

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM CASE NO. E052 OF 2020

BETWEEN

LUCY WANGARI KAMAU.....1ST
PLAINTIFF

ELIUD NGUGI NDEGWA.....2ND
PLAINTIFF

LILIAN ANYANGO OWITI NDEGWA.....3RD
PLAINTIFF

ALICIA WANGECI NDEGWA.....4TH
PLAINTIFF

MARGARET WACHEKE.....5TH
PLAINTIFF

YVONNE KIANDUMA.....6TH
PLAINTIFF

JAMES NGUGI NJUGUNA.....7TH
PLAINTIFF

NKATHA GITONGA.....8TH
PLAINTIFF

JACQUELINE NJOKI NYAGA.....9TH
PLAINTIFF

DOREEN WANJIKU KAMAU.....10TH
PLAINTIFF

RUTH WANJIKU KAMAU.....11TH
PLAINTIFF
SUSAN WANJIKU KIIRU.....12TH
PLAINTIFF
GLADWELL NJOROGE.....13TH
PLAINTIFF WINNIE
WANJIRU.....14TH PLAINTIFF

AND

MUGA DEVELOPERS LIMITED (UNDER
RECEIVERSHIP)1ST DEFENDANT
SUSAN WACHEKE MURAYA.....2ND
DEFENDANT PETER KIARIE
MURAYA.....3RD DEFENDANT
TRANSNATIONAL BANK
LIMITED.....4TH DEFENDANT
SURAYA SALES
LIMITED.....5TH
DEFENDANT
SURAYA PROEPRTY GROUP
LIMITED.....6TH DEFENDANT
EQUITY BANK
LIMITED.....7TH
DEFENDANT
THE CLASSIX AT FOURWAYS
LIMITED.....8TH DEFENDANT

RULING

1. The 4th Defendant has by a Notice of Motion Application date 22nd August 2025 moved this Honourable Court under a Certificate of Urgency brought pursuant to Section 1A, 1B and 3A of the Civil Procedure Act, Section 104 (2) (d) of the Land Act, Order 51 Rule 1 of the Civil Procedure Rules seeking the following reliefs: -

- a. Spent
- b. THAT this Honourable Court be pleased to grant leave to the 4th Defendant/Applicant to sell by public auction the property known as **Land T-5A on L.R. No. 28223/33** at the best reasonably obtainable price below the forced sale value of **Kenya Shillings One Hundred and Five Million (Kshs.105,000,000.00/=)** as per recent valuation.
- c. THAT this Honourable Court do deem any such sale as concluded pursuant to prayer (ii) as valid, lawful and binding upon the parties.
- d. THAT costs of this application be provided for.

2. The Application is supported by the grounds set out on its face. The Application is opposed and the 5th Plaintiff has sworn a replying affidavit on 15th October 2025. In addition, the Plaintiffs/Respondents raised a preliminary objection filed on 22nd September 2025 on the grounds that the present application offends the doctrine of *sub judice* under section 6 of the Civil Procedure Act, the doctrine of *res judicata* under section 7 of the

Civil Procedure Act and the doctrine of *lis pendens*. In addition, they accuse the 4th Defendant of bring this application as an abuse of the Court and multiplicity. Both parties filed written submissions which I have carefully considered.

Analysis and Determination

1. It is the practice where a party raises a preliminary objection in a matter before court that the court is called upon to determine the preliminary objection first as in line with the *locus classica* case on preliminary objections in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors (1969) E. A 696** where the court stated as follows:-

“.....A preliminary Objection consists of pure points of law which has been pleaded or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit....”

3. It is therefore necessary for this court to consider the objection first before delving into the merits of the application. I have carefully considered the preliminary objection as filed and I note that it raises several grounds and accuses the Applicant in the present motion of violating core principles of res **sub judice**, res **judicata** and **lis pendens**. All these are principles of law are set

out in the Civil Procedure Act. I have also alongside the preliminary objection carefully considered the replying affidavit sworn by the 5th Plaintiff herein. I note that in responding to the present motion, the Respondents have reiterated the same ground now contained in the preliminary objection. It is therefore imperative that a determination of the preliminary objection will inadvertently determine the present motion before this court.

4. The 4th Defendant bank has laid an elaborate background to the present suit that was filed as a consequence of a breach of the obligations of the 1st Defendant, who was advanced funds by the 4th Defendant to develop various properties. The said loans or banking facilities were secured by various legal charges including a legal charge over the suit property being **Land T-5A on L.R. No. 28223/33.**
5. Having on various occasions attempted to dispose of the suit property by public auction, the 4th Defendant has approached this court under section 104(2)(d) of the Land Act, seeking leave of the court to dispose the suit property at a value below the reserved price of **Kenya Shillings One Hundred and Five Million (Kshs. 105,000,000.00/=).** The Applicant argues that the best offer received in the various attempts to sell at public auction was Kenya Shillings Seventy Million (**Kshs.**

70,000,000.00/-) and is seeking leave of the Court to proceed and conclude the intended sale at the said price and the said sale once concluded be deemed valid and legally binding upon the parties.

Section 104 of the Land Act provides as follows:-

“S.104. Power of the court in respect of remedies and reliefs

(1) In considering whether to grant relief as applied for, a court—

(a) shall, have regard to whether the remedy which the chargee proposes to exercise is reasonably necessary to prevent any or any further reduction in the value of the charged land or to reverse any such reduction as has already occurred if the charged land consists of agricultural land or commercial premises, and the remedy proposed is to appoint a receiver, or to take possession of or lease the land or a part thereof;

(b) shall, where the charged land consists of or includes, a dwelling- house, and the remedy proposed is to appoint a receiver, or take possession or lease the dwelling house or a part of it, have regard to the effect that the appointment of a receiver or the taking of possession or leasing the whole or a part of the

dwelling house would have on the occupation of the dwelling house by the chargor and dependants and if the effect would be to impose undue disturbance on those owners, whether it is satisfied that—

(i)the chargee has made all reasonable efforts, including the use of other available remedies, to induce the chargor to comply with the obligations under the charge; and

(ii)the chargor has persistently been in default of the obligations under the charge; and

(iii)if the sale is of land held for a customary land, the chargee has had regard to the age, means, and circumstance including the health and number of dependants of the chargor, and in particular whether—

(A)the chargor will be rendered landless or homeless;

(B)the chargor will have any alternative means of providing for the chargor and dependants;(iv)it is necessary to sell the charged land in order to enable the chargee to recover the money owing under the charge;(v)in all the circumstances, it is reasonable to approve, or as the case may be, to make the order to sell the charged

land.(2)A court may refuse to grant an order under subsection (1) or may grant any relief against the operation of a remedy that the circumstances of the case require and without limiting the generality of those powers, may—(a)cancel, vary, suspend or postpone the order for any period which the court thinks reasonable;(b)extend the period of time for compliance by the chargor with a notice served under [section 90](#);(c)substitute a different remedy or the one applied for or proposed by the chargee or a different time for taking or desisting form taking any action specified by the lessor in a notice served under [section 90](#);

(d)authorise or approve the remedy applied for or proposed by the chargee, notwithstanding that some procedural errors took place during the making of any notices served in connection with that remedy if the court is satisfied that—

(i)the chargor or other person applying for relief was made fully aware of the action required to be taken under or in connection with the remedy; and

(ii)no injustice will be done by authorising or approving the remedy, and may authorise or approve that remedy on any conditions as to

expenses, damages, compensation or any other relevant matter as the court thinks fit.

(3) If under the terms of a charge, the chargor is entitled or is to be permitted to pay the principal sum secured by the charge by instalments or otherwise to defer payment of it in whole or in part but provision is also made in the charge instrument or any collateral agreement for earlier payment of the whole sum in the event of any default by the chargor or of a demand by the chargee or otherwise, then for purposes of this section the court may treat as due under the charge in respect of the principal sum secured and of interest on it only the amounts that the chargor would have expected to be required to pay if there had been no such provision for earlier payment.

(4) A court may at any time before the charged property is sold refuse to authorise or approve a remedy if it appears to the court that—

(a) the default in issue has been remedied;

(b) the threat to the security has been removed;

(c) the chargor has taken the steps that the chargor was required to take by the notice served under [section 90](#); and (d) the chargee has taken or attempted to take some action against the chargor in contravention of [section 90\(4\)](#).

6. The above section 104(2)(d) was interpreted by the court in the case of **M Z S vs Gulf African Bank Limited & 2others (2015)eKLR** thus:-

“_Accordingly, having considered the pleadings, the affidavit evidence and written submissions and case law that was relied upon by the parties, the court found that this was clearly a suitable case in which it could invoke the inherent jurisdiction as provided under section 3A and 63 of the Civil Procedure Act that give it wide and unfettered discretion to make such orders as may be necessary for the ends of justice and to make such interlocutory order as may appear to the court to be just and convenient to prevent the ends of justice from being defeated. Further, the powers under Section 104(2) of the Land Act are not limited to the powers set out therein but are expansive and can be exercised depending on the circumstances of each case.”

7. The present objection to application raises several issues of law.

The respondents argue that the suit is both *res sub judice* and *res judicata* and that it also offends the doctrine of *lis pendens*..

Section 7 of the Civil Procedure Act provides as follows: -

“7. Res judicata- 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.

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.”

8. The Court of Appeal in [Kenya Commercial Bank Limited v Benjoh Amalgamated Limited \[2017\] eKLR](#) espoused the principles of res judicata as follows ... *“The elements of res judicata have been held to be conjunctive rather than disjunctive. **As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;***

(a) The suit or issue was directly and substantially in issue in the former suit. (b) That former suit was between the same parties or parties under whom they or any of them claim. (c) Those parties were litigating under the same title. (d) The issue was heard and finally determined in the former suit. (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

9. Similarly, the Court of Appeal expounded the doctrine of *res judicata* in the Independent **Electoral & Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR**, where it stated as follows.....

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

10. Flowing from the above decisions of the Court of Appeal and the dictates of section 7 of the Civil Procedure Act, the court must satisfy itself that the case before it is not ***res judicata***. I have noted the argument put forward by the Respondents that there exists a suit in the Environment and Land Court (ELC No. 281 of 2025- **Nancy Wanja Gatabaki vs, State Law Office & Classic Fourways and others** where the same issues have

been canvassed in an application for injunction seeking to stop the sale of the suit property. I also note that the Respondents confirm that the said application was declined and thereafter there has been several attempts to sale by public auction the suit property. I also note that both parties agree that the court declined to grant the interim injunctive prayers sought in the land and that there is no order presently barring the 4th Defendant from proceeding to sell the property. I agree with the Applicant that prayers sought in the said suit are different and that the land court was not moved under section 104(2)(d) as is the case in the present suit, for leave to accept a lower bid than the reserved forced sale value of the applicant. I find therefore the argument that the present motion offends the doctrine of **res judicata** is not substantiated by evidence. The parties in both suits are different and not related and the issues are totally unrelated. I am satisfied that the motion before this court does not offend the doctrine of res judicata as envisioned under section 7 of the Civil Procedure Rules. The objection on this ground therefore fails.

11. The second argument put forth by the Respondent is that present suit is **sub judice**. The civil Procedure Act at section 6 of the Civil Procedure Act sets out the parameters as to when a suit is sub judice. It provides as follows;-

“ 6. Stay of suit- No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.”

12. These parameters on **sub-judice** were distilled by the court in the case of **Kenya National Commission on Human Rights v. Attorney General & 17 others (2020) eKLR** by the Supreme Court when it stated thus;

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

13. As correctly argued by the 4th Defendant the suit before the ELC Court and the present suit are unrelated and seek different reliefs. It is also not disputed that the parties in the two suits are not the same and that in addition, while the present suit was filed way back in 2020, the suit in ELC No. 281 of 2025 was filed this year while the present suit was already before the courts. I agree with the 4th Defendant therefore the present motion is not **res**

sub-judice as it does not seek to relitigate the issues before the ELC court. The objection on this principle therefore fails.

14. On the doctrine of *lis pendens* the court in ELC court and in previous motions in the present suit having declined to stop the intended sale by public auction, does not arise. I find there is no bar stopping the 4th Defendant/Applicant with continuing with the intended sale. The only question that the court is left to determine whether it should grant leave to the 4th Defendant to accept a bid below the reserved forced sale value of the suit property.

15. I have looked at the arguments put forth by the Applicant. As at 30th November 2020, the loan outstanding stood at Kshs. 115,758,834.34/= and the forced sale value was placed at Kshs 105,000,000/=. The loan amount continues to accrue interest and the borrowers and the Chargors have made no attempt to redeem the loan or make any payments. Indeed, from the pleadings filed herein, the Chargors and their guarantors, who are the 1st to 3rd Defendants, have raised no objection to the sale of the charged property. The objection and opposition to the sale, the court notes, is from the Plaintiffs whose claim to the suit property is distinct and separate from the claim by the 4th Defendant who hold a legal charge over the same.

16. Section 1A, 1B and 3A of the Civil procedure Act, grants this court a wide discretion to ensure that the inherent power of the court is safeguarded. Indeed, Section 3A of the **Act** provides thus;- ***“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”*** From the material placed before this court and in order to ensure that the ends of justice are met, this court is satisfied that the orders being sought are necessary for the ends of justice to be met.

17. I find therefore the application before this court is with merit. I allow the same as prayed. The 4th Defendant is at liberty to proceed and accept a bid below the reserve forced sale price of Kshs. 105,000,000/=. The said sale once concluded shall be deemed valid, lawful and binding upon the parties. The costs of this application are awarded to the 4th Defendant. It is so ordered.

**DATED SIGNED and DELIVERED virtually at NAIROBI this
1ST DAY of DECEMBER 2025**

.....
J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Mr. Chebon holding brief for Mr. Mbogo for the 4th
Defendant/Applicants
2. N/A for the Plaintiff.
3. N/A for the 1st, 2nd, 3rd and 5th Defendants.
4. Ms. Mwangi holding brief for Mr. Kimani for the 7th
Defendant.
5. Ivan - Court Assistant