



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 64 OF 2019**

**MARTHA WANGUI MURIITHI** (Suing as the Sole Administratrix of the Estate of  
the late **ISHMAEL ELIJAH MURIITHI**.....**PLAINTIFF**

**VERSUS**

- 1. LIMURU HILLS LIMITED**
- 2. HIGHGROVE HOLDINGS LIMITED**
- 3. KIRIT BHAGWANDAS KANABAR**
- 4. KARISH KUMAR KANABAR**
- 5. MADHAV BHALLA & AZIM TAIBJEE (t/a  
TAIBJEE & BHALLA ADVOCATES**
- 6. ASL CREDIT LIMITED**
- 7. KARTIK PATEL**
- 8. RAMAN MODH**.....**DEFENDANTS**

**RULING**

1. I have before me for determination a Notice of Motion dated 7<sup>th</sup> August 2019 filed herein by the Plaintiff, an amended Notice of Motion dated 19<sup>th</sup> September 2019 filed herein by the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants as well as a Notice of Preliminary Objection dated 17<sup>th</sup> October 2019 filed herein by the Plaintiff.

2. In her application dated 7<sup>th</sup> August 2019, Martha Wangui Muriithi suing as the administratrix of the Estate of Ishmael Elijah Muriithi (the Plaintiff) prays for orders:-

***4. That pending the hearing and determination of the suit herein the Honourable Court be pleased to issue an order of temporary injunction restraining the Defendants, their employees, servants or agents or any one of them from trespassing into, advertising, or in any other way offering for sale to the public the developments made (in) LR No. 350/III/MN Kilifi being House No. 3 and 5 as sold to the Plaintiff in the Agreement for the sale and Exchange dated 19<sup>th</sup> July 2013 between the Plaintiff and the Othaya Villas Ltd; and***

***5. That the costs of and incidental to the application be awarded to the Applicants.***

3. The Plaintiff's application is supported by a lengthy affidavit sworn by herself and is premised on the grounds, inter alia, that:

***i) On 13/7/2013 and 28/4/2013, the Plaintiff entered into two Sale Agreements with the 1<sup>st</sup> Defendant for the purchase of House No. 3 and 5 within CR 9829 LR No. 350/III/MN in Kilifi County at a consideration of Kshs 78,000,000/- and thereby became the beneficial owner thereof;***

*ii) By virtue of the sale transaction, there was a resulting trust for sale created in the Plaintiff's favour and the 1<sup>st</sup> and 6<sup>th</sup> Defendants could not lawfully transact in the properties without the consent of the Plaintiffs;*

*iii) Negotiations leading to the preparation of the charge in favour of the 5<sup>th</sup> and 6<sup>th</sup> Defendants who were also acting as the Advocates for the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants wrongfully failed to remove the effect of the charge or to draw a Discharge of the two properties thereby unlawfully rendering the Plaintiffs' properties liable to be sold in the event of a default in payment of the loan by the 1<sup>st</sup> Defendant. This omission was wrongful, unlawful, fraudulent, deliberate, negligent and/or otherwise reckless as it resulted in the wrongful encumbrance of the suit properties;*

*iv) Since the 5<sup>th</sup> Defendant was acting for the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants in the said transaction, the 6<sup>th</sup> Defendant knew or ought to have known the extent of the Plaintiff's interests in the suit properties and was therefore estopped from denying the said interests in the suit properties;*

*v) The 3<sup>rd</sup> and 4<sup>th</sup> Defendants who are the directors of both the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and who are the architects of the fraudulent scheme that precipitated the creation of the charge, conspired with the 5<sup>th</sup> and 6<sup>th</sup> Defendants to use the suit properties to secure a loan for the benefit of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the Plaintiff's detriment;*

*vi) The 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants owed the Plaintiff a duty of care and they ought to have conducted their transactions in a manner that would have protected the Plaintiff's interests in the event of a default on the part of the 1<sup>st</sup> Defendant in performing its obligations under the Charge;*

*vii) The Plaintiff's interest in the suit property are earlier in time and notwithstanding the fact that the said interests had not been registered against the title at the point in time at which the unlawful charge was created, the Plaintiff has an overriding interest based on the constructive trust for sale created by the Agreements referred to;*

*viii) The 6<sup>th</sup> Defendant advertised the developments in which the suit properties are constructed for sale allegedly for reason of default by the 1<sup>st</sup> Defendant. The Plaintiff did not receive any notice of the intended sale though the 6<sup>th</sup> Defendant was aware that she would be gravely affected by the 6<sup>th</sup> Defendant's wrongful exercise of its statutory power. As an affected party, the Plaintiff had a right in law to receive notice; and*

*ix) The 6<sup>th</sup> Defendant has every intention of selling the properties an act that shall cause the Plaintiff loss and damage unless the Court intervenes with an appropriate order of injunction.*

4. By the Amended Notice of Motion dated and filed herein on 19<sup>th</sup> September 2019, ASL Credit Ltd, Kartik Patel and Raman Modh (the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants respectively) pray for orders:

*4. That the orders granted herein ex-parte on 13<sup>th</sup> August 2019 in regard to the Plaintiff's application dated 7<sup>th</sup> August 2019 be discharged and/or set aside.*

*5. That the Plaintiff's application dated 7<sup>th</sup> August 2019 and the suit against the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants be dismissed with costs.*

*6. That the costs of this Application and the Plaintiff's application dated 7<sup>th</sup> August 2019 be paid by the Plaintiff;*

*7. That the costs of the aborted auction that was scheduled to be held on the 19<sup>th</sup> August 2019 be borne by the Plaintiff.*

5. The Amended Motion is supported by an affidavit sworn by the 6<sup>th</sup> Defendant's Head of Legal Daniel Wandera and is premised on the grounds, inter alia, that:

*i) The matter directly and substantially in issue in this suit was the matter directly and substantially in issue in Malindi ELC No. 218 of 2017; PJ Dave Flowers Ltd -vs- ASL Credit Ltd & 2 Others wherein the Plaintiff was enjoined and substantially participated;*

*ii) On 18<sup>th</sup> July 2019, this Court issued orders to the effect that the Plaintiff did not warrant to be granted an injunctive order against the 6<sup>th</sup> Defendant's exercise of its statutory power of sale and dismissed the Plaintiff's suit against the 6<sup>th</sup> Defendant with costs;*

*iii) The suit by the Plaintiff is thus tainted with an illegality since this matter is res judicata;*

*iv) There is no privity of contract between the Plaintiff and the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants hence the suit against the said Defendants is incompetent and discloses no reasonable cause of action in law against the said Defendants;*

*v) The Plaintiff has in any event not demonstrated a prima facie case with a probability of success. Contrary to her allegations, she will not suffer irreparable loss that may not be compensated by an award of damages;*

*vi) As at 27<sup>th</sup> August 2019, the outstanding balance on account of the 1<sup>st</sup> Defendant under the Charge is Kshs 867,319,932/- which amount has already outstripped the value of the security under the Charge and it is in the interest of justice that the 6<sup>th</sup> Defendant be allowed to sell the entire suit property to recover the outstanding amount; and*

*vii) The Plaintiff is guilty of delay or laches as the charge was registered over the suit property more than eight years ago on 11<sup>th</sup> August 2011.*

6. Equally opposed to the Plaintiff's suit and application dated 7<sup>th</sup> August 2019 are the two partners Madhar Bhalla and Azim Taibjee trading as Taibjee & Bhalla Advocates LLP (jointly sued herein as the 5<sup>th</sup> Defendant). In a Replying Affidavit sworn on the Law Firm's behalf by Madhar Bhalla and filed herein on 17<sup>th</sup> October 2019, the 5<sup>th</sup> Defendant avers that it is not aware that the Plaintiff paid the full consideration of Kshs 78,000,000/- in cash and in kind as stated in the sale of the two properties.

7. The 5<sup>th</sup> Defendant asserts that the purchase price never passed through its hands and/or account as the Plaintiff and the 1<sup>st</sup> to 4<sup>th</sup> Defendants dealt directly with each other and its role was merely that of an agent in the sale. The Law Firm further avers that it has since ceased acting for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants but states that owing to the facts of this case, the 1<sup>st</sup> and 6<sup>th</sup> Defendant could not have possibly transacted in the said property without the consent of the Plaintiff. It is their case that the Plaintiff and its former advocates have been in the know of all dealings and the circumstances leading to this suit including the charging of this property to the 6<sup>th</sup> Defendant hence the reason the Plaintiff's former Advocates drafted a Deed of Novation in which the property was novated to the 1<sup>st</sup> Defendant.

8. The 5<sup>th</sup> Defendant further avers that it did not act for the Plaintiff and as such had no duty of care towards the Plaintiff. They deny that there was any omission on their part or any wrongful, unlawful, fraudulent, deliberate, negligent and/or otherwise reckless omission which resulted in the wrongful encumbrance on the properties belonging to the Plaintiff.

9. In opposition to the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants' Amended Motion dated 19<sup>th</sup> September 2019, the Plaintiff has lodged a Preliminary Objection dated and filed herein on 17<sup>th</sup> October 2019 on five grounds listed as follows:

**1. The application is an omnibus application seeking 7 substantive orders based on 36 grounds inter alia seeking to strike out the suit on the grounds that the same does not disclose a reasonable cause of action under Order 2 Rule 15(1) (a) and at the same time it seeks to dismiss the suit under Order 2 Rule 15 (d) by reason that it is otherwise an abuse of the process of the Court. Such an application is fatally defective.**

**2. The application is contra statute in that it offends the provisions of Order 2 (15) (2) that reads as follows:-**

***"2.No evidence shall be admissible on an application under Sub-rule (1) (a) but the application shall state concisely the grounds on which it is made."***

**3. The application is omnibus application seeking 7 substantive orders based on 36 grounds inter alia seeking to strike out the suit on the grounds that the same does not disclose a reasonable cause of action under Order 2 Rule 15(d) of the Civil Procedure Rules and at the same time it seeks to set aside the order of injunction under Order 40 Rule 7 of the Civil Procedure Rules. These grounds range from allegations of res judicata, privity of contract, non disclosure of material facts, the role of an interested party in proceedings, allegations of secret sale of Beach House No. 4, allegations of illegality, laches, the absence of a prima facie case for an injunction, mischief, bad faith and abuse of process. These grounds are wide ranging, none admitted and will require of the Court a detailed analysis employing various tests and principles of the law. Such an application is fatally defective and should be struck out.**

**4. The application does not meet the threshold or the requirements for the striking out of a suit on the grounds outlined in the application.**

**5. The application by the 2<sup>nd</sup> Defendant (sic) is frivolous, vexatious and otherwise an abuse of the process of the Court and the same ought to be dismissed with costs.**

10. The stating point, given its implications is of course the Preliminary Objection raised by the Plaintiff against the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants Amended Motion dated 19<sup>th</sup> September 2019. As Law J.A stated in the oft-cited case of **Mukisa Biscuits Manufacturing Company Ltd –vs- West End Distributors Ltd (1969) EA 696:**

***"So far as I am aware, 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 as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration"***

11. Guided by that great judicial pronouncement, it follows that for a Preliminary Objection to succeed, the following must be satisfied. First, it should be confined to a pure point of law. Secondly, a Preliminary Objection is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The very reason for which such an objection is raised is the desire to save on the Court's time and hence a valid Preliminary Objection should, if successful, dispose of the matter in contention."

12. I have looked at the five grounds of the Plaintiff's Preliminary Objections and I have no hesitation in finding that the same are incapable

of disposing of the Amended Motion dated 19<sup>th</sup> September 2019. The Plaintiff objects to the application on account that the same seeks to have the suit dismissed under various provisions of the law and for a variety of reasons and is thus, as they say, an omnibus application.

13. Those are in my view not matters that may dispose of the dispute between the parties herein. A look at the Plaintiff's Replying Affidavit to the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants application reveals that they disagree on a number of facts raised in the application and it was clear to me that this Court was being invited first and foremost to make an inquiry as to the facts before it can arrive at a proper determination on the points of contention. That would not be a proper way of spending judicial time.

14. In saying this, I stand guided by the dictum of Sir Charles Newbold in the case of *Mukisa Biscuits Manufacturing Company Ltd (Supra)* wherein His Lordship expressed himself as follows:

***“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and an occasion, confuse the issue. The improper practice should stop.”***

15. That being the case, the second issue for my consideration is whether the Plaintiff's suit herein is res judicata as contended by the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants in their Amended Notice of Motion dated 19<sup>th</sup> September 2019. According to the said Defendants, the matter directly and substantially in issue in this suit is the same one that was directly and substantially in issue in *Malindi ELC No. 218 of 2017; PJ Dave Flowers Ltd –vs- ASL Credit Ltd & 2 Others*. It is accordingly their case that this suit is tainted with an illegality as the matter is res judicata.

16. In her Replying Affidavit filed herein on 13<sup>th</sup> September 2019 however, the Plaintiff while conceding that she did participate to an extent in the said *Malindi ELC No. 218 of 2017* denies that the matter is res judicata. At paragraphs 7, 8 and 10 of the said Affidavit, the Plaintiff avers as follows:-

***‘7. That as I waited for the leases in respect of the two houses, I learnt about ELC No. 218/2017; P.J. Dave Flowers Ltd –vs- Limuru Hills Ltd & 2 Others through my erstwhile advocates in the transaction who also forwarded to me the attached email and order from the Advocates for the 1<sup>st</sup> Defendant. Copies of the email dated 27/3/2018 and injunction order of the Court issued on 7<sup>th</sup> February 2018 are annexed to my affidavit dated 7/8/2019 as the Exhibits “MWM 7 and 8” respectively. I then sought leave of Court to be joined in the said proceedings as an Interested Party. Leave was granted (on) 17/5/2018 for me to participate as an Interested Party, not as a Plaintiff or defendant. I understand that my participation in such proceedings was very peripheral and in order for me to make substantive claims, I had to be joined as a proper party or file my own suit. I have taken the later step;***

***8. That contrary to the view championed by the Applicants herein, the Court was seized and could lawfully only determine, the issues raised in ELC No. 218/2017; PJ Dave Flowers Ltd –vs Limuru Hills Ltd & 2 Others by the principle litigants in the action, that is to say the Plaintiffs and the Defendants therein. I was not a Plaintiff or defendant in the said suit and my involvement was purely as an Interested Party. None of the findings made by the Court on the issues between the Plaintiffs and the Defendants in the said suit bind me and the doctrine of res judicata does not arise in the circumstances of this case;***

***9. That an examination of the Plaintiff in this case and the Plaintiff in ELC No. 218 of 2017; PJ Dave Flower Ltd –vs Limuru Hills Ltd & 2 Others reveals the difference between the two suits, though it is correct that both attack the Defendants for their perceived infractions in performance of their respective roles in relation to the property. I have a copy of the Plaintiff in ELC No. 218/2017; PJ Dave Flowers Ltd –vs Limuru Hills Ltd & 2 Others and I annex the same hereto as Exhibit PEX 4. The principal difference between the two suits is the fact that I challenge the validity of the charge and assert that the Defendants are guilty of fraud (and) that the charge does not confer any rights to the 6<sup>th</sup> Defendant on account of its defects; and***

***10. That it is the case here that while acting for the 1<sup>st</sup> Defendant and the applicants herein, the 5<sup>th</sup> Defendant who were also acting as advocates for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, failed to remove the two properties owned by the Estate from the properties to be charged to the 6<sup>th</sup> Defendant. This omission was wrongful, fraudulent, deliberate, negligent, and/or otherwise reckless as it resulted in the wrongful charging of the properties belonging to the Estate.”***

17. I have looked at the said pleadings filed in *Malindi ELC No. 218 of 2017* and those filed in the matter presently before me. The doctrine of res judicata is anchored in Section 7 of the Civil Procedure Act in these terms:-

***“7. Res Judicata***

***No Court shall try any suit or issue in which the matter 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.”***

18. In their submissions in support of their contention that this matter falls within the doctrine as defined under Section 7 of the Civil Procedure Act, the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants urge the Court to consider the fact that the Plaintiff herein made a formal application in *Malindi ELC No. 218 of 2017* wherein they sought to be enjoined as an Interested Party for purposes of highlighting and protecting their

alleged interests over the two houses said to have been purchased. They further urged the Court to consider the fact that the Plaintiff's application was allowed and she was granted an opportunity to litigate on the issue before the Court which was an application to restrain the 6<sup>th</sup> Defendant from exercising its statutory power of sale and preserving the suit property.

19. It was however the Plaintiff's case that in **Malindi ELC No. 218 of 2017**, she was a mere observer and that in these proceedings, she was litigating under a different title, not as an Interested Party, but as the Plaintiff. Accordingly the Plaintiff contends that she could not have raised substantive issues in the previous suit. In this respect, the Plaintiff relies on the Supreme Court decision in **Methodist Church in Kenya –vs- Mohamed Fugicha & 3 Others (2019) eKLR** where the Learned Judges observed at paragraph 53-55 as follows:-

**“(53) What should we make of a cross-petition fashioned as such yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in Francis Kariuki Muruatetu & Another –vs- Republic & 5 Others, Supreme Court Petition 15 & 16 of 2015 (consolidated); (2016) eKLR, as follows(paragraphs 41, 42):**

**“Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as public interest litigation (PIL), like the proceedings now before us.**

**Therefore in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether new issues to be introduced before the Court.**

**(54) In like terms we thus observed in Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012(paragraph 24):**

**“A suit in Court is a ‘solemn’ process, ‘owned’ solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.”**

**(55) Against such a background, the trial Court ought not to have entertained issues arising from the cross-petition by the interested party, especially in view of Article 163(7) of the Constitution which provides that “ALL Courts, other than the Supreme Court are bound by the decisions of the Supreme Court”. Moreover, this cross-petition did not comply with Rule 15(3) of the Mutunga Rules which speak to a respondent filing a cross-petition; and it was also not in conformity with Rule 10(2) of these Rules. Rule 10(3) cannot be invoked as the replying affidavit of the interested party does not fit any of the descriptions contained herein.”**

20. While I am in agreement with the submissions of Mr. Ole Kina, Learned Counsel for the Plaintiff that, in light of the foregoing decision, an Interested Party is not a primary party in a matter such as this, I did not hear the Supreme Court to say that where the issues as presented by the principal parties or as framed by the Court have been determined, the Interested Party could still be allowed by separate litigation to bring up the same issues for litigation before a different or the same Court.

21. As the Court of Appeal observed in **Pop-in (Kenya) Ltd & 3 Others –vs- Habib Bank A.G. Zurich (1990) eKLR** while quoting the celebrated dictum of Wigram VC in **Henderson –vs- Henderson (1843) Have 100, , 115:-**

**“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 cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce 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.”**

**Put simply, in the circumstances the persuasive authority of the Judgment in the Yat Tung Case, the present complaint could have been made and should have been raised in the earlier suit numbered 2066/86 OS. It would be an abuse of process to raise the issues complained about in the subsequent suit numbered HCCC No. 1893 of 1987.”**

22. In the matter before me, the Plaintiff in the Plaint dated and filed herein on 7<sup>th</sup> August 2019 makes some nine (9) substantive prayers against the Defendants as follows:

**a) A declaration that the Plaintiff is the beneficial owner of House No. 3 and 5 within CR 9829 LR No. 350/III/MN, Kilifi County;**

**b) A declaration that the Plaintiff holds an overriding interest arising from a constructive trust for sale created by the agreements**

referred to in paragraph 6 and 7 (of the Plaintiff);

c) A declaration that the Charge document prepared by the 5<sup>th</sup> Defendant dated 3<sup>rd</sup> August 2015 is null and void;

d) A mandatory order of injunction requiring the 1<sup>st</sup> Defendant (and) 6<sup>th</sup> Defendant, its employees, servants and agents to issue the Plaintiff leases for House No. 3 and 5 within CR 9829 LR No. 350/III/MN, Kilifi County and a mandatory order of injunction requiring the 6<sup>th</sup> Defendants, their servants and or agents or any one of them to issue partial discharges of the Charge to permit the Plaintiff to register the said leases in favour of the Plaintiff;

e) A permanent injunction restraining the Defendants, their employees, servants or agents or any one of them from trespassing into, advertising, or in any other way offering for sale to the public House No. 3 and 5 within CR 9829 LR No. 350/III/MN, Kilifi County as sold to the Plaintiff as detailed in Paragraph 6 and 7 (of the Plaintiff)

f) In the alternative and without prejudice to the foregoing, the 6<sup>th</sup> Defendant, its employees, servants and agents be restrained by an order of injunction from exercising its statutory power of sale held over CR 9829 LR No. 350/III/MN, Kilifi County unless they exclude the Plaintiff's properties being House No. 3 and 5 developed within CR 9829 LR No. 350/III/MN from the sale

g) General damages

h) Costs and interest at Court rates

i) Any other or further orders that the Honourable Court may deem fit to grant in the circumstances.

23. A consideration of the prayers sought reveals that the main concern of the Plaintiff's suit herein is the remedy of injunction to restrain the 6<sup>th</sup> Defendant from the exercise of its statutory power of sale over the House No. 3 and 5 as erected on LR No. 350/III/MN. Those were basically the same orders sought by PJ Dave Flowers Ltd who were the Plaintiffs in the said *Malindi ELC Case No. 218 of 2017*.

24. The Plaintiff herein applied and was enjoined in the said suit on the basis that she had a stake therein. The 6<sup>th</sup> Defendant herein was the 2<sup>nd</sup> Defendant in those proceedings. From the record, the Plaintiff swore a 17-paragraph Supporting Affidavit filed therein on 22<sup>nd</sup> May 2018 wherein she averred as follows at paragraphs 12 to 15 thereof:

*12. That further to the above, the 2<sup>nd</sup> Defendant was duty bound at the time it expressed an intention to Charge to exclude the Estate (of Ishmael Elijah Muriithi's) 2 houses and when it decided to sell, to notify the Estate and to ensure that any notices send (sic) and any auction conducted would have clearly excluded the estate's properties from the said auction. Looking at the Charge, the Notices referred to in paragraphs 11, 12 and 13 of the Replying Affidavit of Raman Modh, it is clear that the notices do not exclude the Estate's Property. To the extent that the notices purport to prepare property that does not belong to the 1<sup>st</sup> Defendant for sale, the said notices are void and should be declared as such.*

*13. That I have been informed by a director of the 1<sup>st</sup> Defendant Mr. Kirit Bhagwadash Karnabar that the value of the suit property is well over Kshs 350 Million hence, the excision of House No. 3 and 5 from the sale will not drastically diminish the value of the security herein.*

*14. That the 2<sup>nd</sup> Defendant has demonstrated a dogged determination to sell the suit premises. As appears from paragraphs 16, 17 and 18 of the Replying Affidavit of Raman Modh and the Notice of Motion dated 3/5/2018, the 2<sup>nd</sup> Defendant is actively engaging the Registrar to remove the caveat registered against the suit premises in the Estate's favour and the injunction issued by this Court to pave the way for the sale of the suit premises.*

*15. That evidently, it is in the interest of justice that the Honourable Court is pleased to issue the injunction sought by the Plaintiff to protect the entire property from sale as the 1<sup>st</sup> Defendants has not issued leases for the House No 3 and 5 in favour of the Estate and any sale would cause the Estate tremendous loss and damage.*

25. Those were the issues considered by this Court in my Ruling delivered in *Malindi ELC No. 218 of 2017* on 18<sup>th</sup> July 2019 in which the Court dismissed the prayer for injunction and thereby allowed the 6<sup>th</sup> Defendant herein to proceed with the sale of the suit properties. From a perusal of Paragraph 5 of the Plaintiff filed herein, the 7<sup>th</sup> and 8<sup>th</sup> Defendants herein are directors of the 6<sup>th</sup> Defendant. In that respect, I am in agreement with the submissions of Ms Kageni Learned Counsel for the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants that this suit in so far as it relates to the said 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants, is res judicata.

26. As the Court of Appeal stated in *John Florence Maritime Services Ltd & Another –vs- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR*:

*“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of the Court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon.”*

27. In the premises, it follows that I find merit in the Amended Notice of Motion dated 19<sup>th</sup> September 2019. Accordingly I proceed and

make orders as follows:

*i) The Plaintiff's application dated 7<sup>th</sup> August 2019 and the suit as against the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants is hereby dismissed with costs.*

*ii) The costs of the aborted auction that was scheduled to be held on 19<sup>th</sup> August 2019 shall be borne by the Plaintiff.*

28. Orders accordingly.

Dated, signed and delivered at Malindi this 10<sup>th</sup> day of July, 2020.

J.O. OLOLA

JUDGE