Republic of Kenya

Court of Appeal at Nairobi

Civil Appeal 100 & 106 of 2010

BETWEEN

KENYA COMMERCIAL BANK LIMITED.....APPELLANT

AND

MUIRI COFEE ESTATE LIMITED.....1ST RESPONDENT

BENJOH AMALGAMATED LIMITED ….....2ND RESPONDENT

DAVID G. KARIUKI T/WATTS ENTERPRISES.....3RD RESPONDENT

BIDII KENYA LTD.....4TH RESPONDENT

consolidated with

CIVIL APPEAL NO. 106 OF 2010

BETWEEN

BIDII KENYA LTD.....APPELLANT

AND

MUIRI COFEE ESTATE LIMITED.....1ST RESPONDENT

BENJOH AMALGAMATED LIMITED ….....2ND RESPONDENT

KENYA COMMERCIAL BANK LIMITED.....3RD RESPONDENT

DAVID G. KARIUKI T/A WATTS ENTERPRISES.....4TH RESPONDENT

(Being an Appeal from the Rulings and Orders of the High Court of Kenya at Nairobi (Khaminwa, J) delivered on 18th November 2008 and 2nd November 2009

in

HCCC NO. 505 OF 2008)

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JUDGMENT OF THE COURT

1. INTRODUCTION

Civil Appeal No. 100 of 2010 has been consolidated with **Civil Appeal No. 106 of 2010** by consent of all learned counsel appearing for the parties herein as they are both in respect of the same parties and raise fairly similar issues that are for determination from the Ruling and Orders of the High Court (Lady Justice Joyce Khaminwa) delivered on 18th November, 2008 and 2nd November, 2009 in **Milimani HCCC No. 505 of 2008** respectively.

Bidii Kenya Limited, hereinafter referred to as the ***1st Appellant***, is aggrieved by the ruling and orders of the High Court delivered by Lady Justice Joyce Khaminwa on 2nd November, 2009 in Milimani HCCC No. 505 of 2008 while **Kenya Commercial Bank Limited** hereinafter referred to as the ***2nd Appellant*** is aggrieved by both rulings which are the subject of this appeal by which the learned Judge dismissed the Preliminary Objection by the ***1st Appellant*** and the ***3rd Respondent***, and allowed a temporary injunction application as against the ***1st Appellant*** and ***3rd Respondent*** respectively.

Background

The genesis of the appeals is a suit initiated by ***MUIRI COFFEE ESTATE LIMITED, 1st Respondent***, vide a Plaint dated 8th September, 2008 in which the 1st Respondent seeks a relief by a permanent injunction to restrain the 1st Appellant ***BIDII KENYA LIMITED*** from taking possession or interfering with the possession of the 1st Respondent's parcel of land LR No. 10075 Thika measuring 443 acres (hereinafter the suit property) and a declaration that the sale of the suit property to the said ***1st Appellant*** was illegal, unlawful, null and void. Further, that It be restored as the proprietor of the suit property and its liability to the ***2nd Appellant*** under the guarantee be discharged, and other consequential declarations and orders. The ***1st Respondent*** also claimed damages for fraud against the Appellants and the 3rd Respondent.

In the suit, the ***1st Respondent***(a guarantor of the loan/overdraft facility) sued the **Appellants** herein, the 2nd and 3rd Respondents in respect of the suit property. It is averred in the Plaint that in April 1988 the suit property was offered as security for an overdraft facility which the ***2nd Respondent (BENJOH AMALGAMATED LIMITED)*** had requested from the ***2nd Appellant***. By a charge document dated 2nd November, 1988 two (2) of the 1st Respondent\'s directors purported to charge the suit property to the ***2nd Appellant*** in order to secure a facility not exceeding the sum of Kshs. 4,500,000/= to be made available by the ***2nd Respondent***. It was further averred that the charge was invalid because it was executed before one Edith W. Gachamba Advocate who did not appear on the list of advocates issued with a practicing certificate for the year 1988 and was done without a duly processed resolution by the Board of Directors of the ***1st Respondent***. By two further charges dated 25th May,1989 and dated 13th July,1990 a further security was created for a sum of Kshs. 11,500,000.00 in favour of the ***2nd Respondent***.

The ***1st Respondent*** claims that on 19th September, 2007 the ***3rd Respondent*** (**DAVID G. KARIUKI T/A WATTS ENTERPRISES**) by an invalid public auction sold the suit property to the ***1st Appellant*** and realized the security at an undervalued amount of Kshs.70, 102,456.00against its market value of Kshs.700, 000,000.00 and that the ***1st Appellant\'s*** purchase of the suit property at the public auction and transfer was fraudulent and therefore null and void.

3. The Plaint was accompanied by a Chamber Summons under certificate of urgency seeking two substantive orders which were.

Firstly, a temporary injunction pending the determination of the main suit restraining the ***1st*** and ***2nd Appellants***, their servants or agents from further advertising for sale, disposing of, by private treaty or otherwise howsoever charging, leasing, letting or otherwise howsoever interfering with the 1st Respondent\'s possession, occupation, use or ownership of title to and or interest in the suit property;

Secondly, an order under section 52 of Indian Transfer Property Act 1882 that during the pendency of the suit all further registration, or change of registration in the ownership, leasing, subleasing, allotment user occupation or possession or in any kind of right and the title interest in the suit property with any land registry, government department and all other registered authorities be prohibited.

4. The application was grounded on the premise that at all material times the suit property had been fraudulently transferred by the ***1stAppellant***and ***3rd Respondent*** to the ***2nd Appellant***. In addition, that the suit property valued at Kshs. 693,365,000.00 was disposed off at the gross under sale of Kshs. 70,000,000.00 and that the sale and transfer was fraudulent particulars of which were enumerated in paragraph iii (a)-(f) of the said application.

The application which was supported by the affidavit of ***Ngengi Muigai,*** a Director of the ***1st Respondent,*** was heard *exparte*by Justice L. Kimaru who granted prayers as sought in the application on condition that the ***1st Respondent*** deposits a sum of Kshs. 500,000.00 as security for costs on or before 10th September, 2008. The application was then set down for hearing on 22nd September, 2008 at 9.00 a.m before any Judge.

5. <u>The evidence adduced for and against the application</u>

According to the affidavit of the said ***Ngengi Muigai*** sworn on 8th September, 2008 the ***1st Respondent*** on 2nd November, 1988 by an invalid charge, purported to charge the suit property to the ***2nd Appellant*** in order to secure a sum not exceeding the sum of Kshs. 4,500,000.00. By a second charge dated 25th May, 1989 it secured the sum of Kshs.7,000,000.00 and by a further charge dated 13th July,1990 it secured a sum for Kshs. 4,500,000.00. He deposed that in breach of the charge, the ***2nd Appellant*** did not advance the full amounts secured. Whereas the securities purported to secure Kshs. 70,000,000.00 while the advances were for Kshs.11,500,000.00, the ***2nd Appellant*** only released a sum of Kshs. 10,200,000.00 instead of the agreed 23,175,000.00. He swore further that the ***2nd Appellant*** together with the ***3rd Respondent*** had irregularly, unlawfully and fraudulently sold the guarantor\'s property to the 1st Appellant.

He swore that the principal debtor's properties namely LR124 1/1 and LR 12411/2 Nyandarua measuring 70 acres and valued at Kshs. 46,600,000.00 as at 2nd October, 2008 ought to have been sold first in the event of any default and that the amount owed would have been fetched from its sale. That notwithstanding, the ***2nd Appellant*** proceeded to sell the ***1st Respondent\'s*** property which was offered as a guarantor's security to the 1st appellant

He also stated that the sale of the suit property to the ***1st Appellant*** was fraudulent, illegal, invalid, irregular and unlawful. Supported by the valuation report dated 4th September, 2008 prepared by Bel Air Properties Limited valuing the suit property at Kshs. 693,365,000.00, he claimed the ***2nd Appellant*** sold the property at an undervalue of Kshs. 70,000,000.00. He further claimed that one of the Directors of the ***1st Appellant***known as ***Kunal Kamlesh Shah*** who executed the transfer of land was non-existent and further, that the ***3rd Respondent*** did not conduct the public auction as required by law.

6. Reinforcing the ***1st Respondent\'s*** application, the ***2nd Respondent*** by the affidavit of its Director one ***Kungu Muigai*** confirmed that the ***1st Respondent*** guaranteed the loan by the ***appellant*** to the ***2nd Appellant.*** He swore that the principal debtor ***2nd Respondent*** had never refused to pay the debt to the ***2nd Appellant*** and further that the ***2nd Appellant*** had never attempted to sell the principal debtors property

valued at Kshs.46,000,000.00 million before selling the guarantor's property.

He deponed that the suit property was illegally transferred on 8th August, 2008 to the ***1st Appellant*** and further, that the ***2nd Appellant*** had not received consideration from the alleged highest bidder to enable it pass a good title to a 3rd party in this case, the ***1st Appellant***. He buttressed this point with the affidavit of one ***Stephen Ndung\'u Njonjo,*** a court process server, who swore that on the date the public auction was scheduled to take place, he went to the advertised venue and waited but no auction took place.

7. In reply, ***Chris Theuri*** the relationship manager of the ***2nd Appellant*** swore that the suit was ***res judicata*** and ***subjudice.*** He narrated that the suit was *res judicata* having been heard and determined in Milimani HCCC No. 1219 of 1992 where a consent judgment was entered between the ***1st Respondent, 2nd Respondent*** and the ***2nd Appellant.*** In the consent judgment, the ***1st Respondent*** and the ***2nd Respondent*** admitted the loan advanced by the ***2nd Appellant*** and agreed to pay the total outstanding principal sum together with the accrued interest.He deposed that the ***1st Respondent***had made every effort to frustrate the realization of the security against the consent order. He stated that when a sale pursuant to the Consent order was scheduled for 23rd January, 1992, the ***1st Respondent*** filed a suit being Milimani HCCC No. 285 of 1993 and obtained an *ex-parte* interim injunction restraining the ***2nd Appellant*** from selling the properties before the date of the sale. However, in view of the consent judgment and order recorded earlier in Milimani HCCC No. 1219 of 1992, the suit was dismissed. Thereafter, the ***1st*** and ***2nd Respondents*** persisted in default and a sale by public auction was scheduled to take place on 26th June, 1996. However, before the said date the ***1st Respondent*** filed Milimani HCCC No. 1520 of 1996 to restrain the ***2nd Appellant*** from selling the suit property but the suit was also dismissed**.** The ***1st Respondent*** then filed HCCC No. 1611 of 1996 on 2nd July,1996 seeking orders that the purported sale was irregular, unlawful, null and void in the mistaken belief that the ***2nd Appellant*** had sold the property. The suit was struck out as being res judicata on 26th January, 1998. The security was re-advertised for sale on 7th February, 1997 whereupon another suit HCCC No. 24 of 1997 was filed this time in Nyeri, which suit was touching on the same issues pertaining to the suit property but that suit was also struck out on 9th May, 1997 for being res judicata.

In August 1999 the ***1st*** and ***2nd Respondents*** filed HCCC No. 1576 of 1999 seeking orders that they be provided with a statement of account by the ***2nd Appellant.*** The suit was heard on its merits and also dismissed with costs to the ***2nd Appellant***.

The ***2nd Appellant*** further swore that the charge documents dated 2nd November, 1988, 25th May, 1989 and 13th July, 1999, were valid and that it advanced the ***2nd Respondent*** the full amount secured up to the authorized limit of financial facility and banking accommodation, and that the ***1st Respondent*** and ***2nd Respondent*** had confirmed the validity of the documents filed by the parties *vide* the consent judgment in. HCCC No. 1219 of 1992, in which they also admitted liability and undertook to liquidate the outstanding amount claimed by 31st July, 1992 and confirmed that the ***2nd Appellant*** was at liberty to sell the properties if they failed to do so.

8. Following the said consent order, the ***2nd Appellant*** lawfully exercised its right of sale as the ***1st Respondent*** and ***2nd Respondent*** had failed to pay the debt by the set date. The ***2nd Appellant*** further stated that the sale of the suit property had already taken place and therefore, the only remedy available to the ***1st Respondent*** would be damages.

On the advanced amount, the ***2nd Appellant*** swore that the loan was for Kshs. 7,200,000.00 and the 2nd Respondent took an overdraft facility of Kshs. 1,800,000.00 summing the loan to Kshs. 9,000,000.00.

On the validity of documents, the ***2nd Appellant*** replied that they received the proper resolution of the ***1st Respondent\'s*** company. Moreover, the terms of the charge included a clause that the ***1st Respondent***

would be considered as a principal debtor for all the charge debt and interest thereby securing the ***2nd Appellant.*** As a result, the security or guarantee offered by the ***1st Respondent*** could not be released or discharged by any act of variation, omission, or any other act save for the satisfaction or repayment of the entire loan.

9. The ***3rd Respondent*** vide the affidavit of ***Daniel G. Kariuki*** replied that the process of redemption was valid and the parties had obtained a valid court order for sale at the time. The sale was for all the secured properties LR. No.10075 Kiambu, and L.R No. 14916/1, and 12411/1 Nyandarua. The ***3rd Respondent*** stated that the auction took place on 19th September, 2007 and all legal provisions relating thereto were strictly complied with.

10. Rahul Dilesh Bid, the Director of the ***1st Appellant***, deposed that the necessary transfer in respect of the property was duly registered; that the consent for the sale of the suit property was lawfully granted by the Land Control Board on 6th November, 2007.In addition, he deposed that the property was valued by a valuer from the Lands department at Kshs. 94, 280,000.00. Moreover, that the sale by public auction was advertised in the local dailies namely the Daily Nation and Standard Newspapers, and duly conducted at View Park Towers, Nairobi. The ***1st Appellant*** attended the auction held on 19th September, 2007 by the deponent who acted as its agent and all the laid down legal procedures were complied with to the letter.

Finally he deponed thatafter the sale by public auction, the ***1st Respondent*** filedHCCC No. 494 of 2008 on 20th August, 2008 against the ***1st Appellant***; which is still pending before the High Court at Milimani.

11. <u>THE PRELIMINARY OBJECTION</u>

In addition to the affidavits in reply to the application, the ***Appellants***and ***3rd Respondent*** filed Notices of Preliminary Objection against the ***1st Respondent\'s*** suit and application. The objections were heard before the main application by Joyce Khaminwa J. on the hearing date set *exparte*.

Among the important points of law raised in the preliminary objection is that the court lacked jurisdiction to entertain the suit and application which were said to be *res judicata* and *subjudice;* that the applicant lacked *locus standi*, that the applicant was guilty of material non-disclosure and that the application was an abuse of court process.

In support of the preliminary objection, the ***1st Appellant*** and ***3rd Respondent,*** submitted to the Court some authorities in support of the principle stated under Section 69B (2) of the Transfer of Property Act to the effect that where the transfer is made in exercise of the mortgagee\'s statutory power of sale, the title of the purchaser shall not be impeached on ground that no case has arisen to authorize the sale, or due notice was not given or that the power of sale had been irregularly or improperly exercised. At the hearing, learned counsel for the ***2nd Appellant*** argued therefore, that the injunction order sought could not lie against any of the ***Appellants*** and ***3rd Respondent*** as the property had been transferred to the ***1st Appellant***. They argued that the only available remedy to the ***1st Respondent*** is that of damages.

12. On the issue of *res judicata*, they submitted that this was the 8th suit on this mortgage (as narrated earlier in this ruling) and that the court had at no time found in favour of the ***1st Respondent***. On the issue of subjudice, it was admitted by the learned Counsel for the ***1st Respondent*** that all matters had been discontinued except in HCCC No. 494 of 2008 and 122 of 2007.

The other issue raised was that of an injunction against the ***1st Appellant***. Based on the principles of *Giella vs. Cassman Brown & Co. Ltd,* the ***1st Appellant*** argued that the ***1st Respondent\'s*** case does not meet the requirements of the principles set therein in order to be accorded an interlocutory injunction. The ***2nd Appellant*** submitted that the land was purchased and the price was fully paid.

13. Defending the application and suit, the ***1st Respondent*** relied on several authorities that advanced the argument that a preliminary objection is in the nature of a demurrer which raises a pure point of law It must be one which can be decided fairly and squarely, one way or the other on facts agreed on or not in issue on the pleadings, and it cannot be raised if any facts have to be ascertained. As a result, they opposed the preliminary objections arguing that the issues raised could only be ascertained if the case was heard and determined on merit. Generally, the ***1st Respondent*** submitted authorities urging the court to sustain the suit rather than dismiss it saying that defects in the pleadings if any could be cured by way of amendment of the pleadings.

They also urged that the prayers for an interlocutory injunction were proper, and the same can be granted to a party who has not prayed for permanent or perpetual injunction in the plaint. Further, they contended that *res judicata* required the court to examine the question with reference to the competence of the court, the party and the representatives, matters in issue, matters which ought to have been made a ground of defence or attack in the former suit and the final decision. The ***2nd Respondent*** also opposed the preliminary objection.

14. Decisions on the application and the preliminary objection

By a ruling dated 18th November, 2008, the High court (Khaminwa J) in determining the preliminary objections raised decided that the issue of an injunction as between ***1st Respondent*** and ***2nd Appellant***was *res judicata* and in any case, the same had been overtaken by events, as the property had already been transferred. On the other hand, the court found that some of the issues in the suit and application were not *res judicata* as between the ***1st Respondent*** and ***1st Appellant***. Further, that the doctrine of *Lis pendens* applied between the parties with the court stating that Section 52 of the I.T.P.A prohibits any alienation of property during the active proceedings of a suit.

As a result, the court found that the suit should proceed in respect of the claims for damages for fraud, collusion and other irregularities that had not been adjudicated upon and therefore dismissed all other objections except the one in respect of the application seeking an injunction against the ***2nd Appellant***.

On 2nd November, 2009, upon hearing the application and after the determination on the preliminary objections taking into consideration the parties' submissions and evidence, the learned Judge held that the doctrine of *res judicata* did not apply to the suit for reasons that the case had not been finally determined between the ***1st Respondent*** and the ***1st Appellant***. She therefore, granted the prayer for an injunction as against the ***1st Appellant*** for a period of 6 months subject to the case being heard to its conclusion within the 6 months, failure to which, the application would stand dismissed. Lastly, the **1*st Respondent*** was ordered to give an undertaking as to damages within three days of the decision.

15. Dissatisfied with both decisions of the learned Judge delivered on 18th November, 2008 and 2nd November, 2009, the ***2nd Appellant*** filed civil appeal No. ***100 of 2010*** and raised substantive grounds of law and fact which were canvassed in the memorandum of appeal dated 7th May, 2010.

Also dissatisfied with the decision of the Court dated 2nd November, 2009, the ***1st Appellant*** filed Civil Appeal **No. 106 of 2010** of which memorandum of appeal dated 12th May, 2010 raised the following substantive issues:

"1. The learned Judge erred in holding that the matters raised by the 1st Respondent were not res judicata.

2. The learned Judge overruled her two previous decisions in the same matter and touching on the same matters and issues previously raised and argued before her, and given on 3rd November 2008 in HCCC Case No. 494 of 2008 and on 18th November, 2008 in HCCC No. 505 of 2008 in which she held categorically that all matters raised by the 1st and 2nd Respondents were res judicata."

16 Appeal

As stated earlier on, the two appeals were consolidated and heard together .

At the hearing of the appeal, Mr. Nyachoti, learned counsel for the 2nd Appellant and 3rd Respondent, presented his submissions in three clusters.

Firstly, he submitted that the learned Judge erred in arriving at several final conclusions on the issues raised in the main suit at an interlocutory stage of the proceedings.

He submitted that the value of the property was not the issue to be determined by the learned Judge at the interlocutory stage. The Judge therefore erred in doing so in view of the prayers (b) to (f) as sought in the plaint. He stated that in the ruling dated 2nd November, 2009, the learned Judge made a finding that there was an undervalue of the property which was sold at Kshs. 70,000,000.00 while valued at Kshs. 693,305,000.00 as per the valuation report of the suit property prepared by Bel Air Properties Limited on behalf of the ***1st Respond*ent.** However, he submitted, the value given on the valuation report of the suit property prepared on behalf of the ***3rd Respondent*** by Centenary Valuers & Property Consultants was Kshs. 82 million and a forced sale value of Kshs.58 million but the learned Judge totally ignored that piece of evidence in her ruling.

Moreover, the learned Judge erred by determining the issue of interest at the interlocutory stage. He argued that the issue of the interest could not be determined at the interlocutory stage and was one that ought to be considered at full trial. He further, contended that the issue of the interest and the consent of the Minister were not for consideration before the Judge.

He further queried the final determination made on the validity of the charges by the learned Judge at the interlocutory stage. He contended that irrespective of the fact that the validity of the two other charges was not in dispute, the learned Judge declared them null and void. He submitted that the charge documents had been drawn by different law firms. The first charge was drawn by the firm of Gachube and Company Advocates while the second and the third were drawn by Githuka and Co. Advocates. In addition, the Judge made the finding that Edith Gachube, Advocate was not qualified to practise as she had not taken out a practicing certificate for the relevant year 1988. The learned Judge referred to the list of advocates who had obtained practicing certificates for the year 1989. He submitted that the said list of advocates was not relevant to the issue of a practicing certificate that was issued in 1988. The Judge did not have a list for 1988, and therefore the ***2nd Appellant*** stood prejudiced**.**

17. In addition, he argued that the learned Judge made a final conclusion in the ruling, that the ***2nd Appellant*** sold the guarantor\'s security intending to cripple the operations of the ***1st Respondent***. He submitted that that was a conclusion that should not have been made as those findings go to the root of the matter as canvassed in the plaint and can affect the findings of the final court.

Secondly, he submitted that the learned Judge failed to address herself to the issue of *res judicata*. He stated that the preliminary objections before the High court were essentially challenging the competency of the suit for being *res judicata*. He argued that the ***Appellants*** and ***3rd Respondent*** demonstrated to the Court that there were eight (8) suits over the same subject matter all of which had been determined in favour of the ***2nd Appellant.***. He argued that the learned Judge erred in dismissing the preliminary objections as she did, as all those applications and suits dealt with the issues that were raised before her. Those other suits were filed before the suit giving rise to these appeals. He explained that the 1st Respondent filed **Mlimani Civil suit No 122 of 2007** and a Chamber Summons soon thereafter on 20th September, 2007 urging the court to hold that the sale of the property was null and void. Accordingly, the issues of sale were canvassed before Warsame J (as he then was) and he rendered a decision which dismissed that suit. The learned Counsel contended that if the ***1st and 2nd Respondents*** were aggrieved, they should have applied for a review of that decision or file an appeal instead of filing a fresh suit, that is, HCCC No. 505 of 2008 from where these appeals emanate.

Further, he raised the issue of *locus standi* canvassed in grounds 5,6 and 7 of the memorandum of appeal. He contended that the learned Judge considered a further affidavit sworn by ***Stephen Ndung\'u Njonjo*** who did not have any *locus standi* in the suit and concluded that no auction ever took place. He submitted that the nexus between ***Stephen Ndung\'u Njonjo*** and the parties is not direct. He argued that the learned Judge was convinced more by the affidavit of the stranger than that of the appellant. In addition, the affidavit of the auctioneer was not taken into account at all by the Judge in arriving at her ruling. He therefore urged the court to allow the appeal.

18. On his part, **Mr. Issa**, learned counsel for the **1st Appellant**, specified that his appeal was only against the ruling of ***2nd November, 2009***. Relying on the memorandum of appeal dated 2nd May, 2010 in Civil Appeal No. 106 of 2010, he submitted on the issue of *res judicata* and urged that the parties before Warsame J (as he then was) in Milimani HCCC No. 122 of 2007 were not the same as those in the present case as the ***1st Appellant*** herein was not a party to the previous suit. He argued that the parties were aware that the ***1st Appellant*** had participated in the public auction and was not joined as a party and the ***1st Respondent*** should have joined the ***1st Appellant*** and ***3rd Respondent*** as a party so that all the issues could be determined in that suit. In any event, he submitted, the said suit was struck out.

He contended that the learned Judge was wrong in law when she said that the issues between the ***1st Appellant*** and the ***1st Respondent*** were not *res judicata*. He supported his argument with the case of **Pop-in (Kenya) Ltd and 3 others vs. Habib Bank, A.G. Zuric C.A No. 80 of 1988** where it was held that the plea of *res judicata* applies 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 matter of litigation.

He submitted that the learned Judge analysed the issues before her very validly and considered the authorities. He stated that she justly concluded that the only recourse left for the ***1st Respondent*** was in damages and directed that the suit should proceed in respect of damages for fraud, collusion and other irregularities raised by the Plaint.

However, the learned Judge made wrong findings in HCCC No. 505 of 2008 which reversed her two previous decisions in the same matter and touching on the same matters and issues previously given on 3rd November, 2008 in HCCC. No. 494 of 2008 and 18th November, 2008 in which she held categorically that all matters raised by the ***1st Respondent*** were *res judicata.*In these decisions the learned Judge said that the suit had been heard and determined. Ochieng\' J. also held that the issue of statutory notice had been heard and determined by Warsame J (as he then was) and Lenaola J and therefore was *res judicata*. She also found that the issue of the notice was sorted out by way of consent by the parties in 1992**.** In addition, the Court of Appeal while dealing with this matter had clearly held that the Appellants herein did not deserve any equitable remedy and therefore, the learned Judge should have taken the same into account when she stated that the ***1st Respondent*** was entitled to damages.

He therefore, submitted that the learned Judge erred in law as she would not revisit these findings without any application for review. He contended further, that the learned Judge did not explain her turnaround from her earlier ruling of 18th November, 2008. He argued that the two (2) rulings delivered by the same judge were contradictory and therefore the second ruling should be set-aside. He explained that section 69B of ITPA only gives a claimant one remedy that is, a claim for damages. The Judge had correctly referred to ***Downhill Limited -vs- Herith Ali El Busaidy & City Finance Bank Ltd Civil Appeal No. 2541 of 1999*** where it was held that***,*** a purchaser can only claim damages against the mortgagee. He argued that even if there were any irregularities, (which he contended there were none), she could not give any relief other than damages. He therefore urged the Court to set aside the rulings of the judge as they were premised on the wrong application and understanding of the law.

He submitted that the issue of the validity of the charges was admitted as early as 1992 before courts of competent jurisdiction that had dealt with these matters before. Therefore, the ***1st Respondent*** could not challenge the validity of the charges at this point. He submitted further, that the decision was upheld when

the judgment of the learned Judge Lenaola, was appealed against but affirmed by the Court of Appeal. He therefore urged the court to allow the appeals.

19. Mr. King\'ara, learned counsel for the ***1st Respondent***, dealt with both appeals together. He submitted that the learned Judge was dealing with two (2) distinctive issues. The first decision of 18th November, 2008 was based on law on the preliminary objection. He submitted that she had correctly overruled the Preliminary Objection because she had been guided by the case of ***Mukhisa Biscuits Manufacturing Co. Ltd -vs- Westend Distributors Ltd. 1969 E.A. 696*** and therefore could not consider the facts.

He submitted that in the second ruling, the learned Judge did consider the facts as borne out in the affidavit of ***Stephen Ndung\'u Njonjo*** who stated that he was at the place of the scheduled auction but no auction took place, and that of ***Ngengi Muigai*** buttressing the same point thus demonstrating that there was collusion between the ***1st Appellant*** andthe ***3rd Respondent,*** hence the learned Judge's finding on collusion and fraud were well founded. He therefore submitted that the learned Judge was right in ordering that the suit should proceed for hearing in respect of the allegations of fraud and collusion.

He argued further that in the previous suits, there was never any case against the ***3rd Respondent*** nor against the ***1st Appellant*** and therefore the issue of *res judicata* does not arise. He submitted that the learned Judge addressed the issue and found that there were never other cases before her which involved the debtors, purchasers and bankers and correctly found that the matter was not *res judicata*.

He contended that the sale of a property can be set aside if fraud is involved. Citing the authority of ***Nyangilo Ochieng\' -vs- Fanuel Ochieng (1996)Eklr,*** learned counsel submittedthat the law excuses irregularities in a sale but not illegalities, especially those which goes to the root of the sale **.** He argued that the illegality herein was that there was no money owed, no accounts rendered and the matter had even gone for criminal investigations. He claimed that the bank said they were not able to get the original statements and that they had written off Kshs. 45.9 million which they were now claiming back. There was therefore no excuse as to where the Kshs. 70 million being claimed was coming from. He contended that it was not enough to make a 90 days demand and that the demand must also be valid. In this case there was no valid demand for 90 days. He submitted that they moved the Court under the doctrine of *Lis Pendens* and that was why they were given 6 months to complete the case. He also stated that he had fixed the case for hearing and could have finished the litigation long ago were it not for the appeals herein.

He contended that all the other suits had been decided before the sale and not after. He submitted that it is only the issue of exercise of power of sale that had been determined elsewhere.

He stated that the interlocutory injunction granted should continue as the learned Judge did not make any final determinations in the interlocutory application. In any event, he submitted, the court that hears the matters cannot be bound by those findings.

He also submitted that there was no valid consent of the Land Control Board and that the learned Judge rightly found that the ***1st Respondent*** had made a *prima-facie* case. He therefore urged the court to dismiss the appeals and requested for the six months granted by the High Court so that the suit can be heard and determined.

20. On his part, **Mr. Wachakana**, learned counsel of the ***2nd Respondent*** aligned himself to the submissions of Mr. King\'ara learned Counsel for ***1st Respondent***. He concurred with Mr. King'ara that the learned Judge did not make any conclusive findings. He submitted that the question that the suit raised was whether there was a sale and if so whether the same was fraudulent given the circumstances. On the valuation of the suit property, he contended that the learned Judge was faced with two valuation reports, one for Kshs. 693 million and the other for Kshs.83 million with the forced sale value being placed at 58million He reiterated that the learned Judge never made any conclusive findings on the value but only made conservatory orders.

On the issue of *res judicata,* he stated that the ***1st Appellant,*** not having been a party to the previous suits excluded the matter from the principle of *res judicata*. He contended that a matter is only *res judicata* where the parties and the issues are the same. In addition, the issue of fraud had never been canvassed in the previous suits. He contended that the decision of the Judge that Edith Gachombe, Advocate had no practicing certificate for 1988 was right and therefore prayed that the ruling be upheld and the suit proceeds to trial for determination on merit.

21. In reply to these submissions learned Counsel, **Mr. Nyachoti** submitted that the criminal proceedings were stopped when the ***2nd Appellant*** went to Court. It is not therefore true that the accounts were undergoing investigations. He stated that on the issue of accounts the matter went to court and was determined by the judgment of Lenaola J in HCCC 1576 of 1999. The judgment was appealed against and the Court of Appeal upheld the decision and the bank's position in the matter was therefore upheld. The issue of illegalities on the point of disputes of monies owing does not therefore arise. He further submitted that there are Civil Appeal Nos. 137of 2010 and 174 of 2010 in respect of HCCC No. 494 of 2008 involving the same parties indicating that the ***1st Respondent*** had filed other matters before Milimani HCCC No. 505 of 2008. He contended that the learned Judge\'s comments go to the root of the suit and cannot be ignored because all other courts of concurrent jurisdiction will be bound by them.

22. In reply, **Mr. Issa**, submitted that the learned Judge rightly found that there was an auction which was conducted validly

He submitted further, that *res judicata* applies to the issues before the court and those that should have been canvassed in the previous suits and that the fact that some of the parties chose not to join the suits by the ***1st Respondent*** does not change the fact that the suit is still *res judicata* as held in the case of ***Omondi & Another -vs- National Bank of Kenya Ltd and 2 others.***

Hecontended that although there had been a multiplicity of suits, the suit debt had been conceded before Lenaola J and the same was upheld by the Court of Appeal. It was held that the parties could not run away from that consent. The limitation or the judgment in rem binds parties in eternity. Further , that the Land Registration Act has transitional provisions which provide that the Land Act No. 6 of 2012 will not repeal the mortgagee's rights and liabilities that already accrued under the old Acts. Consequently, the new Land Acts are inapplicable. He therefore urged the court to allow the appeals.

23. Having analysed the issues before us and the issues arising in the suit before the High court as we are bound to do as a 1st appellate court,(See **Selle vs. Associated Motor Boat Company (1968) E.A. 123 at page 126)**, we now turn to the issues for our determination in this appeal which we summarise as follows;

1. Whether the suit is res judicata?

2. Whether the learned Judge made final conclusions in the suit at the interlocutory stage?

3. ***Whether the 1st respondent\'s suit is subjudice?***

24. Whether the suit is res-judicata?

The principle of *res-judicata* is anchored on **Section 7 of Civil Procedure Act,(** Cap 21, Laws of Kenya) which provides that:-

"No court shall try any suit or issue in which the matter directlyand substantially in issue has been directly and substantially in issue ina former suit between the same parties, or between parties under whomthey or any of them claim, litigating under the same title, in a courtcompetent to try such subsequent suit or the suit in which such issuehas been subsequently raised, and has been heard and finally decidedby such court."

"*Explanation (4)* ***any matter which might and ought to have been made a 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."***

This Court has interpreted and applied the principle of *res judicata* in a litany of cases and one would be excused to make an assumption that the law in this area is straight forward and well settled. If that were so however, the Courts would not still be battling with this issue on a daily basis. Although generally speaking the principles are well spelt out, it is important to consider the facts of each case in order to determine if a suit which has been the subject of litigation before has become res judicata. If a court of competent jurisdiction has adjudicated over a matter between parties or parties whom they claim and determined the issues raised in such matters then the same parties or others litigating through them are barred from re-litigating the same issues before any other court. Such a determination inevitably includes any judgments or orders issued following by consent of the litigating parties.

In the appeal before us, it is not disputed that there are several matters-some concluded while others are still pending, which basically relate to the same subject matter. It is not disputed either that one such case is **HCCC No.1219 of 1992** in which the 1st and 2nd respondents entered into a consent judgment and confirmed the validity of the charge documents (now being contested), admitted liability of the debt owed to the 2nd appellant herein, and undertook to liquidate the same by 31st of July 1992, and confirmed that the 2nd appellant was at liberty to sell the said properties if the debt was not paid as agreed.

Those issues cannot be re-litigated. On that point this case falls on all fours with **Kamunge & Others Vs. Pioneer General Assurance Society Ltd** [**1977] EA 263 at pg. 265**" where this court stated as follows on the issue of *res judicata.*

"*It does not matter that the judgment was by consent and not on merit after trial. It is as binding as if the judgment was one after evidence had been called..*"

This Court has also stated in the case of **Pop-in (Kenya) Ltd and 3 others vs. Habib Bank, A.G. Zuric C.A No. 80 of 1988** that a matter will be *res-judicata* not only on points upon which the court was actually required by parties to form an opinion and pronounce a judgment but also on every point which properly belonged to the subject matter of litigation.

In this case, as pointed out earlier on, the parties herein did enter into a consent in which the 1st and 2nd respondents admitted the debt owed and made an undertaking to settle the same. This in effect in our considered view also meant that they accepted the validity of the charges on which their indebtedness was based. They are therefore estopped from reneging on that consent and their re-litigation on these two issues is manifestly res judicata. At the risk of sounding repetitive we reiterate that the challenge on the validity of the charges was determined by the High court (Lenaola J),and the same was upheld by this Court on appeal. That issue must therefore be laid to rest and cannot continue to be re-litigated ad nauseum.

We note further, that the ***1st Respondent*** has filed a number of cases that have been between the same parties, addressing the same issues, heard and finally decided by courts of competent jurisdiction that are directly and substantially in issue in HCCC No. 505 of 2008. In addition, a perusal of decisions in the record of appeal that were made by Lenaola J, Warsame J, Ochieng\' J, and the Court of Appeal discloses that these previous decisions have addressed the issue of fraud. Indeed even Khaminwa J herself also made a finding in her ruling of 8th November, 2008 to the effect that;

"I believe all issues between the parties have been raised in one case or the other. What is obvious is that the Plaintiff\'s are now silent about the payment of the 1st Defendants loan."(Emphasis ours.)

Having found that all the issues between the parties had already been determined, it is not clear to us how the learned Judge made the finding in her ruling later on to the effect that the issue of fraud was not res judicata. It is our finding that the learned Judge erred in that respect.

Mr. Issa, learned counsel for 1st applicant (Bidii Kenya limited), submitted that the suit was not res judicata, as all the other suits except Milimani HCCC 122/08 were filed before the sale and there had therefore been a change of circumstances that could allow for the 1st appellant to litigate the matter without being caught up in the res judicata quagmire. We note that the said suit was actually dismissed by Warsame J (as he then was). The suit was actually filed after the said sale and so the 1st appellant should have been joined as a party. Further to this we note that Milimani HCCC No. 494 of 2008 had the 1st appellant as the 2nd defendant. Any issues affecting the 1st appellant in respect of the suit property ought to have been raised in that suit. According to Mr. Nyachoti for the 2nd appellant, a determination was given in that matter and there are two appeals pending in respect of the said suit i.e Civil appeals no 137/2010 and 174/2010. This therefore means that the 2nd appellant has indeed had a chance to ventilate the matters affecting it as far as the dispute in question is concerned.

The same issues should not have been relitigated afresh in HCCC 505/08. This proposition is clearly enunciated in ***Hoystead and Others v TaxationCommissioner, (1925) All ER Rep 56 at p 62*** *where*it was stated that:-

"The admission of a fact fundamental to the decisionarrived at cannot be withdrawn and a fresh litigationstarted with a view of obtaining another judgment upona different assumption of fact; .....Parties are notpermitted to begin fresh litigation because of new viewsthey may entertain of the law of the case, or newversions which they present as to what should be aproper apprehension by the court of the legal resulteither of the construction of the documents or the weightof certain circumstances. If this was permitted litigationwould have no end, except when legal ingenuity isexhausted. It is a principle of law that this cannot bepermitted ..."

In addressing additional parties in a suit, the Court has decided that a suit does not cease to be *res judicata* becausea new party has been added to the suit that had been previously decided upon. This Court in the case of ***Omondi & Another -vs- National Bank of Kenya Ltd and 2 others*** decided that:-

"Parties cannot evade the doctrine of res-judicata by merely adding other parties or causes of action in a subsequent suit."

Also in **Lotta -vs- Tanaki & Others [2003] 2 EA 556 (CAT)** the court held in relation to the doctrine of res judicata,

"Its *object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit."* Further that *"a person does not have to be formally enjoined in a suit, but he will be deemed to claim under the person litigating on the basis of a common interest in the subject matter of the suit."*

Consequently, the addition of the *2nd Appellant* and the *3rd Respondent* in this suit cannot stop the suit herein from being *res judicata*.

We find that HCCC. NO.505 of 2008 is res judicata and the learned Judge ought to have so found.

24. Whether the learned Judge made final conclusions in the suit at an interlocutory stage.

We have gone through the impugned ruling dated 2nd November,2009 and in our considered view, the learned Judge made some final conclusions on some substantive issues at an interlocutory stage before hearing the parties fully for instance:-

· **"The purported charges are defective and incapable of taking effect for failure to comply with the registration of Transfer of Property Act and the law of Contract Act."**

· **"These properties were charged to the first defendant but first defendant proceeded to sell the guarantors security intending to cripple the operations of the Plaintiff"(see page 1821 line 23)**

· **"Furthermore the statutory notice was invalid. I have already said the period of 3 months had not expired."(page 1821 lines 24-27)**

· **"In this case there was a gross under sale for Kshs. 70,000,000/= when value was Kshs. 693,363,000/=. There was undervalue."(see pg 1825 line12-13)**

The learned Judge also made findings to the effect that the charge in question was invalid for having been signed by an advocate who is said not to have renewed her practicing certificate not withstanding that the said issue was controverted and could only be proved after hearing both parties.

These conclusions in our view were prejudicial to some of the parties and they ought to have been heard before such conclusions were made.

In the case of **Kenya Railways Corporation vs. Thomas M. Nguti & 6 others Civil Appeal No. 210 of 2004 (Unreported)**, this Court stated at page 9 as follows:-

"There is, of course, no general rule of law that final orders cannot be granted in an interlocutory application. But it will be a rare case when such orders will be granted where there are serious disputes of fact which can only be resolved after hearing the parties."

It is our view that the above finding of this Court was relevant and thus applicable to this case**.**

25. **Whether the suit is subjudice?**

Section 6 of the Civil Procedure Act provides:-

"No court shall proceed with the trial of any suit or proceedingin which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties,or between parties under whom they or any of them claim, litigatingunder the same title, where such suit or proceeding is pending in thesame or any other court having jurisdiction in Kenya to grant the reliefclaimed."

Rahul Dilesh Bid, the Director of the ***1st Appellant*** deponed that after the sale by auction, the 1st Respondent filed HCCC No. 494 of 2008 on 20th August, 2008 against the 1st Appellant; which is still pending before the High Court at Milimani.

In her Ruling of 8th November, 2008, the learned Judge failed to expressly address the issue of *subjudice* but proceeded to make the following finding:-

"The 3rd Defendant has denied the allegation and asserts that he gave notice under Auctioneers Rules. In his submissions, Advocate for the Applicant stated that he has discontinued all suits except 494 of 2008 and 122 of 2007, therefore there is no res judicata."**.....**

The learned Judge with the concession of the Advocate for the ***1st Respondent*** that the suit Milimani HCCC No. 494 of 2008 and Milimani HCCC No. 122 of 2007 dealing with same subject and between the same parties were still pending before court, should have stayed the suit and application in ***HCCC No. 505 of 2008*** which was filed during the pendency of the two othersuits.

From the foregoing, it is clear that this suit was res judicata, it was also sub judice. The preliminary objection was meritorious and ought to have been sustained.

In the result, we allow both appeals and set aside the rulings of Joyce Khaminwa J delivered on 18th November 2008, and on 2nd November 2009.

The appellant's preliminary objection dated 18th September 2008 is hereby allowed in its entirety with the

result that **Milimani HCCC NO of 505 of 2008** be and is hereby dismissed with costs to the appellants herein.

Dated and delivered at Nairobi this 26th day of April, 2013.

J. W. ONYANGO OTIENO
……..……
JUDGE OF APPEAL

W. KARANJA
……
JUDGE OF APPEAL

D. K. MARAGA
……
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR