



REPUBLIC OF KENYA



Mombasa Water Products Limited v Kenya Commercial Bank Limited (Environment & Land Case E007 of 2023) [2024] KEELC 4275 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4275 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E007 OF 2023**

LL NAIKUNI, J

MAY 16, 2024

BETWEEN

MOMBASA WATER PRODUCTS LIMITED PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED DEFENDANT

RULING

I. Introduction

1. Before the Honourable Court for its determination are two (2) applications being the Notice of Motion application dated 15th August, 2023 by the Plaintiff, while the other was dated 25th September, 2023 was filed by the Defendant.
2. Upon service, each of the Respondents filed their Replies accordingly. The Honourable Court will be dealing with each of the applications distinctly but deliver a single Ruling thereof.

II. The Notice of Motion application dated 15th August, 2023 by Plaintiff.

3. The application by the Plaintiff/Applicant was brought under the provision of Order 40 Rule 1, 2, 3 and 4 of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the *Civil procedure Act*, Cap. 21. The Applicant sought for the following prayers:
 - a. Spent.
 - b. That pending the hearing and determination of the application herein inter partes the Defendant by itself, its servants and/or agents, particularly M/s Keysian Auctioneers be restrained by a temporary injunction from alienating, selling, or in any other way dealing with the plaintiff's property known as Plot No. MN/1/12003.



- c. That pending the hearing and determination of the suit the Defendant by itself, its servants and/or agents, particularly M/s Keysian Auctioneers be restrained by a temporary injunction from alienating, selling, or in any other way dealing with the Plaintiff's property known as Plot No. MN/I/12003.
 - d. That the costs of this application be provided for.
4. The application is based on the grounds, testimonial facts and averments based the 15 Paragraphed the supporting affidavit by Joseph Mbugua Gichanga and he averred as follows that:-
- a. The Deponent was one of the Directors of the Plaintiff herein and hence conversant and competent to swear this Affidavit on its behalf.
 - b. At all material times the Plaintiff was and still is the registered owner of all that property known as Plot No. MN/I/12003 (hereinafter referred to as the "suit property") with a value of approximately Kenya Shillings Sixty Two Million (Kshs.62,000,000/=). Annex herewith was a copy the official search and valuation report marked as "JMG - 1".
 - c. The Plaintiff applied to the Defendant for a loan facility and used the suit property as security for the loan facility. Vide a charge dated 9th September, 2011 Letter of Offer dated 18th February, 2014 the Defendant approved the Plaintiff's request and offered the Plaintiff a facility of a sum of Kenya Shillings Fifteen Million Eight Hundred Thousand (Kshs.15,800,000/=). Annexed herewith a copy of the charge document and marked as "JMG - 2".
 - d. The Plaintiff had been diligently making payments towards repayment of the loan facility however sometime in the year 2015 the Plaintiff started falling into arrears due to financial constraints.
 - e. The Defendant then threatened to sale the suit property without following the laid down law thus necessitating the Plaintiff to initiate the civil case "High Court (Mombasa) Civil Suit No. 40 of 2015; Mombasa Water Products Limited – Versus - Kenya Commercial Bank Limited. Through a consent by the parties, it was agreed as follows:-
 - "(1) That the Application dated 23rd January, 2018 be marked as settled on the following terms:
 - i. the Plaintiff procure a purchaser for the suit property for a sum of not less than the reserve price provided by the bank within 60 days and have the purchase price paid to the Defendant within the same period.
 - ii. In default, the Defendant be at liberty to stage a public auction based on their defaulted reserve price upon advertising the sale on daily newspaper of wide circulation for at least 15 days.
 - f. That upon foregoing terms this suit was marked as fully compromised with each part bearing own costs." Annexed herewith a copy of the order and mark the same as "JMG - 3".
 - g. Through an advertisement made in the local dailies – "The Daily Nation on 7th August, 2023, the Defendant had advertised the property for sale on 17th August, 2023. The intended sale was clearly in violation of order (b)above. Annex herewith was a copy of the advertisement and mark as "JMG - 4".



- h. Further, the intended sale of the suit property by the Defendant was tainted with grave illegalities for the following reasons:
- a. The Defendant has not served the Plaintiff within a forty five (45) days notice as provided for under Rule 15 (d) of the Auctioneers Rules as the purported 45 days' notice that the Plaintiff took from the auctioneer on 11th May, 2021 was dated 21st March, 2021 and was addressed to "P.O Box 540-00600" yet in the letter of offer the agreed address was P.O Box 4709-01002.
 - b. The intended sale offended Section 97 (2) and (3) of the *Land Act* as read with Rule 11 (b) (x) of the Auctioneers Rules, which provides that the Defendant undertake a current valuation of the suit properties before undertaking the said sale, as no current valuation of the suit properties had been undertaken herein. For the avoidance of any doubt such a report should not be older than 12 months upto the date of the intended date of sale of the property.
 - i. The Plaintiff stated that through a letter dated 4th August, 2023, one of the Plaintiff's directors notified the Defendant that he would be receiving compensation exceeding the sum of Kenya Shillings Two Billion (Kshs. 2,000,000,000/=) from the National Land Commission and would like them to first clear the facility using the said funds and further created a fixed deposit account for the sum of Kenya Shillings Five Hundred Million (Kshs. 500,000,000/=). Annexed herewith a copy of the letter and the supporting documents from the National Land Commission and mark as "JMG - 5".
 - j. Surprisingly, upon receiving the said letter, the Defendant hurriedly advertised the suit property for sale so as to defeat the Plaintiff's right to redeem the suit property. The said action violated the principles set out under the provision of Articles 10 and 46 of *the Constitution* of Kenya, 2010.
 - k. Since it was due to receive compensation exceeding the sum of Kenya Shillings Two Billion (Kshs. 2,000,000,000/=), the Defendant should not lock it out from redeeming the suit property.
 - l. As per the information given by the National Land Commission, the compensation would have been paid before the lapse of the 1st quarter of the new financial year, that was, before the end of October, 2023. The Defendant should therefore allow the Plaintiff a chance to redeem the suit property.
 - m. As a result of the aforesaid illegal advertisement by the Defendant, the Plaintiff was apprehensive that if the suit property was disposed off through the intended unlawful public auction by the Defendant, the same would be sold at a price that was below the best available price of the suit properties due to the aforesaid grave non-compliance with mandatory provisions of the law whose primary objective was to ensure that lenders such as the Defendant, strive to notify the borrower and/or guarantors of loan facilities and or any other person affected by the sale of a charged property to give them a chance to secure the same. Further, to obtain the best possible price of a property that was sold in pursuance of the Lenders Statutory Power of Sale. Indeed, the very essence of the said legal requirement is to ensure that lenders do not as they used to do in the past, abuse their said power to the grave detriment of borrowers such as the Plaintiff herein.



- o. It was highly probable that if this matter was not certified urgent and an injunction issued restraining the Defendant, his agents or servants from undertaking the aforesaid public auction, the Defendant would proceed with the public auction to his detriment and against the interest of justice.
- q. He would suffer irreparable loss and damage if the sale proceeds whereas he had a strong case with a high probability of success. Indeed, if the Defendant was not restrained from proceeding with the sale of the suit property this suit shall be rendered nugatory.
- s. It was necessary and in the interest of justice that the court grants the orders sought herein so as to preserve the subject matter of the suit and ensure that justice is served to all parties.

III. The Responses by the Defendant.

5. While opposing the said application, the Defendant filed a Replying Affidavit sworn on 5th October, 2023 through Justus Wambua. He averred as follows:
 - a. That the Plaintiff filed Mombasa HCC 40 of 2015 and there was a narration of events and orders in favour of the Plaintiff issued where the Plaintiff was to service the loans but it consistently failed to do the same.
 - b. That finally, the afore mentioned consent was adopted by the court on 18th April, 2018 and the Plaintiff still failed to pay for the loan.
 - c. The Defendant thereafter continued pursuing the payment of the loan but was met with resistance by one of the tenants in the suit property who filed civil suits “Mombasa CMCC 109 of 2019 and Mombasa CMCC E009 of 2020” which were both dismissed as the courts lacked pecuniary jurisdiction.
 - d. That the Plaintiff by filing this suit has offended the provisions of “Res Judicata” and has neither done equity nor has it come with clean hands.
 - e. That with regard to the multiple suits, the current suit was an abuse of the court process and with the Defendant’s view that the Plaintiff was a persistent defaulter, the same sought to hide behind court orders and defeat the Defendant’s power of statutory sale.
 - f. That the Defendant denied that it failed in serving statutory notices and produced copies of notices dated 22nd September, 2014, the redemption notice dated 3rd February, 2015 and a reminder notice dated 24th July, 2023 which was sent out of courtesy.
 - g. The Defendant averred that the Plaintiff had failed to establish ‘a prima facie case’ with a probability of success and that it could be able to remunerate the Plaintiff should it succeed. Furthermore, the Defendant stated that it was capable of undertaking the suit property through valuation but was insistent that after it was charged to the Defendant it became a commodity in the market place for sale.
 - h. The loss would truly be on the Defendant as the interest that kept rising would outweigh the value of the suit property and that the balance of convenience tilted towards the Defendant. Hence, he prayed that the application be dismissed with costs.



IV. The Notice of Motion Application dated 25th September, 2023 by the Defendant.

6. The second application was filed the Defendant. It was brought under the provisions of Sections 3A and 7 of the Civil procedure Act, cap. 21 and Section 13 of the Environment and land Court Act. No. 19 of 2011. The Defendant/Applicant sought for the following orders:-
 - a. That the suit by the Plaintiff against the Defendant bank commenced by way of a Plaint dated 15th August, 2023 and filed in court on even date together with the ensuing proceedings be struck out on account of being Res Judicata to Mombasa High Court Civil Case No. 40 of 2015; Mombasa Water Products Limited – Versus - KCB Bank Kenya Limited, Mombasa CMCC No. 109 of 2019; Richard Maina – Versus - Kenya Commercial Bank & Mombasa Water Products Limited, Mombasa CMCC E9 OF 2020; Richard Mwambi Lundi – Versus - Kenya Commercial Bank & Mombasa Water Products Limited.
 - b. That the motion application dated 15th August, 2023 and filed on even date together with the ensuing proceedings be struck out on account of being Res Judicata and for otherwise being an abuse of the court process.
 - c. That the suit filed by the Plaintiff herein be struck out on the ground that the suit is filed in the Environment and Land Court while the dispute in question is purely a commercial dispute arising from the banker-customer relationship that exists between the plaintiff and the defendant.
 - d. That the Paint dated 15th August, 2023 be struck out for being an abuse of the process of court and for lack of jurisdiction.
 - e. That the cost of this application and of the suit be awarded to the Defendant.
7. The application was based on the grounds, testimonial facts and averments made out under the 17 Paragraphed supporting affidavit sworn on 25th September, 2023 by JUSTUS WAMBUA and seven (7) annextures marked as “KCB – 1 to 7” annexed thereto. He averred as follows:-
 - a. He was an employee by the Defendant as a Recovery manager, Credit Support Unit and thus conversant with the matter in dispute and duly authorized to swear this affidavit on behalf of the Defendant.
 - b. The Plaintiff had admitted at Paragraph 6 of the Plaint dated 15th August, 2023 that it instituted the civil Suit “Mombasa High Court Civil Suit No.40 of 2015; Mombasa Water Products Limited – Versus - Kenya Commercial Bank Limited after the Bank took measures to exercise its statutory power of sale over all that property known as Plot No.MN/I/12003 [Hereinafter referred to as “The Suit Property”].
 - c. vide a Plaint dated 18th March, 2015 the Plaintiff instituted the civil suit Mombasa High Court Civil Suit No.40 of 2015; Mombasa Water Products Limited - Versus - Kenya Commercial Bank Limited and sought the following reliefs:
 - i. A declaration that the purported auction sale of L.R No.MN/1/2003, Title Number CR 34752 Mombasa is wrongful, illegal, null and void ab initio.
 - ii. That a Permanent Injunction restraining the Defendant by itself, its agents and or servants from selling the Plaintiff's property in pursuance of the illegal Auctioneer's Notice dated 03.02.2015 be granted.



- iii. That the Costs of the suit to be provided for.
- d. He annexed and marked as “KCB – 1” was a copy of the Complaint dated 18th March, 2015.
- e. Additionally, the Plaintiff filed a motion application dated 18th March, 2015 and sought the following reliefs:-
 - i. That the service of this application be dispensed with and the same heard ex-parte in the first instance.
 - ii. That pending the hearing and determination of the application the Defendant by itself, its servants and/ or agents be restrained by a temporary injunction from alienating, selling or in any other way dealing with the Plaintiff’s properties known as LR. No. MN/1/12003, Title No. CR 34752 situated in Nyali, Mombasa.
 - iii. That pending the hearing and determination of the suit the Defendant by itself, its servants and/or agents be restrained by a temporary injunction from alienating, selling or in any other way dealing with the Plaintiff’s properties known as LR. No. MN/1/12003, Title No. CR 34752 situated in Nyali, Mombasa.
 - iv. That costs be provided for.
- f. He annexed and marked as “KCB – 2” was a copy of the motion application dated 18th March, 2015
- g. Vide a ruling delivered on 15th April, 2016 the Honourable Court dismissed the Plaintiff’s motion application dated 18th March, 2015. He annexed and marked as “KCB – 3” was a copy of the ruling delivered on 15th March, 2016.
- h. The civil suit being “Mombasa High Court Civil Suit No.40 of 2015; Mombasa Water Products Limited – Versus - Kenya Commercial Bank Limited was heard and determined vide a consent recorded by parties and adopted as an order of the court on 18th April, 2018 in the following terms:
 - i. That the Plaintiff to procure a purchaser for the suit property for a sum of not less than the reserve price provided by the Bank within 60 days and have the purchase price paid to the Defendant within the same period.
 - ii. That in default, the Defendant be at liberty to stage a public auction based on their reserve price upon advertising the sale in a daily newspaper of wide circulation for at least 15 days.
 - iii. That upon the foregoing terms this suit is marked as fully compromised with each party bearing its own costs.
 - iv. That the file be closed. He annexed and marked as “KCB – 4” was a copy of the consent order adopted in Court on 18th April, 2018
- i. The Suit Property had been the subject of “CMCC (Mombasa) No.109 of 2019; Richard Maina – Versus - Kenya Commercial Bank & Mombasa Water Products Limited whereupon the following reliefs were sought:-
 - i. A declaration that the purported public auction sale by the Defendants of the property known as Plot No. MN/1/12003 Title No. CR. 34752 is illegal, null and void ab initio



unless the Defendant strictly complies with the law, in particular Section 96 (2) of the Land Act and Rule 15 (d) of the Auctioneers Rules.

- ii. A Permanent Injunction restraining the Defendants by itself, its servants, employees and/or agents from alienating, selling or in any other way interfering with the Plaintiff's occupation of the premises standing on the property known as Plot No. MN/1/12003 Title No. CR. 34752.
 - iii. Costs of the Suit.
 - iv. Any other relief that this Honourable Court may deem fit to grant.
- k). Vide a ruling delivered on 14th June, 2019 the Honourable Court struck out the civil suit "CMC (Mombasa) No.109 of 2019; Richard Maina – Versus - Kenya Commercial Bank & Mombasa Water Products Limited on the basis of lack of pecuniary jurisdiction. He annexed and mark as "KCB – 5" was a copy of the ruling delivered on 14th June, 2019.
- l. Similarly, the Suit Property had been the subject of "CMCC (Mombasa) E9 of 2020; Richrd Mwambi Lundi – Versus - Kenya Commercial Bank & Mombasa Water Products Limited whereupon the following reliefs were sought:-
- i. A declaration that the purported public auction sale by the Defendants of the property known as Plot No. MN/1/12003 Title No. CR. 34752 is illegal, null and void ab initio unless the Defendant strictly complies with the law, in particular Section 96 (2) of the Land Act and Rule 15 (d) of the Auctioneers Rules.
 - ii. A declaration that the Defendants cannot evict the Plaintiff without compliance with the provisions of Section 96 (2) of the Land Act and Rule 15 (d) of the Auctioneers Rules.
 - iii. A Permanent Injunction restraining the Defendants by itself, its servants, employees and or agents from alienating, selling or in any other way interfering with the Plaintiff's occupation of the premises standing on the property known as Plot No. MN/1/12003 Title No.CR.34752.
 - iv. Costs of the suit.
 - v. Any other relief that this Honourable Court may deem fit to grant. He annexed and marked as "KCB – 6" was a copy of the Plaint dated 19th October, 2020.
- n. Vide a ruling delivered on 25th March, 2021 the Honourable Court struck out "CMCE9 (Mombasa) of 2020; Richard Mwambi Lundi – Versus - Kenya Commercial Bank & Mombasa Water Products Limited on the basis that the court lacked the jurisdiction to hear and determine the matter. He annexed and marked as "KCB – 7" was a copy of the ruling delivered on 25th March, 2021.
- o. In the foregoing premises, and by way of a Plaint dated 15th August, 2023, the Plaintiff filed the present suit seeking to litigate on the same issues and over the same subject matters which were in issue and were determined, or were capable of being determined, with finality in "High Court Civil Suit (Mombasa) No. 40 of 2015; Mombasa Water Products Limited Versus - Kenya Commercial Bank Limited, Mombasa CMCC No. 109 of 2019;Richard Maina – Versus - Kenya Commercial Bank & Mombasa Water Products Limited and Mombasa CMCC E9 OF 2020; Richard Mwambi Lundi – Versus - Kenya Commercial Bank & Mombasa Water Products Limited.



- p. He was advised by his Counsel on record on behalf of the Bank that the current suit and motion application offended the doctrine of res judicata and was a gross abuse of the Court process.
- q. Further, it was manifestly clear that the abovementioned suits were contrived to clog the Bank exercising its statutory power of sale. Therefore, the contention by the Plaintiff that the Bank should be restrained from exercising its statutory power of sale over the Suit Property as it was illegal, null and void ab initio never justified the filing of the present suit as if the Plaintiff was litigating on a new issue.
- r. Moreover, the Plaintiff had not demonstrated any grounds and or evidence to entitle it to orders sought against the Bank which was a testament that there were no new issues raised in the present suit.
- s. In the premises, he was advised by his Counsel on record on behalf of the Bank, that that, the suit filed herein by way of a Plaint dated 15th August, 2023 was res judicata and amounted to a gross abuse of the court process and the entire Plaint together with the Motion Application should be struck out with costs.
- t. The Plaintiff had filed this suit in the Environment and Land Court. The dispute in question was a purely commercial dispute which arose from the default by the Plaintiff in repaying loans borrowed from the Defendant. Consequently, the Honourable Court lacked the requisite jurisdiction to hear and determine this suit. The same should be struck out with costs.

V. Grounds of Opposition by the Plaintiff

- 8. The Plaintiff in a rejoinder filed grounds of opposition dated 6th November, 2023 stating the following that:-
 - a). A new cause of action could not be defeated by the doctrine of Res Judicata.
 - b). The issues raised in the suit were new and could not possibly be raised in “High Court Civil Case (Mombasa) No. 40 of 2015; Mombasa Water Products Limited – Versus - Kenya Commercial Bank Limited.
 - c). The dispute before the court was a land dispute and therefore before the proper forum for determination.

VI. Submissions

- 9. On 7th November, 2023 while the parties were present in Court, direction were taken on disposing off the two application dated 15th August, 2023 and 25th October, 2023 respectively. Pursuant to that, the parties complied and the Honourable Court reserved a date for delivery of the Ruling accordingly on 17th April, 2024. However, due to unavoidable circumstances herein such as the Court undertaking a Judges training the delivery of the Ruling delayed and was eventually delivered on 6th May, 2024 thereof.

A. The Written Submissions by the Plaintiff

- 10. Being in support of the Plaintiff’s Notice of Motion dated 15th August, 2023 and in opposition to the Defendant’s Notice of Motion dated 25th September, 2023, the Law firm of Messrs. Mutisya Mwanzia & Ondeng Advocates filed their written submissions dated 12th February, 2024. Mr. Mwanzia Advocate commenced his submission by rehashing that on 7th November, 2023 the Court directed that the Plaintiff’s Notice of Motion dated 15th August, 2023 to be heard together with the



Defendant's Notice of Motion dated 25th September, 2023. Both of these applications sought for the aforementioned orders.

11. The Plaintiff opposed the said application through Grounds of Opposition dated 6th November, 2023. The Learned Counsel stated that the facts leading to the suit and the application were as stated in the two affidavits sworn by the Plaintiff. For the sake of brevity, the same will not be regurgitated herein.
12. The Learned Counsel averred that considering that the Defendant's application raised a question of law, to wit, the issue of res-judicata, he would first deal with the same then proceed on to analyze the Plaintiff's application. On the issue of Res – Judicata, he submitted that it was governed by the provision of Section 7 of the Civil Procedure Act, Cap. 21. He referred to the said provision of the Law and cited the case of : “In Independent Electoral & Boundaries Commission – Versus - Maina Kiai & 5 Others (2017) eKLR the 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.
13. The court went further and also applied an upheld the elements set out in the case of “Uhuru Highway Development Limited – Versus - Central Bank of Kenya [1999] eKLR. The said elements are as follows:
 - a) The former judgment or order must be final;
 - b) The Judgment or order must be on merits;
 - c) It must have been rendered by court having jurisdiction over the subject matter the parties; and
 - d) There must be between the first and the second action identity or parties, of subject matter and cause of action”.
14. According to the Learned Counsel, the above were the elements which had to be fulfilled before the court could exercise its discretion in holding that a matter was Res - Judicata. It was his contention that the Defendant had not demonstrated the elements giving rise to Res - Judica due to the following reasons:
 - a) Through a letter dated 4th August, 2023, one of the Plaintiff's directors notified the Defendant that he would be receiving compensation exceeding the sum of Kenya Shillings Two (2) Billion (Kshs.2,000,000,000/=) from the National Land Commission and would like them to first clear the facility using the said funds and further create a fixed deposit account for the sum of Kenya Shillings Five Hundred Million (Kshs. 500,000,000/=).
 - b) Surprisingly, upon receiving the said letter, the Defendant hurriedly advertised the suit property for sale so as to defeat the Plaintiff's right to redeem the suit property. The said action violates the principles set out under Article 10 and 46 of the Constitution of Kenya, 2010.



- c). Since the Plaintiff it was due to receive compensation exceeding the sum of Kenya Shillings Two (2) Billion (Kshs. 2,000,000,000/=), the Defendant should not lock it out from redeeming the suit property.
 - d). As per the information given by the National Land Commission, the compensation would have been paid before the lapse of the 1st quarter of the new financial year, that was, before the end of October, 2023. The Defendant should therefore allow the Plaintiff a chance to redeem the suit property.
 - e). The current suit therefore seeks, ".....A declaration that the manner in which the Defendant hurriedly advertised the suit property for sale, after receiving the letter dated 4th August, 2023, which informed the Defendant that one of the Plaintiff's directors will be receiving compensation exceeding the sum of Kenya Shillings Two (2) Billion (Kshs. 2,000,000,000/=) from the National Land Commission and would like them to first clear the facility using the said funds, is in violation of Articles 10 and 46 of *the Constitution* of Kenya, 2010". This had never been any issue before any other suit or court other than the one currently under determination. The issue of Res - Judicata could not therefore stand.
15. The principles for grant of an interlocutory injunction are now well settled in the celebrated case of "Giella – Versus - Cassman Brown & Company limited [1973] EA 358. The said case laid the three tier guiding principles for grant of an injunction which were:-
- a. The applicant must establish a prima facie case with a probability of success at the main trial.
 - b. Secondly, the applicant must show that if the order is denied, he would suffer irreparable harm that cannot be adequately compensated by an award of damages;
 - c. Thirdly, the applicant has to show that the balance of convenience tilted in his favour should the court be in doubt as regards the test under the first and second requirements as a condition to grant interlocutory injunction.
16. On this aspect, the Learned Counsel submitted that the Plaintiff had established "a prima facie case" with a probability of success at the main trial for the following reasons:
- a. The Plaintiff was and still is the registered owner of all that property known as Plot No. MN/I/12003 (hereinafter referred to as the "suit property") with a value of approximately of a sum of Kenya Shillings Sixty two Million (Kshs. 62,000,000/=).
 - b. The Plaintiff applied to the Defendant for a loan facility and used the suit property as security for the loan facility. Vide a charge dated 9th September, 2011 letter of offer dated 18th February, 2014 the Defendant approved the Plaintiff's request and offered the Plaintiff a facility of a sum of Kenya Shillings Fifteen Million Eight Hundred Thousand (Kshs. 15,800,000/=).
 - c. The Plaintiff had been diligently making payments towards repayment of the loan facility. However sometimes in the year 2015 the Plaintiff started falling into arrears due to financial constraints.
 - d. The Defendant then threatened to sale the suit property without following the laid down law thus necessitating the Plaintiff to initiate the Civil case "High Court Civil Suit (Mombasa) No. 40 of 2015; Mombasa Water Products Limited – Versus - Kenya Commercial Bank Limited. Through a consent by the parties, it was agreed as follows: "(1) That the Application dated 23.01.2018 is marked as settled on the following terms:



- a) That the Plaintiff procure a purchaser for the suit property for a sum of not less than the reserve price provided by the bank within 60 days and have the purchase price paid to the Defendant within the same period.
 - b) That in default, the Defendant be at liberty to stage a public auction based on their defaulted reserve price upon advertising the sale on daily newspaper of wide circulation for at least 15 days.
- (2) That upon foregoing terms this suit is marked as fully compromised with each part bearing own costs."

17. Through an advertisement made in the Daily Nation on 7th August, 2023, the Defendant had advertised the property for sale on 17th August, 2023. The intended sale was clearly in violation of order (b) above. Further, the intended sale of the suit property by the Defendant was tainted with grave illegalities for the following reasons:

- a) The Defendant has not served the Plaintiff with a forty five (45) days notice as provided for under Rule 15 (d) of the Auctioneers Rules as the purported 45 days' notice that the Plaintiff took from the auctioneer on 11th May, 2021 is dated 21st March, 2021 and is addressed to "P.O Box 540-00600" yet in the letter of offer the agreed address was P.O Box 4709-01002.
- b) The intended sale offends Section 97 (2) and (3) of the Land Act as read with Rule 11 (b) (x) of the Auctioneers Rules, which provides that the Defendant undertake a current valuation of the suit properties before undertaking the said sale, as no current valuation of the suit properties has been undertaken herein. For the avoidance of any doubt such a report should not be older than 12 months upto the date of the intended date of sale of the property.

18. As was held by the Court of Appeal in the case of:- "Nyangilo Ochieng & another – Versus - Fanuel B. Ochieng & 2 others [1996] eKLR the onus of proving issuance and service of the requisite notices lies on the chargee. The court stated that; "It is trite that before a chargee can exercise his/her/its statutory power of sale there must be compliance with Section 74(1) of the Registered Land Act (Cap.300, Laws of Kenya). This section obliges the chargee to serve, by registered post, the relevant statutory notice. Three months after the chargors receiving such notices the bank's power of sale arises. This was the basis upon which the bank can put up the properties for sale.

19. It was for the chargee to make sure that there was compliance with the requirements of the provision of Section 74 (1) of the Registered Land Act, and the burden was not in any manner on the chargor. Once the charger alleges non-receipt of the statutory notice it is for the charge to prove that the notice was infact sent. The bank had failed to produce stamps showing proof of posting of the registered letters containing statutory notice. In the absence of proof of such posting, the sale by auction was void."

20. Justice P.J.O Otieno in the case of "Kwale Cement Factory Limited & another – Versus - Bank of Africa Kenya Limited [2018] eKLR comprehensively captured the manner in which the Court deals with the issue of need by the chargee to prove service of the requisite notices where he stated that;

".....As said before the only task of the court is to establish if there was a valid service on the persons intended. For the 40 days Notice, there were two certificates of posting exhibited to show postage. The first problem is that as drafted and exhibited that notice was due for service upon the plaintiffs as well as the two individuals who I take to have been directors of the charger. There is no evidence at all that the Notice to the 1st plaintiff as the charger was ever posted. To that extent, there has not been demonstrated due compliance with the requirement of section 96(2), and therefore, in law, the right to exercise the power of sale had



not accrued. How about service to the directors and the borrower? The Notice shows clearly that it was intended to be sent to P.O. Box 9722 -00100 Mombasa. The problem here is that there is nothing to show that address to have been that for the borrower. What is shown from the legal charge and even the letter by the borrower to the relationship manager of the bank forwarding the suit titles is that the postal address of the borrowed is P.O. Box 95819-80106 PUNJANI ROAD, SHIMANZI MOMBASA. Even the certificate of realization says the mail sent on 15/02/2018 was destined for GPO Nairobi. To that extent the Notice under Section 96(2) was never served upon the borrower as was mandatory. That is enough to show a prima facie case and therefore right to seek and be granted an injunction. Even though there were other consideration about the notices under Rule 15 auctioneers Rules, to this court, one transgression against the law is enough to demonstrate a prima facie case.

21. The Learned Counsel urged this Court to apply the good reasoning in the above cases and find that the Defendant had not demonstrated that it served the Redemption Notice and Notification of Sale upon the Plaintiff. To that end the Defendant has not demonstrated due compliance with the requirement of Rule 15 (d) and 15 (b) and (c) of the Auctioneers Rules 1997 and therefore in law the Defendant's right to exercise its statutory power of sale had not accrued.
22. The Learned Counsel averred that furthermore, through a letter dated 4th August, 2023, one of the Plaintiff's directors notified the Defendant that he would be receiving compensation exceeding the sum of Kenya Shillings Two (2) Billion (Kshs.2,000,000,000/=) from the National Land Commission and would like them to first clear the facility using the said funds and further create a fixed deposit account for the sum of Kenya Shillings Five Hundred (Kshs. 500,000,000/=).
23. Surprisingly, upon receiving the said letter, the Defendant hurriedly advertised the suit property for sale so as to defeat the Plaintiff's right to redeem the suit property. The said action violated the principles set out under the provision of Articles 10 and 46 of *the Constitution* of Kenya, 2010.
24. The Plaintiff stated that since it was due to receive compensation exceeding the sum of Kenya Shillings Two (2) Billion (Kshs. 2,000,000,000/=), the Defendant should not lock it out from redeeming the suit property.
25. As per the information given by the National Land Commission, the compensation will have been paid before the lapse of the 1st quarter of the new financial year, that is, before the end of October, 2023. The Defendant should therefore allow the Plaintiff a chance to redeemed the suit property. The Defendant should therefore have granted the Plaintiff time to redeem its property in good faith.
26. He relied on the decision made in the case of: "Benjamin Kaburi Kamuruci – Versus - Stanbic Bank Limited [2014] eKLR where the court stated:-

“.....I have perused the file and documents filed. The Defendant made a demand for payment of the entire sum after the Plaintiff defaulted. The Plaintiff admits he defaulted. Then a statutory notice for 90 days was served on in person on 8th July 2013. Thereafter, on expiry of the 90 days, the defendant served a 40 days' notice through registered post on 22nd October, 2014. Out of abundance of caution, the Defendant served the 40 days' notice on 28th February 2014 upon the person of the Plaintiff. The said notice was also affixed at the registry notice board at Ardhi House and at the suit property. The Defendant averred again at paragraph 16 of the Replying Affidavit that the auctioneer served a 45 days' notice through registered post on 3rd February 2014 for an auction scheduled for 3rd April 2014. It is clear the defendant made efforts to serve the notices on the Plaintiff. This is despite earlier attempts to serve by registered post. Affidavits of services filed have not been controverted



except the Plaintiff attempted to discredit the service because the person identifying him had not been named. The affidavit clearly stated that the process server identified him through his phone No [particulars withheld]. There was really no serious challenge posed to the service and no request for cross-examination of the process server that was made which perhaps would have provided more information on the service. For now, the evidence shows he was served with all the requisite notices. His challenge to the notices as a ground for an injunction fails. Now therefore, shouldn't the court consider the entire case and its peculiar circumstances so as to chart a path with least risk of injustice? The court had found that the Applicant defaulted to repay the debt as agreed; it had also noted that losing employment was a great loss for the Applicant who had made effort, albeit not enough, to make some payments. Those payments was also scattered and without any uniform trend. He noted also that the Plaintiff had confessed that he was ready and willing to repay the loan amount found to be due. I will, therefore, grant a temporary injunction on the condition that the plaintiff pays the entire debt herein within 60 days. That does not prejudice his suit as he can always get reimbursement of any extra sum he may have paid, if any. Indeed I should emphasize that these orders are purely made in the interest of justice. I make no orders as to costs. It is so ordered."

27. Following the reasoning above, the Learned Counsel submitted that even in the event that the court found that the application for injunction was not merited, the court should in the interest of justice, and considering that the Plaintiff had made a commitment to settle the outstanding sum, grant the Plaintiff a limited period of 90 days within which to settle the outstanding sum.
28. In conclusion, he urged the Court to find that the Plaintiff's Application dated 15th August, 2023 was well merited and be allowed with costs.

B. The Written Submissions by the Defendant.

29. While opposing the Notice of Motion application dated 15th August, 2023 and supporting the one dated 25th October, 2023 the Learned Counsel for the Defendants being the law firm of Messrs. Munyao, Muthama & Kashindi Advocates filed their written submissions dated 15th March, 2024. Mr. Kariuki Henry Advocate commenced his submissions by informing Court that there were two motion applications filed by parties herein and seeking the aforestated reliefs accordingly.
30. The Learned Counsel briefly addressed Court on the background leading to the present suit. He stated that on or about year 2014 the Plaintiff approached the Defendant Bank for a loan facility of Kenya Shillings Fifteen Million Eight Thousand (Kshs. 15,800,000.00/=) and charged all that property known as Plot No. MN/I/12003 [herein referred to as the suit property]. The Plaintiff defaulted in making regular payments and the Defendant Bank proceeded to exercise its statutory power of sale pursuant to its rights under the charge. Before the Defendant Bank exercised its statutory power of sale, vide a Plaint together with a motion application dated 18th March, 2015 the Plaintiff instituted a civil case "High Court Civil (Mombasa) Suit No.40 of 2015;Mombasa Water Products Limited – Versus - Kenya Commercial Bank Limited. The Court after hearing the Plaintiff on merit determined the Plaintiff's motion application and dismissed it with costs. Consequently, this suit was heard and determined vide a consent recorded between the Plaintiff and the Defendant Bank on 18th April, 2018. Instead of the Plaintiff complying with the terms of the consent order adopted in court on 18th April, 2018, the Plaintiff hatched yet another plan to clog the Defendant Bank's right to exercise its statutory power of sale.



31. Indeed, the Plaintiff under the guise of its tenant filed a civil suit being “CMCC “Mombasa” No. 109 of 2019; Richard Maina – Versus - Kenya Commercial Bank & Mombasa Water Products Limited”. The suit was heard determined vide a ruling delivered on 14th June, 2019. The Plaintiff’s indebtedness persisted and in yet another attempt to clog the Defendant Bank right to exercise its statutory power of sale, the Plaintiff through its tenant filed “CMCC (Mombasa) E9 of 2020; Richard Mwambi Lundi – Versus - Kenya Commercial Bank & Mombasa Water Products Limited” which the Honorable Court struck out for want of jurisdiction. Despite previous litigation between the Plaintiff and the Defendant Bank in respect to the Suit Property, the Plaintiff filed the present suit and yet again sought to clog the Defendant Bank’s right to exercise its statutory power of sale.
32. The Learned Counsel submitted that it was against the foregoing backdrop that the Honourable Court was invited to determine the following three (3) issues. Firstly, whether the Plaint together with the motion application dated 15th August, 2023 was an abuse of the court process. The Learned Counsel submitted that the motion application dated 25th September, 2023 was found to be meritorious, it would automatically discharge the motion application dated 15th August, 2023 together with the Plaint dated on even date. In the circumstances, we will first address the Honourable Court to the motion application dated 25th September, 2023. It was the Defendant Bank’s humble submission that the Plaint together with the motion application all dated 15th August, 2023 was an abuse of court process and ought to be struck out for offending the doctrine of Res - Judicata. The said Plaint and motion application were Res Judicata to “High Court Civil Case No.40 of 2015; Mombasa Water Products Limited vs KCB Bank Kenya Limited, Mombasa CMCC No. 109 of 2019; Richard Maina – Versus - Kenya Commercial Bank & Mombasa Water Products Limited, CMCC (Mombasa) E9 of 2020; Richard Mwambi Lundi – Versus - Kenya Commercial Bank & Mombasa Water Products Limited.
33. The Learned Counsel averred that the provision of Section 7 of the *Civil Procedure Act*, Cap. formed the foundation upon which the doctrine of Res judicata is anchored. He cited the said provision of the law. He held that under the aforementioned rule, and as it was observed in the Supreme court’s decision “In the Independent Electoral & Boundaries Commission – Versus - Maina Kiai & 5 others (Supra) the threshold for doctrine of res judicata to apply was clearly spelt out as stated herein above. Further, the Counsel referred Court to the case of:- “C.K. Bett Traders Limited & 2 others – Versus - Kennedy Mwangi & another [2021] eKLR” it was observed as follows on Res Judicata by Justice C. Mwita:
- “The doctrine of res judicata may be pleaded by way of estoppel so that where a Judgment has been given future and further proceedings are estopped. The rationale for the doctrine of res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction. Res judicata is normally pleaded as a defence to a suitor cause of action that the legal rights and obligations of the parties have been decided by an earlier Judgment, which may have determined the questions of law as well as of fact between the parties. In other words.res judicata will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction.
34. Indeed, according to the Counsel, the Plaintiff admitted at Paragraph 6 of the Plaint dated 15th August, 2023 that it instituted “Mombasa High Court Civil Case No. 40 of 2015; Mombasa Water Products Limited – Versus - KCB Bank Kenya Limited.



Notably the orders sought in the aforementioned suit was mirrored in the present suit and in particular the orders that; “pending the hearing and determination of the application the Defendant by itself, its servants and/ or agents be restrained by a temporary injunction from alienating, selling or in any other way dealing with the Plaintiff’s properties known as LR. No. MN/1/12003, Title No. CR 34752 situated in Nyali, Mombasa. That pending the hearing and determination of the suit the Defendant by itself, its servants and/or agents be restrained by a temporary injunction from alienating, selling or in any other way dealing with the Plaintiff’s properties known as LR. No. MN/1/12003, Title No. CR 34752 situated in Nyali, Mombasa.

Further, the Counsel held that even in the surrogate suit instituted under the guise of the Plaintiff, the Plaintiff was not only a party, but the issues therein were similar to those raised in the present suit and had been heard and determined previously by courts of competent jurisdiction. Therefore, he urged Court to have the present Plaint together with the motion application had satisfied the threshold as espoused in “the Maina Kia case []. The same offended the doctrine of res judicata and it ought to be struck Supra out with costs.

35. Secondly, whether the Plaintiff had met the threshold for granting of orders of injunction. The Learned Counsel submitted that the principles for grant of an order of temporary injunction are threefold and the Plaintiff ought to satisfy the Court that all three limbs were met as espoused in the case of “Giella – Versus - Cassman Brown (1973) E.A 358 being that:-

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience...”

On prima facie case, he held that the Honourable court to consider what was stated in the case of “Mrao – Versus - First American Bank of Kenya Limited & 2 others (2003) KLR 125, where the Court of Appeal defined a prima facie case as follows:-

“..... a prima facie case in a Civil Application included but is not confined to a genuine and arguable case. It is a case which, on the material presented to the Court, a 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:”

36. To buttress on this point, the Learned Counsel cited the case of: “Michel Gitere & another – Versus - Kenya Commercial Bank Limited [2018] eKLR it was restated that:-

“It was therefore held by Ringera J (as he then was) in Dr. Simon Waiharo Chege vs Paramount Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 360 of 2001: The remedy of injunction is one of the greatest reliefs. It will issue in appropriate case to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with probability of success at the trial. If the court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary



in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity.

37. The Learned Counsel opined that to establish a prima facie case, the Plaintiff ought to demonstrate that it had a right capable of protection by the Honourable Court. The Plaintiff had no right which had been infringed and that was capable of being protected by the issuance of an order of temporary injunction. To the contrary and by its previous conduct, the Plaintiff had used the court process to intentionally and deliberately defeat the Defendant Bank's right which crystallized pursuant to its right under the charge. Indeed, the Counsel argued that the Plaintiff acknowledged that it defaulted in making payments towards settling the loan facility and the facility fell into arrears. As at 28th August, 2023 the total outstanding balance due and owing to the Bank stood at a sum of Kenya Shillings Twenty Seven Million Nine Eighty Eight Thousand Two Five Thirty Five Hundred and Twenty Four Cents (Kshs. 27,988,535.24/=). The Defendant Bank's established vide the replying affidavit sworn on 05th October, 2023 by Justus Wambua that when the Defendant Bank's rights under the charge crystallized, it served all statutory notices as required by law.
38. The Learned Counsel held that the upshot of the foregoing was that ultimately, the Plaintiff having acknowledged its indebtedness to the Defendant Bank, and the Bank having served statutory notices as required by law, there existed no prima facie suit against the Defendant Bank. Separately, the Plaintiff deliberately failed to disclose to this Honourable Court that the Suit Property had been subject of previous litigation between parties. He submitted that where a party to a suit failed to make full and frank disclosure to a court, the said party was not capable of an order of temporary injunction. For the proposition above, the Counsel was guided by the decided case of:- "Kenleb Cons Limited – Versus - New Gatitu Service Station Limited another, (1990) eKLR where it was held that:-
- “to succeed in an application of injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.”
39. Thus, in view of the foregoing, he submitted that the Plaintiff had not surmounted the first hurdle of establishing a prima facie case to entitle it an order of temporary injunction as sought. Additionally, he held that the Plaintiff had not demonstrated that it would suffer irreparable loss that could not be compensated by an award of damages. He referred Court to the provision of Section 99 (4) of the Land Act provides that the remedy for any person who is prejudiced by unauthorized or irregular exercise of the power of sale shall have remedy in damages. It followed thus that if the Plaintiffs were to be successful in the present suit against the Defendant Bank, then the remedy the Plaintiff would be entitled to would be damages and not an injunction. The Counsel opined that the Plaintiff would not suffer irreparable loss in any way because the value of the suit property was known and could be ascertained. Additionally, the Defendant Bank was a reputable Bank capable of compensating the Plaintiff in damages in the unlikely event that the suit would be determined in the Plaintiff's favour. The realization of the suit property by the Defendant Bank could not in any way occasion a loss to the Plaintiff, for in any case, the Plaintiff offered the property as security and consequently the property became a commodity in the marketplace that would be amenable to be sold once the Plaintiff defaulted on its loan repayment obligation. For this proposition, the Counsel cited the of: "Amos Wangera Njoroge & 9 others – Versus - Serah Wamuyu Muriuki & another [2014] eKLR where Justice J.M Mutungi held thus:-

“Once property is offered as security for a loan to a Bank, such property becomes a commercial property which can be offered in the market for sale in case of default in the repayment of the loan and a chargor would be hard-pressed to justify that damages would



not be adequate remedy to compensate the chargor in the event of what would be considered and/or found to be an irregular sale by way of realization of the security by the charge. In such cases, an award of damages would be adequate remedy."

40. Lastly, the Counsel asserted that even on a balance of convenience the odds would not favour the Plaintiff for the following reasons:- The Plaintiff admitted that it was indebted to the Defendant Bank and the huge debt continued Advocate A.C.K to escalate. The Plaintiff had not offered to settle the debt save for the assertion that the Plaintiff was due to receive compensation money from the National Land Commission. The Defendant Bank remained a stranger to the said compensation and in any event the said compensation cannot in law clog the Bank's right over the suit property.

This Honourable Court had in previous occasions held that the balance of convenience tilted in favour of allowing the recovery of a debt as early as possible. With the passage of time, and despite various extensions to the Plaintiff, the debts continue to grow and there is real risk that the debt will grow to a level that the value of the security offered to the Bank will be outstripped.

To buttress on this point, he referred Court to the case of: "Stek Cosmetics Limited – Versus - Family Bank Ltd & another [2020] eKLR Justice E.C Mwitia held as follows:-

"What about the balance of convenience? The loan amount continues to attract interest and the amount could easily outstrip the value of the properties. This means that if the Respondents is restrained from exercising its statutory power of sale until the suit is determined, it may not be able to recover the outstanding loan amount and interests by the time the suit will be determined since the value of the properties cannot be guaranteed to be sufficient to cover the amount outstanding then. In that regard, I find the balance of convenience to tilt in favour of the 1st respondent which can pay the value of the properties if it loses the suit."

41. Finally, on whether the Plaint together with the motion application dated 15th August, 2023 was an abuse of the court process. The Counsel held that the Plaintiff's suit as against the Defendant Bank was an abuse of the court process as it offends the doctrine of res judicata. Additionally, even if the Court were to consider the Plaintiff's motion application on merit, the Plaintiff had not demonstrated that it had met the threshold for the grant of orders of temporary injunction.

VII. Analysis & Determination.

42. I have carefully perused the two (2) applications, the Replying Affidavit and the grounds of opposition together with the submissions and the authorities by the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
43. In order to arrive at an informed, just and fair decision, the Honourable Court has crafted the following four (4) issues for its determination. These are:-
- a. Whether this Honourable Court has Jurisdiction to hear and determine this case.
 - b. Whether the Notice of Motion application dated 25th October, 2023 by the Defendant has any merit.
 - c. Whether the Notice of Motion application dated 15th September, 2023 by the Plaintiff has any merit.
 - d. Who will bear the costs of the two (2) applications.



Issue No. a). Whether the Honorable Court has Jurisdiction to hear and determine this matter.

44. Prior to embarking on issues herein, the jurisdiction of this Court has been challenged by the Defendant. It has argued that from the cause of action before Court, the issues in question are substantially of commercial nature and hence ought to be entertained before the High Court the commercial division. Although the challenge was brought out in passing and in a very thin membrane, this Court cannot wish it away being such a weighty legal issue and guided by the decision of the Indeed “the locus classicus’ case on the question of jurisdiction was dealt with in the celebrated case of:- “The Owners of Motor vessel Lillian ‘S’ -Versus - Caltex Kenya Limited. [1989] KLR 1” where the Court, Nyarangi JA held:-

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”

45. I wish address the pertinent legal issue of the jurisdiction of the Environment & Land Court indepth later on. In Kenya, Where does the jurisdiction of the Environment and Land Court has been created by law. It flows from either the Constitution and the legislation. The Supreme Court of Kenya in the case of “Samuel Kamau Macharia – Versus - KCB & 2 Others, Civil Application No. 2 of 2011 it noted:-

“ A Court's jurisdiction flows from either the Constitution or Legislation or both. Thus a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law”

The Environment and Land Court is a statutory creation by the Constitution of Kenya under the provision of Article 162 (2) (b). Here, the Courts are vested it with original and unlimited jurisdiction. From the preamble of the Environment & Land Court Act No. 19 of 2011, the jurisdiction of the court is defined as “.....a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes.....”

46. The ELC Court is donated by Article 162 (2) (b) which provides that Parliament shall establish a court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Further the Court’s jurisdiction is also set out in Section 3 & 13(2) of the Environment& Land Court Act, 2011 which states:-

- (2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes relating to environment and land, including disputes?
- a. relating to environmental planning and protection, trade, 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.

47. Further, still on the same point, in the case of “County Government of Migori – Versus - I N B Management IT Consultant Limited (2019) eKLR” whereby court being faced with an objection regarding jurisdiction, analyzed the law and observed as follows:-

“SUBPARA ”10-

The jurisdiction point raised by the Respondent herein clearly meets the foregone criteria being a pure point of law. That jurisdiction is everything is a well settled principle in law. My Lordship Ibrahim, JSC in Supreme court of Kenya Civil application No 11 of 2016-“Hon (Lady) Justice Kalpana H Rawal Versus Judicial Service Commission and others when in demystifying jurisdiction quoted from the decision in Supreme court of Nigeria supreme case No 11 of 2012- “Ocheja Immanuel Dangama – Versus - Hon. Atoi Aidoko Aliaswan and 4 others where Walter Samuel Nkanu Onnoghen, JSC and expressed himself as follows;-

“.....it is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity deed on arrival and of no legal effect whatever that is why an issue of jurisdiction is granted and fundamental in adjudication and has to be dealt with first and foremost.....”

48. Additionally, I wish to cite the case of:- “Mary Musuki Mudachi & another – Versus - Anthony Muteke Mudachi & 2 others; Elijah K. Kimanzi & 6 others (Interested Parties) [2021] eKLR” that:-

“While I fully concur and associate myself with the ration made out under Pheonex of EA Assurance Limited case (Supra) my interpretation of the ratio on jurisdiction was where a case for instance of the Commercial or running down or Succession or employment and labour related and so forth was instituted before the Environment and Land Court or the vice versa then clearly that stated case becomes a nullity of jurisdiction and it’s the one that cannot be salvaged by neither consent of parties, the Oxygen principles or the Overring Objectives or the prepositions found under Article 159 of *the Constitution* of Kenya. The instant case is extremely distinguishable from what was envisaged under that decision of the Court of Appeal. For these very reason, therefore, it is completely wrong for the Defendants to emphatically state that the Environment and Land Court at Mombasa has no jurisdiction to hear and determine this case. The court is clothed with the legal jurisdiction to hear and determine the case.”

49. Clearly, in my view, from the orders sought by the Plaintiff in this matter are distinct and graphic. Without appearing to be splitting hairs, they fall within the ambit of the ELC court to hear and make a determination. Hence, the objection on whether the Court has jurisdiction is lame, baseless and unfounded.



ISSUE No. b). Whether the Notice of Motion application dated 25th October, 2023 by the Defendant has any merit.

50. Under this Sub – title, the Honourable Court decipheres that the main substratum of this matter is whether the suit instituted by the Plaintiff through the filed pleadings before the Court should be struck out for offending the doctrine of Res – Judicata”, and hence an abuse of the due process and whether the Plaintiff is entitled to be granted temporary injunctive orders restraining the Defendant from interfering with the suit property until the matter is heard and finally determined.
51. With regard to the issue of the doctrine of Res – Judicata. As agreed by all parties herein, the doctrine is codified at the provision of Section 7 of the Civil Procedure Act, Cap. 21 which provides as follows:-

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

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

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

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

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

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

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

52. For a suit to be declared res-judicata, the following must be proved;
- (i) The former suit must have been decided.
 - (ii) The competence of a court which decides the former suit must be determined irrespective of any provision as to right of appeal.
 - (iii) The former suit must have been alleged by one party and denied or admitted expressly or impliedly by the other party.
 - (iv) Any matter which might and ought to have made a ground of defence or attack in the former suit shall be deemed to have been directly and substantially in issue in the former suit.
 - (v) The parties litigating must be the same.
53. For res judicata to apply in a particular matter, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the



previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See “The Independent Electoral and Boundaries Commission – Versus -Maina Kiai (Supra); “John Florence Maritime Services Limited & another – Versus - Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR”. Res judicata operates as a complete estoppel against any suit that runs afoul of it. See “Maithene Malindi Enterprises Limited – Versus - Kaniki Karisa Kaniki & 2 others [2018] eKLR”.

54. Res judicata operates as a bar to subsequent proceedings involving same issue which had been finally and conclusively decided by a competent court in a prior suit between the same parties. In case of:- “John Florence Maritime Services Limited & another – Versus - Cabinet Secretary for Transport and Infrastructure & 3 others” the Court of Appeal stated:

“..... Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indentation of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313: -

“.....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 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”

.... Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.”

55. In the case of:- “Henderson – Versus - Henderson (1843-60) All ER 378 the court stated as follows:

“.....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 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 only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, 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.”

56. In the instant case, it is held that through a letter dated 4th August, 2023, one of the Plaintiff’s directors notified the Defendant that he would be receiving compensation exceeding the sum of Kenya Shillings Two (2) Billion (Kshs.2,000,000,000/=) from the National Land Commission and would like them



- to first clear the facility using the said funds and further create a fixed deposit account for the sum of Kenya Shillings Five Hundred Million (Kshs. 500,000,000/=).
57. Surprisingly, upon receiving the said letter, the Defendant hurriedly advertised the suit property for sale so as to defeat the Plaintiff's right to redeem the suit property. The said action violates the principles set out under Article 10 and 46 of *the Constitution* of Kenya, 2010.
 58. Since the Plaintiff it was due to receive compensation exceeding the sum of Kenya Shillings Two (2) Billion (Kshs. 2,000,000,000/=), the Defendant should not lock it out from redeeming the suit property. As per the information given by the National Land Commission, the compensation would have been paid before the lapse of the 1st quarter of the new financial year, that was, before the end of October, 2023. The Defendant should therefore allow the Plaintiff a chance to redeem the suit property.
 59. The current suit therefore seeks, ".....A declaration that the manner in which the Defendant hurriedly advertised the suit property for sale, after receiving the letter dated 4th August, 2023, which informed the Defendant that one of the Plaintiff's directors will be receiving compensation exceeding the sum of Kenya Shillings Two (2) Billion (Kshs. 2,000,000,000/=) from the National Land Commission and would like them to first clear the facility using the said funds, is in violation of Articles 10 and 46 of *the Constitution* of Kenya, 2010". This had never been any issue before any other suit or court other than the one currently under determination. The issue of Res - Judicata could not therefore stand.
 60. The Defendant has opined that this suit is an abuse of the cause process. The Learned Counsel for the Defendant submitted that it comes out clearly that the Plaintiff not only had full knowledge but admitted the existence of other suit in a court of competent and still went ahead and filed this suit with the sole intention to circumvent and/or to frustrate the Defendant from exercising its statutory powers of sale.
 61. Mr. Justus Wambua, the Recovery Manager for the Defendant has averred in his supporting affidavit afore mentioned that he has been reliably informed that the instant suit is res judicata as it is similar to "HCC 40 (Mombasa) of 2015, CMCC (Mombasa)109 of 2019 and CMCC (Mombasa) E009 of 2020. In CMCC (Mombasa) 109 of 2019 and E009 of 2020. I have keenly read these rulings by the said court. The lower court struck out the said suit on the grounds that they lacked pecuniary jurisdiction while the high Court only declined to grant the injunctive orders Court. None of these Court conducted any adjudication of the matter per excellence and hence making a final determination as required by law in order to constitute the Doctrine of Res – Judicata under the provision of Section 7 of the *Civil procedure Act*, Cap. 21.
 62. Therefore, by and large, the upshot of the foregoing is that this Honourable Court does not find that the present suit offends the doctrine of Res Judicata" contrary to the provision of Section 7 of the *Civil Procedure Act*, Cap. 21 and for that reason the objection by the Defendant through the Notice of Motion application dated 25th October, 2023 must fail.

Issue No. c). Whether the Notice of Motion application dated 15th August, 2023 by the Plaintiff has any merit.

63. Under this sub – heading, the Honourable Court wishes to address whether the Plaintiff is entitled to the orders of Injunctive orders which forms the pith and substance of the Notice of Motion application dated 15th August, 2023 by the Plaintiff/Applicant.
64. Without belabouring the point as both the Learned Counsels have effectively deliberated on these issues, the principles for grant of an interlocutory injunction are now well settled in the celebrated case



of “Giella – Versus - Cassman Brown (Supra). Just to emphasize, the said case laid the three tier guiding principles for grant of an injunction which were:-

- a. The applicant must establish a prima facie case with a probability of success at the main trial.
- b. Secondly, the applicant must show that if the order is denied, he would suffer irreparable harm that cannot be adequately compensated by an award of damages;
- c. Thirdly, the applicant has to show that the balance of convenience tilted in his favour should the court be in doubt as regards the test under the first and second requirements as a condition to grant interlocutory injunction.

65. This legal position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of “Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR” where the Court of Appeal held that:-

“In an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

66. Consequently, the Applicant ought to, first, establish a prima facie case as relied on in the judicial decision of “MRAO LIMITED (Supra) and where the Court of Appeal gave a determination on a prima facie case. The court stated that:

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

67. The Honourable Court now wishes to apply these principles to the current suit. As noted above the Plaintiff/Applicant seeks for declaration that the manner in which the Defendant hurriedly advertised the suit property for sale, after receiving the letter dated 4th August, 2023, which informed the Defendant that one of the Plaintiff's directors will be receiving compensation exceeding the sum of Kenya Shillings Two (2) Billion (Kshs. 2,000,000,000/=) from the National Land Commission and would like them to first clear the facility using the said funds, is in violation of Articles 10 and 46 of the Constitution of Kenya, 2010. I have already noted that these issues had never been adjudicated before any other suit or court other than the one currently under determination. On this aspect, I concur with the Learned Counsel for the Plaintiff, that the Applicant had established “a prima facie case” with a probability of success at the main trial for the following reasons. In saying so, I hold that the Plaintiff was and still is the registered owner of all that property known as Plot No. MN/I/12003 (hereinafter referred to as the “suit property”) with a value of approximately of a sum of Kenya Shillings Sixty two Million (Kshs. 62,000,000/=). The Plaintiff applied to the Defendant for a loan facility and used the suit property as security for the loan facility. Vide a charge dated 9th September, 2011 letter of offer dated 18th February, 2014 the Defendant approved the Plaintiff's request and offered the Plaintiff a facility of a sum of Kenya Shillings Fifteen Million Eight Hundred Thousand (Kshs. 15,800,000/=). Additionally, the Plaintiff had been diligently making payments towards repayment of the loan facility. However



sometimes in the year 2015 the Plaintiff started falling into arrears due to financial constraints. Indeed, the Defendant then threatened to sale the suit property without following the laid down law thus necessitating the Plaintiff to initiate the Civil case “High Court Civil Suit (Mombasa) No. 40 of 2015; Mombasa Water Products Limited – Versus - Kenya Commercial Bank Limited. Through a consent by the parties, it was agreed as follows:

- "(1) That the Application dated 23.01.2018 is marked as settled on the following terms:
- a) That the Plaintiff procure a purchaser for the suit property for a sum of not less than the reserve price provided by the bank within 60 days and have the purchase price paid to the Defendant within the same period.
 - b) That in default, the Defendant be at liberty to stage a public auction based on their defaulted reserve price upon advertising the sale on daily newspaper of wide circulation for at least 15 days.
- (2) That upon foregoing terms this suit is marked as fully compromised with each part bearing own costs."

68. Through an advertisement made in the Daily Nation on 7th August, 2023, the Defendant had advertised the property for sale on 17th August, 2023. The intended sale was clearly in violation of order (b) above. Further, the intended sale of the suit property by the Defendant was tainted with grave illegalities for the following reasons:

- a) The Defendant has not served the Plaintiff with a forty five (45) days notice as provided for under Rule 15 (d) of the Auctioneers Rules as the purported 45 days' notice that the Plaintiff took from the auctioneer on 11th May, 2021 is dated 21st March, 2021 and is addressed to "P.O Box 540-00600" yet in the letter of offer the agreed address was P.O Box 4709-01002.
- b) The intended sale offends Section 97 (2) and (3) of the Land Act as read with Rule 11 (b) (x) of the Auctioneers Rules, which provides that the Defendant undertake a current valuation of the suit properties before undertaking the said sale, as no current valuation of the suit properties has been undertaken herein. For the avoidance of any doubt such a report should not be older than 12 months upto the date of the intended date of sale of the property.

69. From the foregoing surrounding facts and inference, there is no doubt that the Plaintiff/Applicant has managed to establish its case and hence are entitled to the orders sought from the Notice of Motion application dated 15th August, 2023. Thus, the said application succeeds.

Issue No. d). Who will bear the costs of the two applications.

70. It is now well established that Costs are issues at the discretion of the Court. Costs are awards granted to the parties at the conclusion of any legal action and proceedings in any litigation. The provision of Section 27 (1) of the civil procedure Rules, 2010 holds that costs follow the event. By event it meant the result of the said legal action or proceedings.

71. In the instant case, the Plaintiff/Applicant has been successful in establishing its case in both the applications and therefore they are entitled to costs thereof.

VI. Conclusion & findings.

72. Consequently, having conducted an indepth analysis of the framed issues herein, on the Preponderance of probability and the balance of convenience, with regard to the two applications, the Honourable Court arrives at the following specific orders. These are:-



- a. That pursuant to the provision of Article 162 (2) (b) of *the Constitution* of Kenya, 2010, the provisions of Sections 3 & 13 of the Environment & Land Court Act, No. 19 of 2011, Sections 101 of the *Land Registration Act*, No. 3 of 2012 and Section 150 of *Land Act*, No. 6 of 2012, this Honourable Court has jurisdiction to hear and determine the issues in question in this matter hereof.
- b. That the Notice of Motion application dated 15th August, 2023 be and is hereby found to be meritorious and has allowed hereof.
- c. That the Notice of Motion application dated 25th September, 2023 be and is hereby found to be unmeritorious and hence dismissed.
- d. That for expediency sake, the suit fixed for hear 7th October, 2024. There be a mention on 8th July, 2024 for conducting a Pre – Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010.
- e. That costs to be awarded to the Plaintiff for the two applications dated 15th August, 2023 and 25th September, 2023 to be in the cause.

It is so ordered accordingly

RULING DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED THIS....16TH DAY OF MAY, 2024

.....

HON. JUSTICE L.L. NAIKUNI

ENVIRONMENT & LAND COURT AT

MOMBASA

Ruling delivered in the presence of:-

- a. M/s. Firdaus Mbula, the Court Assistant
- b. Mr. Chege Advocate holding brief for Mr. Mwanzia Advocate for the Plaintiff
- c. Mr. Kariuki Henry Advocate for the Defendant.

