



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO. 42 OF 2020**

**CELINE WAMBUI KIGWE.....PLAINTIFF/APPLICANT**

**VERSUS**

**NATIONAL BANK OF KENYA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**PURPLE ROYAL AUCTIONEERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**MADONNA REALTORS LTD.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

The matter for determination herein is the **Notice of Motion Application** dated **1<sup>st</sup> July 2020**, by the Plaintiff/Applicant who has sought the following orders:-

- 1. THAT the Honourable Court be pleased to restrain all or any of the Defendants from evicting the Plaintiff from or dispossessing the plaintiff of land parcel No. 10823/423(I.R No. 121737) or to any other person pending the hearing and determination of this suit.**
- 2. THAT in the event Plaintiff would have been evicted from or been dispossessed of land parcel No. 10823/423(I.R No. 121737) by the time this Application is heard, or orders granted, then the Honourable Court be pleased to order that the Plaintiff be reinstated to the said parcel of land pending the hearing an determination of this suit.**
- 3. THAT the costs of this Application be provided for.**

There are also two **Notices of Preliminary Objection** by the 1<sup>st</sup> Defendant dated **27<sup>th</sup> July 2020**, and by the 3<sup>rd</sup> Defendant dated **15<sup>th</sup> July 2020**.

The two **Notices of Preliminary Objection** are basically the same. The 1<sup>st</sup> and 3<sup>rd</sup> Defendant have sought for striking out of the entire suit on the following grounds:-

- 1) That the suit is contrary and offends sections 6 and 7 of the Civil Procedure Act, for being Subjudice and Res judicata since a suit and an Application was filed at the Chief Magistrates's Court being Milimani CMCC No. 7493 of 2018 and Milimani ELC Misc No. 172 of 2019 which matters were heard and determined on merit.**
- 2) The whole suit is vexatious, mischievous, misconceived, non-starter, does not hold in law and is an abuse of the Court process.**
- 3) THAT the whole suit is fatally defective for offending the mandatory legal requirements and should be struck out in the first instance.**

The **Notice of Motion Application** is premised on the grounds that the Plaintiff/ Applicant was the 1<sup>st</sup> Defendant's/ Respondent's **chargor** in respect of the suit property **L.R No. 10823/423(I.R NO.121737)** being security for a loan. That the 1<sup>st</sup> Defendant/ Respondent operated the said loan account **irregularly, illegally** and **in breach** of the contract by debiting the same with an **unauthorized amounts**, which led to huge accumulations as loan arrears. Further that the Defendants/ Respondents fraudulently sold the said property on **12<sup>th</sup> February 2019**, secretly and without the requisite Notice.

That the Plaintiff/Applicant instituted a suit on **14<sup>th</sup> March 2018**, to stop the sale, but which sale had purportedly taken place a month earlier although the Court restrained the said sale. However, the suit property had not been transferred to the 3<sup>rd</sup> Defendant/Respondent's name. That the Plaintiff/ Applicant has established that the purported **Public auction** during which the 3<sup>rd</sup> Defendant/ Respondent purported to buy the property was in breach of the **Auctioneers rules**, the sale was secretly and fraudulently arranged and executed by all Defendants/Respondents.

Further that the 2<sup>nd</sup> Defendant/Respondent sold the suit property at **Kshs. 12,750,000/=** contrary to the Valuation Report which had put the land at **Kshs. 45,000,000/=** and it is therefore necessary that the Court restrain **Madonna Realtors Limited**, from transferring the suit property as it was registered on **2<sup>nd</sup> June 2020**, as the proprietor of the suit property .

In her supporting Affidavit **Celine Wambui Kigwe**, averred that she took a loan of **Kshs. 4 million** from the 1<sup>st</sup> Defendant/ Respondent for which she offered the suit property as security in **2016**. That in **2016**, the suit property was valued at **Kshs. 45,000,000/=** at open market or at **kshs. 35,000,000/=** were it to be through forced sale. Further that she was servicing the loan from the quarrying business that she undertakes at the suit property. It was her contention that the said suit property is also her residential home although it was never captured in the report.

She also averred that she made several monthly payments towards the repayment of the loan until she noticed that the 1<sup>st</sup> Defendant/ Respondent had started debiting the said account with sums that were neither contractual nor legal. That the non-contractual and or illegal sums kept the loan account stagnant despite the repayments. She contended that she raised the issue of illegal debits with the 1<sup>st</sup> Defendant/ Respondent on several occasions who promised to remove them. That as she waited for the 1<sup>st</sup> Defendant/ Respondent to remove the illegal entries. But on **4<sup>th</sup> July 2018** the 2<sup>nd</sup> Defendant/ Respondent served her with a **Notification of sale** dated **2<sup>nd</sup> July 2018**, notifying her that her property would be sold by **public auction on 6<sup>th</sup> September 2018**.

It was her contention that the loan outstanding at the date of the said Notice was far less than **Kshs.3,814,587.99**, and that the quoted rate of 14% interest p.a was illegal. She further averred that the value of land quoted on the documents was not **Kshs. 17,000,000** as the said land that was valued at **Kshs. 45,000,000/= in 2016** could not have depreciated to **Kshs. 17,000,000/=** in the year **2018**. Further that the instructions to the Auctioneer were purportedly issued by **National Bank Limited**, when the Chargee is **National Bank of Kenya Ltd**. It was her contention that the time for the 1<sup>st</sup> Defendant/ Respondent to exercise power of sale had not arisen, as there had been no **demand Notice** issued by **National Bank Kenya Ltd**, to her. She further averred that there had not been any demand notice given to one **Rosemary Wangechi Mwangi**, who was her guarantor.

Further that upon receipt of the notification for sale, she approached the 1<sup>st</sup> Defendant/Respondent, who assured her that they would attend to the issues. That the suit property was not sold on **6<sup>th</sup> September 2018**, as advertised and she believed that the illegal entries would be removed as the notice was issued during a waiver period. That she then instituted **Milimani CMCC No. 7493 of 2018**, being apprehensive that the 1<sup>st</sup> Defendant/ Respondent intended to sell her property in which an order of injunction was issued on **14<sup>th</sup> March 2018**, restraining any sale or transfer of the suit property. That subsequent to the injunction orders, the 1<sup>st</sup> Defendant/ Respondent made an Application for the reviews of the orders in which it indicated that it had sold the property a month before the order of Court to stop the sale. It was her contention that the **unauthorized** and **illegal** sums debited on her account together with the illegal charges was a fraudulent move on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents in collusion with the 3<sup>rd</sup> Defendant/ Respondent to pave way for the 3<sup>rd</sup> Defendant/ Respondent to buy the said property.

She averred that **Kshs. 17,000,000/=** indicated in the notification of sale as the value of the suit property as at **30<sup>th</sup> April 2018**, was fraudulent and done to get a quick buyer. Further that the suit property was sold at **Ksh. 12,750,000/=** which stands her home and she urged the Court to maintain **status quo** and **stay** any **transfer**. She contended that although the subordinate Court set aside its order of injunction on review, it stayed its order pending the hearing and determination of the Application before the Environment and Land Court Nairobi. That the ruling before the Environment and Land Court in **ELC Misc Application 172 of 2019** was delivered after the transfer and which discharged the stay order of the Chief Magistrates Court. That the transfer of the suit was done before the stay order lapsed and the same was therefore in breach of the Court order.

The Application is opposed and the 3<sup>rd</sup> Defendant/ Respondent filed a Replying Affidavit sworn by **Moses Kibathi** on **20<sup>th</sup> July 2020**, who averred that on **28<sup>th</sup> January 2019**, the 3<sup>rd</sup> Defendant/ Respondent learnt of a scheduled **public auction** through an advertisement in the **Daily Nation Newspaper**, indicating that the suit property would be sold at the 2<sup>nd</sup> Defendant's/ Respondents offices. He averred that the 3<sup>rd</sup> Defendant/ Respondent contacted the 2<sup>nd</sup> Defendant/ Respondent to inquire about the auction and whether all requirements had been met and the 2<sup>nd</sup> Defendant/Respondent indicated that the same was being sold upon the Plaintiff/ Applicant defaulting in a loan facility. That it was confirmed that the 1<sup>st</sup> Defendant/ Respondent had issued various notices under section **90(1) of the Land Act** and 40 days' notice under **Section 96(1) of the Land Act 2012**. That on the **12<sup>th</sup> February 2018**, the 3<sup>rd</sup> Defendant/ Respondent placed a bid of **Kshs. 12,750,000/=** on the day of the auction and being the highest bidder, the suit property was sold to it upon payment of full purchase price.

It was his contention that on **15<sup>th</sup> March 2019**, the 2<sup>nd</sup> Defendant/ Respondent informed the 3<sup>rd</sup> Defendant/ Respondent that it had been served with orders purporting to injunct them from auctioning the suit property pending the hearing and determination of the suit. That they confirmed from the Court file that at the time of the auction, there were no orders of injunction and that the 1<sup>st</sup> Defendant/ Respondent had responded to the Application detailing the steps take as required to conduct an auction. It was his contention that the 2<sup>nd</sup> Respondent moved to Court seeking to have the trial Court review the ruling and on **14<sup>th</sup> March 2020**, the said orders were vacated and the documents required to transfer the property were forwarded to the 3<sup>rd</sup> Defendant/ Respondent on **24<sup>th</sup> September 2019**.

He further averred that the purported withdrawal of **Milimani CMCC NO. 7493 of 2018, Celine Wambui Kigwe ...Vs... National Bank of Kenya Limited & Purple Royal Auctioneers**, has not been adopted as an order of the Court nor has any notice been given and thus the

same is irregular. Further that the Plaintiff/ Applicant sought leave from the **ELC Court in Nairobi** to appeal out of time, which Application was heard on its merits and dismissed. That the suit property has already been transferred to the 3<sup>rd</sup> Defendant/ Respondent and a title issued and that the subject matter has been litigated upon before a Court of competent jurisdiction and a determination made. He averred that the 3<sup>rd</sup> Defendant/Respondent undertook all **due diligence** required of a purchaser and he denied that it participated in any irregularity.

He further averred that the orders sought are untenable and unmerited as they will interfere and bar the 3<sup>rd</sup> Defendant/ Respondent from enjoying the ownership of the suit property. It was his contention that the Plaintiff/ Applicant has willingly granted the 3<sup>rd</sup> Defendant/ Respondent vacant possession and thus the prayer of protecting her from being evicted has been overtaken by events. Further that the prayers sought in the main suit have been overtaken by events. That he had been advised by his Advocates that a **Mortgagor's** right of equity of redemption is extinguished upon the fall of the hammer in a public auction, Further that the Plaintiff/ Applicant has not led any evidence to establish any state of affairs that would irreparably affect her, as she has also sought for prayers of damages in the main suit. That the suit discloses no **prima facie** case and it is in the interest of justice that it is dismissed.

Further in opposing the Application, the 1<sup>st</sup> Defendant/ Respondent filed grounds of opposition to the Application and averred that the Application is **mischievous, misconceived** and a **total abuse of the Court process**. That the Application is **incompetent** and **fatally defective** as it offends **Section 7 of the Civil Procedure Act Cap 21**, in view of the pleadings filed in **Milimani CMCC 7943 of 2018**, which matter has since been conclusively heard and determined. That the Application and the suit are fatally defective since the orders sought therein are incapable of being granted in light to the fact that the subject property in question has been sold and legally transferred to the 3<sup>rd</sup> Defendant/ Respondent and as such the 1<sup>st</sup> Defendant no longer has any interest in the suit property. That the 1<sup>st</sup> Defendant/Respondent as erroneously been enjoined as a party in the suit. Further that the claim cannot hold in lieu of **Sections 6 and 7 of the Civil Procedure Act**, with regards to orders issued in **Milimani CMCC 7493 of 2018 and Misc Application No. 172 of 2019**. That the Plaintiff/ Applicant is in court with **unclean hands** having lost upon filing a similar matter in another Court.

The Plaintiff/ Applicant swore a Supplementary Affidavit on **4<sup>th</sup> August 2020**, and averred that her Advocate sent to the Chief Magistrates Court Notice of change of Advocates and **Notice of Withdrawal of the suit** both dated **1<sup>st</sup> July 2020**. That the method of filing court papers in the Chief Magistrates Court in matters existing since the onset of the **Covid 19 pandemic** was through email numbers [mattersexisting@gmail.com](mailto:mattersexisting@gmail.com). That her Advocates informed her that they waited to be informed of the Court fees but, no information was forthcoming until **28<sup>th</sup> July 2020**, when they were advised to resubmit the said documents through the new filing system and the said matter has therefore been withdrawn. That the suit before the Chief Magistrates Court and the interlocutory Application was against two defendants being the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents herein and sought an injunction from selling the suit property and although an injunction was granted, the same was later set aside. She further averred that her Advocate was late in filing the Appeal and leave to file the appeal out of time was not granted.

That she has been advised by her Advocates that a party can withdraw a suit at any stage of the proceedings and such withdrawal is never a defence in a subsequent suit. That since her property is valued at **Kshs. 45, 000,000/=**, the subordinate Court did not have pecuniary jurisdiction to hear and grant any orders. That the instant suit does not seek an injunction to stop any sale and the basis of the suit is cancellation of the title arising from fraudulent advertisement of the suit property.

She further averred after service of the suit papers, the 3<sup>rd</sup> Defendant in the company of police officers went to the suit property and confiscated her quarrying equipment and ordered her and her workers to leave the site and she had no option as she awaited the Court's intervention. She urged the Court to reinstate her to allow her continue with her business and occupation of the residence. She further contended that the purported **public auction** was premature, illegal and fraudulent and that she was ready to deposit **Kshs. 4 million**, being the loan she took from the 1<sup>st</sup> Defendant/ Respondent over which she had given proposal on how to redeem when the Defendants/ Respondents colluded to purport to sell the suit property.

That the 3<sup>rd</sup> Defendant has started to level and demolish everything on the site and unless the Court restrains the Defendants, then she is likely to suffer grave and irreparable loss. She attached photographs of excavation that were taking place on the suit land as **CWK – s of 2**.

The application and the Notices of Preliminary objection were canvassed by way of written submissions.

The **Law Firm of Masore Nyangau & Co. Advocates** for the Plaintiff/ Applicant filed their submissions dated **13<sup>th</sup> August 2020**, and urged the Court to allow the Applicant's prayers.

On Preliminary Objection, the Plaintiff/Applicant submitted that a suit cannot be both **subjudice** and **res judicata** at the same time. Further that a suit cannot offend both **Sections 6 and 7 of the Civil Procedure Act**. It was submitted that both the suit at Milimani Subordinate Court being **CMCC No. 7493 of 2018**, and **Milimani ELC Misc Application No. 172 of 2019**, are not pending. Further that the parties in the said suit are not the same parties in the instant suit. That the Chief Magistrate's Court at Milimani did not have jurisdiction to deal with the matter and the suit property was valued at **Kshs.45,000,000/=** as at **30<sup>th</sup> November 2016**. That the suit at Milimani subordinate Court has been wholly withdrawn as per the **Notice Of Withdrawal** of the said suit and so it is not pending.

Further that the suit does not offend **section 7 of the Civil Procedure Act**, as the instant suit does not seek to stop the auction, but seeks a declaration that the public auction of the suit property conducted on **12<sup>th</sup> February 2019**, and the transfer done on the **2<sup>nd</sup> June 2020**, were premature and are **illegal** and therefore **null and void**. That this case is totally different from that case **No. 7439 of 2018**, and the issues are different and therefore, this suit cannot be **Res judicata**.

On the Notice of Motion Application, the applicant submitted that she has established all the threshold for grant of injunctive orders set out in the case of **Giella ...Vs... Cassman Brown Co Ltd (1973)EA 358**.

It was her submissions that the 1<sup>st</sup> Defendants purported exercise of its **Statutory power of sale**, was premature, improper and the same was in breach of the **Land Act 2012**.

That the 1<sup>st</sup> Defendant did not give a demand notice in writing to the Plaintiff to pay the money owing as is required under **Section 90(1)** of the **Land Act**. Further that the demand and statutory Notice were not served upon the guarantor as required by **Section 96(2)h** of the **Land Act** which is a mandatory requirement.

That the 1<sup>st</sup> Defendant offended **Section 97(1)** of the **Land Act** which obligated a chargee to exercise a duty of care to the chargor and guarantor and obtain the best price reasonably obtained at the time of sale. It was submitted that the suit property was old at **Kshs.12,750,000/=** whereas it was valued at **Kshs.45,000,000/=**. The applicant urged the Court to allow the prayers as sought in the Notice of Motion Application.

The 1<sup>st</sup> Defendant though **Masire & Mogusu Advocates**, filed their written submissions dated **18<sup>th</sup> September 2020**, and submitted when the 1<sup>st</sup> Defendant moved to exercise its **Statutory power of sale**, the Plaintiff/applicant moved to Milimani Court and filed **CMCC No. 7493 of 2018**, wherein she obtained injunctive orders which were later reviewed by the Court. That she filed **Milimani ELC Misc. Application No. 172 of 2019**, which was determined too and dismissed. That by the time of filing the instant suit, **Milimani CMCC No. 7493 of 2018**, was still pending and therefore this suit is **subjudice**. The 1<sup>st</sup> Defendant relied on various decided cases among them the case of **Thiba Min. Hydro Co. Ltd ...Vs... Josphat Karu Ndwiga [2013] eKLR** where the Court held that:-

***“It is not the form which the suit is framed that determine whether it is subjudice, rather it is the substance of the suit and looking at the pleadings in both cases.”***

Further on **section 7** of the **Civil Procedure Act**, it was submitted that the Applicant approached the Court in **Milimani ELC Misc Application No. 172 of 2019**, which Application was heard on merit and dismissed with costs. That the Plaintiff did not move to the **Court of Appeal** but instead filed the instant suit, which offends the provisions of **Section 7 of Cap 21**.

On whether the Applicant has satisfied the threshold for grant of injunctive orders, the 1<sup>st</sup> Defendant/ Respondent submitted that the remedy sought by the Applicant is equitable in nature and the Court should decline to grant the same to the Applicant has not come to Court with clean hands.

Further that the suit property has been sold and legally transferred to the 3<sup>rd</sup> Defendant and the 1<sup>st</sup> Defendant no long has any interest on the said suit property. That the Plaintiff has approached the Court with unclean hands as she has lost similar matter in other court and she is now on a fishing expedition. For this the 1<sup>st</sup> Defendant/Respondent relied on the case of **Francis J. K. Ichatha vs Housing Finance Co. of Kenya (2005) eKLR**, where the Court held:-

***“A Plaintiff should not be granted an injunction if he does not have clean hands and no Court of Equity will aid a man to derive advantage from his own wrong. For the Plaintiff seeks this Court to protect him from the consequences of his own default. He who seeks equity must do equity. The Plaintiff should not be protected or given advantage by virtue of his own refusal to make repayment to the Defendant/Respondent, a debt which he expressly undertook to pay.”***

The Court was urged to strike out the Plaintiff/Applicant’s entire suit and the instant application for being fatally defective and incompetent.

On the part of the 3<sup>rd</sup> Defendant, the **Law Firm of Wachira Kirigo & Co Advocates** filed their written submissions dated **22<sup>nd</sup> August 2020**, and submitted that the suit herein is **Subjudice** and/or **Resjudicata**. That the Plaintiff/applicant had filed **Milimani CMCC No. 7493 of 2018**, which culminated in **Milimani ELC Misc App. No. 172 of 2019**. That though the Plaintiff alleges that the lower court suit was withdrawn, the same was done on **28<sup>th</sup> July 2020**, whereas this suit was filed on **1<sup>st</sup> July 2020**. It was submitted that at the time of filing this suit, there was a matter still pending in Court over the same issues. The 3<sup>rd</sup> Defendant/Respondent relied on the case of **Kofinaf Company Ltd & Another ...Vs... Nahashon Ngige Nyagah & 2 others (2017)eKLR**, where the Court held:-

***“A Court will not allow a Plaintiff to use the right to discontinue or withdraw so as to abuse the process of the Court or to defeat the ends of justice.”***

Further that even if the Plaintiff/Applicant has introduced a 3<sup>rd</sup> Party, that cannot be used to dissuade this Court that the suit herein is not **Res Judicata**.

For the 3<sup>rd</sup> Defendant/Respondent relied on the case of **Christopher Orina Kenyariri T/A Kenyariri & Associates Advocates ...Vs... Salama Beach Hotel Ltd & 3 Others (2017)eKLR**, where the Court held that:-

***“The introduction of 3<sup>rd</sup> Respondent as a Plaintiff in this matter does not change the design of the Respondents claim. The fact that the Respondent claim is res judicata cannot be upset by bringing on board the 3<sup>rd</sup> Respondent. Litigating a concluded matter under surrogates or uploading more parties to a claim does not change the conclusion already reached by the Court in former trial.....”***

Therefore, it was the 3<sup>rd</sup> Respondent’s submission that the Plaintiff/ Applicant is barred from instituting this matter which was a subject of litigation in the forementioned cases and which matter has been concluded thereof dismissed.

On the Application the 3<sup>rd</sup> Defendant submitted that it is a **bonafide purchaser** for value **without notice** and in possession. That at the time of purchase there was no orders to inhibit the said sale. That since the 3<sup>rd</sup> Defendant did not participate in any **irregularities**, that it was aware of, then it holds **indefeasible** title to the suit land and the law on sanctity of title is now settled. The 3<sup>rd</sup> Defendant relied on the case of **Arthi Highway Developers Ltd vs West End Butchery Ltd & 6 Others [2015] eKLR.**

On whether the Applicant is deserving of injunctive orders, the 3<sup>rd</sup> Defendant/Respondent submitted that the Plaintiff has not established that she has a **prima-facie** case with a probability of success at the trial as she is seeking injunction beyond the fall of the hammer. That it is settled law that if a claimant is able to convince that the process leading to the fall of the hammer was flawed in any way, such a claimant can only get compensation. For this the 3<sup>rd</sup> Respondent relied on the case of **Bomet Beer Distributors Ltd & Another vs Kenya commercial Bank Ltd & 4 others [2005] eKLR,** where the Court held that:-

***“What is clear is that once a property has been knocked down and sold in a public auction by charge in exercise of its statutory power of sale, the equity of redemption of the charge is extinguished. The only remedy for chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages.”***

That it is not in dispute that the suit property herein was sold and at the fall of the hammer by public auctioneer transfer of the property took effect. Therefore, all the Plaintiff can claim is damages.

Further that the Plaintiff/Applicant has put a value to the suit property and can thus be compensated by an award of damages. Again the Plaintiff/Applicant has sought for damages as an alternative prayer in the Plaint. It was contended that the Plaintiff does not reside on the suit property and therefore she will not suffer any irreparable loss.

On the balance of convenience, it was submitted that the same does not tilt in favour of the Plaintiff/Applicant but in favour of the 3<sup>rd</sup> Defendant/Respondent who is a **bonafide purchaser** for value. The Court was urged to uphold the **Preliminary Objection** herein and to dismiss the Plaintiff/Applicant instant application with costs.

The above being pleadings and the submissions filed by the parties, the court will now consider the same and determine the two matters.

The first to be determined are the **two Notices of Preliminary objection**. This is so because if the Court was to find that the issues raised herein falls within the purview of what amounts to pure Preliminary Objection and the same is upheld, then the said Preliminary objections are capable of disposing of this matter at a Preliminary stage. See the case of **Quick Enterprises Ltd vs Kenya Railways Corporation, Kisumu HCCC No. 22 of 1999,** where the court held that:-

***“When preliminary points are raised, they should be capable of disposing the matter preliminary without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings.”***

A Preliminary Objection was described in the case of **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** to mean:-

***“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.”***

Further Sir **Charles Nebbold, JA** stated 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 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”***

From the description of a Preliminary Objection, it is evident that anything that purports to be a Preliminary Objection must not deal with disputed facts. See the case of **Oraro...Vs...Mbaja (2005) 1KLR 141,** where the Court held that:-

***“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”***

The 1<sup>st</sup> and 3<sup>rd</sup> Defendant have averred that the suit herein offends the provisions of **Sections 6 and 7** of the **Civil Procedure Act** as the suit is **Subjudice** and **Resjudicata**. The said objection has been opposed by the Plaintiff herein. In the case of **Henry Wanyama Khaemba... Vs... Standard Chartered Bank Ltd & Another (2014) eKLR,** the Court held that:-

***“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1<sup>st</sup> Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1<sup>st</sup> Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary***

*objections in improperly”.*

Again in the case of George Kamau Kimani & 4 Others...Vs...County Government of Trans Nzoia & Another (2014), eKLR, the Court held that:-

***“I have considered the points raised by the 1<sup>st</sup> Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.***

From the above findings and holding of the Court, it is evident that for a Court to determine whether the issues raised herein were directly and substantially in issue in the other cases cited by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants, the Court will have to ascertain facts and probe evidence. In a Preliminary Objection the Court is not required to ascertain facts and the same cannot be raised on disputed facts. Taking into account the above position, the Court finds and holds that the issue of **Subjudice** and **Resjudicata** are not capable of being determined without ascertaining of facts as thus do not fall under the purview of pure points of law. These issues need to be determined through a Notice of Motion application or at the main trial

The other issues raised is that the suit is **vexatious, misconceived** and is an **abuse** of the Court process. Further that the said suit is fatally defective for offending the mandatory legal requirement and should be struck out.

The principles of striking out are well settled. See the case of D.T Dobie & Company Ltd -vs- Muchina & Another (1982) KLR 1 (Madan, Miller & Potter, JJA) wherein the court stated:-

***“No suit ought to be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment.”***

It is clear that a suit should only be struck out where the said suit is hopeless clear that it raises no cause of action. This is so because a Court of Justice should aim at sustaining a suit rather than terminate it by summary dismissal. See the case of Francis Kamande ...Vs... Vanguard Electrical Services Ltd (1998) eKLR where the Court of Appeal stated as follows:-

***“The summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable”.***

The Court has considered the Plaintiff as filed by the Plaintiff herein. It raises various allegations of fraud and illegality against the Defendants. The court cannot find and hold through a summary dismissal that this suit is hopeless and raises no cause of action. It is clear that there is a **reasonable cause of action** and thus this suit is not a candidate for summary dismissal through striking out. The Plaintiff should be allowed to ventilate her case and then the same should be decided on merit.

For the above reasons, the Court finds that the **two Notices of Preliminary Objections** raised by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants are not merited and the same are dismissed entirely with costs being in the cause.

On the Notice of Motion dated **1<sup>st</sup> July 2020**, the Court notes that the Plaintiff/Applicant has sought for injunctive orders which are equitable reliefs granted at the discretion of the Court. However, the said discretion should be exercised judicially. See the case of Nyutu & Others... Vs...Gatheru & Others (1990) KLR 554, where the Court held that:-

***“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one, but must be judicially exercised”.***

The principles for grant of injunctive orders are well settled in the case of Giella ...Vs... Cassman Brown Co Ltd (1973)EA 358. There principles are:-

***“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might 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. See also E.A Industries ...Vs...Trufoods (1972) EA 420.”***

It is also very clear that at this juncture the court is only called to determine whether the Plaintiff/Applicant is deserving of the injunctive orders sought and cannot delve into the substantive issue and make finally concluded views of the dispute at hand. See the case of Agip (K) Ltd...Vs...Maheshchandra Himatlal Vora & Others, Civil Appeal No.213 of 1999 (2000) 2EA 285, where the Court held that:-

***“In an application for injunction, the Court should not delve into substantive issues and make finally concluded views of the dispute before hearing oral evidence”.***

Taking into account the Principles set out in **Giella vs Cassman** and juxtaposing the same with the available evidence, the Court finds that the Plaintiff/Applicant needs to first establish that she has a prima facie case with the probability of success at the trial. In the case of **Habib Bank Attorney General Zurich...Vs...Eugene Marion Yakub, Civil Appeal No.43 of 1982, (1982) (LR 4977(LAK)** the Court held:-

***“Probability of success means the Court is only to gauge the strength of the Plaintiff’s case and not to adjudge the main suit at that stage since proof is only required at the hearing stage”.***

From the available evidence, it is evident that the suit property was sold to the 3<sup>rd</sup> Defendant/Respondent through public auction. It is also evident that at the time of sale of the suit property, there were no injunctive orders. The Plaintiff/Applicant has alleged that the said sale by public auction was not conducted regularly and that there were illegalities and fraud that were employed by the Defendants/Respondents herein. However, it is evident that the Plaintiff/Applicant had charged her suit property to secure a loan facility from the 1<sup>st</sup> Defendant. It is also evident that in the said charge, the 1<sup>st</sup> Defendant had a right to exercise its Statutory Power of Sale in the event of default by the charger. It is also evident that the 1<sup>st</sup> Defendant did exercise the said Power of Sale as provided by **Section 96** of the **Land Act**. The suit property was purchased by 3<sup>rd</sup> Defendant through a Public Auction.

The Plaintiff/Applicant is seeking to injunct the Defendants after the fall of the hammer. The Court will concur with the 3<sup>rd</sup> Defendant’s Submissions that once the property has been knocked down and sold in a **Public Auction**, by the chargee, in exercise of its Statutory Power of Sale, the equity of redemption of the Chargor is extinguished. See the case of **Bomet Beer Distributors Ltd & another v Kenya Commercial Bank Ltd & 4 others [2005] eKLR:-**

***There are other decisions made on this point but the above referred cases will suffice for the purposes of this application. What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages.”***

The Plaintiff/Applicant will be required to call evidence and prove the allegations raised by her against the Defendants. The 3<sup>rd</sup> Defendant purchased the suit property through a Public Auction and has denied any impropriety on its part. The disputed issues herein can only be resolved after calling of evidence at the main trial. For now, the Court finds and holds that the Applicant’s **equity of Redemption was extinguished** at the fall of the hammer and thus she has not established a **prima-facie** with probability of success at the trial.

On the second limb of whether the Plaintiff/Applicant will suffer irreparable loss which cannot be compensated by an award of damages it is clear that in her Complaint, the Plaintiff has given the value of the suit property and has also sought for damages as an alternative prayer in the Complaint. It is therefore clear and evident that the Plaintiff/Applicant can adequately be compensated with an award of damages in the event the Court is to find that the process of carrying out the public auction was irregular. See the case of **East African Breweries Ltd Vs Castle Brewing(k) Ltd, Nairobi High Court Civil case No. 848 of 1998 (1998) LLR 7408**, where the Court held that:-

***“where the defendant has particularized its losses in monetary terms and figures, the loss is redressable in damages that are certain.”***

Equally in this case, the Plaintiff/Applicant has given a figure of the monetary value of the suit property and the same is redressable in damages that are certain.

Further **Section 99(4)** of the **Land Act** provides a remedy for a person who feels prejudiced by the exercise of the chargees’ Statutory Power of Sale.

It states as follows:-

***“99(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.”***

A person prejudiced by an unauthorized, improper irregular exercise of the power of sale shall have a remedy in damages against the person exercising that powers. It is evident that the Plaintiff/Applicant herein has a remedy in damages and she has indeed sought for damages as an **alternative** prayer in her Complaint. Further the Plaintiff/Applicant has alleged that she resides at the suit property and that if the orders sought are not granted, she will have to lose her residential house. However, the 3<sup>rd</sup> Defendant has denied that allegations and has averred that it is the one in possession of the suit property. It is very clear that once a suit property is put up as **security** to secure a loan, it becomes a commodity for sale, and the Court cannot injunct a chargee from exercising its Statutory Power of Sale on allegations that the chargor’s attaches sentimental value to the suit property. Once the suit property herein was charged, it became a commodity for sale, See the case of **Daniel Ndonge Ndirangu...Vs...Barclays Bank of Kenya Ltd & Another, Nakuru HCCC No.8 of 2012, (B)**, where the Court held that:-

***“It must also be noted that when a Chargor lets loose its property to a Chargee as security for a loan or any other commercial facility on the basis that in the event of a default, it be sold by the Chargee, the damages are foreseeable. The security is henceforth a commodity for sale or possible sale without prior concurrence and consent of the Chargor. How can he having defaulted to pay loan arrears prompting a Chargee to exercise its Statutory Power of Sale claim that he is likely to suffer loss and injury incapable of compensation by an award of damages.”***

On the third limb of if the Court is in doubt to decide the matter on a balance of convenience, this Court finds that it is not in doubt. Even if the Court was to decide on the said balance of convenience, the same would not tilt in favor of the Plaintiff/Applicant, but in favor of the 3<sup>rd</sup>

Defendant/Respondent who purchased the suit property through a Public auction from the 1<sup>st</sup> Defendant/Respondent who was to exercise its Statutory powers of sale.

**Section 99(2)** of the **Land Act** offers protection to purchasers such as the 3<sup>rd</sup> Defendant herein. See **Section 99(2) (c)** which provides:-

***“A person to whom this section applies:- is not obliged to inquire whether there has been a default by the chargee on 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.”***

Further **section 99(1) (a)** provides that the protection of purchaser applies to a person who purchases charged land from the **Chargee** or receiver except where the chargee is the purchaser:-

The 3<sup>rd</sup> Defendant is such a purchaser and at this juncture, the Court finds that it is protected under **Section 99** of the **Land Act**, and thus the balance of convenience does **not** tilt in favor of the Plaintiff/Applicant.

Having now carefully considered the available evidence, and the written Submissions together with the cited authorities, the Court finds that the Plaintiff/Applicant has failed to establish the threshold for grant of injunctive orders which are equitable reliefs.

Consequently, the Court finds that the **Notice of Motion Application** dated **1<sup>st</sup> July, 2020**, is **not** merited and the same is **dismissed** entirely with the costs to the Defendants/Respondents.

It is so ordered.

***Dated, signed and Delivered at Thika this 22<sup>nd</sup> day of October 2020***

**L. GACHERU**

**JUDGE**

**22/10/2020**

**Court Assistant – Lucy**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Masore Nyangau for the Plaintiff/Applicant**

**Mr. Mabeya holding brief for Mr. Nyamwaya for the 1<sup>st</sup> Defendant/ Respondent**

**Mr. Maina holding brief for Mr. Wachira for the 3<sup>rd</sup> Defendant/Respondent**

**L. GACHERU**

**JUDGE**

**22/10/2020**