



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL SUIT NO. 80 OF 2018**

**OSMAN TAHIR SHEIKH SAID**

**AMINA TAHIR SHEIKH SAID**

**SAID AHMED TAHIR SHIKH SAID.....PLAINTFFS**

**(All suing as the Executors of the will**

**of the late Tahir sheikh Said Ahmed)**

**VERSUS**

**BANK OF AFRICA LIMITED.....DEFENDANT**

**RULING**

1. There are four applications before this court for consideration, being;

**(a) Notice of Motion application dated 2<sup>nd</sup> October, 2018 and filed in court on 4<sup>th</sup> October, 2013 by the plaintiff /applicant**

**(b) a chamber summons application dated 10<sup>th</sup> April, 2019 and a Notice of Motion dated 10<sup>th</sup> April, 2019 both filed in court on 10<sup>th</sup> April, 2019 by the plaintiff applicant;**

**(c) a Notice of Motion application dated 24<sup>th</sup> April, 2019 and a Notice of Preliminary Objection dated 11<sup>th</sup> February, 2019, filed by the Defendant;**

**(d) a Notice of Motion application dated 28<sup>th</sup> June, 2019, and filed in court on 1<sup>st</sup> July, 2019 by the Plaintiff/Applicant.**

2. However, counsel for the parties opted to dispense with the notice of motion application dated 24<sup>th</sup> April, 2019 by way of written submissions with the Defendant /applicant filing its submissions on 1<sup>st</sup> July, 2019 while the plaintiff/Respondent filed theirs on 18<sup>th</sup> July, 2019.

3. I have read through all the applications filed in this matter and find it appropriate to begin with considering the Notice of Preliminary objection filed by the Defendant on 12<sup>th</sup> February, 2019 in opposition to the notice of motion application dated 28<sup>th</sup> January, 2019 and filed by the plaintiff. This is for the reasons set out in the case of MUKHISABISCUIT MANUFACTURING CO. LTD –VRS- WEST END DISTRIBUTORS LTD, ( 1969) E.A 696, where it was held that;

**“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion”.**

4. It was also held in the same MUKHISA case (Supra) that a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued, may dispose of the suit.

5. In the Notice of Motion application dated 28<sup>th</sup> January, 2019 and filed on even date the plaintiff sought;

(a) spent

(b) the Honourable court to be pleased to set aside and/or vary the orders made suo motu on 26<sup>th</sup> November, 2019 dismissing the suit;

(c) the Honourable court to be pleased to reinstate the suit and allocate it a hearing date on priority basis;

(d) costs of the application in the case.

6. The defendant, in his Notice of Preliminary Objection contents that

(a) On 21<sup>st</sup> July, 2016 Lady Justice Njoki Mwangi in **Mombasa HCCC No. 57 of 2016 Juja coffee Exporters Ltd & Others -v- Bank of Africa**, granted a conditional injunction restraining the bank from disposing of the charge properties;

(b) The Court of Appeal in **Mombasa Civil Appeal No 99 of 2016 Bank of Arica Limited V Juja coffee Exporters Ltd & Others** by a ruling dated 25<sup>th</sup> January, 2018 determined the question of exercise of the Defendants' statutory power of sale over the suit properties. The court allowed the bank's appeal and set aside the order of Hon. Lady Justice Njoki Mwangi dated 21<sup>st</sup> July 2016 where she had granted a conditional injunction.

7. Counsel for both parties filed their written submissions with respect to the Preliminary Objection with regard to the plaintiff's notice of motion application dated 11<sup>th</sup> February 2019. The plaintiff filed their written submissions on 28<sup>th</sup> March, 2019 while the defendant filed theirs on the 1<sup>st</sup> April, 2019.

8. The first point of law raised by the defendants is that the Plaintiffs/Applicants lack locus standi to institute the present suit since the suit properties are owned by limited liability companies. In their submissions, the defendants' counsel has cited, among others, the case of **SALMON VRS SALMON ( 1897) A.C 22** in support of the arguments that a company is an entirely separate entity from its shareholders and hence, the Plaintiffs/Applicants herein cannot purport to have any right to any item or property owned by the said companies. The defendant's counsel further quoted the case of **NAIROBI MAMBA VILLAGE VRS NATIONAL BANK OF KENYA (2002) IEA 197**, where the court held that the chargor is the only person who can legitimately complain that the power of sale is being exercised unlawfully, irregularly or oppressively (summarized)

9. In response to the above arguments, the plaintiffs' counsel relied on the case of **HCCC No. 29 of 2018 SABIR TAHIR SHEIKH SAID AND 6 OTHERS VRS BANK OF AFRICA**, where Honourable L.J. Njoki Mwangi granted the Applicants a leeway to file a suit as executors of the will of the late Tahir Sheikh Said, that seeking the court to take judicial notice of the fact that the properties in dispute are registered in the names of companies where the deceased was a chairman and majority shareholder. The applicants counsel further submitted that they are only protecting the interest of the beneficiaries of the estate of the deceased "TSS" who stand to lose the shares in the companies which own the disputed properties.

10. It will be noted that there is no divergence of opinion by counsel for the parties on the legal personality of a limited liability company which acquires its own property, rights and liabilities separate from its members upon its incorporation, as the centuries old case of **SALMON VRS SALMON** as cited by the defendant's counsel laid this principle rest.

11. There is also no argument that the proper plaintiff in any proceedings or action in respect of a wrong done to a company is the company itself. This rule is properly referred to in company law as "the rule in **Foss V. Harbottle**". The divergence of view in the present case centers on the exception to this rule which were stated in the **Foss** case itself and in other cases that came after it, especially the case of **EDWARDS VS HALLIWELL ( 1950) ALL E.R 1064** which is regarded as the Locus classicus that laid out the exception and where **Jenkins, L.J** emphasized that;

**".....the rule ( in Foss V Harbottle) is not an inflexible rule and it will be relaxed where necessary in the interest of justice".**

12. The court of Appeal cited with approval the case of **Foss V Harbottle and that of Edwards V Halliwell in their case of AMIN AKBERALI MANJI & 2 OTHERS VRS ALTAF ABDULRAJUDANI & ANOTHER (2015) e KLR**, and stated the exception therein as follows;

**(a) There is an exception to the rule where what has been done amounts to fraud and the wrong doers are themselves in control of the company;**

**(b) Where it is alleged that the personal rights of the plaintiff shareholders have been or are about to be infringed;**

**(c) any other case where the interest of justice requires that the general rule, requiring suit by the company, should be disregarded.**

13. Applying those principles in the present case, the plaintiffs in the amended plaint filed on 5<sup>th</sup> April, 2019 describe themselves as the executives of the will of their deceased father, Tahir Sheikh Said, who was the chairman and majority shareholder of the companies which own the disputed properties. And under the law of succession, shareholding in a company partly forms subject to a will and the plaintiffs can only bring an action as the lawful administrators where the shareholding rights of their late father have been or are about to be infringed

14. In the case of **RAJESH PRANJIVAN CHUNDAJAMA VRS SALILESH PRINJIVAN CHIDASAMA ( 2014) e KLR**, the court of

appeal on the issue of locus standi in a case that deals with the administration of a deceased person's estate stated that;

**“ .....an administrator is not entitled to bring any action as an administrator before he has taken out letter of administration. If he does, the action is incompetent as of the date of inception....” (Emphasis added).**

15. And in the case of **KOTHARI VRS QURESHI & ANOTHER (1997) E.A.564**, the court stated as follows;

**“ where a person dies leaving a will appointing an executor, the person so appointed as Executor represents that estate of the deceased testator as from the date of death of the testator”.**

The court further added that :

**“ .....and executor may commence a suit before grant of probate and he can carry on the proceedings without grant as far as possible until he has proven his title and if this will is ultimately powered no one power not one can question the validity of such acts....”**

16. The plaintiff in the instant case have attached a copy of will of the late Tahir Sheikh Said drawn by Messrs Aboo & Company advocates and altered on 12<sup>th</sup> June, 2012. And paragraph 9 of the said will reads;

**“ I appoint my children (1) Osman Tahir Sheikh Said (son) (2) Amina Tahir Sheikh Said ( Daughter ) and (3) Said Ahmed Tahir Sheikh Said (son) to be the joint executors and Trustees of this my will”.**

From the foregoing, it is my considered view that as appointed executors in the deceased's will, the plaintiffs can commence any proceedings in their capacities as administrators pending the grant of probate.

17. The second point of law that has been raised by the defendant is that the suit herein is re-judicata. This point will be considered concurrently with the issues that the suit is re-subjudice. The defendant's counsel submitted that the plaintiffs/applicants have failed to disclose the existence of previous decisions of where injunction applications over the suit properties in the present suit have been dealt with in the pending suits and concluded on appeal, being;

**(a) Civil Appeal No 99 of 2016, BANK OF AFRICA LIMITED –VRS- JUJA COFFEE EXPORTERS LIMITED & 4 OTHERS, where the bank allowed the banks appeal and set aside Hon. Justice Njoki's order for conditional injunction**

**(b) Civil application No 48 of 2018 pending at the court of Appeal.**

**(c) Mombasa HCCC No. 57 of 2016 JUJA COFFEE EXPORTERS LTD & OTHERS VRS BANK OF AFRICA where Hon. Lady Justice Njoki Mwangi granted a conditional injunction restraining the bank from disposing of the charged properties**

According to the defendant's counsel, the Plaintiffs/Applicants' action of failing to disclose that similar applications for injunction over the suit properties have been dismissed and the bank ought to exercise its statutory power of sale, amount to material non disclosure and is an abuse of the court process. In response thereof, the plaintiffs' counsel only submitted that res-judicata had not been proved as pleaded

18. The rule or doctrine of res-judicata serves the solitary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless road of litigations at the behest of intrepid pleaders hoping that by a multiplicity of suits, and for a party may at last, obtain outcomes favorable to themselves. Without this doctrine (rules) there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundation of res-judicata thus rests in public interest for benefit, sure and certain justice ( See the dictum in independent Electoral and Boundaries Commission Main Kamanda and 5 Others (2017) e KLR, by the court of Appeal).

19. In that respect, I have considered all the cases outlined by the defendant in their Notice of Preliminary objection as falling within the rule of res-judicata. I am convinced that HCCC No. 29 OF 2018, SABIR TAHIR SHEIKH SAID & 6 OTHERS VRS BANK OF AFRICA LIMITED, is much related to the suit herein. The learned Honourable Judge delivered her ruling on the 21<sup>st</sup> September, 2018, which I have keenly considered.

20. I note that the defendant in that case, which is also the defendant herein, had filed a Notice of Preliminary Objection dated 28<sup>th</sup> April, 2018 and a notice of motion application dated 27<sup>th</sup> April, 2018 on grounds similar to the ones raised in the present preliminary objection. The subject matter therein is the same suit properties in the present case but only the name of the plaintiffs seem to differ. The court in that case vehemently dealt with the issue of res-judicata and concluded that HCC NO. 57 of 2016 raised issues not similar to those in HCCC NO. 29 of 2018. The latter suit was filed by person who claimed to be the beneficiaries of the late TAHIR SHEIKH SAID with intention of protecting the estate of the deceased from alteration and wastage. The former suit sought injunctive orders different from the issues stated above

21. In **HCCC No. 29 of 2018**, the plaintiffs perceived the sale of assets of the companies where their deceased father was a majority shareholder as being tantamount to intermeddling with his estate. It turns out that the purported assets in HCCC No. 29 of 2018 are suit properties in the present case. However, the learned judge dismissed the suit on finding that the plaintiff therein had not showed they were lawful administrators of the estate of the late TAHIR SHEIKH SAID. Hence, the only difference in HCCC No. L 29 of 2018 and the

presentcase is that the plaintiff's in this case have attached a will appointingthemas Executors of theestate of their late father, which they failedto doin the former case. The plaintiffsbeing different, eventhoughtthe subject matter is the same, I find the present suit cannot be held to be res-judcata.

22. The last point of law that has been raised by the defendant in thePreliminary Objection is about the case abating since no summons were served on the defendants by the plaintiffs.

23. In response , the plaintiffs' counsel submits that the case was dismissedand for that fact, it cannot be said the suit abated. The plaintiff's counsel goes onto submit that there is a pending application ( Noticeof Motion application dated in which reinstatement of the suit has been sought , and that until the same is determined , the issue ofsummons cannot be argued . This line of summons by the plaintiff's counsel is surprising because there is an interim order in favour ofthe plaintiff in that regard.

24. The provisions of the law under Order 5 Rule 1 (6) of the CivilProcedure Rules is clear that "every summons except where thecourtis to effect service, shall be collected for service within thirty days ofissue or anticipation,whichever is later, fulfilling to which the suitshall abate.

25. In this instant case, I find that there are no copies of summons whichhave beenpreparedand filed by the plaintiff. I also find that there is noexplanation to that default. In the case of FRENZE INVESTMENTSLTDVRS KENYA WAY LTD, HCCC NO 524 of 1999, the court stated;

**" A summon to enter appearance is not a piece of paperof little consequence. It is a necessary and vital document governing the time table of pleadings andrules governing the insurance and that service thereofmust be complied with for the pleadings to acquirelegitimacy. Such seriousness was underscored by theCourt of Appeal in C.A 85 of 1996 UDAY KUMARCHANDULLALRAJAN & RS T/A LIT PETROL STATIONVRSCHARLES THAITHI ( Unreported ) where a defectivesummonwas issued and served beyond thevalidity of one year butobjection was raised as to itsvalidity although the defendant had already accepted itand entered an unconditional appearance".**

26. Order 5 Rule 1 of the Civil Procedure Rules therefore mandates thataplaint must be accompanied by summonsto enter appearanceandwhere the plaintiff has not taken out summons, the court cannotinvoke its inherent jurisdiction to save such suit as the plaintiff without appearanceis a nullity. That notwithstanding, the law is clear that the summons once issued are only for one year, after which they lapseand the plaintiff can nonetheless apply for extension.

27. Also, Order 5 of the Civil Procedure rules contemplates that summonsto enter appearance will be issuedand served at the same time as theplaint within 30 days of the date of filing a suit, and the duty,according to Rule 3 (5) is placed on the plaintiff or his advocate toprepare the summons to enter appearance for signature and sealingby the court so as to give it validity. The said provisions stipulates asfollows;

- (1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.**
- (2) Every summons shall be signed by the judge or an officer appointed by the Judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.**
- (3) Every summons shall be accompanied by a copy of the plaint.**
- (4) The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear, provided that the time for appearance shall not be less than ten days**
- (5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub rule (2) of this rule;**
- (6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate.**

28. Under order 5 Rule (1) 7 of the Civil Procedure Rules , the life span of the summon to enter appearance is 24 months upon which if no application is made to extend them, the court would without notice dismiss the suit. Although in this case, 24 months are not yet over. However, no summons to enter appearance were ever issued from the date of filing of suit and it is now almost one year, which is beyond the 30 days contemplated by the law for such issuance. The rules of engagement are enacted to achieve justice for both parties. There is no reason why no summons to enter appearance were not taken out in this case. This court is under a judicial duty to ensure that parties adhere to the rules of procedure. It therefore follows, that unless otherwise proven this case has abated.

29. There being injunctive orders issued by this court, focus is now turned to the notice of motion application dated 24<sup>th</sup> April, 2-19, which the parties have submitted on. The said notice of motion application dated 24<sup>th</sup> April, 2019 was filed on 30<sup>th</sup> April, 2019 and is expressed to be brought under Article 159 of the Constitution, section 1A ,B,BA and 63 of the Civil Procedure Act, sections 55 and 56 of the Advocates Act, Order 40 Rules 4 and 7 and Order 50 rule 2 of the Civil Procedure Rule whereby several orders have been sought against the plaintiffs jointly and severally as follows;

**(a) Spent**

**(b) The exparte Order of injunction given on 10<sup>th</sup> April 2019 be forthwith set aside suo motto.**

(c) this application be heard in priority or together with the plaintiff's notice of motion dated 10<sup>th</sup> April 2019 and Notice of Motion dated 28<sup>th</sup> January 2019 that is fixed for hearing on 20<sup>th</sup> May, 2019.

(d) The suit and all pending applications filed but plaintiffs be dismissed with costs on a full indemnity basis to the defendant.

(e) The court do find that the plaintiffs are vexatious litigants who should seek leave of the court before filing any proceedings in any court registry in Kenya.

(f) This Honourable court do make and order that Mr Mark Waziri Advocate acted in blatant dishonesty with the intention to mislead this Honourable court in granting the interim injunction dated 10<sup>th</sup> April, 2019 which conduct amounts to professional misconduct and forum shopping.

(g) This Honourable court do recommend appropriate disciplinary measures and/or action against Mr Mark Waziri Advocate under section 55 and 56 of the Advocate Act or find the advocate in contempt of court.

30. The Motion is based on the grounds set out in the body thereof and fortified by the supporting affidavit sworn by CHARLES WAIYAKI as Senior Recoveries Officer of the defendant Bank that;

(a) the plaintiff/Respondent misled this court by deliberately and blatantly concealing material facts with regard to proceedings in the case where similar applications had been dismissed and orders denied.

(b) the plaintiff/Respondents have no locus standi on the basis that they are not the owners of the suit properties which properties are owned by limited liability companies.

(c) the plaintiff/Applicant filed an application dated 8<sup>th</sup> April, 2018 whereby injunctive orders were denied by Honourable Justice P. J. Otieno, and the same was withdrawn on 10.4.2019. That the plaintiffs/applicants then filed another application seeking for similar orders which were granted by the Honourable Lady Justice Dora Chepkwony. It is the defendant's view that this is forum shopping and it amounts to abuse of court process.

(d) the defendant/applicant's equity of redemption with respect of plot No 44 section XXI Was extinguished after the said property was sold by public auction on 18<sup>th</sup> April, 2019.

(e) the plaintiff/applicants are vexatious litigants who, knowing that their three injunction applications were dismissed by court, proceeded to file similar matters based on similar facts.

31. The application is opposed by the plaintiffs/Respondents vide a replying affidavit sworn on 20<sup>th</sup> May, 2019 by their advocate, MARK WAZIRI and in which he has deposed that;

(a) he relies on the court record with specific reference to court proceedings of 8<sup>th</sup>- 11<sup>th</sup> April, 2019 with regard to the allegations made against him and the court;

(b) on 4<sup>th</sup> April, 2019, the matter came up for highlighting of submissions and he realized that an auction had been conducted on 1<sup>st</sup> April, 2019 in respect of one of the suit properties hereby Plot No. 44 sections XXI Mombasa Island; without notifying the plaintiff's.

(c) he was instructed to come on record and he filed an application dated 8<sup>th</sup> April, 2019 in which he sought an order for status quo to preserve the suit properties, which was certified urgent and scheduled to be heard on priority basis.

(d) the application was fixed for hearing on 10<sup>th</sup> April, 2019 and when the defendants filed a preliminary objection and the plaintiff's counsel realized that they had indicated the wrong parcel number. He had to withdraw the application, which withdrawal was not opposed and he intimated that he was moving to file another application under the vacation rules.

(e) they were granted status quo orders as prayed during the Easter vacation

(f) the plaintiff's counsel denies the allegations on forum shopping and avers that the defendant seeks to set aside valid court orders without following the due process.

The parties agreed to canvass the application by way of written submissions. The defendant /applicant filed its submission on 1<sup>st</sup> July, 2019 while the plaintiffs filed their on the 18<sup>th</sup> July, 2019.

#### **DEFENDANT'S SUBMISSIONS**

32. In its submissions, the defendant submitted on five (5) grounds in support of its application. On the first ground the defendant submitted that the ex parte order of 10<sup>th</sup> April, 2019 cannot last for more than 14 days as it would contravene order 40 rule 4 of the Civil Procedure Rules. The defendant relies on the case of AUNIBHAIJI & 4 OTHERS VRS CHIEF MAGISTRATE, MILLIMANI

LAWCOURTS AND 20THERS (2017) e KLR, in support of this arguments. The defendant submitted that the lapse of 14 days was on 24<sup>th</sup> April, 2019, the ex parte orders having been granted on the 10<sup>th</sup> April, 2019. The matter was fixed for inter parties hearing on the 30<sup>th</sup> April, 2019, after the defendant filed the application herein, which the defendant contends that by then the orders had lapsed and would not be extended.

33. On the second ground, the defendant /applicant submitted that since the ex parte orders were not served within 30 days after issuance, the said orders automatically lapsed. As a result of the said ex parte orders, the defendant contends that it continues to suffer loss since the chargor has refused to pay the loan advanced to which is over 570 million Kenya shillings. The defendant has cited the court of appeal decision in DIRECTOR OF PUBLIC PROSECUTION VRS JUSTUS MWENDWA KATHENGE & 2 OHTERS ( 2010) e KLR, where the court stressed on the Rules committee stringent rules on injunctions which are conveyed to prevent the abuse of the remedy of a temporary injunction.

34. Thirdly, the defendant submitted that the plaintiffs' lack locus standi in the matter since the suit properties are owned by limited liability companies and not them. The plaintiffs are neither directors nor shareholders of the respective companies and their claims cannot hold water.

35. On the fourth ground, the defendant submitted that the plaintiffs' advocate acted dishonestly when he withdrew his notice of motion dated 8<sup>th</sup> April, 2019 where the court had declined to grant him the order sought only to file a similar application a few hours later where injunctive orders were granted. In support of this argument by the defendant, the case of ABDULLAHI MOHAMED SHEIKH VRS GULF AFRICAN BANK LIMITED (Unreported) MILIMANI HCCCNO. 501 of 2016. He also submitted on the abuse of court process, and material non-disclosure as well as on professional misconduct by the plaintiffs' counsel and cited authorities to support these arguments.

36. On the fifth issue, the defendant submitted that the chargor's right of redemption was extinguished by the auction sale on 18<sup>th</sup> April 2019 and the only remedy available was an award of general damages. He relied on the provision of Section 99 of the Land Act, 2012 and the case of MBUTHIA VRS JIMBA CREDIT FINANCE CORPORATION (1998) to support its arguments.

### **PLAINTIFFS' SUBMISSIONS**

37. In their submissions filed in court on the 18<sup>th</sup> July, 2019, the plaintiff submitted that the orders granted on 10<sup>th</sup> April, 2019 were orders for status quo and not injunctive to the extent asserted by the defendant/applicant. The plaintiff's counsel further submits that the defendant is guilty in approaching the court with unclean hands since it has previously advertised its auction in the Daily Nation or the Standard but opted to advertise in the People's Daily. The plaintiffs' counsel submitted further that no notices were issued nor leaflets circulated in respect of the auction. However, the plaintiffs' counsel is of the view that the defendant's application raises issues which are pending and are yet to be determined. The plaintiff's counsel submits that it would be prudent for this court to rule on the defendant's application and the orders granted on the 10<sup>th</sup> April, 2019 and leave the rest to the trial court.

38. In any event, the plaintiffs' counsel submitted on the following issues.

The first issue is whether the order of status quo order was issued judiciously. On this the plaintiff submitted that the court granted the said orders to strike and preserve a balance pending the hearing and determination of the application.

39. Secondly, in response to the contention that an ex parte order cannot last for more than 14 days the plaintiffs' counsel submitted that they moved immediately and on 12<sup>th</sup> April, 2019 obtained the earliest hearing date being the 9<sup>th</sup> May, 2019 which they served upon the defendant's advocate on 16<sup>th</sup> April, 2019. To this, the plaintiffs' counsel submitted that they are not in control of the registry's diary and in a nutshell no earlier date could be obtained. Further, the plaintiffs' counsel submitted that they could only serve the ex parte orders after they had been signed by the Deputy Registrar. Thus the three days required for service of ex parte orders could only start counting as from 11<sup>th</sup> April, 2019 when the orders were granted.

40. And on the issue of the equity of redemption having been extinguished, the plaintiffs' counsel submitted that they wish to challenge the legality of the said auction and therefore inference cannot be read to the effect that the same has been extinguished.

### **ANALYSIS AND DETERMINATION.**

41. Having considered the application, the grounds in the supporting affidavit, the Respondents' replying affidavit, written submissions by both counsel together with the cited authorities and the law relied upon I find that the premise of the present application is that the injunctive order in force was issued ex parte and would not have been issued had the court been seized of all the necessary information. The plaintiffs are accused of forum shopping in having been denied the same orders by the Honourable P. J. Otieno, then hours later moving to this court and obtaining the said orders. The ex parte status quo orders which were granted on the 10<sup>th</sup> April, 2019, are in essence injunctive orders restraining the defendant from interfering with the existing state of affairs or circumstances pending the determination of the application. Status quo orders are issued by the court to prevent any of the parties in a dispute from taking any action until the matter can be resolved.

42. To understand what proceedings ex parte or ex-parte orders mean in law, one need not go further than the Civil Procedure Act ( Cap 21) and the rules made there under, and in this case, reference is made to Order 40 of the Civil Procedure Rules, 2010, which provides for issuance of orders Ex-parte. It states as follows;

**“ Where the court is satisfied for reason to be recorded that the objective of granting the injunction would be defeated by the delay, it may hear the application ex-parte”.**

43. More crucially, for our purposes however are provisions of Order 40 Rule 4 (2) and (3) which sheds light on what is to be regarded ex-parte. The provision is also follows;

Order 40 rule 4 (2)

**“ An ex parte injunction may be granted only once for not more than 14 days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days.”**

Order 40 rule 4 (3)

**“ In any case where the court grants an ex-parte injunction the applicant shall within three days from the date of issue of the order, serve the order, the application, and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse”.**

44. A summation of Order 40 Rule 4 (1),(2) and (3) is that for reason of likelihood of delay, a court may issue injunctive relief ex-parte. But that can only be once, with the order issued having a legal lifespan of 14 days, with a possible extension only once for equal period. The order, however, is issued when the other side is not yet served ( See sub- rule 3) and if issued, the order is to be served together with the application and the pleadings within three days of issuance. If this is not done, the order automatically lapses. (see the case of ERICOCHIENG VRS FREDRICK AILA ONYANGO & ANOTHER (2018) eKLR.

45. From the foregoing provisions of the above Order 40 of the Civil Procedure Rules, no doubt, the ex-parte injunction having been granted on 10<sup>th</sup> April, 2019, the law above quoted required that it lasts for 14 days only. In the instant case, I agree with the defendant that 14 days lapsed on 24<sup>th</sup> April, 2019 and no extension was granted then. The explanation put forward by the plaintiff is that the earlier date available in the registry was on 9<sup>th</sup> May, 2019 and the circumstances were beyond the control of the plaintiffs and the advocate.

46. For the benefit of the parties herein, the Black's Law Dictionary, 9th Edition at page 657 the word “ex-parte” is defined as;

**“ Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adverse interest; of, or relating to involving court action taken or received by one party without notice to the other, USU for temporary or emergency relief”.**

47. Having said so, I have considered the court file and found that none of the parties was present when these orders were issued on 10<sup>th</sup> April, 2019. It is therefore my considered view that the proceedings of the court on the said date well fit within the definition of ex-parte proceedings and were to be entertained within the confines of Order 40 Rule 4 of the Civil Procedure Rules.

In the case of **MRS RAHAB WANJIRU EVANS VRS ESSO (K)LTD, Civil appeal no. 13 of 1995 ( 1995)-1998) IEA 332**, the court of appeal held that;

**“....ex-parte injunction orders granted for more than 14 days are of no legal effect and cannot be extended, I therefore find that this court is so bound”.**

In any event, the status quo at the time this court granted the orders was that plot No 44 section XXI had already been sold in a public auction on the 1<sup>st</sup> April.

48. Having earlier considered the issue on locus standi in the preliminary objection, I therefore move to the next issue, which is whether equity of redemption had been extinguished with regard to plot No.44 section XXI. The defendant submitted that the chargor's equity of redemption was extinguished after the auction sale on the 1<sup>st</sup> April, 2019. The plaintiffs' are contesting the legality of auction sale by purporting that due procedure was not exercised and that no notice was served on them. Section 99 of the Land Act provides;

**“(1) this section applies to –**

**(a) A person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or**

**(b) A person claiming the charge land through the person who purchases charged land from the chargee or receiver including a person claiming through the chargee if the chargee and person so claiming obtained the charged land in good faith and for value”.**

**(2) A person to whom this section applies;**

**(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;**

**(b) is not obliged to see to the application of the purchase price;**

**(c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in**

connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary proper or regular,

(3) A person to whom this section applies is protected even if at any time before the completion of the sale the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper, or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power”.

**This section protects the purchaser. The equity of redemption is extinguished at the fall of the hammer.**

49. On 1<sup>st</sup> April, 2019, the charged property was sold by public auction to a third party. The sale by public auction extinguishes equity of redemption at the fall of the hammer whether the property is transferred to the purchaser or not. I find the plaintiffs' application with regard to plot No. 44 Section XXI has been overtaken by events as the sale which the plaintiffs sought to stay had already taken place. The third party who purchased the property at a public auction is therefore protected by provisions of section 99 of the Land Act.

50. In the case of MBUTHIA VRS JIMBA CREDIT FINANCE CORPORATION AND ANOTHER (1986-1989) IEA 340 (CAK) the impact of an auction sale on the equity of redemption was considered. There, the charged property was sold by public auction to the second respondent and the court of appeal held.

**“ A sale destroys the equity of redemption in the mortgaged property and constitutes the mortgagee's exercising the power of sale trustee of the surplus proceeds of sale, if any for the person interested according to priorities. The court will not grant to a mortgagor tampering the moneys due under the mortgage, an injunction restraining the mortgagee from completing by conveyance a contract to sell the mortgaged property in exercise of this power of sale unless it is proved that the mortgagee entered into the contract in bad faith”.**

The transaction which is the subject of the dispute was entered into in February, 1982 and is therefore governed not only by the registered Land Act itself, but also by the Common Law and Equity under section 72(1) of that Act, the equity of redemption subsisted in the mortgagor until the leasehold premises was sold. It was then extinguished and the Act provides that “a charge shall be deemed to have been sold when a bid has been accepted at the auction sale.

This means that mortgagor's right of redemption is lost as soon as the mortgage either sells the mortgaged property by public auction or enters into a binding contract in respect of it. On the acceptance of a bid at an auction, there is an immediate sale binding on the chargor. The charge is then entered to immediate possession of the charged property under subsection (2) of the Act”.

51. In the case of ZE YU VRS YANG NOVA INDUSTRIAL PRODUCT LTD (2003) IEA 362 (CCK) Justice Nyamu (as he then was) held as follows;

**“The existence of a valid sale agreement extinguished the equity of redemption and the applicant had no remedies touching on the property both as against the former mortgagee and against the person exercising the power”.**

52. In view of the foregoing, it is evident that the defendant did not suppress and or ignore the plaintiff's effort to try and redeem the property nor were they denied the equitable right of redemption before the auction sale took place. Nonetheless, as the plaintiff's noted, the auction was advertised in the People's Daily Magazine instead of Nation newspaper or Standard, but this has not demonstrated that the said action by the defendant clogged the plaintiffs' right of redemption.

53. Furthermore, the plaintiffs have not justified that there was lack of issuance of proper notice of sale as they alleged or proved that they have a prima facie case with a probability of success or that damages will not be sufficient compensation or that the balance of convenience tilts in their favour. After all, the defendant is a bank and cannot be defeated to pay general damages to the plaintiffs' in case of such eventuality.

54. It is worth noting that in the agreement creating the charge, if not express, it is an implied condition that the chargor would pay the loan in the matter agreed therein by the parties. So far, the plaintiff's have not rebutted the defendant's averments on the issue of a loan of over Kshs 570,000,000 creating a charge in the suit properties. The chargor was therefore duty bound to make good the said loan that was advanced to him. But as submitted by the defendant, the chargor defaulted in the payment plan of the said loan which was advanced to him, so that the charge remains undischarged as he still owes the bank money.

55. And upon his demise, this duty passed on to the Administrators/Executors of his estate. But so far, no payment has been made in payment proposal furnished by the plaintiffs in their capacity as Executors of his will. There is a declaration in the plaint filed herein stating that they are willing to pay any loan advanced to their late father but this is not enough to bind the defendant bank which is suffering loss. It should be remembered that the monies the bank advances to people as loans belong to other clients and that the bank is just in business.

56. It is incumbent upon litigants to know that he who comes to equity must come with clean hands and that he must also do equity if he expects to have equity done to him. Litigants must also know that he who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his right. The conduct of the chargor in this case, and even their own conduct, betray the plaintiffs herein it does not endear them to equitable remedies. Neither the chargor nor the plaintiff have fulfilled all or substantially all the outstanding obligations,

and they cannot expect equity to be done to them.

57. In light of the foregoing,

**(a) The application dated 24<sup>th</sup> April, 2019 by the defendant succeeds and the same is allowed with costs to the defendant.**

**(b) The orders issued by this court on 10<sup>th</sup> April, 2019 be and are hereby vacated since the parties have not submitted on the other application,**

**(c) I direct that they appear before the presiding Judge of this court, Honorable Justice E. K. Ogolla for further directions on a date to be taken in the registry.**

**Delivered, signed and dated in open court at Mombasa this 7<sup>th</sup> day of October, 2019.**

**D. O. CHEPKWONY**

**JUDGE**