

REPUBLIC OF KENYA

HIGH COURT AT NYAHURURU

CIVIL CASE NO E003 OF 2024

FRANCIS

NGARAMA

KIRATU.....APPLICANT/PLAINTIFF

-VERSUS-

**EQUITY BANK LTD.....RESPONDENT/1ST
DEENDANT**

**PURPLE ROYAL AUCTIONEERS.....2ND
DEFENDANT**

**LAND REGISTRAR RUMURUTI.....3RD
DEFENDANT**

ESTHER NJOKI KAINAMIA.....4TH DEFENDANT

RULING

1. To understand the gist of the application it is imperative to consider the background of the matter. This is a case where the Applicant/Plaintiff seeks issuance of a permanent injunction restraining the 1st Respondent/1st Defendant from transferring/interfering with **LR. No. Laikipia/Ol'arabel /253**. The backdrop of the matter being that Applicant/Plaintiff obtained a loan of Kshs. 13,000,000/- to purchase land and the 1st Respondent created a charge over the property. Later the 1st Defendant advertised the

property for sale without the appropriate Statutory Notice. An auction was conducted and the 4th Defendant, the highest bidder purchased the land.

2. Following events that unfolded, Applicant/Plaintiff filed the application dated 24/7/2024 seeking orders that:

1. Stay of proceedings be granted pending hearing and determination of the suit herein, and in the alternative, there be consolidation of this suit and Nyahururu ELC Case No. E002 /2024 (O.S) ESTHER NJOKI KAINAMIA v FRANCIS NGARAMA KIRATU

2. Restraining orders to issue against the 1st Defendant and 4th Defendant from interfering with the Plaintiff's occupation of LR Laikipia Ol'arabel/253 measuring 35 Ha.

3. Leave be granted to the Plaintiff to amend his plaint as per attached draft amended plaint;

4. The 1st Defendant be ordered to avail statement of accounts for the Plaintiff's account No. 035019050505179 for the period between 30th September 2010 and 18th November 2013.

3. Before the application was disposed of, the Respondent /1st Defendant filed an application dated 2/9/2024 seeking orders thus:

The honorable court be pleased to strike out the application and suit being offensive to the

principle of res judicata and subjudice for matters dealt with in Nyahururu HCCC No 4 of 2018 formerly ELC 21/2018.

4. The Applicant/Plaintiff's application is brought on the grounds on the face of the application and also supported by an affidavit sworn by the Plaintiff, Francis Ngarama Kiratu which can be summed up as follows: That the proceedings in **ELC No. E002/24 (O.S)** arose from the dispute in this case. The Plaintiff is challenging the sale which resulted in the 4th Defendant's title in the suit land and that the Nyahururu **ELC No. E002/24 (O.S)** seeks eviction against the Plaintiff.
5. The Plaintiff /Applicant seeks cancellation of the entries in the register of the suit land which includes the 4th Defendant's title. That the issues in the suits are intertwined and there is need to call the 4th Defendant to defend her interests without necessity of multiple suits.
6. Further, that the issues of facts in **ELC Case No. E002 /2024 (O.S)** cannot be dealt with within the ambit of the originating summons. That there is also risk of two contradictory findings from both courts which have concurrent jurisdiction. That this suit will be rendered nugatory if the ELC court issues a finding in favour of the 4th Defendant.
7. The amendment of pleadings is sought on the ground that the ownership of the land and cause of action has changed after the impugned auction.

- 8.** That the ruling by Honourable Justice Wendoh delivered on 19/11/2019 allowed joinder of the 2nd and 3rd Defendants after the court considered the gravity of issues which are still alive today.
- 9.** That the statutory power of sale was dubious and was detrimental to the Plaintiff's interest. Public auction is also contested. That the issues in the application are serious and deserve stay of proceedings in **Nyahururu ELC case No E002/2024** and restraining orders sought in the application before this court.
- 10.** The Applicant/Plaintiff urges that the Defendants flouted the terms and conditions of sale by public auction. The 2nd Defendant issued a redemption notice on behalf of the 1st Defendant in breach of Section 96 of the Land Act and the 4th Defendant failed to pay the balance of the purchase price within 90 days as prescribed in the memorandum of sale, the balance having been paid after 5 years 2 months and 3 days.
- 11.** Further, that the 4th Defendant's title was registered 2 months 7 days before payment of the balance of the purchase price; and the original title deed was replaced without the Applicant/Plaintiff's knowledge and without a court order.
- 12.** That the Applicant/Plaintiff stands to suffer irreparable loss and the balance of convenience also tilts in his favour. That his family will be rendered destitute and sale of

property is a serious matter that deprives one of a right that is recognized in law. That sale of property should not proceed in doubtful circumstances.

13. Lastly that the 1st Defendant has declined to furnish the Applicant/Plaintiff statement of accounts.

14. The application dated 24/09/2024 by the 1st Defendant/1st Respondent is brought on the grounds that; The cause of action arose from statutory power of sale which is a commercial dispute. That the Plaintiff filed suit in **Nyahururu case No. 4 of 2018** against the bank which also involved an application that was dismissed by Wendoh J.

15. That the Plaintiff has not prosecuted the case; and, he also filed an appeal in **Nairobi Court of Appeal Case No. No.15 of 2020** where the application for stay was dismissed on 19/3/2021; and, he also filed **Nyahururu HCC No. 23 of 2018 formerly ELC 65/2018** and sought injunction against the Defendant but withdrew the case. Hence, issues will be the same with issues in **Nairobi Misc. Civil Application No. 462 OF 2015 and Nyahururu HCC 23/2018.**

16. The application is supported by an affidavit, further affidavit and replying affidavit of Samuel Wamaitha filed on behalf of the bank.

17. The Applicant/Plaintiff's application for injunction is contested through the replying affidavit and further affidavit of Samuel Wamaitha, the Assistant Manager, Legal services of the 1st Defendant. Its case is that the Applicant approached

the bank for a loan of Ksh. 13Million to purchase the suit land. The loan was secured by a charge and the land parcel No. Laikipia Ol'arabel 253 was collateral.

18. That the Applicant/Plaintiff defaulted payment from the onset and sought to restructure the loan so as to pay Kshs.5 Million. The Defendant conceded to the loan restructure but the Plaintiff made irregular payments. The Plaintiff made another offer on 26/12/2011 which was accepted but the Applicant/Plaintiff refused to repay the loan balance which accrued interest and charges.

19. It is reiterated that the bank held valid legal charge over the suit land and it was entitled to realize the amount owed by the chargor. That the Plaintiff's account was in arrears of Kshs. 16,219,940.60/= as at 2/2/2014 and interest continued to accrue. The Plaintiff failed to redeem the subject property despite several statutory notices and demand for payment.

20. The Applicant/Plaintiff filed **Nyeri ELC CASE No. 40/2014 Francis Ngarama Kiratu v Equity Bank Ltd** and obtained injunction a case transferred to Nyahururu and renamed **ELC No.21 /2018**.

21. That the Applicant/Plaintiff was indolent and failed to prosecute the matter, the injunction was discharged on 18/12/2017 and the Defendant proceeded to dispose off the subject property by public auction to recover Kshs.

23,016,344.65/- whereby Accurate Valuers conducted the land's valuation and availed the report.

- 22.** That the Plaintiff also filed **Nyahururu HCCC NO 23/2018 formerly ELC No. 65/2018** and sought injunction but was unsuccessful and he withdrew the case. Later the suit land was sold on 19/12/2018 and the 4th Defendant was the highest bidder for Kshs.23 Million.
- 23.** The Applicant/Plaintiff also attempted to stop the sale in **Nairobi HCCC Miscellaneous Civil Application No. 462 of 2015** and a Notice of Motion dated 28/2/2019 filed in **Nyahururu HCCC NO 4 OF 2018** for injunction where he also challenged the sale. He filed an appeal against the decision in **HCCC 4 OF 2018 in NAIROBI Court of Appeal NO. 15/2020** where he sought stay.
- 24.** The Respondent/1st Applicant/Defendant contends that the Plaintiff is out to frustrate the bank through unending litigation and abuse of court process.
- 25.** That the application offends *res judicata* and the issues were determined in **Nyahururu HCC No.4 of 2018 formerly ELC No.21/2018,** and, the orders are overtaken by events and are unavailable.
- 26.** On the issue of issuance of injunction, the Respondent/1st Defendant reiterates that Applicant has not demonstrated infringement of his legal right by the Respondent/1st Defendant in the sale process. That equity of redemption was extinguished at the fall of the hammer and the Plaintiff has

not demonstrated grounds for injunction. The prayer for injunction has been overtaken by events after the land was sold and transferred to the 4th Defendant.

27. That amendment of pleadings is brought after 10 years and the Plaintiff's request for statements is malicious and made in bad faith as the Applicant has had access to the statements.

28. Lastly, the Defendant contests the Plaintiff prayer for consolidation and stay of the 4th Defendant's suit. That the two suits are separate and distinct with different parties and issues.

29. That the 4th Defendant filed suit against the Plaintiff in **Nyahururu ELC case No. E002 of 2004**. The proposed Defendant purchased the land through public auction and claims proprietary rights. The proposed Defendant also filed her replying affidavit to oppose the Plaintiff's application.

30. The 4th Defendant reiterates that the application is intended to scuttle eviction proceedings scheduled for directions on 23/10/2024. That prayer for joinder is for cosmetic facelift and is sought to escape the doctrine of *res judicata*. Further, that she is a purchaser for value and there is no case against her.

31. The Applicant/Plaintiff filed a supplementary affidavit in response to the Respondent/1st Defendants affidavit's and the application dated 24/9/2024, where he contends that the facts before court are not *res judicata* following **Nyahururu Case No. 23 of 2018** which was withdrawn. That he filed **Nyahururu HCCC 4 of 2018 and Nairobi Miscellaneous**

Civil Application No.462 of 2015 to preserve the subject matter from alienation or transfer to 3rd parties.

32. The applications were canvassed through written submissions. The Applicant/Plaintiff submits that the case against the Defendant has mutated and this necessitates amendment of pleadings and to allow the court determine the real questions in controversy as per the provision of **Order 8 Rule 5 of the Civil Procedure Rules** which gives the court discretion to allow an amendment for purposes of determining the real question in controversy.

33. Also cited is the case of **General Manager E.A.R & Thierstein 1968 1 E.A 354 HCK**, that was cited in **John Nyagaka Osoro v Reynold Karisa Charo & 5 Others (2021) EKLR** in respect of amendments being necessary for purposes of determining controversy between parties.

34. That the Applicant/Plaintiff seeks to have the auction declared null and void and the 4th Defendant's title will be negatively affected. Further that no prejudice will be occasion as the main suit has not taken off and the Defendant will amend its defence. That the Plaintiff seeks to address the challenges in the transaction between the Plaintiff and the bank.

35. That the statement attached by the bank in response to the application does not reflect payments made by the Plaintiff, the court is referred to the case of **Jack Kaguu Githae v Kenya Commercial Bank Ltd & 2 Others [2021] EKLR** on

the courts discretion to order statement of accounts in such cases.

- 36.** On consolidation and /or stay of **ELC Case No. E002 /24 (OS)**, the Plaintiff submits that the instant suit should take precedence over the Originating Summons. That the proposed 4th Defendant seeks immediate vacant possession of the subject land and alludes to acquiring the land by sale by auction on 19/12/2018 while the Plaintiff herein is challenging the transaction that led to purchase of the land.
- 37.** That this suit should be determined before the proposed Defendant can enforce any rights over the impugned title. That the Applicant will be evicted and this suit will be nugatory.
- 38.** That the 4th Defendant would be at liberty to defend the Applicant's claim and counterclaim for vacant possession before this court. That the ELC court may order eviction while this court finds a different ruling.
- 39.** Further that the matter in ELC case No. E002/2024 is *subjudice*, is substantially in issue before this court and should be determined by this court. Reliance is placed on the case of **David Ndi & Others v Attorney General & Others [2021] eKLR.**
- 40.** That this suit was brought by plaint while the other case was by Originating Summons. The subject matter relating to the suit property concerns substantial issues as per draft amended plaint.

- 41.** On restraining orders and injunction, the Plaintiff urges that a case has been made out. That the balance of the purchase price following public auction was Kshs.17,250,000/= an amount that was deposited into the Applicant's account after 5 years of the auction. The 4th Defendant only paid 25% of sale price and also breached express mandatory terms and conditions of the sale.
- 42.** Issues to be resolved are hence; whether the chargor is still entitled to the proceeds of the auction for settling the loan, whether the chargor is entitled to fair processes of sale through strict compliance of conditions of auction.
- 43.** That the failure to pay within the period to clear the balance was substantial breach and the dubious and illegal sale process infringed his rights under article 40 of the Constitution. These prove a *prima facie* case as ruled in the case of **Mrao v First American Bank Ltd & 2 Others [2003] KLR 125.**
- 44.** On irreparable loss, the Applicant/Plaintiff refers to the threat of eviction faced by his family. Further that eviction would be founded on a botched exercise of the charges statutory power of sale. That the Defendant will alienate/ transfer the land to 3rd parties rendering the Applicant destitute. Reliance is placed on the case of **Harrogate Ltd & Another v Mwananchi Credit Ltd Mistna Auctioneers (Interested Party) [2021] KEHC 126(KLR).**

- 45.** Lastly that the balance of convenience is in favour of the Applicant whose suit will be nugatory and who also stands to be evicted.
- 46.** In its submissions, the Respondent/1st Defendant urges That the court's power to refuse or allow amendment of pleadings is discretionary as ruled in the case of **Andrew Wabuyele Biketi v Chinese Centre for Promotion of Investment Development & Trade Kenya Ltd & 2 others (2015) eKLR.**
- 47.** That amendment of the suit is sought after the motion dated 28/2/2019 was dismissed on 19/11/2019. That land was sold after interim orders were vacated. The amendment seeks unimaginable prayers and if allowed , the suit would be introducing a new claim which drastically changing nature of the case and is brought after 10 years. The case would be prejudicial to the Defendant.
- 48.** That the Plaintiff's statement of account was annexed as SW6 in the Defendant's response to the application and the Plaintiff's prayer is an afterthought.
- 49.** On stay and /or consolidation of the proceedings , the Defendant contends that the orders sought are not universal right and the court considers the specific circumstances of each case .
- 50.** That there is no evidence that **ELC case No. E002 /2024 (O.S)** affects administration of justice in this case for the matter to be stayed. Further that there is no conflict of

jurisdiction since the ELC case is a land matter while the instant suit is commercial in nature. Therefore, this court lacks jurisdiction to stay the ELC case.

- 51.** On the prayer for injunction, the 1st Defendant argues that the property was sold and the title was transferred and that the Plaintiff breached repayment obligations and does not deserve the orders sought. The court is referred to the case of **Kenya Breweries Ltd v Okeyo (2002) EA, John Edward Ouko Edward -Vs- National Industrial Credit Bank Ltd (2013) eKLR** for the position that a contracting party who failed to perform cannot obtain injunction to restrain breach by another party.
- 52.** That the equity of redemption was extinguished and the Plaintiff's remedy lies in damages. Reliance is placed on the case of **Joyce Wairimu Karanja v James Mburu Ngure & 3 others (2018) eKLR** and **Simon Njoroge Mburu v Consolidated Bank of Kenya LTD [2014] eKLR.**
- 53.** Further, that the Plaintiff has not pleaded both real or imagined loss should the court find that the sale was not valid. The Defendant also relies on the case of **Andrew Muriuki Wanjohi v Equity Bank Building Society Ltd & 2 Others 2006 eKLR.**
- 54.** Further, there is no proof that the Defendant is unable to compensate the Plaintiff. The court also lacks jurisdiction to issue restraining orders after the chargee complied with requirements and title exchanged hands.

- 55.** Lastly that the allegation that the sale was fraudulently conducted does not prove a prima facie or entitlement to stay and injunction .
- 56.** The Defendant reiterates that the balance of convenience lies with the 1st Defendant who was owed money by the Plaintiff and there is no attempt to settle the amount. That the Defendant should be allowed to recover what is due after equity of redemption was extinguished.
- 57.** The 4th Defendant filed submissions and reiterated that the suit is *res judicata* and that injunction was obtained in **Nyeri ELC 40/2014**. That the ELC case was transferred to Nyahururu as **ELC case No. 21 /2018** which became **Nyahururu HCCC No 4 of 2018**, then cited as **Nyandarua HCC No. 1/2023** and later **Nyahururu HCC No.3/2024**.
- 58.** That the application filed before Wendoh J was for injunction and restrained sale, transfer and dealings with the property pending determination of suit and the same facts were pleaded.
- 59.** The Plaintiff's application before this court was brought after the 4th Defendant filed the O.S and sought vacant possession which the Plaintiff seeks to frustrate.
- 60.** On consolidation of the two matters, it is argued that the cases are before courts different jurisdictions and also have different causes of action. That no prejudice will be caused if the cases proceed simultaneously. The Defendant relied on

the case of **Bank of Africa Kenya Ltd & Another v TSS Investment Ltd & 2 others (2024) eKLR** in that regard.

61. That contracts, choses in action and instruments granting enforceable interests in land are not heard by the land court and do not relate to use of land under **Section 13 of the Environment & Land Court Act**. Reliance in that respect is placed on the case of **Cooperative Bank Ltd v Patrick Kangethe Njuguna & 5 others [2017] eKLR**.

62. Having considered both applications, supporting affidavits and annexures thereto, and rival submissions, it is my considered view that issues for determination are as follows:

1. Whether the application for injunction is res judicata,

2. Whether issues before court are subjudice,

3. Whether to stay or consolidate the matter with Nyahururu ELC Case No O.S E002/2024

4. Whether leave for Plaintiff's prayer for amendment can be granted

5. Whether injunctive orders should issue.

Whether the application for injunction is res judicata.

63. Section 7 of the Civil procedure Act which sets out the doctrine of ***res judicata*** provides 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 issue in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

64. An issue cannot be re-litigated if it has been heard between the same parties by a competent court and the matter finally determined. The issue raised should be similar or related to issues determined in the previous suit, the parties ought to be the same or connected, the previous court should have jurisdiction.

65. The issues should also be determined with finality. **See Mulla, Code of Civil Procedure, 18th Ed. 2012 page 293** cited by the Supreme Court in **John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others [2021] KESC 39 (KLR)**. Mulla states that the principle of res judicata, as a judicial device on the finality of Court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction; that:

“The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless

fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”

66. In **Bernard Mugo Ndegwa v James Nderitu Githae & 2 Others, [2010] KEHC 3922 (KLR), W. Karanja J** (as she then was) summarized the principle under 5 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;***
- v. finality of the previous decision***

67. I have looked at the pleadings attached to the Respondent/1st Defendant’s affidavit and the pleadings and ruling in **Nyeri ELC case No. 40/2014 Francis Ngarama Kiratu v Land Registrar** and **Nyahururu case No 4 of 2018 Francis Ngarama Kiratu v Equity Bank**. The Plaintiff’s application dated 28/2/2019 was the subject matter of the ruling of ***Wendoh J*** referred to by parties and the appeal in Nairobi COA No. 15/2020. The Plaintiff/Applicant sought to enjoin the Land Registrar, Rumuruti and Purple Auctioneers and intended to stop sale by auction.

68. The court allowed the application for joinder but dismissed the application for injunction. The court found that lack of a reserve price or instruction to the auctioneers and notice to

sale does not render the sale invalid. That no injunction can issue and there is no *prima facie* case where the Applicant defaulted. The land was also a commodity for sale and balance of convenience did not tilt in his favour.

69. In **Nyeri ELC case 40 of 2014**. filed against the bank, the Plaintiff sought to stop sale on the ground that the statutory notice was not issued. The court allowed the prayer for injunction after it resolved that the Redemption notice was not issued. However, the injunction was vacated after the Plaintiff failed to prosecute the case within 60 days as earlier directed.

70. The proceedings that follow relate to **Nyahururu HCCC No. 4 of 2018** (The instant matter). I find that the same issues were before **Nyeri ELC case No 40 of 2014** as they relate to the legality and propriety of the sale by auction by Equity Bank and the auctioneers and subsequent registration by the Land Registrar who are Defendants in this case.

71. The land court in **Nyeri ELC case No 40 of 2018** did not resolve the dispute as there is no judgement on record. The High court in **Nyahururu HCCC No 4 of 2018** is yet to resolve the dispute. As argued the court ordered compliance with **Order 11** but no steps have been taken to prosecute the matter. The Court of Appeal also dismissed the application for stay and preferred parties to resolve the dispute which was still on trial. Therefore, whether the sale was void or could be

avoided and issues relating to subsequent title has never been determined by any court.

72. I have also considered the relief/prayers sought before this court and the grounds of the application. The Defendants do not dispute that the proposed 4th Defendant is the current title owner which was not available at the time when the earlier application were filed.

73. I find that the issues have mutated and that what was before ***Wendoh J*** included a prayer for proceedings of the sale by auction conducted on 19/12/2019. The Plaintiff asked for an independent valuation and the reserve price and that the court orders a new auction that complies with the law. What was before the ELC court (***Ombwayo J***) was an arrangement by the bank to sell the land which was stopped due to noncompliance within 45 days redemption notice sale.

74. The application to restrain interference with the Applicant/Plaintiff's occupation and to stop eviction proceedings is not ***res judicata***. Further, adding the 4th Defendant is not for cosmetic face lift.

75. Apparently, there is no doubt that the Plaintiff challenged the sale by auction in several suits which have been listed by the 1st Defendant. However, no judgment was entered and the surviving case at the High Court, at this juncture is Nyahururu HCCC No. 4 of 2018.

As to whether the matter is subjudice and the issue of jurisdiction;

76. Having found that the **ELC Case filed in Nyeri, ELC 40/2014** was not determined with a determination (judgment) and that **Nyahururu HCCC case No 4/2018** relates to the same issues before this court and is still pending, the issues in the current suit are *subjudice* and would be an abuse of process to proceed with the cases contemporaneously.

77. Then there is **ELC E002/2024** which was filed by the 4th Defendant. The Defendant seeks eviction orders against the Plaintiff and asserts his right to title. The suit also touches on the subject land, the sale by public auction which forms the basis of her claimed right over the land and the parties here will be a crucial part in determining the originating summons. I also find that whether the Defendant can obtain vacant possession and the legality of the sale by auction informing his right to land are intertwined issues.

78. The Defendants have challenged this court jurisdiction to stay, consolidate or determine the issues filed in the originating summons. **Section 6 of the Civil Procedure Act** does not prevent stay of proceedings before a court with jurisdiction. All that is required is that the subject matter is similar or substantial part of it forms the dispute before it and the parties are similar. The cases satisfy this rule on *subjudice*.

As to whether to stay or consolidate the cases;

79. Section 3A and 1B of the Civil Procedure Act and the overriding objectives of the court require expeditious determination of civil disputes and/or with optimal use of judicial resources. Steps taken include to avoid multiplicity of suits and abuse of court process which cogs resources in one case without considering other cases and minimal judicial time and resources available.

80. To stay proceedings in an active matter means that the matter would be kept in abeyance until one case is determined. I find that such orders would not be optimal use of resources and would not be in line with expeditious determination of the two cases.

81. On the other hand, consolidation of cases is the court's discretion and is done in full compliance with overriding objectives listed above and the applicable law. This was explained in the case of **Nyati Guards & Security Ltd v Mombasa Municipal Council, HCCC No 992 of 1994** where Maraga J (as he then was) that:

“Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The situations in which consolidation can be ordered include

where there are two or more suits or matters pending in the same court where:

- 1) some common question of law or fact arises in both or all of them; or***
- 2) the rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or***
- 3) for some other reason it is desirable to make an order for consolidating them.***

The circumstances in which suits can be consolidated are broadly similar to those in which parties may be joined in one action. Accordingly, actions relating to the same subject matter between the same Plaintiff and the same Defendant, or between the same Plaintiff and different Defendants or between different Plaintiffs and the same Defendants may be consolidated.” See also Stumberg & Another v Potgieter [1970] EA 323.

82. In **Chimweli Jangaa Mangale & 3 Others -Vs- Hamisi Mohamed Mwawasaa & 11 Others Civil Appeal No 51 of 2015**, the Court of Appeal also added that overriding objectives are part of all legislations which refer to expeditious and just determination of cases further placing the burden on parties in the dispute to assist court in achieving these objectives. It delivered itself thus:

“.... It does not amount to observing that constitutional demand to hear largely the same dispute between largely the same parties in two different courts and on two or more different occasions. Such approach entails tying down two courts and calling the same witnesses twice thus incurring unnecessary costs and expense. Order 11, rule 3(1) (h) of the Civil Procedure Rules regarding pre-trial directions and conferences nowadays empowers the court, with a view to furthering expeditious disposal of cases and case management, to among other things, consolidate suits.

83. Further that:

“In addition, the overriding objective found in virtually all the legislation regulating the procedure of the High Court, the ELC and even this Court stipulates that the objective of the legislation is to facilitate the just, expeditious, proportionate and affordable resolution of disputes and requires all the courts to give effect to that objective, so as to achieve the just determination of the proceedings, the efficient disposal of the business of the court, the efficient use of the available judicial and administrative resources, and the timely disposal of the

proceedings at a costs affordable by the parties

“

84. The dispute relates to the same subject matter and parties and the desirability test cited in the Nyati case (supra), is applicable to the matter before court. However, on jurisdiction to determine the dispute filed in the Originating Summons, the court is bound by the decision of the Court of Appeal in **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others[2017] KECA 79 (KLR)** where the court held at paragraphs 40 and 41 that:-

“40. To the appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under Section 2 of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purposes of this suit, that instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.

41. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land as discussed herein above. Such contracts, in our view, ought to be incidental to the 'use' of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court."

85. It is clear that the 4th Defendant's case which is similar to what is before this court relates to the sale by auction and subsequent title issued following the sale. The evidence would feature the memorandum of sale, charge document and the processes of auction under **Section 90 and 96 of the Land Act and Auctioneers rules** which do not fall within the ambit of **Section 13 (2) of the ELC Act** now limited to disputes relating to use of land and the environment. The statute enacts that:

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

a) climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b) relating to compulsory acquisition of land;

- c) relating to land administration and management;**
- d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and e. any other dispute relating to environment and land.**

86. The charge instrument and subsequent sale through auction properly fall under the Commercial Division of the High Court, by their nature of instruments and processes conferring enforceable rights.

Whether an injunction should issue.

87. For injunctive orders to be granted the Applicant must satisfy three (3) core legal tests of granting injunction. That he has *prima facie* case which is proved against the defence, that the injury or loss is irreparable and damages would not cure the loss and that balance of convenience tilts in favour of granting the injunction.

88. The Applicant has challenged the completed sale by auction. The 1st Defendant case is that the Applicant failed to settle loan arrears and accrued interests and charges, and, the sale proceeded when the injunction stopping the sale was discharged by the court. **Wendoh J** found that the Plaintiff had been in arrears at the time of the impugned sale and that the relief would be in compensation of damages.

89. In **Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR**, the land court explained irreparable harm to mean that

“...the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

90. In **Nancy Kahoya Amadiva v Expert Credit Limited & Another [2015] eKLR**, the Court of Appeal reaffirmed its decision holding that:

“... We find it necessary to consider the remedies available for sale arising out of a non-valid statutory notice. We restate that a mortgagor who has been prejudiced by a defective auction can only be remedied in damages. This is both under RLA and ITPA. Ringera J in David Ngugi Mbutia v Kenya Commercial Bank and Another (HCCC No. 304 of 2001) Unreported set the principle thus: a person damnified by a transfer of property by mortgagee to an auction purchase pursuant to any irregular or improper

exercise of statutory power of sale is entitled to recover any damages directly suffered by him from the auctioneer. The same judge restated the position in *Hilton Walter Osinya and Saving and Loan (K) Ltd and another (HCCC No.274 of 2001) Unreported. We agree with the above observation of Ringera J (as he then was).*

- 91.** In ***Euro Bank Limited (In Liquidation) v Twictor Investments Limited & 2 others [2020] eKLR*** the court also held that if the sale was improper, or caused prejudice to the mortgagor recourse lay in damages and not in cancellation of the Title Deed. Further that if the Court was minded to cancel the 3rd Respondent's Title Deed, then it should have been restored to the position before the sale, and not revert it to the 1st Respondent who had not cleared the loan with the Bank.
- 92.** The Applicant seeks financial statements and also claims that money was not reflected in the accounts; in addition, he claims fraudulent dealings with the title document which was lost when he had secured a buyer and was mysteriously reissued to frustrate his attempts to secure the land. I find that the same grounds challenge the statutory power and chargor's rights but the sale having proceeded and title having followed; the issues are set for trial.
- 93.** The Applicant has averred that he had been in occupation all along and that he faces a threat of eviction when the

dispute against the Respondents remains unresolved. It would not be appropriate to find that his case is not arguable and that he does not deserve hearing. I find that the issues are suitable for trial, however, the damage caused is not irreparable hence not calling for issuance of an injunction.

94. As regards balance of convenience. The bank executed the chargee's statutory power of sale and had issued demand notice raising the arrears. The Applicant on the other hand claims that the sale of land is a serious issue and ought to be procedural to protect his rights under Article 40 of the Constitution. Further that he faces eminent eviction.

95. I have considered the grounds of opposition and that the 4th Defendant has sought eviction when this case is pending. In case of doubt, the court seeks to avoid injustice and to settle for the choice which results in less harm and greater good.

96. In **Pius Kipchirchir Kogo case** (supra), balance of convenience was defined as a concept in the following manner:

"The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of

convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

97. In **Amir Suleiman v Amboseli Resort Limited [2004] eKLR** the court explained in part that:

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

98. While in **Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR** the court opted for status quo orders holding that:

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the

injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

99. The Applicant has been in occupation during existent cases and the 3 cases are pending trial. The Plaintiff stands to suffer more damage and risks eviction before parties are heard on their cases. The bank has obtained amounts due following the public auction and the bank has limited interest in the suit land, I find that no prejudice will be caused to the 1st Defendant.

100. The 4th Defendant is the registered proprietor; she also filed a case after the current suit. Her loss can be compensated through monetary damages for the period she had been denied right to the land.

101. From the foregoing, I order thus:

- 1) The status quo at time of filing the application shall be maintained and the matter shall be heard within 60 days as ordered earlier in Nyeri ELC case No 40 of 2018.**
- 2) The Plaintiff/Applicant is restrained from making permanent developments on the land until determination of the suit.**
- 3) The prayer for consolidation of ELC Case No 2 of 2024 (OS) and Nyahururu HCC No 4 of 2018 be and is hereby declined,**
- 4) The amendment of pleadings is allowed which should be done within 14 days.**
- 5) Costs shall abide hearing of the substantive matter.**

102. It is so ordered.

Dated, signed and delivered virtually this 20th day of February, 2026.

.....
L.N. MUTENDE
JUDGE