

**IN THE COURT OF APPEAL
AT MALINDI
(CORAM: MURGOR, LAIBUTA & NGENYE,
JJ.A.) CIVIL APPEAL NO. E045 OF 2022**

BETWEEN

FATMA TAHIR SHEIKH SAID (*Suing as the Administrator of the Estate of TAHIR SHEIKH SAID AHMED - Deceased*).....**APPELLANT**

AND

KCB BANK KENYA LIMITED.....**RESPONDENT**

(Being an appeal against the Ruling and Orders of the High Court of Kenya at Malindi (R. Nyakundi, J.) dated 26th February 2021

in

H.C.C.C No. 3 of 2020)

JUDGMENT OF THE

COURT

1. This is an appeal from the ruling of the High Court of Kenya at Malindi (R. Nyakundi, J.) dated 26th February 2021 in Malindi HCCC No. 3 of 2020. The genesis of the appeal is the suit filed by the appellant, Fatma Tahir Sheikh Said, suing as the administrator of the Estate of Tahir Sheikh Said Mohamed (deceased), against the respondent herein, KCB Bank Kenya Limited, vide her a Plaint

dated

19th February 2020 in which she prayed for:

“(a) A declaration that the charges created over the suit properties are forgeries and are otherwise illegal, null and void. .

(b) Cancellation of the charges registered against the suit properties.

(c) An injunction restraining the Defendant by itself, agent or servants or otherwise howsoever from selling, disposing of by public auction or otherwise howsoever the suit properties.”

2. The appellant’s case was that the deceased was at all material times the registered proprietor of the properties known as Portion No. 10801 Malindi Title No. CR 34037 and Portion No. 11215 Malindi Title No. CR 46603, both situate in Malindi (the suit properties); and that the respondent advertised in the *Daily Nation* of 11th November 2019 for sale of the suit properties by a public auction purportedly in exercise of its statutory power of sale on account of alleged guarantees in favour of Kaab Investments Limited to secure various loan advances disbursed by the respondent to Kaab Investments Limited (Kaab).

3. The appellant contended that the deceased never executed any letters of offer, guarantees or charges in favour of Kaab, the

principal debtor, or for the benefit of the respondent and, in particular, in

relation to the charges and securities sought to be enforced by sale of the suit properties; that the said letter of offer and guarantee were the subject of criminal prosecution in Malindi CM Criminal Case No. 1096 of 2018; that the said letters of offer, charges and guarantees over the suit properties were fraudulent and/or forgeries; that the said documents were unlawful, null and void and unenforceable and that, therefore, could not confer upon the respondent a valid and/or legitimate statutory power of sale; that the deceased passed away in the Republic of South Africa on 10th January 2017; and that no notices had previously been served upon the deceased's estate as mandated by sections 90 and 96 of the Land Act, and the Auctioneers Rules, 1997.

4. Contemporaneously with the Complaint, the appellant filed a Notice of Motion dated 19th February 2020 seeking an injunction restraining the respondent from alienating, selling, or disposing off, or in any other manner dealing with the suit properties pending hearing and determination of the suit. By orders issued on 20th February 2020, the trial court granted an interim injunction restraining the respondent from alienating, selling or disposing of the suit properties pending hearing and

determination of the appellant's application.

5. The respondent opposed the application and filed a replying affidavit sworn on 25th February 2020 by Francis Kiranga, its Section Head, who deponed that the application was fatally flawed, misconceived, and an abuse of court process, lacking any substantive legal or evidentiary basis to entitle the appellant to the orders sought; and that the appellant's claim was brought on the basis of a *grant ad litem* obtained through her misrepresentation that the deceased died intestate, despite ongoing proceedings in Kadhi's Court Succession Cause No. 78 of 2017 relating to a Will dated 12th June 2012 by which the deceased named other executors.

6. Mr. Kiranga stated that the allegations of forgery and fraud were baseless; that the deceased had charged the suit properties to the respondent as security for credit facilities advanced by the respondent to Kaab; that the charge documents were executed in 2009 and 2010; that, upon default, the respondent commenced recovery efforts in 2015 while the deceased was still alive; that the deceased and Kaab filed Malindi ELC Case No. 2 of 2016 (Kaab Investments Limited & Tahir Sheikh Said Ahmed vs. Kenya

Commercial Bank Limited) seeking an order of injunction to
restrain

the Bank from selling the property on the grounds that they had not been served with the requisite statutory notices; that, in the pleadings filed in the case aforesaid, the deceased admitted having charged the suit properties to the respondent as well as the default by Kaab; that, by a ruling dated 12th May 2017, the court dismissed the application having found that the requisite notices had been properly served; and that the appellant's attempt to reopen the issue was barred by the doctrine of *res judicata* and amounted to an abuse of the court process.

7. Mr. Kiranga further deponed that the allegations of forgery and fraud were also raised in a separate suit, namely Malindi ELC Case No. 240 of 2017 (Isha Mohamed Noor vs. Kenya Commercial Bank Limited & Garam Investments Auctioneers) in which a forensic expert confirmed the authenticity of the signatures on the charge documents; that the respondent was not a party to the referenced Malindi Chief Magistrate's Criminal Case No. 1096 of 2018, which concerned a purported letter of offer dated 8th August 2014, and not the charge documents executed in 2009 and 2010; and that, in those criminal proceedings, the deceased's daughter, Tauhida Sheikh Said,

testified that the deceased signed the charge documents.

8. While the appellant's application was pending, the respondent filed a Notice of Motion dated 26th October 2020 seeking the following orders:

"1. THAT the Notice of Motion Application dated 19th February, 2020 be struck out for being res judicata the notice of motion dated 11th January, 2016 filed in Malindi ELC Case Number 2 of 2016 KAAB Investments Ltd & Tahir Sheikh Said Ahmed vs Kenya Commercial Bank Ltd.

2. THAT the Suit filed by the Plaintiff commenced by way of the Plaint dated 19th February, 2020 filed in Court on 19th February, 2020 together with the ensuing proceedings be struck out on account of being sub judice to Malindi ELC Case Number 2 of 2016 - KAAB Investments Limited & Tahir Sheikh Said Ahmed vs Kenya Commercial Bank Limited and Malindi ELC Case Number 240 of 2017 - Isha Mohamed Noor vs Kenya Commercial Bank Limited & Garam Investments Auctioneers.

3. THAT in the alternative, the Suit filed by the Plaintiff be struck out for being otherwise an abuse of the process of the Court.

4. THAT the Costs of this Application and Costs of the Suit be awarded

to the Defendant.”

9. The respondent's application was supported by the affidavit of Francis Kiranga sworn on 26th October 2020 essentially deposing to the grounds on which the application was anchored, namely: that the suit properties were registered in the name of the deceased, who had charged them to the respondent as securities for a loan granted to Kaab; that in default, the respondent commenced recovery of the mortgage debts by sale of the suit properties; and that several suits were subsequently filed to restrain the respondent from realizing its securities, namely Malindi ELC Case No. 2 of 2016 - KAAB Investments Limited & Tahir Sheikh Said Ahmed vs. Kenya Commercial Bank Limited, Malindi ELC Case No. 240 of 2017 - Isha Mohamed Noor vs. Kenya Commercial Bank Limited & Garam Investments Auctioneers, and the appellant's suit in Malindi HCC No. 3 of 2020 - Fatma Tahir Sheikh Said vs. KCB Bank Kenya Limited.

10. The respondent averred that Malindi ELC Case No. 2 of 2016 was filed by Kaab and the deceased, jointly challenging the respondent's recovery efforts; that, after the deceased's death, Isha Mohamed Noor (the deceased's spouse) and Hamude

Ahmed Said,

were substituted as administrators of his estate; that, thereafter,
Isha

Mohamed Noor filed Malindi ELC Case No. 240 of 2017 seeking similar orders of injunction to stop sale of the suit properties; that, in the current suit, the appellant purported to litigate as the administrator and representative of the deceased's estate; that the respondent was the defendant in the current suit and Malindi ELC Case No. 2 of 2016 and the 1st respondent in Malindi ELC Case No. 240 of 2017; and that the suit properties were also the subject matter in the earlier suits aforesaid.

11. The respondent further averred that, in Malindi ELC Case No. 2 of 2016, Kaab and the deceased filed a Motion dated 11th January 2016 seeking an injunction to restrain the respondent from realizing its securities by sale of the suit properties pending hearing and determination of the suit; that the trial court dismissed the Motion by a ruling dated 12th May 2017; that any new application seeking similar reliefs, including the applicant's Motion dated 19th February 2020, violated the doctrine of *res judicata* as well as the *sub judice* rule; and that the appellant's Motion and any similar application amounted to abuse of the court process, and ought to be dismissed or struck out.

12. In conclusion, the respondent contended that both Malindi ELC Case No. 2 of 2016 and Malindi ELC Case No. 240 of 2017 remained pending; that the issues raised in the current suit were directly and substantially in issue in the two earlier suits; that, allowing the appellant to litigate the current suit parallel with the two earlier suits could lead to conflicting decisions and judicial embarrassment; and that, in the premises, the current suit ought to be struck out with costs.

13. In response, the appellant filed Grounds of Opposition dated 13th November 2020 opposing the respondent's application on the grounds that it was incompetent, frivolous and bad in law; and that the ELC lacked the jurisdiction to hear and determine the issues raised in the suit and, accordingly, the issues raised in the suit were not *res judicata*.

14. The respondent's application was canvassed by way of written submissions filed by both parties.

15. In its ruling dated 26th February 2021, the High Court (R. Nyakundi, J.) held that the parties in Malindi ELC Case No. 2 of

2016

and the current suit were substantially the same; that the issues in both cases were intertwined as they both concerned the mortgage deed allegedly entered into by the deceased and the respondent; that the appellant was therefore bound by the determinations in Malindi ELC Case No. 2 of 2016; that there was a ruling in Malindi ELC Case No. 2 of 2016 dismissing an application seeking an injunction to restrain the respondent and Garam Investments Auctioneers from selling or alienating the suit properties; and that the decision was binding on both the original parties and their successors in title, unless new facts emerged that would alter the foundation of the ruling.

16. The court further held that the parties, causes of action and objects of litigation in all the three suits were identical; that the filing of multiple suits in different courts over the same subject matter amounted to an abuse of the court process; that the ELC, having been first seized of the dispute, should have been given an opportunity to hear and determine the matter before the High Court was approached; and that, therefore, the suit fell short of the doctrine of *sub judice*. Consequently, the court struck out the appellant's application dated 19th February 2020 for being fatally

incompetent

on the ground of *res judicata* and allowed the respondent's motion dated 26th October 2020 with costs.

17. Dissatisfied with the learned Judge's decision, the appellant filed the instant appeal on 5 grounds set out in her Memorandum of Appeal dated 28th November 2022, namely:

"1. The trial court erred in law and in fact in that it decided that Malindi

H.C.C.C. No. 3 of 2020 ... was rendered res judicata by reason of the decision made in Malindi E.L.C.C. No. 2 of 2016 ... when there was no evidence to support such a holding.

2. The trial court erred in law and in fact in that the trial court failed to realise that in Malindi H.C.C.C. No. 3 of 2020 ... the Plaintiff had brought out a claim that the securities that the Respondent intended to realize were created fraudulently and that thereby the issue raised in the said suit could not be defeated by a plea of res judicata.

3. The trial court erred in law and in fact in that it made a decision that effectively denied the Plaintiff a chance to fully ventilate her case.

4. The trial court further erred in that it determined the issues

presented before it in a technical manner and thereby allowed substantive justice to bleed at the altar of technicalities.

5. *The trial court erred in that it arrived at a decision which was against the weight of law and evidence presented before the court.*”

18. On the grounds aforesaid, the appellant prays for orders that the impugned ruling be set aside and the matter be remitted to any other Judge of the High Court other than R. Nyakundi, J. for hearing; and that, pending such hearing, the status quo be maintained. She also prayed for costs of the appeal and all costs incurred so far in the High Court, and that such costs be borne by the respondent.

19. In our considered view, two issues commend themselves for our determination, namely: whether the learned Judge erred in striking out the appellant’s application on the ground that it was *res judicata*; and whether the learned Judge erred in striking out the appellant’s suit on account of being *res sub judice* the two earlier suits.

20. In support of the appeal, learned counsel for the appellant, M/s.

Gikandi & Company, filed written submissions, a list and bundle of authorities dated 5th March 2025, which we have considered.

21. In rebuttal, learned counsel for the respondent, M/s. Munyao, Muthama & Kashindi, filed written submissions, a list and bundle of authorities dated 12th March 2025, which we have taken to mind.

22. On the 1st issue as to whether the trial court was at fault in striking out the appellant's Motion for being *res judicata*, the learned Judge pronounced himself on the question as to whether or not the legal questions as framed by the applicant in the motion dated 19th February 2020 were indeed canvassed and determined by the court in ELC No. 2 of 2016 on 12th May 2017.

23. In the trial Judge's considered view, the appellant's affidavit evidence, the respondent's replying affidavits and the annexures thereto, led to the conclusion that there was privity of the parties litigating in ELC No. 2 of 2016 with those litigating in HCCC No. 3 of 2020 at Malindi. As the learned Judge correctly observed, a perusal of the record presented *prima facie* evidence that there were substantial interlocking issues in ELC Case No. 2 of 2016 and 240 of 2017, with the pending suit referenced as HCCC No. 3 of 2020; and that the appellant sought to ventilate the issues

revolving around the Mortgage Deed allegedly entered into
between Tahir Sheikh Said

Ahmed (deceased) and KCB Bank Kenya Ltd and, on the other hand, litigating as the defendant, Bank, in all the aforementioned suits.

24. As the learned Judge further observed:

*“As the record stands there is a judicial decision pursuant to an application dated 11.1.2016 in **ELC No. 2 of 2016** which sought to invoke the Court’s jurisdiction for grant of an injunction against the defendant Bank and **Garam Investments Auctioneers** or their agents from advertising, or offering for sale, or selling or in any way alienating propriety interests in suit properties referenced as **LR 10801 CR 34037** and **Portion No. 1121 CR 46603. Suit No.***

***10801 CR 34037** and **Portion No. 11215 CR 46603**. Pending the hearing and determination of the suit among other reliefs. That application was heard and determined on 2.5.2017 [read 12.5.2017] by the Court.*

The decision is binding to the predecessors and successors to the claim and cannot be reconsidered by another Court unless new facts emerge that change the basis on which they were rendered. The dispositive of the decision on injunction and closely related

matters therefore becomes res judicata as regards matters which were distinctively raised and litigated in the application dated 11.1.2016.”

25. In the learned Judge's view, *"the parties, cause of action and objects of litigation in ELC 240 of 2017 and HCC Number 3 of 2020 are identical in all three suits."*

26. In conclusion, the learned Judge had this to say:

"In my view and on examination of the circumstances of the primary application of 19.2.2020 and the rejoinder motion thereafter filed on 28.10.2020 as distinct application and also in defence to the initial motion by the applicant, I hold that res judicata effect attaches to the interlocutory issues in the prior Ruling of the Court pronounced to the parties on 12.5.2017

In the result, bearing that statement of principle under Section 7 of the Civil Procedure Act in mind and taking all other factors of this case, I think this is a proper case to exercise my discretion in the respondent's favour. I accordingly decline the motion dated 19.2.2020 for being fatally incompetent for reason of res judicata. It is therefore struck out with costs to the respondents."

27. Taking issue with the learned Judge's decision, counsel for the appellant submitted that the trial court misapprehended the

law on

res judicata as set out in section 7 of the Civil Procedure Act; that no evidence was availed to demonstrate that the plaintiffs in Malindi ELC Case No. 2 of 2016 and Malindi ELC Case No. 240 of 2017 were connected to the appellant; that the basis for the appellant's suit was evidence of fraud relating to forged charge documents alleged to have been signed by the deceased in the form of the Forensic Report by Emmanuel Karisa dated 28th September 2018 and produced in Malindi Chief Magistrate's Criminal Case No. 1096 of 2018; that the new evidence could not have been available in the earlier suits, particularly Mombasa ELC Case No. 2 of 2016 in which the ruling dated 12th May 2017 was delivered, and since those suits were filed way before the evidence came into existence; that it was erroneous for the trial court to merely determine what *res judicata* entails but fail to consider the effect of the fresh evidence; and that neither the doctrine of *res judicata* nor the rule of *sub judice* can be allowed to overrun and defeat fraud and illegality.

28. Counsel cited the cases of **John Florence Maritime Services**

Ltd & another v Cabinet Secretary for Transport and

Infrastructure & 3 others [2021] eKLR where the Supreme Court

held that, although the doctrine of *res judicata* lends itself to the

promotion of orderly administration of justice, it should not be at the cost of real injustice; **Mistry Amar Singh v Serwano**

Wofunira

Kulubya [1963] 3 WLR 513 for the proposition that no court ought

to enforce an illegal contract; **Robert M. Muga v Muchangi Kiunga**

& 2 Others [2007] eKLR for the proposition that fraud vitiates any

court proceedings and the defence of *res judicata* is inapplicable in cases of fraud; **Lazarus Estates Ltd v Beasley** [1956] 1 QB 702;

and **Jonathan Van Blerk v The Attorney General & 5 Others** (SCZ

8 3 of 2020) [2021] ZMSC 31 for the proposition that no court will allow a person to keep an advantage which he has obtained by fraud, and that fraud unravels everything once proved.

29. In response, counsel for the respondent submitted that the trial court was correct in holding that the appellant's application dated 19th February 2020 was *res judicata* the application dated 11th January 2016 filed in Malindi ELC Case No. 2 of 2016; that a keen comparison of the two applications will reveal that the

subject matter in both applications were the suit properties; that they related to the same borrowing/transaction secured by the charges created by the deceased in favour of the respondent; that the action which triggered all the suits was the same action, that is, the commencement of

realization of the securities by the respondent; and that the issues raised in the application filed in Malindi ELC Case No. 2 of 2016 were the same as those raised in the appellant's application filed in Malindi HCCC No. 3 of 2020.

30. Counsel further submitted that the parties in all the suits in question are the same, with the deceased and/or representatives of his Estate litigating under the same title as plaintiffs; that the issues of the alleged fraud and the existence of criminal proceedings were capable of being raised in Malindi ELC Case No. 2 of 2016 or Malindi ELC Case No. 240 of 2017; and that, since both suits are still pending before the court, the plaintiff should have amended the existing plaint(s) in order to bring out any alleged new issues.

31. According to counsel, the allegations of fraud fly in the face of the fact that the deceased personally admitted to having charged the suit properties as securities to the Bank for the loan advanced to Kaab in the plaint and application filed in Malindi ELC Case No. 2 of 2016; and that the issues of fraud and forgery were also raised in Malindi ELC Case No. 240 of 2017 in the plaintiff's

Amended Complaint dated 14th January 2019.

32. Counsel cited the cases of E.T. v. Attorney-General & Another

[2012] eKLR for the proposition that courts must always guard against litigants evading the doctrine of *res judicata* by introducing new causes of action or adding other parties in a subsequent suit so as to seek the same remedy; **George Kihara**

Mbiyu v Margaret Njeri

Mbiyu & 15 others [2018] eKLR for the proposition that the doctrine

of *res judicata* applies equally to decisions on applications as it

does to final decisions in a suit; and **John Florence Maritime**

Services

Ltd & another v Cabinet Secretary for Transport and

Infrastructure & 3 others (*supra*) for the proposition that the

court requires parties to a litigation to bring forward their whole

case, and will not (except under special circumstances) permit the

same parties to open the same subject of litigation in respect of a

matter which might have been brought forward as part of the

subject in contest, but which was not brought forward for the

reason that they had, by reason of negligence, inadvertence, or

even accident, omitted part of their case.

33. We hasten to observe that, in principle, a subsequent application for an injunction can be barred by the doctrine of *res*

judicata if it is based on the same or a substantially similar cause of action as a prior application already determined by a court of competent jurisdiction. However, it is not lost on us that the application of the doctrine of *res judicata* in the context of injunctions is not absolute and depends on the specific circumstances of each case.

34. Section 7 of the Civil Procedure Act sets out the doctrine of *res judicata* in the following terms:

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.

35. In **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others** [2017] KECA 477 (KLR), this Court held

that:

“... for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms:

(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.”

36. In Kenya Commercial Bank Limited & another v Muiri

Coffee Estate Limited & 3 others [2016] KESC 6 (KLR), the Supreme Court held that:

“57. The essence of the res judicata doctrine is further explicated by Wigram, V-C in Henderson v Henderson

(1843) 67 ER 313, as follows:

'... where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'
[Emphasis supplied]."

37. In the same vein, Majanja, J. had this to say in **E.T. v Attorney**

General & another [2012] KEHC 5506 (KLR):

“57. The courts must always be vigilant to guard against

litigants evading the doctrine of res judicata by introducing

new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and Others [2001] EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata'

38. The appellant's argument is that she was not a party in Malindi ELC Case No. 2 of 2016; and that new evidence of fraud

and forgery had surfaced in Malindi CM Criminal Case No. 1096 of 2018, which was unavailable during the earlier proceedings. However, no

explanation is given as to why she did not seek to be joined in the earlier suits in Malindi and have the evidence of the alleged fraud produced since the cases involved the deceased's estate, the same parties, the same properties and the same charges and securities.

39. In Malindi ELC Case No. 2 of 2016, Kaab and the deceased sued the respondent vide a plaint dated 11th January 2016. Their case was that, in 2008, the respondent issued credit facilities to Kaab; that the facilities were secured by charges over the suit properties; that the respondent failed to provide copies of all the security documents to them; that the respondent later reneged on loan restructuring agreements comprised in its letters dated 8th August 2014 and 15th July 2015; that it prematurely advertised the suit properties for sale purportedly in exercise of its statutory power of sale without giving them the requisite statutory notices, and before undertaking valuation of the suit properties; that the debt claimed was grossly overstated due to arbitrary interest rate adjustments made by the respondent; and that the respondent's actions resulted in clogging their equity of redemption.

40. By reason of the matters aforesaid, they sought, *inter alia*, a declaration nullifying the intended sale of the suit properties scheduled for 26th January 2016; a permanent injunction restraining the respondent and its agents from selling, alienating or dealing with the suit properties; and an order to compel the respondent to make discovery of all security documents in its possession in respect of the loan secured by charges over the suit properties; and costs of the suit.

41. In addition to the suit, Kaab and the deceased also filed a Notice of Motion application dated 11th January 2016 in Malindi ELC Case No. 2 of 2016 seeking an injunction restraining the respondent and its agents from selling, alienating or dealing with the suit properties pending the hearing and determination of the suit; an order for discovery directed at the respondent to produce all security documents relating to the loan granted to Kaab and secured by charges over the suit properties pending hearing and determination of the suit; and an order appointing an independent commissioner to investigate and ascertain the interest rates applied on the loan as well as the market value of the suit properties.

42. By a ruling dated 12th May 2017, the ELC (J. O. Olola, J.) dismissed the application dated 11th January 2016, holding that the plaintiffs therein had not established a *prima facie* case; that the plaintiffs were aware that the suit properties would be sold in default of the mortgage debt and could not claim irreparable damage if the injunction was not granted; and that the prayer for discovery of documents was premature.

43. The ruling aforesaid was cited by the learned Judge to support the finding that the appellant's application for injunctive relief in the current suit was barred by the doctrine of *res judicata*.

44. The appellant's suit against the respondent, and in which she sued as the administrator of the deceased's estate, made the parties herein effectively the same as those in the previous suit, *to wit*, Malindi ELC Case No. 2 of 2016.

45. It is also instructive that the appellant's application dated 19th February 2020 revolved around the issue as to whether the respondent had properly served the requisite statutory notices

before attempting to exercise its statutory power of sale. This same question

was in issue in Malindi ELC Case No. 2 of 2016 as well as in the application dated 11th January 2016.

46. It is also noteworthy that the appellant's suit and application was also founded on the contested issue of the validity of the charges created over the suit properties. In our considered view, if the deceased had intended to dispute the validity of the charges in issue, this issue ought to have been raised and pleaded in Malindi ELC Case No. 2 of 2016 and the application dated 11th January 2016. However, the appellant has not demonstrated that the deceased could not have raised the issue in Malindi ELC Case No. 2 of 2016.

47. It is worth noting that, in the pleadings filed in Malindi ELC Case No. 2 of 2016, the deceased admitted having charged the suit properties in favour of the respondent. The forensic report dated 28th September 2018 filed in Malindi Chief Magistrate's Criminal Case No. 1096 of 2018 and relied on by the appellant in her suit concerned the deceased's purported signature in a Form of Acceptance attached to a Facility Letter dated 8th August 2014, yet the deceased had referred to the same letter in Malindi ELC

Case No. 2 of 2016 as evidence of a restructuring agreement.

48. Since it has become apparent that the appellant is seeking to litigate under the same title as the deceased in Malindi ELC Case No. 2 of 2016 and has raised issues that were already, or should have been, determined by the ELC vide its ruling on the application dated 11th January 2016, we find that the learned Judge was not at fault in concluding that the appellant's application ran afoul of the doctrine of *res judicata* and that, therefore, he had no option but to strike it out.

49. Turning to the 2nd issue as to whether the learned Judge erred in striking out the appellant's suit on account of being *res sub judice* the two earlier suits, we take the liberty to restate *in extenso* part of the learned Judge's decision as hereunder:

*"It is also clearly evident from the record and the sets of pleadings outlined by the respondent in reply to the notice of motion of 19.2.2020 as read together with notice of motion of 28.10.2020 that issues in the pending suits in **ELC Case No. 2 of 2016, ELC Case No. 240 of 2017 and HCCC No. 3 of 2020** discloses that the cause of action in each case is the same*

I strongly find it offensive to the judicial process for the plaintiffs not to raise their entire claim in one action and not litigate by instalments or parts in separate cause of action and at different Courts. If, in any event it's the plaintiff's view that both ELC and High Courts exercise their respective jurisdictions, justice will be best served by not having simultaneous litigation on the same issues proceeding on the basis of comity and forum of non-convenience. The parties must redraw the boundary of issues that give the respective jurisdiction to the Courts to entertain the same cross-cutting matters raised in the suits. This is justified substantially and directly on the plaintiff claim not being res sub-judice.

*In the instant case, the initial chosen Court of ELC should have been given an opportunity to hear and decide the case before filing a parallel suit in **HCCC No. 3 of 2020**. Whichever angle one takes and looks at this dispute, the truth is the two Courts cannot purport to entertain [these] suits appropriately and simultaneously without a manifest of injustice or mistrial and the likely conflicts in the outcome of the decisions of the Courts; given the nature of the pleadings and other relevant materials presented by both parties*

The instant suit involves matters already filed at the Environment and Land Court Registry which has neither been withdrawn [nor]

determined... For that reason, the applicant notice of motion [read suit] falls short on the doctrine of res sub-judice under Section 6 of the Civil Procedure Act as there is a suit on the same cause of action.

The question whether there would be ultimately a pending issue formally to be adjudicated and sufficiently decided separately by the Court is moot.

To this end and without mercy, matters adverted to by the applicant are offensive to the provisions under Section 6 and 7 of the Civil Procedure Act on res sub-judice and res judicata respectively. It is therefore good for striking it out and in its place the respondent motion succeeds with costs."

50. Counsel for the appellant was of a different view and submitted that neither *res judicata* nor *res sub judice* can be allowed to overrun and defeat fraud and illegality; that locking out the appellant from ventilating her case which raises serious issues of fraud, forgery and illegality amounted to a denial of the appellant's fundamental right of fair hearing as contained in Articles 48 and 50 of the Constitution; that any court of law is clothed with inherent jurisdiction to do anything that would

ensure that the ends of justice are met, and that there is no abuse of the process of the court; that, with the situation

the trial court was faced with, it was open for the court to use its inherent jurisdiction to consolidate the three matters instead of taking the drastic action of striking out the appellant's suit; and that the effect of striking out the suit was that the evidence of the fraud as captured in the criminal case and in the forensic report would remain locked out from scrutiny by the court.

51. Counsel cited the case of **D. T. Dobie & Company (Kenya)**

Limited v Joseph Mbaria Muchina & Another [1980] eKLR for the

proposition that a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal; and that no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment.

52. On their part, counsel for the respondent did not submit on this issue.

53. The *sub judice* rule is stipulated in section 6 of the Civil Procedure Act 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.

54. Explaining the intent of the *sub judice* rule in **Kenya Bankers**

Association v Kenya Revenue Authority

[2019] KEHC 12178 (KLR), Mativo, J. (as he then was) correctly observed that:

“30. The basic purpose and the underlying object of Section 6 is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief

31. The words “directly and substantially in issue” are used in contradistinction to the words “incidentally or collaterally in

issue.” Therefore, Section 6 would apply only if there is identity

of the matter in issue in both the suits, meaning thereby, that the whole of the subject- matter in both the proceedings is identical.

32. The test for applicability of Section 6 is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit. However, when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit.

37. ... the principle of sub judice does not talk about the “prayers sought” but rather “the matter in issue.”

55. In Re the Matter of The Interim Independent Electoral Commission [2011] KESC 1 (KLR), the Supreme Court cited with approval an Australian decision where it was held:

“... we do not think that the word ‘matter’...means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter...unless there is some right, duty or liability to be established by the determination of the Court”

56. The following observations of Mativo, J. (as he then was) in

Republic v Paul Kihara Kariuki, Attorney General & 2 others;

Ex parte Law Society of Kenya [2020] KEHC 10142 (KLR) are

equally persuasive:

“26... The test for applicability of the sub judice rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit. As concluded earlier, the answer to this question is a resounding yes. However, when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit or suits”

57. The learned Judge (Mativo, J.) went further to cite the decision of the High Court of Uganda at Kampala in **Nyanza**

Garage v

Attorney General HCCC No. 450 of 1993 where it was held:

“In the interest of parties and the system of administration of justice, multiplicity of suits between the

same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the

wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”

58. In conclusion, Mativo J. had this to say:

“29. The uncompromising manner in which courts have consistently enforced the sub judice rule was best explained in Thiba Min Hydro Co. Ltd v Josphat Karu Ndwiga which held that it is not the form in which the suit is framed that determines whether it is sub judice, rather it is the substance of the suit, and that, there can be no justification in having the two cases being heard parallel to each other.”

59. As already observed, the core issue for determination in the appellant’s suit was whether the respondent had duly served the requisite statutory notices prior to exercising its power of sale over the suit properties to recover the loan arrears. The same issue was in dispute between the same parties in Malindi ELC Case No. 2 of 2016, which preceded the appellant’s suit, and is still pending determination.

60. The other key issue in the appellant's suit concerned the contested validity of the instruments of charge and the authenticity of the deceased's signature appended thereon. Notably, this issue was first raised in an earlier suit, *to wit*, Malindi ELC Case No. 240 of 2017 in which Isha Mohamed Noor, the deceased's widow, sued the respondent and Garam Investments Auctioneers Limited vide a plaint dated 30th November 2017 as amended on 14th January 2019.

61. Noor alleged that the deceased passed away on 10th January 2017; that she discovered in November 2017 that the suit properties had been charged as security for a loan to Kaab Investments Limited, which had defaulted; that the properties were listed for auction on 4th December 2017; that she never gave spousal consent for her late husband to charge the suit properties, thereby rendering the charges defective; that she was not served with statutory notices; that there were ongoing criminal proceedings involving the deceased's estate, including Criminal Case No. 220 of 2017 where Kaab's directors had been charged with forgery and conspiracy to defraud; that she discovered that the deceased's signature appended on a Letter of

Offer dated 8th August 2018 was a forgery and did not belong to the deceased; that this prompted her to lodge a complaint with the police,

which culminated in criminal charges against Kaab's directors for forgery in Malindi Chief Magistrate's Criminal Case No. 1096 of 2018.

62. By reason of the matters aforesaid, Noor sought an injunction restraining the respondent from selling, alienating or in any other way dealing with the suit properties; a declaration that the charges were procured by fraud and were null and void or, alternatively, that the charges were defective for failure to obtain spousal consent; an order directing removal of the charges from the suit properties' registers and release of the original titles to the deceased's estate; and for costs and interest.

63. Notably, Noor's suit is yet to be determined and, therefore, the issue as to the validity of the charge documents in light of the alleged evidence of fraud and forgery said to have arisen from Malindi Chief Magistrate's Criminal Case No. 1096 of 2018 was already directly and substantially in issue in Malindi ELC Case No. 240 of 2017, which predated the appellant's suit, and which is still ongoing.

64. In view of the foregoing, we find nothing upon which to fault the learned Judge for concluding that the appellant's suit was *sub judice*

both Malindi ELC Case No. 2 of 2016 and Malindi ELC Case No. 240 of 2017 and, therefore, not capable of being maintained. The learned Judge's finding on this issue was well-grounded and by no means in error in view of the fact that she purported to litigate over the same issues, the same subject matter and against the same parties litigating in two previous suits currently pending determination in Malindi.

65. Finally, we are not persuaded by the appellant's contention that allowing the respondent's application to strike out her suit and Motion amounted to denial of her constitutional right to a fair hearing. In our respectful view, had the appellant desired to be granted audience to ventilate the allegations of fraud and illegality stemming from the alleged "new evidence," nothing would have been easier for her than to seek joinder as a plaintiff or interested party in either of the earlier suits and present such evidence as may be necessary to prove the same claims pleaded in her case. In the alternative, she would be more than welcome as a witness and close member of the deceased's family to testify on any of the common issues raised in the suits aforesaid. To our mind, initiating a separate suit in a different court over the

same issues, between the same

parties, and over the same subject matter is nothing short of abuse of the court process.

66. Having carefully considered the record of appeal, the grounds on which it is anchored, the rival submissions of learned counsel, the cited authorities and the law, we reach the inescapable conclusion that the appeal has no merit and is hereby dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Mombasa this 5th day of December 2025.

A. K. MURGOR

.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed
DEPUTY REGISTRAR