indeed, notices issued and that the 1st Defendant cannot be faulted for serving the Notification of sale as it did.

> In any event by the provisions of the charge at Clause 7(i) allowed the notices to be left at the mortgaged property. That is what I find the auctioneer to have done when he left the notice with the Plaintiff's son at the premises. I do find that the prayer for declaration that the notification of sale was illegal as well as that for permanent injunction have not been proved to be merited and the same are thus not granted but dismissed."

30. They submit that the suit offends sections 6 and 7 of the *Civil Procedure Act*. our Honour, The Black's Law Dictionary 8th Edition at pg. 4087 - 4088 defines Res judicata as follows: An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been — but was not — raised in the first suit.

31. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.

32. They state that the Court of Appeal in the case of Uhuru Highway Development Limited ~vs~ Central Bank of Kenya & 2 others [1996] eKLR pg. 12 stated as follows: -

> "That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation." 34. The above position was reiterated in the case of Mwambeja Ranching Company Limited & another ~vs~ Kenya National Capital Corporation Limited (Kenya) & 6 others [2015] eKLR, Honourable Justice Gikonyo stated: "To say the least, although the Plaintiff has been zealous to seek justice, but the filling of numerous applications under different provisions of the law seeking same relief is not appropriate way of exerting a bona fide zeal by a litigant. Such path may be interpreted to be an attempt to confuse the Court and circumvent its clear intellect on justice in this matter. As was reiterated by the Court of Appeal, a rose by any other name will smell the same. The Plaintiff is attempting to re-litigate a matter that has on several occasions been canvassed before, and determined by this Court and the Court of Appeal. I too as a court of law must exert the noble desire to bring litigation to a closure as part of administration of justice. Res judicata serves a noble cause in the administration of justice-brings finality to litigation and avoids parties vexing others on the same matter over and over again under craft of pleadings. See the case of Kenya Hotel Properties Limtied v Willisden Investments Limited & 6 others.

33. They lamented on non disclosure by the Plaintiff. This is reflected in their submissions that; -

34. Your Lordship, in the Andrew Ouko –vs- Kenya Commercial Bank & 3 Others (2005) eKLR, Azangalala J. emphatically stated that: - Mombasa Hccomm Case No. E029 Of 2023 – Fuad Mahamoud Mohamed ~Vs~ Diamond Trust Bank Kenya Limited 19

> "In my view these were material non-disclosures and if the same had been disclosed at the ex parte stage of these proceedings the Plaintiff would not have been granted the interlocutory ex parte injunction. On my part, even if I had found that the plaintiff had shown a prima facie case with a probability of success, these material nondisclosures would have disentitled the Plaintiff to the equitable relief of injunction... In the English case of the King ~vs~ the

General Commissioners for the Purposes of Income Tax Acts for the District of Kensington (1917) 1 KB 486, the Learned Chief Justice Viscount Reading expressed himself as follows: - 'where an ex parte application has been made to this court for a rule nisi or other process if the court comes to the conclusion that the Affidavit in support of the Application was not candid and did not fairly state the facts, the Court ought, for its own protection and to prevent an abuse of its process to refuse to proceed any further with the examination of the merits... Before coming to this conclusion, a careful examination will be made of the facts as they are and as they have been stated in the Applicant's Affidavit, and everything will be heard that can be used to influence the view of the Court when it reads the Affidavit and knows the true facts. But if the results of this examination is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading Affidavit.' 81. The learned Judge further held that: - "And Lord Warrington L.J. in the same case delivered himself as follows: - 'the Court will not allow a Plaintiff to obtain any advantage from an ex parte injunction which he has improperly obtained' And Lord Scrutton L.J. in the same case at page 514 delivered himself as follows: - '...the Court is supposed to know the law. But it knows nothing about facts and the applicant must state fully and fairly the facts and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action it has taken on the faith of imperfect statements... A plaintiff applying ex-parte comes (as it has been expressed) under a contract with the Court. If he fails to do that, and the Court finds, when the other party applies to dissolve the injunction, that any material fact has been suppressed or not properly brought forward, the Plaintiff is told that the Court will not decide on the merits and that, as he has broken faith with the court, the injunction must go.' Applying the principles expounded in the said English case, I would have held that the plaintiff was guilty of material non-disclosure and on that basis the ex-parte temporary injunction would have had to go even without considering the merits of the Application."

35. It is their prayer that not only should the application be dismissed but the entire suit be dismissed in limine.

Analysis

36. What is not in doubt is that parties have exhausted all these factual disputations in the matter. The Defendant has an unimpeachable decree. The court is bound by decisions of the most superior of the courts, the Supreme Court. This is in line with article 163(7) of *the Constitution* which states as doth: -

> "(7) All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.".

37. There are three issues to be determined in this matter as a whole.

    i. Whether the suit is sub judice

    ii. Whether the suit is res judicata

    iii. Whether the plaintiff is entitled to the orders sought.

38. I will start with the Defendant's case. They are of the considered view that they are entitled to exercise statutory power of sale. As such issues raised should not be raised as this amount to res judicata. At some stage they stated sub judice. However, I do not find anything subjudice as all the cases have been decided all the way to the supreme court. I thus dismiss off hand, the issue of sub judice.

39. The claim for both subjudice and res judicata is covered under sections 6 and 7 of the *civil procedure act*, as doth: -

a. section 6 of the *Civil Procedure Act* 2020 provides as follow: -

> " 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."

b. Section 7 of the *Civil Procedure Act* 2020 provides as follows: -

> " 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."

40. None of the cases is pending and as such subjudice does not apply.

41. Regarding the concept of res judicata, the same deals with questions that were or could have been in issue in a previous suit. The parties have been in a bruising 13 year battle or battle royale in all superior courts of the country. The Plaintiff escaped with wounds, while the Defendant escaped with a trophy, decrees and certificate of costs for the amount arising under the charge. That marked the end of the battles as regards what is due under the charge. The amount in the charge morphed into decree. The Plaintiff's argument is that there are no longer amounts due under the charge, due to the existence of a decree of the superior courts.

42. It is my understanding that the issue raised is what instrument will guide the parties on what is due. The Supreme Court has spoken. It is debatable whether any amount incurred after the closure of the gates of the Supreme Court, can be pursued outside the decree of the Court of Appeal. For example, the Auctioneers may be paid and legal charges will be deducted, from which account will these be from given that the degree has crystallized?

43. I agree with the Plaintiff that this novel issue is not in any of the pleadings. In other words, is there any money due and owing for which a statutory power of sale can be exercised? Can the Plaintiff proceed to exercise statutory power of sale after suing for the money under a charge.

44. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms: -

i. ''Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

ii. Explanation (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

iii. Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.''

45. In the dicta in In Re Estate of Riungu Nkuuri (Deceased) [2021] eKLR the court stated as follows:

> " The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:
>
> (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."

46. In the case of Attorney General & another ET vs (2012) eKLR where it was held that;

> " The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & Others (2001) EA 177 the court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit".
>
> In that case the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata....."

47. 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. The court in the English case of Henderson v Henderson (1843-60) All E.R 378, observed thus:

> " ...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but

to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

48. Res judicata applies to applications just like suits. In the case of Julia Muthoni Githinji v African Banking Corporation Limited [2020] eKLR the court stated thus:

> 14. After a careful reappraisal of the application for injunction before the lower court, I have come to the conclusion that the application was res judicata and the entire suit was subjudice as there was an active pending suit before a court of competent jurisdiction being Nakuru ELC No. 272 of 2017. All issues raised in the suit before the subordinate court could be properly litigated in the suit pending before the ELC. The filing of the suit by the appellant in the subordinate court when she had a similar suit in the ELC Court was an abuse of the Court process which the Court cannot countenance.

49. Similarly, in Maumbwa & 3 others v Kisemei (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment Maumbwa & 3 others v Kisemei (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment) the court stated doth:

> " By comparing the two applications and the authorities on res judicata, it is clear to me that the issues being canvassed in the application dated 11th January 2021 is res judicata. The issues in issue in that application were directly and substantially in issue in the application dated 13th September 2017. These issues relate to the same parties and these issues have been tried by a competent court. To my mind to bring the same issues between the same parties that have been determined by a court of competent jurisdiction is an abuse of the court process."

50. So, in this case the defendant opted or elected to sue for the amounts. The plaintiff has sued him on the fact that by suing, the defend gave up the statutory power of sale.

51. Without making firm determination I find that the question raised in this court is a pure point of law, that does not arise from the cases before. There is no factual dispute. The decree has crystallized and is executable, pronto. The second aspect is Dalali traders who purported to exercise statutory power of sale. I shall not address that issue till evidence is tendered. As we so speak the main question is whether a party who has a money decree has a right to exercise statutory power of sale. None of the pleadings deal with that issue.

52. In any case the cause of action relating to sale by Dalali auctioneers arose after the matter was dealt with by the Court of Appeal to finality. In the case of David Karanja Kamau v Harrison Wambugu Gaita & another [supra] the court was of the view that the statutory power of sale is extinguished upon a party exercising an election. It appears the plaintiff led the defendant down the garden path and drove him out of their power of sale. In that case the court stated as doth: -

> 89. There is also no doubt that the 2nd defendant sued the plaintiff in HCCC No. 53 of 2004 and obtained judgment against him for Kshs. 450,000 together with interest. That meant the 2nd defendant could only execute against the plaintiff for the amount in the decree and interest as ordered by the court in that suit. The action of suing both the principal borrower and the plaintiff as the guarantor discharged the plaintiff from his obligations under the charge. He became a debtor under the decree and the 2nd defendant could only execute against him in terms of the decree. It could not sell his charged property purporting to exercise the statutory power of sale that it lost the moment is elected to sue for the amount.

90. The 2nd defendant did not address itself to section 90(3) of the *Land Act* at all but maintained that it had its statutory power of sale was intact even after electing to sue for the outstanding loan amount. The view this court takes is that the 2nd defendant was aware of the law but was skating around the issue.

91. In that regard, I agree with the court's observation in Dinesh Kumar Zaverchand Jetha v Guaranty Trust Bank (Kenya) Limited (supra), that:

> [49]. Among the remedies of the chargee against a "defaulting chargor" is the power of sale. It targets the charged property and not the chargor on his personal covenants. Therefore the chargee cannot sue the Principal Debtor and at the same time "exercise power of sale" [over]the Guarantor's charged property. But cannot sue the Guarantor personally and at the same time sell the charged property."

53. Even one issue is enough to safe a suit from being struck out. Unless a suit is so hopeless and cannot be saved, the duty of the court is to hear cases on merit. In In case of The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999, the Court of Appeal stated as follows:

> " The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant's defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did."

54. In the case of Uchumi Supermarkets Limited & another v Sidhi Investments Limited [2019] eKLR, the court of Appeal stated as doth: -

> " An application to strike out pleadings involves the exercise of judicial discretion on the part of the court. In Crescent Construction Co. Ltd vs. Delphis Bank Ltd [2007] eKLR the Court stated that:-
>
> > "... one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant, however weak his case may be, from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair

to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.

55. They are of the view that courts should be slow to strike out cases as held in D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR, where the court of Appeal stated as doth: -

> " per Chitty J. in Republic of Peru v. Peruvian Guano Company, 36 Ch.Div. 489 at pp. 495 and 496.
>
> "It has been said more than once that the rule is only to be acted upon in plain and obvious cases, and, in my opinion, the jurisdiction should be exercised with extreme caution."
>
> per Swinfen Eady, L.J. in Moore v. Lawson and Another,/31 ff.L.lf. 418 at p. 419... 31 T.L.R. 418 at p. 419.
>
> "It is a very strong power indeed. Itis a power which, if it not be most carefully exercised, might conceivably lead a court to set aside an action in which there might really, after all, been right, and in which the conduct of the defendant might be very wrong, and that of the plaintiff might be explicable in a reasonable way. Unless it is a very clear case indeed, I think the rule ought not to be acted upon.....
>
> Therefore, unless the case be absolutely clear, I do not think the statement of claim ought to be set aside as not showing a reasonable cause of action."

56. I find and hold, that on the pleadings before me, the suit is not res judicata. The illegality of the sale challenged does not arise from any notices but from the operation of the law. The operation of the law may not have taken effect, had an election not been taken under section 90 of the *Land Act*. The said section provides as follows: -

> " 90. Remedies of a chargee
>
> (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.
>
> (2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—
>
> a. the nature and extent of the default by the chargor;
>
> b. if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
>
> c. if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from

doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

d. the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

e. the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the chargor does not comply within ninety days after the date of service of the notice under, subsection

(1) the chargee may—

(a) sue the chargor for any money due and owing under the charge;

(b) appoint a receiver of the income of the charged land;

(c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land;

(4) If the charge is a charge of land held for customary land, or community land shall be valid only if the charge is done with concurrence of members of the family or community the chargee may—

(a) appoint a receiver of the income of the charged land;

(b) apply to the court for an order to—

(i) lease the charged land or if the charge is of a lease, sublease the land or enter into possession of the charged land;

(ii) sell the charged land to any person or group of persons referred to in the law relating to community land."

57. This court will have then to determine, even if it is that one issue, whether a party who has elected (have they?), can, while holding a valid decree proceed and exercise a statutory power of sale. The plaint thus raises at least one triable issue.

58. Accordingly, I find no merit in the Application dated 22/11/2023. I dismiss the same with costs of 30,000/= to the Plaintiff payable within 30 days in default execution do issue.

59. The test for grant of injunction was set out in the case of the locus classicus case of Giella = vs = Cassman Brown & Co. Ltd (1973) EA, 358, 360, which sets out principles for grant of injunction. The court, stated as follows, though the wisdom of Spry VP, as then he was, as follows: -

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in east Africa. 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."

60. In the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal was of the view that these tests are sequential. The Court stated: -

> " In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> (a) establish his case only at a prima facie level,
>
> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
>
> (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable.
>
> In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

61. What constitutes a prima facie case was set out succinctly in the case of Mrao Ltd ~vs~ First American Bank of Kenya Ltd & 2 Others (2003) KLR 125 by the Hon. Bosire J.A. (as he then was) as follows: -

> " So what is a prima facie case? I would say that in cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter... Mr. Wasuna appeared to me to imply that the test as to whether or not a prima facie case had been made out is satisfied if the applicant is able to show the existence of an arguable case. But as I earlier endeavoured to show, and I cited ample

authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

62. As already stated there is a strong prima facie case that the statutory power of sale may have been extinguished by dint of the election to sue for money under a charge. There is a strong possibility that if the above is correct, then the exercise of the statutory power of sale is illegal. If it is illegal, then it cannot be saved.

63. What happened if the sale is null and void? Then it has no effect whatsoever. In Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

64. What about the irreparable loss. If the sale is conducted and the decree also executed, the defendant will have undue advantage even where the plaintiff opts for insolvency. The defendant will have a right to participate in insolvency using the decree at the same time warding off other creditors as a secured debtor.

65. Further even where the sale takes place there is a high likelihood that the purchaser will be a purchaser for value without notice. In the case above the court stated as doth: -

> " 97. At the time the property was advertised, the 1st defendant could not know that there was a dispute between Rupa (K) Ltd and the plaintiff on the one hand and the 2nd defendant on the other. Even during the auction, there was no way the 1st defendant would know of existence of such a dispute. The 1st defendant attended and participated in the auction just like any other bidder. He was under no obligation to inquire on the conditions of the title and whether there were any outstanding disputes between the parties.
>
> 98. Doing so, would be asking too much from a bidder who would have no way of ascertaining such details. Once the property is advertised for sale by public auction, interested bidders are informed what to ascertain and what is not warranted. In that regard, therefore, I am persuaded that the 1st defendant was a purchaser for value without notice.
>
> 99. In arriving at this conclusion, I am guided by the decision in Captain Patrick Kanyagia & Another V Damaris Wangeci & Others) supra). The court, (Shah, JA) observed that the first appellant who had attended the auction sale was declared the highest bidder. He paid 25% of the bid price as was stipulated by one of the conditions of sale. He signed the contract of sale. He was to pay the balance of the purchase (bid) price within 60 days which he did. He and

his wife were therefore purchasers in good faith without notice of any right or title, if any. The Judge then stated:

> "I see no duty cast, in law on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell.... The buyer's duty is to check the register and see if the title of the vendor or the mortgagee exercising its/his power of sale is clear."

100. See also Athi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR

101. The 1st defendant has a title deed in his name. He participated in a public auction where he was declared the highest bidder. Although the plaintiff tried to argue that he did not pay the balance of the price as required, the 1st defendant showed that the money was paid to the 2nd defendant. Even if it had not been paid as required, the 2nd defendant tolerated it and the money was eventually paid. It was on that basis that a title was issued to the 1st defendant. Moreover, there is no evidence that the 1st defendant was party to any alleged fraud. I therefore find and hold in the affirmative, that the 1st defendant is a purchaser for value without notice."

66. The balance of convenience tilts in favour of granting the orders. The defendant already has a decree which they can execute. The exercise of statutory power of sale after a bruising court battle is stealing a match and a bid to unjustly enrich themselves. The election should stand. In the Court of Appeal in Esso Kenya Limited. vs. Mark Makwata Okiya Civil Appeal No. 69 of 1991:

> " The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory...As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available."

67. In Dr. Simon Waiharo Chege vs. Paramount Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 360 of 2001:

> " The remedy of injunction is one of the greatest equitable reliefs. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity."

68. The act of the Defendant having a decree and purporting to exercise the so-called statutory power of sale is anathema to good conscience and reeks of mischief. An injunction is thus an appropriate remedy. It is not enough to flaunt damages as adequate where there is patent evidence of a likelihood of an illegality being committed.

69. On the face of inequitable conduct, I find the plaintiff's application merited and allow it.

Determination

70. In the light of the foregoing, after considering the law and the Affidavits, submissions and principles of equity, I make the following determination: -

    a. The Defendant's Application dated 22/1/2023 is hereby dismissed with costs of 30,000/=.

    b. The Plaintiff's Application dated 10/11/2023 is hereby allowed in that, an order of injunction do issue restraining the Defendant by itself, its servants and/or Agents or otherwise howsoever from alienating, selling, disposing off or in any other manner dealing with the property known as L.R. No. MN/I/3420 (the suit property) pending the hearing and determination of the suit.

    c. Costs of the Application dated 10/11/2023 to the Plaintiff.

    d. The combined costs be paid by 19/2/2024, in default execution do issue.

    e. The matter shall proceed for directions on pretrial on 7/5/2024

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 18TH DAY OF JANUARY 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Miss Azei for the Respondent

Ms Osewe for the Appellant