

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION

HCCOMM NO. 37 OF 2020

KIJUNJE GARDENS LIMITED.....1ST PLAINTIFF/APPLICANT

NDONGA LIMITED.....2ND PLAINTIFF/APPLICANT

-VERSUS-

NCBA BANK KENYA PLC.....DEFENDANT/RESPONDENT

AND

BY COUNTERCLAIM

NCBA BANK KENYA PLC.....PLAINTIFF

-VERSUS-

KIJUNJE GARDENS LIMITED.....1ST DEFENDANT

PATRICK KANG'ETHE NJUGUNA.....2ND DEFENDANT

MARGRET WAMBUI KANG'ETHE.....3RD DEFENDANT

NDONGA LIMITED.....4TH DEFENDANT

GLADYS NJERI KANG'ETHE.....5TH DEFENDANT

GEORGE JAMES KIRERU KANG'ETHE.....6TH DEFENDANT

EDWARD NJUGUNA KANG'ETHE.....7TH DEFENDANT

RULING

1. Before me is a Notice of Motion application dated 3rd October 2024 filed by the plaintiffs/applicants under the provisions of Sections 1A, 1B, 3A & 63(e) of the Civil Procedure Act, Order 40 Rules 1 & 2 and Order 50 of the Civil Procedure Rules, 2010, the Constitution of Kenya and any other enabling powers as are conferred by the law. The applicants pray for an order of injunction restraining the defendant, its agents, and in particular Philips

International Auctioneers, from selling, auctioning, disposing of, or otherwise interfering with their quiet possession and use of the suit properties, L.R. No. 209/1817 (L.R. No. 2630) and L.R. No. 209/2489/34 (I.R. No. 103766), as advertised for sale on 11th October 2024 in the Daily Nation of 30th September 2024, pending the hearing and determination of this suit, and an order setting aside the Ruling delivered by the late Hon. Justice Majanja on 23rd February 2022 in **HCCOMM 653 of 2021**.

2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Patrick Kang'ethe Njuguna, the applicant's Principal Officer. Mr. Njuguna averred that the applicants obtained financial accommodation from the respondent secured by the suit properties L.R. No. 209/1817 (L.R. No. 2630) and L.R. No. 209/2489/34 (I.R. No. 103766). He stated that it was a condition precedent that the respondent through its Advocates, would perfect the securities by transferring the suit properties into the applicants' names and registering charges thereon. He further stated that although the respondent's Advocates prepared and had the applicants execute the transfer and charge documents, the respondent failed to perfect the securities as required by law.
3. He averred that subsequent investigations by the Directorate of Criminal Investigations (DCI) revealed that the transfers, charges, and Titles in the respondent's possession were forgeries, as confirmed by statements of the Land Registrar, Ms Betty Atieno, and Forensic Reports. He also averred that the DCI concluded that the respondent did not hold any valid legal charges over the suit properties, having relied on forged instruments. He contended that despite these findings, the respondent later instructed Philips International Auctioneers to auction the suit properties as advertised in the Daily Nation of 30th September 2024. Mr. Njuguna stated that the

respondent has no statutory power of sale, having failed to perfect the securities and to conduct lawful valuations of the suit properties, which have since appreciated significantly in value.

4. He further stated that the respondent's earlier representation before the late Hon. Justice Majanja in **HCCOMM No. E653 of 2021** that the charges were duly registered, was based on false documents, therefore the Ruling delivered on 23rd February 2022 dismissing the applicants' application was founded on a misrepresentation. Mr. Njuguna deposed that although the parties had initiated negotiations in 2022-2023 to resolve the dispute herein amicably, the respondent's failure to produce copies of the Title documents frustrated the process. He asserted that the respondent's conduct is fraudulent and unconscionable and urged the Court to preserve the *status quo* pending the determination of the suit to prevent irreparable loss.
5. In opposition to the application, the respondent filed two replying affidavits sworn on 8th October 2024 & 5th November 2024 by Ms Christine Wahome, the respondent's Senior Legal Counsel. Ms Wahome averred that the applicants and their Directors have persistently filed multiple and repetitive applications before different Courts seeking to restrain the respondent from exercising its statutory power of sale over the suit properties, despite similar applications having previously been heard and dismissed. She cited earlier suits, including **ELC No. E353 of 2024 - Kinjunje Gardens Limited & another v NCBA Bank Kenya PLC**, in which interim injunctive orders were granted on 30th August 2024, but later discharged on 18th September 2024 upon the Court finding that the applicants were engaging in abuse of the Court process.

6. Ms Wahome contended that the issues raised herein were conclusively determined in **HCCOMM E653 of 2021**, in a Ruling delivered by the late Hon. Justice D. Majanja, making the instant application *res judicata* and *sub judice*, given the pendency of similar proceedings. She averred that the multiplicity of suits and applications by the applicants is a deliberate act of forum shopping intended to frustrate the respondent's realization of its securities. She stated that the applicants are indebted to the respondent to the tune of Kshs.435,514,061.62, as is evident from the statements of account annexed to the respondent's replying affidavit. She asserted that the respondent's exercise of its statutory power of sale is lawful, regular and justified in light of the continuing default by the applicants.
7. In her further affidavit, Ms Wahome averred that a similar application had been filed by the 1st applicant in **HCCOMM No. E653 of 2021 - Kinjunje Gardens Limited v NCBA Bank Kenya PLC & Regent Auctioneers Limited**, where the late Hon. Justice D.S. Majanja dismissed the application for injunction upon finding that the respondent held a valid and duly registered first charge over the suit property, and that the applicant had failed to establish a *prima facie* case. The Court further held that any allegations of fraud and illegality could only be determined at a full trial and that the applicant would not suffer irreparable loss since damages were an adequate remedy. She further averred that a subsequent application for review in the same matter was also dismissed on 11th November 2022, confirming the validity and priority of the respondent's charge.
8. Ms Wahome deposed that investigations in **J.R. No. 429 of 2016** were directed against the applicants' Directors and not the applicants themselves. In addition, the Ruling in that matter confirmed the existence of the charges over the suit properties. She further deposed that in **Mombasa HCCC No.**

58 of 2016 - Ndonga Limited v Commercial Bank of Africa Ltd, the 2nd applicant admitted the existence of the charge and default in repayment. She maintained that the applicants' allegations of forgery and defective securities are unfounded, asserting that original charge documents are ordinarily retained by the chargee until discharge. She asserted that the applicants' reliance on a DCI Report has no probative value since they are not the makers of the document. Ms Wahome averred that the applicants had previously acknowledged the debt and proposed various repayment plans through letters dated 19th October 2022 & 26th July 2023, thereby admitting liability.

9. The instant application was canvassed by way of written submissions. The applicants' submissions were filed on 30th October 2024 by the law firm of Moses N. Siagi & Company Advocates, whereas the respondent's submissions were filed by the law firm of Wainaina Ireri Advocates LLP on 12th November 2024.
10. Mr. Kioko, learned Counsel for the applicants submitted that the applicants herein were relying on findings allegedly made by the DCI and statements from Land Registrars indicating that the entries relating to the transfers and charges of the suit properties were forgeries and that the relevant presentation day book numbers did not exist in the Lands Registry. He stated that the DCI Report is said to have concluded that the loan facilities advanced by the respondent were secured using forged documents and that the respondent therefore holds no valid legal charge capable of conferring the statutory power of sale.
11. He further submitted that under Section 79(5) of the Land Act, a formal charge takes effect only upon registration and no remedies under the charge

can be exercised unless the registration is properly effected. Counsel asserted that since the suit properties were never transferred into the applicants' names, no valid charge could have been created over them. Mr. Kioko argued that the respondent having failed to perfect the securities as required under the Loan Agreement, cannot lawfully exercise its statutory power of sale, and the applicants have no exercisable right of redemption over the suit properties.

12. Mr. Kioko urged this Court to revisit and set aside the Ruling delivered by the late Hon. Justice Majanja on 23rd February 2022 in **HCCOMM No. 653 of 2021**. He contended that the said Ruling was based on documents which have since been established to be forgeries, specifically the transfer and charge documents relating to all that parcel of land known as L.R. No. 209/1817 (LR. No. 2630).
13. He referred to the respondent's pleadings in its counterclaim, wherein the respondent admits being unable to verify the status of the Title or to exercise its statutory power of sale due to missing land records and argued that this amounts to an acknowledgment that the searches presented before the late Hon. Justice Majanja were inaccurate or deficient. Mr. Kioko asserted that the foregoing constitute sufficient grounds under Order 45 Rule 1 of the Civil Procedure Rules, 2010, to warrant a review and setting aside of the said Ruling.
14. Mr. Kabaiku, learned Counsel for the respondent relied on the case of **Kennedy Mokuia Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende** [2022] KEELC 1631 (KLR), and submitted that the instant application is barred by the doctrine of *res judicata* under Section 7 of the Civil Procedure Act, as the issues raised herein have been directly and

substantially determined in prior proceedings between the same parties. He relied on the case of **Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya** [2020] KEHC 10142 (KLR), and submitted that the applicants' conduct of filing similar applications in this Court and the ELC, then later withdrawing the suit filed in the ELC amounts to forum shopping and a gross abuse of the Court process.

15. Counsel referred to the Ruling by the late Hon. Justice D.S. Majanja in **HCCOMM No. E653 of 2021 - Kinjunje Gardens Ltd v NCBA Bank Kenya PLC & Regent Auctioneers Ltd**, which dismissed similar applications for injunction, holding that the respondent herein had advanced a loan secured by a duly registered charge, the applicant had defaulted, and the allegations of fraud required proof at trial. He stated that the Court also found that damages would be an adequate remedy under Section 99(4) of the Land Act if the case succeeded. Counsel argued that the allegations of fraud now raised were previously canvassed and determined in **HCCOMM No. E653 of 2021** and are therefore *res judicata*.
16. Mr. Kabaiku submitted that no sufficient grounds have been advanced to warrant an order for setting aside the Ruling delivered by the late Hon. Justice D.S. Majanja. Further, that the suit in which the Ruling was rendered was subsequently withdrawn, thereby rendering this Court *functus officio*. He contended that reliance on the alleged DCI Report questioning the legality of the charge is misplaced, as the Report has no probative value and was neither authored nor verified by the applicants. Counsel urged this Court to note that similar allegations were fully considered and rejected by the late Justice Majanja, who declined to grant injunctive reliefs on two previous occasions. He contended that the claim that the charges are defective for lack

of original documents is without merits, as it is standard banking practice for the chargee to retain the originals until discharge.

17. Mr. Kabaiku stated that the applicants' allegations that the loan amounts were never disbursed and that the suit properties were never charged are false and contradicted by their own prior conduct and sworn statements. He referred to **Mombasa HCCC No. 58 of 2016, Ndonga Limited v Commercial Bank of Africa Ltd**, where the 2nd applicant through its Director, expressly admitted that the suit properties had been charged to the respondent and that the chargors had defaulted in repayment. He further relied on correspondence dated 19th October 2022 and 26th July 2023 in which the applicants and their associated companies proposed repayment plans amounting to Kshs. 200,000,000/=, confirming acknowledgment of the debt.
18. Additionally, that in a subsequent application dated 8th April 2024, one of the applicants' Directors admitted to the facility of Kshs.160,000,000/= advanced by the respondent for the purchase of L.R. No. 209/1817 and to default thereof. In light of these admissions, Mr. Kabaiku argued that the applicants cannot be permitted to approbate and reprobate, or to evade their contractual obligations under the guise of legal challenges. Counsel cited the decision by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others** [2003] KECA 175 (KLR), emphasizing that Courts should not aid debtors seeking to avoid repayment of legitimate debts as is the case herein.

ANALYSIS AND DETERMINATION.

19. I have considered the application herein, the grounds on the face of it, and the affidavit in support thereof. I have also considered the replying affidavits

by the respondent and the written submissions by Counsel for the parties.
The issues that arise for determination are –

- i) Whether the instant application is *res judicata*;**
- ii) Whether this Court has jurisdiction to set aside the Ruling delivered by the late Hon. D.S. Majanja on 23rd February 2022 in HCCOMM No. 653 of 2021; and**
- iii) Whether an order of temporary injunction should issue.**

Whether the instant application is *res judicata*.

20. The doctrine of *Res Judicata* is provided for under the provisions of Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya, which states that –

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

21. The Civil Procedure Act has also provided explanations in respect to the application of the *res judicata* Rule. Explanations 1-6 are in the following terms -

Explanation (1) -The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

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

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

Explanation (4) - Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation (5) - Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation (6) - Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

22. The Supreme Court in the case of **John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others** [2021] KESC 39 (KLR), addressed itself on the doctrine of *res judicata* and held that –

Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain

whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, [2010] eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

23. The respondent contends that the instant application is *res judicata*, the issues herein having been conclusively determined in **HCCOMM No. E653 of 2021 - Kinjunje Gardens Ltd v NCBA Bank Kenya PLC & Regent Auctioneers Ltd**. It is not disputed that in that matter, the 1st applicant sought injunctive orders restraining the respondent from advertising, selling, transferring, alienating, or otherwise interfering with its quiet possession and enjoyment of L.R. No. 209/1817 (I.R. No. 2630).
24. Upon review of the Ruling delivered by the late Justice D.S. Majanja on 23rd February 2022, it is evident that the 1st applicant's case in that the suit was premised on the argument that the respondent was seeking to realize a security it did not legally hold. The issues of alleged fraud, forgery, and illegality in relation to the Title and charge over the said property were central to that determination. The Court held that those allegations could not be conclusively determined at the interlocutory stage, as they required the calling of evidence during the main trial. The Court further held that on a *prima facie* basis, NCBA's charge over the said property was the first in time, having been registered prior to that of Equity Bank.
25. The Court in its Ruling, made reference to a letter dated 25th February 2016, in which the 1st applicant's Advocates acknowledged receipt of statutory

notices, admitted indebtedness of the 1st applicant to NCBA and even proposed a repayment plan for the outstanding debt. In concluding that the 1st applicant had failed to establish a *prima facie* case to justify being granted an injunction, the Court found that NCBA had advanced a loan of Kshs.160,000,000/= to the 1st applicant for the purchase of L.R. No. 209/1817 (L.R. No. 2630), which was secured by *inter alia*, a first legal charge over the said property in favour of NCBA. The Court further noted that the 1st applicant had defaulted on its loan repayment obligations, a fact it expressly admitted.

26. In the instant application, the applicants are seeking an order of injunction to restrain the defendant, its agents, and in particular Philips International Auctioneers, from selling, auctioning, disposing of, or otherwise interfering with their quiet possession and use of the suit properties, namely L.R. No. 209/1817 (L.R. No. 2630) and L.R. No. 209/2489/34 (I.R. No. 103766), which were advertised for sale on 11th October 2024 in the Daily Nation of 30th September 2024, and an order to set aside the Ruling delivered by the late Hon. Justice Majanja on 23rd February 2022 in **HCCOMM No. 653 of 2021**.
27. From the foregoing, this Court notes that the only similarity between the application herein and the one filed in **HCCOMM No. E653 of 2021** is that in both instances, the applicants seek orders of temporary injunction concerning the property known as L.R. No. 209/1817 (L.R. No. 2630). It is however noteworthy that the grounds advanced in support of the injunctions in both applications are closely intertwined. While in **HCCOMM No. E653 of 2021** the applicant also relied on additional grounds, including the assertion that it had not been served with all the requisite statutory notices, it is evident that in both applications, the applicants fundamentally contest the

validity of the charges registered over the properties L.R. No. 209/1817 (L.R. No. 2630) and L.R. No. 209/2489/34 (I.R. No. 103766) in favour of NCBA, alleging fraud, forgery, and illegality.

28. In **HCCOMM No. E653 of 2021**, the Court considered the above allegations and held that such claims could not be conclusively determined at the interlocutory stage, as they required the presentation of evidence during the main trial. The Court further found that NCBA had advanced a loan facility of Kshs.160,000,000/= to the 1st applicant for the purchase of L.R. No. 209/1817 (I.R. No. 2630), which was secured by among other securities, a first legal charge over the said property in favour of NCBA. It also noted that the 1st applicant had defaulted in repaying the loan, a fact that was expressly admitted. The Court consequently held that damages are a statutory remedy under Section 99(4) of the Land Act for any person aggrieved by an unauthorized, improper, or irregular exercise of the power of sale and proceeded to dismiss the application for injunction.
29. This Court notes that although the applicants now claim to possess evidence supporting their allegations of fraud, forgery, and illegality against the respondent, such assertions do not alter or negate the findings of the late Justice D.S. Majanja. The late Judge had established that NCBA advanced a loan facility of Kshs.160,000,000/= to the 1st applicant for the purchase of L.R. No. 209/1817 (L.R. No. 2630), which was secured by *inter alia*, a first legal charge over the said property in favour of NCBA, and that the 1st applicant defaulted in repaying the loan, an admission made by the 1st applicant itself. Moreover, in the instant application, the applicants do not dispute their indebtedness to the respondent. Their challenge to the respondent's exercise of its statutory power of sale over the suit properties is limited to contesting the validity of the legal charges over the properties, an

issue a Court of equal and competent jurisdiction to this Court dealt with, and held that it can only be conclusively determined at the main trial upon the parties adducing evidence in support of their respective positions.

30. In the oft cited case of **Gurbachan Singh Kalsi v Yowani Ekori** Civil Appeal No. 62 of 1958, the former East African Court of Appeal in dealing with a similar issue held as follows -

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 a judgement, 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...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

31. In the circumstances, it is my finding that the parties in the present matter are litigating under the same title as in **HCCOMM No. E653 of 2021**. Furthermore, the dispute between the parties herein concerning the application for an injunction against the respondent in relation to the suit properties was conclusively determined by the Court in **HCCOMM No. E653 of 2021** through a Ruling delivered on 23rd February 2022, in which a Court not only of concurrent and equal jurisdiction to this Court, but also a Court of competent jurisdiction. It is equally undisputed that the said Ruling

has neither been varied nor set aside by any Court of competent jurisdiction. There is therefore no basis for this Court to re-litigate or re-determine the same issues.

32. In the circumstances, this Court finds that the present application is *res judicata*, but only in respect to the injunctive reliefs sought.

Whether this Court has the jurisdiction to set aside the Ruling delivered by the late Hon. D.S. Majanja on 23rd February 2022 in HCCOMM No. 653 of 2021.

33. The applicants have moved this Court under Order 45 Rule 1 of the Civil Procedure Rules, 2010, to review and/or set aside the Ruling delivered by the late Hon. D.S. Majanja on 23rd February 2022 in **HCCOMM No. 653 of 2021**, on the ground that the respondent's earlier representation before the late Hon. Justice Majanja in **HCCOMM No. E653 of 2021** that the charges were duly registered, was based on false documents.

34. In the case of the **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd** [1989] KLR 1, Nyarangi, JA, held as follows on the issue of jurisdiction –

...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

35. This Court's jurisdiction to review decisions are derived from the provisions of Section 80 of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 45 Rule 1 of the Civil Procedure Rules, 2010, which provide as hereunder-

80. Any person who considers himself aggrieved-

- a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**
- b) by a decree or order from which no appeal is allowed by this Act,**

May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 1

(1) Any person considering himself aggrieved-

- a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
- b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”**

36. From the foregoing provisions, it is clear that applications for review must be made before the Court that issued the impugned Order, or, in exceptional

circumstances, before a higher Court on Appeal. The purpose of these provisions is to enable Courts to correct their own errors or reconsider their decisions in light of new evidence, thereby ensuring that justice is served and not defeated by technicalities or oversight. Consequently, a Court cannot review, vary, or set aside Orders issued in a different suit by a Court of concurrent and competent jurisdiction.

37. In the circumstances, this Court finds that any application seeking to set aside the Ruling delivered by the late Hon. Justice D.S. Majanja on 23rd February 2022 in **HCCOMM No. 653 of 2021** ought to have been made within that very suit.
38. This Court finds that it does not have the requisite jurisdiction to set aside the Ruling delivered by the late Hon. D.S. Majanja on 23rd February 2022 in **HCCOMM No. 653 of 2021**.
39. The upshot is that the application herein is not merited. It is hereby dismissed with costs to the defendant/respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 14th day of November 2025. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Kioko for the plaintiffs in the main suit and for 1st & 4th defendants in the counterclaim

Mr. Ngugi holding brief for Mr. Kabaiku for the defendant in the main suit and the plaintiff in the counterclaim

Ms. Ithondeka for the 5th & 6th defendants in the counterclaim

Mr. Mwaniki for the 7th defendant in the counterclaim

Mr. Karwanda for the 2nd & 3rd defendants in the counterclaim

Ms. B. Wokabi - Court Assistant.

ORIGINAL