



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC NO. 27 OF 2015

JOYCE MINAYO KEYA:.....PLAINTIFF/APPLICANT

VERSUS

KEYA KIGAGA:.....1ST DEFENDANT/RESPONDENT

PRESTON WOODS CO. LTD:.....2ND DEFENDANT/RESPONDENT

EQUATORIAL COMM. BANK:.....3RD DEFENDANT/RESPONDENT

NYALUOYO AUCTIONEERS:.....4TH DEFENDANT/RESPONDENT

RULING

This application is dated 9th February 2015 and is brought under order 40 rule 1 and 2, order 51 rule 2010 of the civil procedure rules Section 1A, 3, 3A and 63 of the Civil procedure Act Cap 21 laws of Kenya Section 103 (1) and Section 104 (i) (iii), Section 78 (i) of the Land Act 2012 seeking the following orders;

1. That this application be certified urgent and it be heard on priority basis.
2. That pending interparties hearing of this application, a temporary injunction be issued against the 3rd and 4th defendants/respondents from disposing off, alienating, transferring, selling and or exercising its statutory power of sale on all that parcel of known as NANDI/KOIBARAK B/381 and TIRIKI/CHEPTULU/830.
3. That pending hearing and determination of this suit, a temporary injunction be issued against the 3rd and 4th defendants from disposing off, alienating, transferring, selling and or exercising its statutory power of sale on all that parcels of land known as NANDI/KOIBARAK B/381 and TIRIKI/CHEPTULU/830.
4. That costs of this application be provided for.

The applicant submitted that, she is married to the 1st defendant herein and they have been staying as husband and wife for about 50 years (annexed and marked JMK 1 is a copy of the marriage certificate). That during the subsistence of the said marriage they bought and or jointly acquired properties namely NANDI/KOIBARAK B/381 and TIRIKI/CHEPTULU/830 though they agreed to have them both registered in the names of the 1st defendant herein (annexed and marked JMK 2 (a) and (b) are copies of the official searches). That she and the 1st defendant established a matrimonial home on land parcel registration number NANDI/KOIBARAK B/381 and further established a family business on land parcel

registration number TIRIKI/CHEPTULU/830 which currently contains family business premises. That she has been staying on their matrimonial home for the last 50 years and carrying out business on the family business land as stated above. That on or about 7th February 2015 her son one Francis Kiganga rung her and told her that he had seen an advert in the daily nation and read about a public auction. She inquired further only for him to tell her that her matrimonial property had been advertised for sale that was due on 11th February, 2015(annexed and marked JMK 3 is a copy of the advert). That she further asked him what he meant and he explained to him that their property namely land parcel registration numbers Nandi/Koibarak 'B'/381 and Tiriki/Cheptulu/830 had been used by the 2nd defendant to secure a charge with the 3rd defendant and as such the 2nd defendant had defaulted in servicing the loan. She further inquired from the 1st defendant who disclosed to her that indeed he had given out the said property to secure a charge and he did not expect the 2nd defendant to default. That all these transactions were carried out in her absence, without her knowledge and or consent, she was further never informed of such a transaction until her son rung to tell her that her property was due for public auction. Following the said conversation and confirmation from the 1st defendant, she proceeded to call for a family meeting and notified her sons and daughters who agreed to contribute towards settling the loan because they were not also informed of the transaction. That her family is agreeable to settling the said amount given time, as she was never aware of such a transaction. That she has extensively developed the two parcels of land and she stands to suffer irreparable loss that cannot be compensated by way of damages. That she is likely to be rendered homeless and destitute should the bank proceed to exercise its statutory power of sale which is due anytime from now.

The 3rd respondent submitted that he is the legal officer of the 3rd defendant/respondent bank and is fully conversant with all matters pertaining to this suit. That he has the authority of the 3rd defendant's board of directors to swear the affidavit on their behalf and thus competent to make and swear the same. That the said application is made with extreme bad faith, it is incompetent and made with the sole purpose to vex the 3rd respondent and prevent it from exercising its statutory power of sale which has crystallized. That the 2nd defendant Preston (K) Woods Ltd, applied for a facility/term loan to enable it buy a business entity better known as Mungakha Farm Millers which is situated on title No. Kakamega/Lubao 564 and Kakamega/1/611. That in the offer letter dated 7th November, 2011, the purpose of the facility was clearly spelt out, i.e. the term loan was to be utilized to provide 80% of the total capital to finance the purchase of the above mentioned property. That in these kinds of transactions and based on the undertakings exchanged between the purchaser and the vendors advocates, the funds are ordinarily disbursed to the vendors lawyer directly on completion of the said transaction. That after a process of thorough evaluation of the 2nd defendant loan application together with a valuation of the properties which the 2nd defendant was offering as security, the 3rd defendant agreed to give the 2nd defendant a term loan of Ksh. 13 million and accordingly issued to the 2nd defendant a letter of offer dated the 7th day of November, 2011. (Annexed and marked "BA 1" is a copy of the same.) The loan was to be secured by the following; First legal charge over L.R. No. Kakamega/Lubao/564 to secure Ksh. 1,700,000/=. First legal charge over L.R. No. Kakamega/1/611 to secure Ksh. 3,000,000/=. First legal charge over L.R. No. Nandi/Koibarak 'B'/381 for Ksh. 4,900,000/=. First legal charge over Tiriki/Cheptulu/380 for Ksh. 3,500,000/= (Annexed and marked BA-II (a) to (d) are copies of the said charge documents).

That it was expressly agreed that the 2nd defendant would make repayments of Ksh. 359,630.70 monthly calculated on a reducing balance payable from 23rd April, 2012 for a period of 48 months. That the 2nd defendant herein ran into defaulted immediately and has failed to regularize its account which is in debit to the tune of Ksh. 19,604,741.88/= as at 13th February, 2015 (Annexed hereto and marked BA-III are the bank statements). That to prevent the bank from selling the charged properties the 2nd defendant did file a suit being **Kakamega HCC Case No. 12 of 2013 Preston Woods Ltd vs. Equatorial commercial Bank ltd and Another.** (Annexed and marked BA-IV is a copy of the said application for injunction and plaint). That upon hearing the said application on merit the same was dismissed vide a ruling of Honourable Justice Said J. Chitembwe dated 8th October 2014 (Annexed and marked BA- is a copy of the said ruling). That indeed after the injunction was dismissed they did instruct the 4th defendant to re-advertise the properties charged which was done (annexed and marked BA-VI is a copy of the newspaper

advert dated 7th February 2015). There is no proof that the applicant and the 1st defendant bought and/or jointly acquired properties namely Nandi/Koibarak 'B'/381 and Tiriki/Cheptulu/830 (hereinafter referred to as the suit properties). That as at November, 2011 when the charge was registered the suit properties solely belonged to the 1st defendant without any encumbrance registered as against it, and he enjoyed exclusively all privileges belonging thereto, free from all other interests (as conferred by section 28 of Registered Lands Act Cap 300, currently repealed). That vide a letter dated 8th December 2011 and 30th May 2011 signed by the 1st defendant he confirmed that he issued out his title deeds to the suit property willingly to secure loan for Preston Woods Co. (K) Ltd. The instruction is irrevocable and will remain in force until the borrowings are paid in full. He has received independent legal advice and executed the security document out of his own free will. He understood the legal, financial and economic consequence of executing the security document. Finally he acknowledged that the charge to be created over the suit property shall be enforceable in accordance to its terms (Annexed hereto marked BA-VII (a) and (b) are copies of the said letters).

The 1st defendant understood the consequences of executing the security documents to have a charge registered over the said properties notwithstanding there being his family home and business premise respectively. That the 2nd defendant did re-advertise the suit properties for sale on 7th February 2015. That the plaintiff is not being candid, where she alleges that she got to know of the charge over the suit property in February, 2015. That in initial application filed (annexture BA-IV) the applicant depones clearly in paragraph 15 of the supporting affidavit that the guarantor and their family are up in arms due to threat to dispose of family property. That as at April, 2013 the plaintiff was fully in the know of what transpired and cannot be heard to allege otherwise. That under the repealed Registered Land Act (Cap 300) there was no express/implied provision requiring one's spouse to consent before family property was charged, this clause came into effect vide the Land Registration Act (No. 3 of 2012) Section 28 (a) dealing with spousal rights over matrimonial property. That the said Act Land Registration Act (No. 3 of 2012) came into effect on 2nd May, 2012, way after the charges herein had been registered on 30th November, 2011 and as such the applicant cannot seek to apply this provision retrospectively. That all procedures as laid down by law were duly followed in registering the said charge. That the charges over the suit property were properly executed and registered and section 74 of the Registered Land Act Cap 300 clearly explained to the 1st defendant and thus we cannot be faulted in any manner. That it is trite law that once a property is charged, there are implications on the charger if he fails to pay and issue of irreparable loss does not arise. This being a commercial transaction and due process having been followed there is no basis to stop the sale. The plaintiff has not shown a prima facie case with any chance of success. The balance of convenience does not tilt in favour of granting the orders sought as the loan outstanding is over Ksh. 19,604,741.88/= and will prejudice both parties if left to grow. The plaintiff lacks locus standi to challenge the charge created over Nandi/Koibarak 'B'/381 and Tiriki/Cheptulu/830. Provision of section 28 (a) of the Land Registration Act No. 3 of 2012 cannot apply retrospectively). This suit offends provision of section 6 and 7 of the Civil Procedure Act 2010. That this application lack merit and should be dismissed. That an injunction is an equitable remedy which ought to be granted to a litigant who has come to court with clean hands and not the applicant who has deliberately withheld facts and information from court.

The applicant in her written submissions submitted that, that she is the wife of 1st defendant herein who is also the registered owner of land parcels numbers Nandi/Koibarak 'B'/381 and Tiriki/Cheptulu/830 form part of the matrimonial property that was acquired by the plaintiff and the 1st defendant herein. That the plaintiff/applicant contributed wholly and generally to the acquisition of the said property which they have established a matrimonial home. The 1st defendant without knowledge and or consent of the plaintiff charged the property in favour of the 2nd defendant over a loan that was granted by the 3rd defendant. The 1st defendant and 2nd defendant have since failed to service the said charge prompting the 3rd defendant to instruct the 4th defendant to attach the subject matter of this suit and proceed to exercise the 3rd defendant's statutory power of sale. The issue in dispute is whether land parcels registration numbers Nandi/Koibarak 'B'/381 and Tiriki/Cheptulu/830 were jointly acquired by the plaintiff and the 1st defendant and whether the said parcels form part of their matrimonial property. The answer here is yes because the said parcels were acquired during the subsistence of the marriage between the plaintiff and

the 1st defendant.

According to the provisions of the matrimonial property act 2013, matrimonial property means, either the matrimonial home, household goods and effects in the matrimonial home, any movable property jointly owned and or acquired during the marriage. This is in accordance with section 1 (4). The 1st defendant does not dispute the fact that the subject matter of this suit is matrimonial property and or contains their matrimonial home. It is also not disputed that the property was jointly acquired but registered in the names of the 1st defendant by mutual consent.

The second issue is whether the 1st defendant obtained consent of the plaintiff/applicant before proceeding to allow the 3rd defendant to charge the said property. The provisions of law under section 78 (1) of the Land Act state that “this part applies to all charges on land including any charge made before the coming into effect of this act and in effect at that time any other charges of land which are specifically referred to in any section of this part.”

It is the applicant’s submission that the defendants/respondents are bound by the provisions of the law under this act. Section 79 (3) of the Land Act states as follows: a charge of a matrimonial home shall be valid if any document or form used in applying for such charge or used to grant the charge is executed by the charger and any spouse of the charger living in that matrimonial home, or there is evidence from the document that it has been assented to by such persons. The applicant contends that her consent was never sought and or obtained, thus, the provisions of section 79 (3) were not complied with. Section 28 (a) of the Land Registration Act stipulates that: “Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and effect the same without being noted on the register”.

On the issue of spousal rights over matrimonial property it is their submission that the plaintiff/applicant has proved that she is the spouse of the 1st defendant through the annexure marked JMK1 on her supporting affidavit. The 3rd respondent argues that there was no express/implied provision requiring one’s spouse to consent before family property was charged. They submit that the respondents are still bound by the provisions of section 78 (1) of the Land Act. That the applicant has established a prima facie case with a probability of success. She has proved that she is a spouse to the 1st defendant, she has a matrimonial home on the suit property that is well established. The plaintiff/applicant further stands to suffer irreparable loss and damage should the orders sought not be granted as she stands to lose the only place she has known as home for the last 50 years or more. The 3rd respondent has raised the issue of the existence of another case vide **Kakamega HCC NO. 12 OF 2013, Preston Woods Ltd vs. Equatorial Commercial Bank Ltd & Another**, his particular case has nothing to do with the plaintiff/applicant because she is not party to that suit.

That the concern of the court is to determine if the applicant has satisfied the requirement of grant of orders of injunction whose principles were set out in the case of **Mrao Ltd vs. first American Bank of Kenya Ltd & 2 others {2003}**. The three principles were set out as follows; the applicant must show a prima facie case with probability of success. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable loss which would not be adequately compensated by an award of damages and if the court is in doubt, it will decide on the balance of convenience. It is their submission that he applicant has satisfied the requirement for grant of the injunction as sought on her application dated 9th February 2015 as explained in the detailed submissions that she is a spouse/wife of the 1st defendant and she stands to lose the only place she calls home if the orders sought are not granted.

The 3rd and 4th respondents’ submissions were as follows; by notice of motion dated 9th February, 2015, the plaintiff/applicant sought orders of temporary injunction against the 3rd and 4th defendants/respondents from disposing off, alienating, transferring, selling and or exercising its statutory power of sale on parcel number Nandi/Koibarak ‘B’/381 and Tiriki/Cheptulu/830. The 3rd and 4th defendants/respondents filed their replying affidavit on 5th December, 2015, opposing the application.

The plaintiff in her application dated 9th February, 2015 states that she is the wife to the 1st defendant and contributed generally to the acquisition of the suit properties Nandi/Koibarak 'B'/381 and Tiriki/Cheptulu/830 during the subsistence of the marriage between her and the 1st defendant. She avers that she was not aware that the said properties had been charged and the said transactions were carried out in her absence, without her knowledge and/or consent. Upon learning that the properties had been advertised, she called a family meeting and the family agreed to settle the loan amount given time as she would suffer irreparable loss and damage that cannot be compensated by way of damages.

The respondent filed a comprehensive replying affidavit dated 20th May, 2015, giving a comprehensive history of the loan granted to the 2nd defendant. Vide a loan application form dated 7th November, 2011, the 2nd defendant through its management applied for a facility/term loan to enable them buy a business entity known as Mungakha Farm Millers which is situated on title No. Kakamega/Lubao 564 and Kakamega 1/611. The purpose of the loan facility was to provide 80% of the total capital to finance the purchase of the suit parcel

Prior to the advancing of the said loan an evaluation of the properties which the 2nd defendant was offering as security was conducted. The 3rd defendant agreed to give the 2nd defendant a term loan of Ksh. 13 million and accordingly issued to the 2nd defendant a letter of offer dated the 7th day of November, 2011. The loan was to be secured by the following: First legal charge over L.R. Kakamega/Lubao/564 to secure Ksh. 1,700,000/=. First legal charge over L.R. No. Kakamega/1/611 to secure Ksh. 3,000,000/=. First legal charge over L.R. No. Nandi/Koibarak "B"/381 for Ksh. 4,900,000/=. First Legal Charge over Tiriki/Cheptulu/380 for Ksh. 3,500,000/=. It was expressly agreed that the 2nd defendant would make repayments of Ksh. 359,630.70 monthly calculated on a reducing balance payable from 23rd April, 2012 for a period of 48 months. The 2nd defendant ran into default and has failed to regularize its accounts which are in debt to the tune of Ksh. 19,604,741.88 as at 13th February, 2015 to date.

The 2nd defendant failed to settle this loan, on terms agreed upon and the Bank was forced to advertise the properties charged in order to redeem the sums owed. The 2nd defendant proceeded to file a suit being **Kakamega HCC No. 12 of 2013 Preston Woods Ltd. Vs Equatorial Commercial Bank Ltd**, seeking injunctive orders to stop the sale. The said application was dismissed on 8th October, 2015. On these premises this suit was thus res-judicata and offended the provisions of Order 6 and 7 of the Civil Procedure Rules, 2010. The 3rd respondent further states that as at November, 2011 when the charge was registered over parcel number Nandi/Koibarak 'B'/381 and Tiriki/Cheptulu/830 there was no encumbrance registered as against the title and the 1st defendant enjoyed exclusively all the privileges and appurtenances belonging thereto, free from all other interest as conferred by section 28 of the Registered Land s Act Cap 300, (currently repealed). Further provisions of the Land Registered Act (No. 3 of 2012) section 28 (a) came into effect on 2nd May, 2012 way after the charge had been registered on 30th November, 2011. Finally the 1st defendant by his letter dated 30th May 2011 and 8th December 2011 addressed to the bank confirmed that indeed he was issuing his property willingly to secure a loan for the 2nd defendant and that the instructions remained irrevocable and will remain in force until the borrowings are fully repaid. The 3rd and 4th respondent thus prayed that the said application be dismissed with costs.

It is their submission that the doctrine of res judicata does apply to this application as the issues raised are directly and substantially in issue in the former suit between the same parties, or between parties under whom they claim, the contents of the replying affidavit sworn by Brian Asin on the 15th of May, 2015 states that, the 2nd defendant filed a suit being **Kakamega HCC NO. 12 OF 2013, Preston Woods Ltd vs. Equatorial Commercial Bank Ltd & Another**, to prevent the bank from selling the charged properties and the application for injunction was dismissed vide a ruling of Honourable Justice Said J. Chitembwe dated 8th October 2014. They have produced evidence as annexed copies of the proceedings (Application for injunction, plaint and ruling which are marked as "BA-IV and BA-V"). Further in paragraph 21 of the replying affidavit, it is clearly brought out that the 2nd defendant in the initial suit

knew of the family pressure he had and stated as much in paragraph 15 of the supporting affidavit to the injunction application by stating that “the guarantor and their family are up in arms due to the threat to dispose of family property”.

Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

“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.”

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. It is not in contention that a previous suit exists being **Kakamega HCC NO. 12 OF 2013, Preston Woods Ltd vs. Equatorial Commercial Bank Ltd & Another**, wherein the 2nd defendant herein sought to restrain the bank from exercising its statutory right to sell the suit properties to recover the sums owed. The said injunction application in the said matter was dismissed on 8th October, 2014. The said suit dealt squarely with the similar issues raised herein, regarding the same cause of action, and most importantly the claim is made between the same parties, or between parties under whom they or any of them claim this suit thus should be stayed as the section is couched in mandatory terms. Further it is clear that under section 7 of the Civil Procedure Act, the principle of res judicata applies to bar subsequent proceedings when there has been adjudication by a court of competent and concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in controversy raised. Referring to the case of in the case of **Pop In Kenya Ltd & 3 Others vs. Habib Bank A.G. Zurich C.A. NO. 80 of 1988** where it was held quoting with approval the case of **Yat Tung Investment Co. Ltd vs. Dao Heng Bank Ltd (1975) AC 581**.

“Where a given matter becomes the subject of litigation in and of 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 litigation in respect of matters which might have been brought forward as part of the subject in contest, but which were not brought forward only because of 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 point upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward.

In the case of **Henderson vs. Henderson (1843) 3 Hare 100 to 115** the same holding was reached that *“Res Judicata also applies to every point which might properly belonged to the subject of litigation and which the parties exercising due diligence might have brought forward at the time.”*

It is their submission that the only issue before the court is to determine if the plaintiffs consent was necessary in order to approve charging of the suit properties. This is not a new or novel issue which the parties did not know about. It is just but a red herring used to buy time and prevent the bank from exercising its statutory right to sell the charged properties. And as clearly stated in the above authorities,

res judicata also applies to every point which might properly belong to the subject matter under litigation and which the parties exercising due diligence might have brought forward at that time. The question of res judicata is a fundamental jurisdiction issue, which must be resolved before the merit of the matter is considered, as it goes to the root of the matter and is the basic foundation that enables the court to make competent and viable decisions. If the court lacks jurisdiction, it lacks power to be invoked by the party seeking to benefit from such power. That the plaintiff's application be struck out for being incompetent as it offends the sound principals of res judicata.

The plaintiff's application is premised on section 1A, 1B, 3A, 63 of the Civil Procedure Act, order 40 Rule 1 and 2 of the Civil Procedure Rules and section 103 (1), 104 (1) (iii) and Section 78 of the Land Act 2012. The application primarily seeks to restrain the 3rd and 4th defendant from exercising their statutory powers of sale of the suit properties being NANDI/KOIBARAK "B"/381 and TIRIKI/CHEPTULU/830. The plaintiff's application is in summary based on the following grounds.

- The plaintiff is the wife of the 1st defendant and that she did not consent to have the properties charged in favour of the 2nd defendant a company run by his son in law.
- The plaintiff stands to suffer irreparable loss if the sale of the charged property is sold by the respondent.
- That her family are agreeable to settling the said amount given time.

The principals governing the grant of interlocutory injunction are clear beyond peradventure. As stated in the case of **Giella vs. Cassman Brown (1973) EA 358**.

"The conditions of granting an injunction are now, I think well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

Furthermore, as elaborated in the case of **Mrao Ltd vs. first American Ban of Kenya Ltd & 2 others {2003}** Hon Bosire J.A. held that:

"So what is a prima facie case? I would say that it is a case in which on the material presented to the court or tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

Further he goes on to state that *"..... a prime facie case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."*

It is not in dispute that the suit properties Nandi/Koibarak 'B'/381 and Tiriki/Cheptulu/830 exclusively belong to the 1st defendant. He did signed letters dated 8/12/2011 and 30/5/2011 addressed to the bank, authorizing them to use his titles (suit properties) willingly to secure loan for Preston Woods Co. (K) Ltd. The process of obtaining consent of the land board and having the charge registered too is not dispute. The only contention of the plaintiff is that she did not give her consent as the wife of the 1st defendant to have the properties charged. But as clearly stated the charges were registered in November, 2011, way before provisions of Land Registratio0n Act (No. 3 of 2012) came into effect in May, 2012. The provision of section 28 (a) thereof are not applicable. Secondly the plaintiff/applicant is not privy to the contract between the 1st, 2nd and 3rd defendants as chargor, borrower and chargee. She thus has no capacity/locus to challenge the same. See authority **Nairobi HCC NO. 1838 of 2001 Nairobi Mamba Village vs. National Bank of Kenya** Ringera J (as he was then) stated as follows:-

"An interlocutory injunction in an equitable remedy which maybe issued at the instance of a party to the suit to protect his legal rights from being violated by unlawful acts of another party. In the

context of rule (1) of Order 39 of the Civil Procedure Rules, the party seeking to prevent alienation, wastage or damage to the property in dispute therein must establish that he has a legal right in such property, which he seeks to protect by the injunction sought”.

“..... he cannot properly seek to restrain the charge from selling the charged property for the reason that the intended sale is pursuant to the exercise of the contractual and statutory powers of the charge which were expressly or impliedly contained in the contract to which the plaintiff is not a party. In my judgment, the only person who can legitimately complain that the power of sale is being exercised unlawfully, irregularly or oppressively is the chargor.

The court cannot deviate from the intention of the parties to a contract the sacred duty of the court is to enforce and/or legitimize what parties have agreed between themselves. They relied on the case of **Gatobu M’ibuutu Karatho Vs. Christopher Muriithi Kubai (2014) eKLR** where the court cited the decision of the Court of Appeal in **National Bank of Kenya Ltd Vs. Pipeplastic Samkolit (K) Ltd & Another (2002) EA 503** where it stated:-

“This, in our view, is a serious misdirection on the part of the learned judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause.”

Also in the case of **HCC No. 3125 of 1995 John P.O. Mutere & Another vs. Kenya Commercial Bank Ltd** – quoted with approval in **Housing Finance Finance Company of Kenya vs. Ngeye Kitson Mondo (2006) eKLR** the court states as follows:-

“Once a power of sale has arisen a mortgagee has the right to exercise it. The court has no power to prevent the exercise of that power if it is properly exercised. It is a power parliament has granted a mortgagee and courts cannot and ought not to interfere if it is being exercised.”

Finally the applicant cannot claim that she would suffer irreparable loss which cannot be adequately remedied. The decision of Justice J.M. Mutungi in **ENW VS PWM & 3 Others (2013) eKLR**, where he stated that

“Where a property that would otherwise be considered as matrimonial property is tendered as security for a bank loan as in the instant matter, such property becomes a commercial commodity available in the market and liable to be sold by the chargee under the chargees statutory power of sale and the exercise of such power of sale cannot be defeated by a claim that such property constitutes matrimonial property.”

Further in the above cited case law, Justice J.M. Mutungi dismissed the applicant’s application for an injunction, where the applicant’s ground was that her matrimonial home where she resided with her three children was in danger of being disposed of. The judge further stated that:-

“Charges taken before the enactment of the land registration act 2012 cannot be invalidated on the basis that spousal consent had not been obtained. It was not a requirement prior to the enactment of the new Land Registration Act and therefore the plaintiff in the present case cannot have refuge under the new Land Act.”

The 3rd defendant/respondent continues to incur losses as the loan amount remains unpaid by the 2nd respondent occasioning them to losses currently to the tune of Ksh. 19,745,711.88 as at 31st January, 2015. That you proceed to find the plaintiff/applicant’s application dated 9th February, 2015 is unmerited and should be dismissed the same with costs to the 3rd & 4th Respondents.

This court has carefully considered the applicant’s and the 3rd & 4th respondents’ submissions and annexures herein. The 1st and 2nd respondents/defendants were served but failed to attend court or file

any grounds in opposition. The issues to be determine in this case are two;

1. Whether the suit is res-judicata?
2. Whether a prima facie case has been established to entitle the applicant for orders sought in her application.

I concur with the submissions from the 3rd and 4th respondents that the question of res judicata is a fundamental jurisdiction issue, which must be resolved before the merit of the matter is considered, as it goes to the root of the matter and is the basic foundation that enables the court to make competent and viable decisions. If the court lacks jurisdiction, it lacks power to be invoked by the party seeking to benefit from such power. I will therefore proceed to determine the issue of whether or not this suit is res-judicata.

This application is premised on the following grounds; that the applicant is the wife of the 1st defendant who is the registered owner of the suit parcels. The applicant contributed generally to the acquisition of the suit property during the subsistence of the marriage between the 1st defendant and the plaintiff. That the applicant was never aware of the fact that her matrimonial property had been charged by the 1st defendant, neither was she involved or consent to the said charge. That the suit properties have since been advertised and is due for sale anytime from now if the orders sought are not granted. That the applicant stands to lose the only place she has known as home should the 3rd defendant be allowed to exercise its statutory power of sale. That the applicant is ready and willing to have the loan repaid given time. That it is in the interest of justice that the orders sought be granted.

It is not disputed that, the 2nd defendant/respondent Preston (K) Woods Ltd, applied for a facility/term loan to enable it buy a business entity better known as Mungakha Farm Millers which is situated on title No. Kakamega/Lubao 564 and Kakamega/1/611. That in the offer letter dated 7th November, 2011, the purpose of the facility was clearly spelt out, that is, the term loan was to be utilized to provide 80% of the total capital to finance the purchase of the above mentioned property. That after a process of thorough evaluation of the 2nd defendant loan application together with a valuation of the properties which the 2nd defendant was offering as security, the 3rd defendant agreed to give the 2nd defendant a term loan of Ksh. 13 million and accordingly issued to the 2nd defendant a letter of offer dated the 7th day of November, 2011. (Annexed and marked "BA 1" is a copy of the same.) The loan was to be secured by the following; First legal charge over L.R. No. Kakamega/Lubao/564 to secure Ksh. 1,700,000/=. First legal charge over L.R. No. Kakamega/1/611 to secure Ksh. 3,000,000/=. First legal charge over LR. No. Nandi/Koibarak 'B'/381 for Ksh. 4,900,000/=. First legal charge over Tiriki/Cheptulu/380 for Ksh. 3,500,000/= (Annex and marked BA-II (a) to (d) are copies of the said charge documents).

It is also not disputed that, it was agreed that the 2nd defendant/respondent would make repayments of Ksh. 359,630.70 monthly calculated on a reducing balance payable from 23rd April, 2012 for a period of 48 months. That the 2nd defendant/respondent herein ran into default immediately and has failed to regularize its account which is in debit to the tune of Ksh. 19,604,741.88/= as at 13th February, 2015 (Annexed and marked BA-III are the bank statements). That to prevent the bank from selling the charged properties the 2nd defendant/respondent did file a suit being **Kakamega HCC Case No. 12 of 2013 Preston Woods Ltd vs. Equatorial commercial Bank ltd and Another** (annexed and marked BA-IV is a copy of the said application for injunction and plaint). That upon hearing the said application on merit the same was dismissed vide a ruling of Honourable Justice Said J. Chitembwe dated 8th October 2014 (Annex and marked BA- is a copy of the said ruling). That indeed after the injunction was dismissed they did instruct the 4th defendant to re-advertise the properties charged which was done (annexed and marked BA-VI is a copy of the newspaper advert dated 7th February 2015).

Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

“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.”

The applicant/plaintiff submitted that, she is the wife of 1st defendant herein who is also the registered owner of land parcels numbers Nandi/Koibarak ‘B’/381 and Tiriki/Cheptulu/830 form part of the matrimonial property that was acquired by the plaintiff and the 1st defendant herein. That the plaintiff/applicant contributed wholly and generally to the acquisition of the said property which they have established a matrimonial home. The 1st defendant without knowledge and or consent of the plaintiff charged the property in favour of the 2nd defendant over a loan that was granted by the 3rd defendant. The 1st defendant and 2nd defendant have since failed to service the said charge prompting the 3rd defendant to instruct the 4th defendant to attach the subject matter of this suit and proceed to exercise the 3rd defendant’s statutory power of sale. She was never informed of such a transaction until her son rung to tell her that her property was due for public auction. The issue in dispute is whether land parcels registration numbers Nandi/Koibarak ‘B’/381 and Tiriki/Cheptulu/830 were jointly acquired by the plaintiff and the 1st defendant and whether the said parcels form part of their matrimonial property hence her request for an interim injunction against the sale.

It is not in contention that a previous suit exists being **Kakamega HCC NO. 12 OF 2013, Preston Woods Ltd vs. Equatorial Commercial Bank Ltd & Another**, wherein the 2nd defendant/respondent herein sought to restrain the bank from exercising its statutory right to sell the suit properties to recover the sums owed. 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. Any issues submitted to be new issues raised in this matter ought to have been raised in the previous suit. This was held in the case of **John Omolo Oracha & 3 Others v Kenya Petroleum Refineries Ltd & 3 Others (2016) eKLR**. I find that the plaintiff/applicant is not being truthful and/or candid, when she alleges that she got to know of the charge over the suit property in February, 2015. In the initial application filed (annexture BA-IV) the applicant depones in paragraph 15 of the supporting affidavit that the guarantor and their family are up in arms due to threat to dispose of family property. I find that as at April, 2013 the plaintiff/applicant was fully in the know of what transpired and cannot be heard to allege otherwise at this late stage. This suit is an afterthought and meant to the 3rd respondent from proceeding to exercise its statutory power of sale. The plaintiff/applicant has not come with clean hands. I find that issues here are were directly and substantially in issue in a former suit (**Kakamega HCC NO. 12 OF 2013, Preston Woods Ltd vs. Equatorial Commercial Bank Ltd & Another**) as between the same parties, and/or between parties under whom they or any of them claim. The said issues have been heard and finally decided by that court. (See Section 7 of the Civil Procedure Act Cap 21).

For those reasons this case is res judicata and as this court lacks jurisdiction it cannot go into the merits of this case. I find that the plaintiff/applicant’s application and suit herein must be struck out for being incompetent as it offends the sound principals of res judicata. Consequently, I strike out the suit and the application dated 9th February 2015 with costs to the 3rd and 4th respondents.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23rd DAY OF
NOVEMBER 2017.**

N.A. MATHEKA

JUDGE