



**Kenya Women Finance Trust v Squaredeal Kenya Limited (Civil Appeal  
36 of 2021) [2023] KEHC 17234 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17234 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL 36 OF 2021  
JRA WANANDA, J  
MAY 12, 2023**

**BETWEEN**

**KENYA WOMEN FINANCE TRUST ..... APPELLANT**

**AND**

**SQUAREDEAL KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This Appeal arises from the Ruling of Hon. L. Kassan delivered on 16/04/2021 in Eldoret Chief Magistrate’s Court Land Case No. E21 of 2020. The Ruling pertained to the Respondent’s Application which basically sought an interlocutory injunction to bar or restrain the Appellant bank from auctioning the Respondent’s property.
2. I took over this matter when the parties had already taken directions and had both already filed their respective Submissions. The respective Advocates asked me to take over from my predecessor and proceed to write the Ruling. I accepted the challenge. However, when I began to write the Ruling, I noted that the Appeal emanates from Chief Magistrate’s Court sitting as a Land Court. I therefore opined that, in the circumstances, the Appeal ought to have been filed at the Environment & Land Court. I have agonised over this issue but since neither of the parties raised this manner and none addressed the Court on the same, since both seem eager to have the Judgment, since they seem to be in unison that this Court proceeds to determine the Appeal, and since the dispute is basically over the exercise of a Lender’s statutory power to sale vis a vis a Chargor’s right to redemption of a security, so be it.
3. The Application the subject of this Appeal is the Notice of Motion dated 27/10/2020 which sought the following prayers:
  - i. Spent



- ii. The defendant/respondent, its servants and agents are restrained from attaching, selling, alienating, leasing, taking possession, appointing a receiver or in any other interfering with the plaintiff's/applicants' property being land parcel no. Eldoret Municipality/Block 10/56 pending interparty hearing and determination of this application.
  - iii. The defendant/respondent, its servants and agents are restrained from attaching, selling, alienating, leasing, taking possession, appointing a receiver or in any other interfering with the plaintiff's/applicant's property being land parcel no. Eldoret Municipality/Block 10/56 pending interparty hearing and determination of the main suit.
  - iv. The parties herein to appoint either jointly or severally a qualified and reputable accountant or accounting firm to carry out a reconciliation of accounts and file a report within 30 days on the loan account with respect to the loan facility advanced by the defendant/respondent to Squaredal uniforms center limited and secured by charge over land parcels numbers Eldoret Municipality/Block 10/56 and Eldoret Municipality/Block 14/12 and the parties herein to share equally the cost of reconciliation.
  - v. Costs of the application are granted to the Plaintiff/applicant.
4. The grounds of the Application were that the Respondent is the registered owner of the land parcel known as Eldoret Municipality/Block 10/56, the Appellant advanced a loan facility to Messrs Squadrel Uniforms Centre Limited (hereinafter referred to as the "borrower") for a sum of Kshs 35,921,373/- in December 2016, the loan facility was secured by two respective Charges, one lodged over the said parcel of land and the second, over a parcel of land known as Eldoret Municipality/Block 14/12, the borrower repaid the loan but at some point experienced financial challenges forcing the parties to agree to sell the second parcel, Eldoret Municipality/Block 14/12 to assist in offsetting the loan, the sale was conducted on 2/10/2019 vide an Auction, according the Respondent, the sale and/or the proceeds received therefrom fully settled the loan, it therefore expected the Appellant to discharge and release the Certificate of title for the first property, land parcel Eldoret Municipality/Block 10/56, the Appellant however declined to do so and instead threatened to sell the property, the Respondent will suffer irreparably if the Application is not granted, the entire suit will be rendered nugatory if the Appellant proceeds to sell the land.
5. The Application was supported by the Affidavit of one Joseph Kipkurgat Rotich who described himself as a Director of the Respondent. The same basically reiterated the matters set out in the grounds but in more detail. He deponed that at the time of the agreed auction, the amount outstanding was Kshs 28,000,000/-, the property was sold for that same amount in October 2019, the sale therefore fully discharged the loan, despite several requests, the Appellant declined to discharge the property and release the title, in October 2020 the Appellant eventually responded by stating that there was still an outstanding amount of Kshs 12,225,969.26, that it is for this reason that it had not acceded to the Respondent's demands, this new claim was an afterthought since it was being raised more than 1 year after the auction, the new claim was an afterthought, it was an attempt at unjust enrichment, the borrower has since been wound up hence the Appellant cannot claim its indebtedness after the winding-up, the Appellant should have challenged the winding up of the borrower if indeed there were pending liabilities, the Appellant is maliciously and mischievously piling interest on the purported outstanding loan with the intention of having the loan outstrip the value of the land hence creating an opportunity for it to take over the entire property, the Appellant's action is an infringement of the Respondent's proprietary rights and there is an imminent risk that the Appellant will proceed to sell the property hence exposing the Respondent to irreparable harm.



## **Appellant's Replying Affidavit**

6. The Appellant opposed the Application and filed the Replying Affidavit sworn by one Solomon Ruoro who described himself as the acting Branch Manager of the Appellant's Eldoret branch. He admitted much of the factual background presented by the Respondent, including that the property Eldoret Municipality Block 14/712 was sold via an auction at a sum of Kshs 28,000,000/-. He however deponed that at the time of the auction, the amount outstanding was Kshs 34,360,421.12 and as such the proceeds of the sale, less the costs of the auction, were not sufficient to settle the debt, the outstanding loan balance as at 5/11/2020 (around the time that the suit was filed) stood at Kshs 12,357,022.53, the same continues to accrue interest. He exhibited bank statements and added that the allegation that the Appellant was acting maliciously and mischievously in piling interest was false, the Appellant has at all times acted lawfully and in good faith, the alleged liquidation of the borrower neither extinguished the debt nor the Appellant's rights to exercise its statutory power of sale.

## **Ruling of the Magistrate's Court**

7. After hearing the matter, the Learned trial Magistrate delivered his Ruling on 16/04/2021 as aforesaid. The orders he issued were in the following terms:
- “ the upshot of the foregoing is that I partly allow the application under the following terms; that the defendant releases to the plaintiff Kshs. 6,000,000/- (six million) being a rough estimate of the amount due on the date the property was sold, within thirty days running from 16<sup>th</sup> April 2021 failure to which execution to issue. The plaintiff shall pay costs.”
8. Being dissatisfied with the decision, the Appellant instituted this Appeal vide the Memorandum of Appeal filed on 21/04/2021. The grounds thereof are as follows;
- i. That the learned trial magistrate erred in law and in fact in ordering the Appellant to pay the Respondents Kshs. 6,000,000/- when the Respondent had not sought such a relief on the Respondent's application dated 27<sup>th</sup> October 2020.
  - ii. That the learned trial Magistrate erred in law and in fact in ordering the Appellant to pay the Respondents Kshs. 6,000,000/- when he had no jurisdiction to do so.
  - iii. That the learned trial Magistrate erred in law and in fact in ordering the Appellant to pay the Respondents Kshs. 6,000,000/- when there was no basis for doing so.
  - iv. That the learned trial Magistrate erred in law and in fact in conclusively finding at interlocutory stage that the Appellant owes the Respondent Kshs. 6,000,000/-.
9. On its part, on 24/01/2022, the Respondent filed a cross-appeal in which it preferred the following grounds;
- i. The Honourable Magistrate erred in law and fact by failing to grant a temporary injunction in favour of the Respondent herein.
  - ii. The Honourable Magistrate erred in law and fact by ignoring the fact that the Respondent's Application met the requisite threshold for temporary injunctions.
  - iii. The Honourable Magistrate erred both in law and fact by ignoring the fact that the Appellant had failed to demonstrate how the amount of KES. 34,114,500 accrued after the issuance of a Notification of Sale and Redemption Notice.



- iv. The Honourable Magistrate erred both in law and fact by ignoring the facts and evidence presented by the Respondent.
  - v. The Honourable Magistrate erred both in law and fact by failing to consider the applicability of the doctrine of Lis Pendens in the matter.
  - vi. The Honourable Magistrate erred both in law and fact by rendering an ambiguous decision.
  - vii. The Honourable Magistrate erred both in fact and law granting reliefs not pleaded for by the parties without a proper basis.
  - viii. The Honourable Magistrate erred in law and fact by holding that a sum of KES, 6,000,000 was outstanding on the basis of a contentious Statement of Account.
10. This Appeal was then canvassed by way of written submissions. The Appellant filed its Submissions on 20/04/2022 through Messrs Kidiavai & Co. Advocates while the Respondent filed its Submissions on 19/01/2023 through Messrs Kenei & Associates.

### **Appellant's Submissions**

11. Counsel for the Appellant submitted that the learned Magistrate erred in ordering the Appellant to pay the Respondent the said amount when the Respondent had not prayed for it in the Application, it is now well settled that parties are bound by their pleadings and that a Court should not grant a relief which has not been sought. On this issue, he cited the case of Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others (2016) eKLR and also Antony Francis Wareham T/A Wareham & 2 others v Kenya Post Office Savings Bank (2004) eKLR.
12. Counsel further submitted that the learned Magistrate did not have jurisdiction to make the said order because it was not prayed for by the Respondent, a Court has no jurisdiction to grant a relief which has not been sought. In support of his submission, he cited the case of Caltex Oil (Kenya) Limited v Rono Limited (2016) eKLR. He added that the Magistrate erred in ordering the Appellant to pay the Respondent Kshs. 6,000,000/- when there was no basis for doing so and the magistrate erred in conclusively finding at interlocutory stage that the Appellant owes Kshs 6,000,000/-. He relied further on the case of Caltex Oil (Kenya) Limited v Rono Limited (supra) in support of this submission.
13. Counsel submitted further that the Appellant had averred in its Replying Affidavit sworn before the lower Court that the outstanding balance owing from the Respondent stood at Kshs 12,357,022.53/= as at 5/11/2020, that the same continued to accrue interest and that the Statement of Account was annexed to the Affidavit showing as much, the Respondent did not allege that the Appellant owes Kshs. 6,000,000/=, it was therefore wrong for the Magistrate to find at interlocutory stage that the Appellant owes Kshs. 6,000,000/=.
14. In response to the cross-Appeal, Counsel submitted that the magistrate correctly declined to grant the temporary injunction sought by the Respondent since it did not demonstrate that the Respondent would suffer irreparable loss if the Court failed to grant the interim injunction, the suit land having been charged to the Appellant as security for repayment of the loan, it became a commodity for sale whose loss can be adequately compensated by an award of damages. He cited the case of John Nduati Kariuki t/a Johester Merchants v National Bank of Kenya Ltd [2006] eKLR in support of this submission.



## Respondent's Submissions

15. On his part, the Respondent's Counsel submitted that the impugned Ruling does not address itself specifically to the prayers sought by the Respondent and that neither does it address itself to the reply by the Appellant, it is trite law that parties are bound by their pleadings, the Court was equally bound by the pleadings brought before it by the parties, the Court had no power to venture outside the parties' pleadings and get into a frolic of its own. On this point, he cited the case of *Malawi Railways Ltd Vs. Nyasulu* [1998] MWSC 3. He added that neither the Appellant nor the Respondent pleaded for the reliefs granted by the trial Court, it will be unfair for the parties to be bound by a decision that has no basis on their pleadings before the Court.
16. Counsel further submitted that the Respondent sought the intervention of the trial Court for a temporary injunction to restrain the Appellant from selling its property, LR No. Eldoret Municipality / Block 10/56, the basis for the Application is that the Appellant had wrongfully commenced a recovery process in spite of the fact that the loan had been fully settled pursuant to a sale of another property, LR No. Eldoret Municipality/Block 14/12, the Respondent's Application satisfied the parameters for grant of a temporary injunction but the Magistrate did not address himself on the competence of the Application and whether the same was merited, the Magistrate failed to give reasons for the decision taken in the impugned Ruling which is one of the fundamental tenets of justice, a Court cannot just act whimsically or take decisions without a proper basis, a Court called upon to render itself in a matter must give its reasons for the decision taken, there is no way a Ruling cannot be said to be just without the reasons for the decision being laid bare to all the parties to appreciate, the right to be given reasons for the Court's decisions underpin the maxim that "justice must not only be done, but must also be seen to be done". He argued that the trial Court gave orders without laying a basis for them, this means then that the impugned Ruling does not meet the basic tenets of a Ruling, the same cannot stand and allowing such a Ruling would be to set a very dangerous precedent where Courts and quasi-judicial entities can act whimsically. In support of this point, he cited the case of *Patriotic Guards Ltd. v James Kipchirchir Sambu* [2018] eKLR.
17. Counsel submitted further that the impugned Ruling is fraught with intra-inconsistencies, the Magistrate contradicted himself in the Ruling at paragraph 4 where he takes the position that there are issues that need to be canvassed in a main hearing for a fair determination of the matter, the Magistrate cites the fact that he was not able to follow the deductions in the statement properly, it is then contradictory for him not to grant a temporary injunction when it was clear to him that there is a problem with computation of the outstanding loan by the Appellant, the Magistrate directs for payment of a sum of Kshs 6,000,000/- by the Respondent to the Appellant but at the same time, directs the Respondent to pay costs of the Application, this flies on the face of the principle that costs follow the event, the contradictory nature of the Ruling is put forth by the fact that both parties do not understand who succeeded in the Application, the contradiction has caused more confusion than the dispute between the parties.
18. He added that the Respondent's case was that the Court for reasons not disclosed in the ruling ignored the application of the doctrine of *lis pendens* in the suit before it, the Respondent's Application was seeking to stop the sale of the suit parcel of land during the pendency of the suit, therefore, the Magistrate should have applied the doctrine in order to protect the substratum of the suit pending hearing and determination thereof, *Black's Law Dictionary*, 9<sup>th</sup> edition, defines *lis pendens* as the jurisdictional power or control acquired by a Court over property while a legal action is pending. Counsel cited the cases of *Bellammy vs Sabine* [1857] 1 De J 566, *Mawji vs US International University & another* [1976] KLR 185. He also cited *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another*



[2015] eKLR in which, he submitted, that the Honourable Court discussed at length, the applicability of the doctrine with respect to the Kenyan jurisdiction.

19. In conclusion, Counsel urged that there is need to protect the substratum of the suit and therefore it is only fair that the Ruling of the trial court is set aside and substituted with a Ruling allowing the Respondent's Application, this will preserve the substratum of the suit before the trial Court and avoid throwing the parties into unnecessary confusion, the Court may want to consider it more rational and logical to set aside the Ruling and substitute it with a Ruling for rehearing of the Application, re-hearing will still give parties a fair chance to have the respective sides of the story put in a proper focus and an informed decision rendered, this Court is vested with the jurisdiction and power to order for rehearing of the Application. On this issue, he referred the case of Welco Services International f/a Cajetan Phidelis Ombere v Rajpal Singh Jabal [2015] eKLR. He urged the Court to return a finding that the Respondent's cross-Appeal has merit.

### **Analysis & Determination**

20. The duty of an appellate Court was set out in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, where the Court stated as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

21. An appellate Court will only interfere with the judgment of the lower Court if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where it was stated as follows:

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.

22. Upon considering the Memorandum of Appeal, the cross-appeal and the parties' submissions, I find the following to be the issues that arise for determination herein:

- i. Whether the trial Court granted a relief not prayed for and if so, whether it erred in doing so.
- ii. Whether the Application should be returned to the trial Court for re-hearing.
- iii. Whether the trial Court should have granted an interlocutory injunction.
- iv. Whether the trial Court should have granted the order for appointment of an accountant or accountants to carry out reconciliation of the loan account.

23. I now proceed to analyze and answer the issues.

#### **i. Whether the trial Court granted a relief not prayed for and if so, whether it erred in doing so.**

24. The crux of this appeal is that the trial Court issued orders that were not prayed for. The appellant contends that none of the parties prayed for the orders issued by the Court. I again recite the orders given by the trial Court as follows;

‘the upshot of the foregoing is that I partly allow the application under the following terms; that the defendant releases to the plaintiff Kshs. 6,000,000/- (six million) being a rough



estimate of the amount due on the date the property was sold within thirty days running from 16<sup>th</sup> April 2021 failure to which execution to issue. The plaintiff shall pay costs.’

25. It is no rocket science to conclude right away that there was no prayer for the Appellants to release Kshs. 6,000,000/- or any other sum to the Respondent. I also note that it is not only the Appellant who submits that the trial Court went outside the pleadings. The Respondent, too, at paragraph 7 of the cross-Appeal and also in its Submissions states as much. The parties are therefore clearly in unison on this issue.
26. The Respondent states in the Submissions that “we are alive to the convoluted manner in which the Ruling by the Honourable Magistrate is presented which could make it unfair for any party to derive benefit from it”.
27. It is trite law that parties are bound by their pleadings. In the case of Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR, the Court of Appeal held as follows;

As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score.

28. It therefore follows that the principle that parties are bound by their pleadings applies mutatis mutandis to the Court. It is true that there are exceptions to this general rule as was set out in the case of *Odd Jobs vs Mubea* (1970) E.A 476, where the then Court of Appeal of East Africa held that a Court may base its decision on an issue that is not in the pleadings as long as the same arises in the course of the proceedings and the same is fully canvassed by the parties. Regarding this issue, the Court of Appeal commented as follows in the case of *Ann Wairimu Wanjohi v James Wambiru Mukabi* [2021] eKLR:

(33) We take the view that parties should specifically state their claim by properly pleading the facts relied upon and the relief sought, as the pleadings are the primary documents that guide the court and the parties concerning the claim and the contesting positions of the parties.

In accordance with the Civil Procedure Rules, the parties should also either provide a list of agreed issues, or if there is no agreement, each provide their own list of issues so that the court can settle the issues. Although it is desirable that where necessary the pleadings should be amended to bring in all the issues, *Odd Jobs vs Mubia* (supra) remains good law, that in limited circumstances where an unpleaded issue is crucial to the matters in issue the court may determine a suit on the unpleaded issue, provided both parties have clearly addressed the unpleaded issue in their evidence or submissions, and left the matter for the determination of the court. However, such determination will not extend to determining or awarding a relief that was not specifically sought in the pleadings.”

29. In the present case, both parties are categorical that the issue of the release of Kshs. 6,000,000/- was not raised and did not come up in the proceedings or pleadings. The trial Court did not lay out what informed this decision and it is not clear how the amount of Kshs. 6,000,000/- was determined as the outstanding balance. The *Odd Jobs vs Mubia* exception cannot therefore apply to this instant case.



30. I therefore have no hesitation in reaching the finding that the trial court erred in making the order. The Applicants sought an injunction to restrain the Appellant from auctioning its charged property pending hearing and determination of the suit and also the appointment of an accountant to carry out a reconciliation of accounts and file a report on the loan account. The trial Court seemingly ignored both these prayers. I am therefore satisfied that the order issued by the trial Court was erroneous. Accordingly, I set aside the order.

### **ii. Whether the Application should be returned to the trial Court for re-hearing**

31. In its Memorandum of Appeal, the Respondent prayed that the Ruling of the trial Court be set aside and substituted with a Ruling allowing the Application. However, in its Submissions, the Respondents appears to have changed its mind since it now proposes to this Court “to set aside the Ruling and substitute it with a Ruling for rehearing of the Application”.

32. In the Submissions, the Respondent argues that rehearing will be “more rational and logical”, “rehearing will still give the parties a fair chance to have the respective sides of the story put in a proper focus and an informed decision rendered”, and that “the Court is vested with the jurisdiction and power to order for hearing of the Application”.

33. On the powers of an appellate Court in civil proceedings, Section 78 of the [Civil Procedure Act](#) provides as follows:

- (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power –
  - (a) To determine a case finally;
  - (b) To frame issues and refer them to trial;
  - (c) To take additional evidence or to require the evidence to be taken;
  - (d) To order a new trial.

34. That this Court possesses, as one of its powers, the mandate to order for re-hearing is therefore not in doubt. However, in the circumstances of this case, I do not believe that remitting the Application back to the trial Court for re-hearing will add any value. On the contrary, ordering a re-hearing will only drag the matter further and delay its conclusion. I take into account the fact that the Application was filed in October 2020. It is therefore approaching 3 years since it was filed. To assist in and facilitate expeditious disposal of the dispute, this Court opts to proceed to determine the Application on its merits.

### **iii. Whether the trial Court should have granted an interlocutory injunction**

35. Having decided against remitting the Application back to the trial Court for re-hearing, I now proceed to determine the Application.

36. In its cross-appeal, the Respondent’s main contention is that it was deserving of the orders for a temporary injunction as sought in prayer No. 3 of the Application and that the trial Court erred in failing to grant the same.

37. It is clear that the parcel of land known as Eldoret Municipality/Block 10/56 forms the substratum of the suit. The Appellant contends that the earlier auction of the separate land parcel known as Eldoret Municipality/Block 14/12 sufficiently fully offset the outstanding loan. On its part, the Respondent’s position is that the proceeds of the auction only reduced, but did not settle the loan amount since the amount that was outstanding at that time of the auction was more than the amount realized from the



auction. It is further contended that as at the time that the suit was filed, the outstanding amount stood at Kshs. 12,225,969.26/- and that interest continues to accrue. The Respondents' position is that it cannot therefore discharge the property nor release the certificate of lease until the balance owing is paid in full. It is therefore apparent that the dispute is on whether or not the proceeds of the auction settled the loan in full.

38. The law governing the grant or refusal of interlocutory injunctions is set out under Order 40(1) (a) and (b) of the Civil Procedure Rules 2010 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.”

39. The conditions for consideration in applications for injunctions were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the Court expressed itself on the conditions that a party must satisfy for the Court to grant an interlocutory injunction as follows: -

“Firstly, 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.”

40. The test applicable in cases of injunction was considered in the case of *American Cyanamid Co. v Ethicon Limited* (1975) AC 135 where 3 elements were noted to be of great importance, namely that:

- i. There must be a serious/fair issue to be tried,
- ii. Damages are not an adequate remedy,
- iii. The balance of convenience lies in favour of granting or refusing the application.

41. I have considered the record, pleadings and the responses to the Application before the trial Court. It is my view that the dispute raises a serious or fair issue to be tried and which pertains to a parcel of land which is the substratum of the suit. I also note that the trial Magistrate conceded that he was unable to sufficiently understand the computation of the alleged outstanding debt as set out in the bank statement. He stated that he was unable to follow some of the deductions on the bank statement and urged that these be canvassed in the main hearing.



42. I am therefore satisfied that the Respondent established a prima facie case with a probability of succeeding. Were the auction to be allowed to proceed and eventually the Respondent succeeds in the suit, all the Respondent may get is compensation in terms of damages. My view is that damages in terms of monetary payment alone would not, in the context of this case, be adequate compensation for loss of the land.
43. Regarding the balance of convenience, I am of the view that the same tilts towards granting the interim injunction as it will preserve the substratum of the suit pending determination. I am therefore satisfied that prayer 3 of the Application, seeking interim injunction pending hearing and determination of the suit, was merited. I accordingly grant the same.

**iv. Whether the trial Court should have granted the order for appointment of an accountant or accountants to carry out reconciliation of accounts**

44. The Respondent, in prayer 4 of the Application, also sought an order for appointment of a firm of accountants to carry out reconciliation of the loan account and file a Report before the trial Court.
45. Considering the contradictory and rival positions taken by the parties on whether or not the auction conducted in October 2019 fully settled the loan, coupled with the trial Magistrate's concession that he was unable to understand some of the deductions and/or entries appearing in the bank statements, I am satisfied that that the prayer for reconciliation of the account is merited. The Report to be filed therefrom will no doubt assist the Court to determine the dispute. This may even settle the whole dispute. I therefore find that the trial Court ought to have also allowed prayer 4 of the Application. Accordingly, I grant the same.

**Final Orders**

46. In the premises, the main Appeal partly succeeds and the cross-Appeal succeeds in its entirety. Accordingly, I issue the following orders:
- i. The Ruling dated and delivered on 16/04/2021 by Hon. L. Kassan in Eldoret Chief Magistrate's Court Land Case No. E21 of 2020 is hereby set aside in its entirety.
  - ii. The Notice of Motion dated 27/10/2020 and filed by the Respondent in Eldoret Chief Magistrate's Court Land Case No. E21 of 2020 is hereby allowed in terms of prayer 3 and 4 thereof. Costs of the Application shall be in the Cause.
  - iii. The parties shall, within a period of thirty (30) days, agree on and appoint one accountant, qualified and licensed under the laws of Kenya to practice as such, who shall, within a period of thirty (30) days upon appointment, carry out reconciliation of the loan account and file a Report in the trial Court. Should the parties fail to agree on one such joint accountant within the period stated, then each party shall nominate one accountant to make up two accountants to jointly carry out the duty above and file either a joint Report or separate Reports in the trial Court, within the period stated. The costs of the accounting and/or reconciliation shall be equally shared between the two parties.
  - iv. To ensure the Respondent takes an active and proactive role in progressing the matter, the Respondent is directed to conclude prosecution of the suit within a period of eighteen (18) months from the date hereof. In default, the orders of injunction granted pursuant to (ii) above shall stand vacated unless extended by the trial Court at its discretion.



- v. Since the Appeal has partly succeeded and the cross-Appeal has succeeded in its entirety, and since this Appeal was not necessitated by the action or omission by either of the parties, but of the trial Court, each party shall bear its own costs.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 12<sup>TH</sup> DAY OF MAY 2023**

.....

**WANANDA J. R. ANURO**

**JUDGE**

