



Equip Agencies Limited & another v Daniel Njuguna Gitau, Lucas Kiiru Ngigi, Kelvin Mureithi & Mary Njoroge (Sued as Office Bearers of Gilgil Total Investors Self Help Group) & 4 others (Environment & Land Case 89 of 2024) [2024] KEELC 5306 (KLR) (Environment and Land) (18 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5306 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE 89 OF 2024
MC OUNDO, J
JULY 18, 2024**

BETWEEN

**EQUIP AGENCIES LIMITED 1ST PLAINTIFF
GILGIL TREATMENT INDUSTRIES LIMITED 2ND PLAINTIFF**

AND

**DANIEL NJUGUNA GITAU, LUCAS KIIRU NGIGI, KELVIN MUREITHI & MARY NJOROGE (SUED AS OFFICE BEARERS OF GILGIL TOTAL INVESTORS SELF HELP GROUP) 1ST DEFENDANT
JOSEPH MUNGAI GIKONYO T/A GARAM INVESTMENTS AUCTIONEERS 2ND DEFENDANT
TIOWER SAVINGS & CREDIT CO-OPERATIVE SOCIETY 3RD DEFENDANT
CHIEF LAND REGISTRAR NAKURU COUNTY 4TH DEFENDANT
I&M INVESTMENT BANK LIMITED 5TH DEFENDANT**

RULING

1. Before me for determination are three Applications, the first one dated 2nd August 2023, the second one dated 28th August 2023 and the third one dated 18th September, 2023. For ease of reference, the parties herein shall be referred to as they appear in the suit.
2. The 1st Application dated 2nd August, 2023, is a Notice of Motion Application brought by the Plaintiffs pursuant to the provisions of Section 1A, 1B, 3A, 59, 63 (e) and 80 of the [Civil Procedure Act](#); Order



- 40 Rule 1(a), 2, 4 and 10, Order 45 Rules 1(a & b), Order 51 Rule 1 of the Civil Procedure Rules; 82, 84, 9(2 & 3), 96, 97, 98, 103, 104(3), 105, 106 and 152 of the Land Act; Section 56, 68, 69, 70, 106 and 107 of the Land Registration Act wherein the Plaintiffs sought for an order of temporary injunction restraining the Defendants whether by themselves, their employees, servants, agents or auctioneers from advertising for sale, selling or further alienating whether by public auction or private treaty, subdividing, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging, entering into, evicting, invading, destroying in any way, barricading entrance or otherwise howsoever interfering with the Plaintiffs' possession and ownership or title to land reference L.R No. Gilgil Township Block 2/210.
3. They also sought that an order be made under Section 106 of the Land Registration Act, that during the pendency of the instant suit, all further registration or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right, title or interest in all that parcel of land known as L.R No. Gilgil Township Block 2/210 by any Land Registry, Government Department and all other registering authorities be prohibited. Finally, the Plaintiffs sought for costs of their Application.
 4. The Application was supported by the grounds therein and a Supporting Affidavit of an even date sworn by Divyesh Indubhai Patel, the Managing Director of the 1st Plaintiff who deponed that until 21st February 2020, the 1st Plaintiff was the registered owner of the property L.R No. Gilgil Township Block 2/210 (suit property), which suit property measured approximately 16.73 hectares or 41.34 acres, was developed in three parts wherein part of it housed a treatment industry operated by the 2nd Plaintiff, which had machinery was valued at Kshs. 120,000,000/=. That on 24th January, 2019, the suit property was illegally sold to the 1st Defendant by the 2nd Defendant under the instruction of the 5th Defendant.
 5. That on or about 22nd April 2013, the 1st Plaintiff had via a duly executed legal charge, charged the suit property to the 5th Defendant to secure maximum principle amount of Kshs. 324,000,000/= wherein pursuant to the provision of clause (c) of the recital to the said Charge dated 22nd April, 2013, the Chargor, the 1st Plaintiff herein, had agreed to charge all its right, title and interest in and to the charged property and in the absence of a debenture, the security that had been given was simply that of land and Buildings. That subsequently, as per the particulars of payments of the term loan attached, the 1st Plaintiff had dutifully and diligently repaid all the sums that had been advanced from the date of the initial lending by the 5th Defendant.
 6. That after clearing the said facility, instead of discharging the security, the 5th Defendant had unlawfully and unilaterally consolidated the said loan with other loans that had purportedly taken unsecured or on other securities without an executed memorandum to so consolidate, and was now demanding money in excess of Kshs. 1,000,000,000/= contrary to the law. That in further disregard of contractual stipulation in clause 3(1) and (2) of the charge, the 5th Defendant had extended the charge facilities that had not been covered therein and had proceeded to vary its rate of interest on several occasions without notice and/or observance of the law. That subsequently, by an omnibus Statutory Notice dated 13th May, 2016, the 5th Defendant had demanded that within 3 months, the 1st Plaintiff pays to it a sum of Kshs. 555,393,923.46/= for Account No. 006251491201 and Kshs. 677,283,313/= for Account No. 006002514940206 failure to which it would sale the suit property in exercise of its statutory power of sale.
 7. That the purported notice under the provisions of Section 90 of the Land Act was null and void thus did not constitute a lawful demand because the charge herein had not been created for purposes of securing a sum of Kshs. 1,200,000,000/ but for a sum of Kshs. 324,000,000/= and that a valid Statutory Notice could only issue for the secured sum and the interest thereon but not for sums secured



- otherwise or unsecured. That further, the Statutory Notice had been void for uncertainty, ambiguity and consolidation of accounts whose particulars were different from the account that the instant charge had been created for. That the 5th Defendant had also subjected the credit facilities to varying penal interest rates that were harsh, oppressive and illegal hence unenforceable against the Plaintiff in addition to demanding penalties that were time barred in contravention of the provisions of Section 4 of the Limitation of Action Act.
8. That thereafter, the 2nd Defendant had on the instruction of the 5th Defendant and without proper valuation advertised the suit property for sale by public auction scheduled for the 24th January 2019. That accordingly, on the said auction date the 5th Defendant had in purported exercise of statutory power of sale through the 2nd Defendant, fraudulently sold the suit property at a gross under value of Kshs. 353,000,000/= despite the suit property's current value being over Kshs. 800,000,000/= . That further as per the attached flask dish showing what transpired during the auction, the purported auction had been marred by massive irregularities and had flouted the mandatory provisions of the law since there had been clear fraudulent collusion between the 1st, 2nd and 5th Defendant thus no legitimate auction had been conducted as required by the law since the 2nd Defendant in its advert did not positively identify what had constituted the property in the sale.
 9. That the assessment and valuation of a running factory, machines and equipment did not fall within the purview and function of a valuer licensed under the Valuers Act but in the purview of assessment by Mechanical Engineers, hence no valuation had been done on the said equipment that belonged to the 2nd Plaintiff. That in any event, the purchase price had been too low evidencing fraud. That further, other than the 2nd Defendant's own account, there had been no known or specific criteria through which the 1st Defendant had been identified or sourced as the highest bidder thus the court should find that the said 2nd Defendant had failed to demonstrate that the public auction had not been flawed and that whatever had transpired in the purported auction had been a private arrangement between the 1st 2nd and 5th Defendants. That therefore, since there had not been an auction as deemed by law the same having been unlawful and fraudulent, the purported action was incapable of conferring any title or proprietary rights to the alleged successful bidder.
 10. He further deponed that the 1st Defendant was neither a natural person nor an artificial person as envisaged by the law but an amorphous organization unknown to law hence it could not purport to lawfully hold property in its name and therefore, the transfer of the suit property to it was null and void. That subsequently, the 1st Defendant had not acquired a title which could be the basis for transfer of the suit property or needed to be protected by law. That further, upon the unlawful registration of the 1st Defendant as the owner of the suit property, it had on several occasions tried to evict the Plaintiffs therein despite not having obtained eviction orders.
 11. That on 9th May, 2023, the office of the Attorney General had informed the Director of Criminal Investigation that the said transfer had been null and void. That resultantly, the court should set aside the purported public auction of 24th January, 2024 and cancel the transfer and charge to the 3rd Defendant and thereafter issue an injunction to restrain the Defendants from further alienating, dealing, transferring or completing the transfer of the suit property in any manner whatsoever.
 12. That further the purported sale of the factory housed on the suit property had been fraudulent and illegal since the advertisement and the charge did not include the machinery and equipment which were never valued as required by the law. That the sale had not been conducted by the Auctioneer who had advertised the same or by a licensed Auctioneer at all. That the Defendant had hastily pushed for the transfer and charged the suit property to cover-up for the fraud and illegality. That since the 3rd Defendant had initiated the process of evicting the Plaintiffs from the suit property and subdividing



- the same for further transfer to third parties, such action would take away the subject matter of the suit and render it nugatory and an academic exercise.
13. That they had an arguable case with high probability of success and no damages would be sufficient to remedy the loss since the further transfers to the 3rd parties would be irreversible should the court find in favour of the Plaintiffs. That subsequently, the orders sought herein were intended to maintain the status quo and preserve the substratum of the suit to prevent further depletion as intended by the Defendants. That the balance of convenience lay in safeguarding the substratum of the suit.
 14. That pursuant to the said auction of the suit property, the Defendants had hired goons who had been blocking the entrance and threatening to storm the same thus disrupting the business and could lead to breach of peace, destruction of property and physical injuries to the 2nd Plaintiff's employees in addition to occasioning irreparable loss. That it was thus in the interest of justice that the instant Application be allowed and the orders sought be granted before the situation escalated.
 15. In response and opposition to the Plaintiff's Application, the 1st and 3rd Defendants filed their Replying Affidavits both dated 14th August, 2023. The 1st Defendant's Replying Affidavit was sworn by Daniel Njuguna Gitau, it's Chairperson who deponed that the 1st Defendant was the registered leasehold proprietor of the suit property and had even registered a charge of the same with the 3rd Defendant after having purchased it on 24th January, 2019 through a sale by public auction wherein it had been issued with a certificate of lease on 21st February, 2020 acquiring a leasehold interest term of 99 years from 1st January 1955.
 16. That the dispute between the 5th Defendant and the 1st Plaintiff over the monies outstanding from loans that had been advanced to the 1st Plaintiff was not new and had been a subject of many litigation having been considered before the court in Nairobi High Court Comm Case No. 87 of 2019; Equip Agencies Limited v I & M Bank and 2 others as evidence by the Court's Ruling and decree therein annexed and marked as DNG 4. That further, the Deed of Settlement between the 5th Defendant, the 1st Plaintiff and other parties which was now acknowledged as the judgement of the court, had been acknowledged that on 24th January 2019 wherein the suit property had been sold to the 1st Defendant and thereafter the same had been transferred to the said 1st Defendant on 21st February, 2020 and a new lease issued thus the suit property had been available for sale which was lawfully carried out and completed in favour of the 1st Defendant.
 17. That subsequently, the court had pronounced itself on the issue of ownership of the suit property and which pronouncement was binding to all hence in the absence of a successful appeal/review of the same, the Decree of the Court had conferred ownership of the suit property upon the 1st Defendant thus the issues raised in the present suit were res-judicata and incapable of being determined by the court.
 18. That the 2nd Plaintiff, being the 1st Plaintiff's tenant, its interest in the suit property, if any, had been extinguished with the sale of the suit property to the 1st Defendant. That further, the said 2nd Plaintiff had instituted proceedings against the 1st Defendant and the 1st Plaintiff before the Business Premises Tribunal Case No. E035 of 2021 which had been determined on 28th July, 2023 to the effect that the tribunal had no jurisdiction hence discharging all the interlocutory orders that had been in place at the time preventing the eviction of the 2nd Plaintiff.
 19. That the 2nd Plaintiff had then sought from the 1st Defendant a period of 40 days to consolidate their equipment which was bulky and vacate from wherein on humanitarian ground this request had been



- granted. On 7th August, 2023, whereas the representatives of the 2nd Plaintiff had met and agreed to vacate from the suit property in 40 days, they had instead used that opportunity to file the instant suit.
20. That the Plaintiffs had also misled the court when they claimed that the sale of the suit property had included the 2nd Plaintiff's equipment and chattels despite the 1st Defendant having granted the 2nd Plaintiff time to move the very equipment in question. He clarified that the suit property as sold had constituted the land and immovable assets therein.
 21. That the prohibitory orders sought by the Plaintiffs herein against further change in the registration of ownership amounted to curtailing the 1st Defendant's right to use its property as it wished which right was guaranteed under the Kenyan Constitution and was incapable of being alienated. That accordingly, the occupation of the suit property by the 2nd Plaintiff without the consent of the 1st Defendant was in breach of law and had constituted a continuous trespass thus hampering the 1st Defendant from taking possession of the suit property to commence income generating activities thus causing it to incur huge losses. He thus deponed that the instant application was without merit and ought to be dismissed with costs.
 22. The 3rd Defendant's Replying Affidavit on the other hand was sworn by Patrick Njenga, the 3rd Defendant's Chief Executive Officer who deponed that the 3rd Defendant's involvement in the instant matter was limited to the financing of the 1st Defendant in acquisition of the suit property by way of public auction wherein the sums that was advanced had been paid to the 5th Defendant in full and the charge to the suit property registered in favour of the 3rd Defendant. That the injunctive orders sought herein had been overtaken by events thus incapable of being granted since the suit property had already been sold and transferred to the 1st Defendant and further charged in favour of the 3rd Defendant. That further, a reading of the Plaint showed that there was no cause of action against the 3rd Defendant save for a prayer sought for the cancellation of the charge registered in its favour, the delivery to the Plaintiff of executed Discharge of Charge and all documents with respect to the suit property which prayers were incapable of being granted since the court had vide a ruling and decree in Nairobi High Court Comm. No. 87 of 2019 upheld the Deed of Settlement that had acknowledged that the 1st Defendant was the proprietor of the suit property.
 23. That from the foregoing, the instant matter was res-judicata and the court lacked jurisdiction thus the present Application should be dismissed with costs for lack of merit.
 24. The 2nd and 5th Defendants opposed the Plaintiffs' Application via its Replying Affidavit dated 25th August, 2023 sworn by Andrew Muchina, the 5th Defendant's Assistant General Manager in the Legal Department who deponed that the court had no jurisdiction to entertain the instant application and the entire suit as the jurisdiction lay with the High Court of Kenya. That further, the Plaintiff lacked the locus standi to seek relief against the 2nd and 5th Defendants as they had no legal interest on the suit property.
 25. That the instant Application and the entire suit was res-judicata Nakuru ELC No. 166 of 2017: Gilgil Treatment Industries Limited vs. I&M Bank Limited & Another and Naivasha HCC No. 6 of 2018; Gilgil Treatment Industries Limited vs I&M Bank Limited and another both of which had dismissed the 2nd Plaintiff's Applications seeking for injunction on 25th May, 2018 and 6th December 2018 respectively which rulings had never been appealed against or set aside.
 26. That the instant Application and the suit was also res-judicata HCC No. 417 of 2018; [*Equip Agencies Limited v I & M Bank Limited, HCC No. 87 of 2019*](#); Equip Agencies Limited v I&M Bank Limited and HCC. No. E943 of 2021; Equip Agencies Limited & 5 Others v I & M Bank Limited & Another in which the court had vide its rulings dated 16th June, 2023, 30th September, 2022 and 3rd June, 2022



- respectively held that the suit was marked as settled in terms of the Deed of Settlement dated 10th June, 2021 that had acknowledged that the 1st Defendant was the legal owner of the suit land. He thus prayed for an order of injunction restraining the Plaintiffs from instituting any fresh suit relating to the suit property herein without leave of the court.
27. He further deponed that the Plaintiffs' advocates had been abusing the court's process by perennially obtaining orders of injunction against the interest of the 5th Defendant hence the court should put a stop to the said abuse by vacating the interim orders that had been granted on 7th August 2023 and extended on 21st August, 2023. That further, the costs of the instant Application and the entire suit be borne personally by the Plaintiffs' advocates.
 28. In a rejoinder, the 1st and 2nd Plaintiffs filed their Further Affidavits both dated 15th September, 2023. The 1st Plaintiff's Further Affidavit was sworn by Divyesh Indubhai Patel, the 1st Plaintiff's Managing Director who deponed that withdrawal of a suit did not activate the bar of res judicata thus the allegations that the instant suit was res judicata pursuant to withdrawal of a suit or suits in High Court Suit No. 87 of 2019 had no legal basis and was contra-statute. That it was clear from the ruling therein that Application for consideration before the court had been premised on the allegations that the 1st Plaintiff had refused to withdraw the suites despite the impugned Deed of Settlement. That further, it was trite law that the adjudication of previous applications for injunction was not a bar for similar applications in future provided the circumstances were different and that the circumstances, cause of action and issues in the previous proceedings were different and beyond the scope of Section 7 of the Civil Procedure Act to the circumstances and cause of action herein.
 29. That other than alleging that the previous Applications were premised on the same provisions, the Defendants had not demonstrated that the issues herein were determined in the previous proceedings and further, that no final determination had been rendered in respect of the issues raised in the instant suit and Application. He reiterated that maintained that the factory, equipment and machinery worth over Kshs. 120,000,000/= had never been valued, had not been subject of sale, and was currently the subject of Debenture in favour of another bank. Further, that the same could not form part of the charge under the law and in the circumstance of the instant matter. That the alleged 2013 valuation report and interlocutory Ruling of court in the year 2018 did not determine that the properties were part of the land that had purportedly been sold in the impugned auction yet the 1st, 2nd, 3rd and 5th Defendants were laboring under the misapprehension that the same had been included in the sale and had sent emissaries to the suit property to take stock of the same.
 30. That the instant suit relates to interest in land and intended eviction hence the court had jurisdiction to determine the same. That the suit land belonged to the 1st Plaintiff who had leased the same to the 2nd Plaintiff whose properties were allegedly sold despite not having any credit facility with the 5th Defendant hence the Plaintiffs were clothed with the requisite locus to prosecute the instant matter to recover that which had been illegally and fraudulently sold.
 31. That High Court Civil Suit No. E943 of 2021 was not in relation to the suit property hence the allegation that the instant suit and/or application was res judicata on that basis was misplaced and had no legal basis. That further, the 2nd Plaintiff had not been a party to the impugned Deed of Settlement as had been held in HCCC. No. 318 of 2018 and that the same was subject to court proceedings in High Court Civil Suit No. E943 of 2021 which was still pending and that the said impugned decree had only marked the matters listed therein as withdrawn.
 32. That the 5th Defendant's allegations were against the parties who were not parties to the instant suit hence the same should be disregarded and that the Plaintiffs' interest over the suit property could not be extinguished under law due to the apparent fraud and illegality in the impugned sale. That the



ruling in the Business Premises Tribunal had only confirmed that the court was the one clothed with the jurisdiction to determine the issues herein hence it had been contradictory for the Defendants to allege that there were issues that had been determined by the tribunal that had held that it had no jurisdiction. That further, the letter that had been annexed as DNG-8 to the 1st Defendant's Replying Affidavit was on a without prejudice basis hence could not form part of evidence to be relied upon in court and therefore the same should be struck out from the record.

33. That the 1st Defendant was an amorphous self-held group with no capacity under the law to hold property in its name as in the instant case and that the injunction sought herein was against any further sale or disposition of the suit property by any of the Defendants hence the present Application had not been overtaken by events. That there was no question of ownership that had been determined by the courts as had been alleged since as per the impugned Deed of Settlement, High Court Civil Suit No. 87 of 2019 had been marked as withdrawn. That however, under the false impression that there had been a decree settling the matter, the same court had on 16th June, 2023 dismissed the 5th Defendant's Application that had sought to execute the same. That similarly, the Defendants had sought to mislead the court that there was a decree determining the ownership and legality of the impugned sale.
34. That from the Rulings that had been cited by the Defendants, the impugned Deed of Settlement had only been partially performed since the 1st Defendant had never withdrawn the negative credit information shared with the CRB and that full payment was never undertaken. That further, upon realization of the fraudulent scheme, the impugned Deed of Settlement was challenged in court thus the issues that had been raised by the Defendants were sub judice.
35. That the allegations contained in the 1st, 2nd, 3rd and 5th Defendant's Replying Affidavits had been unsubstantiated, misleading and had only been intended to taint the character of the Plaintiffs without any legal basis hence he urged the court to disregard the same and grant the orders sought.
36. The 2nd Plaintiff's Further Affidavit sworn by James Njuguna Burugu, the 2nd Plaintiff's General Manager adopted and reiterated the contents of the 1st Plaintiff's Further Affidavit stating that the 2nd Plaintiff had not been a party in High Court Civil Suit No. 87 of 2019, the other cited suits between the 1st Plaintiff and the 5th Defendant or the alleged Deed of Settlement hence it was not bound by the outcomes therein. That accordingly, the court had on 16th June, 2023, in HCCC. No. 418 of 2018 dismissed the 5th Defendant's Application and held inter alia that since the 2nd Plaintiff was neither a party to the Deed of Settlement nor HC Comm No. 87 of 2019, the suit could not be settled in terms of the Deed of Settlement or in terms of the decision of the court in a case to which it had not been a party. That the said Ruling marked as JNB-1 had not been appealed against or set aside thus the Defendants' allegations premised on the Ruling in HCCC. No. 87 of 2019 and the impugned Deed of Settlement had been misplaced, misguiding, misleading and res judicata.
37. That the fact that the Defendants had contradicted themselves as to whether the 2nd Plaintiff's assets formed part of the property that had been sold in the impugned auction was sufficient to warrant the court's determination on the fate of its assets whose title or ownership documents were held by another financier and contained in a debenture that had been entered with the 2nd Plaintiff. That it was trite law that any purchaser to a property occupied by tenants purchases the same subject to the rights of the tenants and could only evict them in accordance with the law. That however, instead of pursuing the legal mechanisms, the Defendant had resorted to the acts of impunity by seeking to damage the 2nd Plaintiff's Assets.
38. That the previous suits did not deal with the issue of unlawful eviction apart from the Business Premises Rent Tribunal (BPRT) matter that had been dismissed for want of jurisdiction and therefore could not give rise to the issue of res judicata. He maintained that their machinery, equipment worth



- over Kshs. 120,000,000/=, raw materials and finished products worth over Kshs. 150,000,000/= on the suit land had never been valued and neither had they formed part of what had been charged to the 5th Defendant as had been alleged.
39. That contrary to the Defendant's allegations, their occupation was recognized under the law hence he urged the court to grant the orders sought by the Plaintiffs herein.
 40. The 4th Defendant did not file any response.
 41. The 2nd Application dated 28th August 2023 is a Notice of Motion brought by the 2nd and 5th Defendants pursuant to the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 40 Rule 1, 2, and 7 and Order 2 Rule 15 of the Civil Procedure Rules and all enabling provisions of the law wherein they sought for the interim orders of injunction granted by the court on 7th August, 2023 and extended on 21st August, 2023 be discharged and/or set aside and that the Application dated 2nd August, 2023 and the entire suit as against them be struck out. They also sought that an order of injunction be issued restraining the Plaintiffs, their agents or employees from instituting any fresh suit relating to the property Title No. Gilgil Township Block 2/210 without leave of the court, or filing any application, lodging any appeals within the instant suit in any court in the Republic of Kenya, aimed at interfering or defeating the 2nd and 5th Defendant's right over the suit property. That the costs of the 2nd and 5th Defendants be personally borne by the Counsel for the Plaintiffs.
 42. The Application was supported by the grounds therein and a Supporting Affidavit of an even date sworn by Andrew Muchina, the 5th Defendant's Assistant General Manager in the Legal Department who adopted and reiterated verbatim the contents of their Replying Affidavit dated 28th August 2023.
 43. The 1st and 2nd Plaintiffs opposed the Application vide their Replying Affidavits dated 15th September, 2023 sworn by Divyesh Indubhai Patel, the 1st Plaintiff's Managing Director who reiterated the contents of his Supporting Affidavit and Further Affidavit deponing that the said Application was omnibus and should be struck out with costs for being fatally defective unsubstantiated, misleading, intended to taint the character of the Plaintiffs and to cloud the issues thereby delaying the hearing of the instant suit. That it was also an abuse of the court process, more so since the 2nd and 5th Defendants had not demonstrated any interest over the suit property. That the same should be struck out and dismissed with costs.
 44. The 2nd Plaintiff through its Relying Affidavit sworn by James Njuguna Burugu its General Manager also deponed that the Application was unknown in law, was fatally defective for being omnibus and an abuse of the court process hence should be struck out with costs. That the court did not have jurisdiction to grant the orders sought which orders were draconian despite the 2nd and 5th Defendants not having demonstrated that they deserved them.
 45. That the said Application had sought to conceal illegalities and fraud as to their claim of right over the suit property. That their interest over the said suit property needed protection which was a prima facie issue that warranted determination by the court.
 46. He placed reliance on the provisions of Article 162(2) of *the Constitution* and Section 13(2) of the *Environment and Land Court Act* to depone that the court was clothed with the jurisdiction to hear and determine all parts of the instant dispute that related to title, use and occupation of the suit property. That the 2nd Plaintiff's occupation of the suit property was threatened by the Defendants acts of impunity. He explained that the 2nd and 5th Defendants who were the Auctioneer and the Chargee should not be affected by orders restraining the sale by purchaser. That the orders by the court were



- issued and extended upon grounds that the court had considered sufficient grounds to warrant the same.
47. That allegations contained in the 2nd and 5th Defendants' Application and Supporting Affidavit did not confer them with power to break the law and/or suspend the 2nd Plaintiff's right over the suit property. That due to the impunity and anarchy that had been perpetrated by the Defendants' hired goons, the court should dismiss the 2nd and 5th Defendants' Application with costs.
48. The 1st Plaintiff also filed Notice of Preliminary Objection dated 5th October, 2023 to the effect that the 2nd and 5th Defendants' Application herein was misconceived, bad in law, an abuse of the court process and should be struck out and dismissed with costs on the following grounds;
- i. That the application had no base on which to be anchored, was filed in vacuum and as such the same is incompetent and fatally defective in the absence of a counterclaim/cross suit and was therefore legally untenable.
 - ii. That the Application is fatally defective for seeking to circumvent and contravene the mandatory requirements of Section 152E and 152G of the Land Act.
 - iii. That since Parties are bound by their pleadings, no party could seek to procure any order in a suit, which orders had not been pleaded and captured in the substantive pleadings as this was prohibited by the Doctrine of departure.
 - iv. That the Applicants' claim that they have no interest in the suit property rendered them devoid of locus standi to seek any injunctive orders over the suit property.
 - v. That the Application is an affront to the law, is fatally defective and premature in law for seeking to challenge another Application and or/to set aside orders of court granted in another application.
 - vi. That the Application sought orders against parties who were not parties to the suit and the cited provisions of law did not confer the court with jurisdiction to grant the prayers sought.
 - vii. That the Plaintiff raised triable issues which had not been controverted hence the Application was an abuse of the court process. No evidence was admissible under Order 2 Rule 15.
49. Lastly, the 3rd Application dated 18th September, 2023 is a Notice of Motion brought by the 1st and 3rd Defendants pursuant to the provisions of Section 1A, 1B and 3A of the Civil Procedure Act and Order 2 Rule 15 of the Civil Procedure Rules and all other enabling provisions of the law wherein they sought that the Application dated 2nd August, 2023 and the entire suit as against them be struck out and there be an order compelling the Plaintiffs to deliver vacant possession of property known as Title No. Gilgil Township Block 2/210 to the 1st Defendant within 30 days and in default, the said Plaintiffs be evicted from the said land under the supervision of the Officer Commanding Gilgil Police Station. That the costs of the suit be borne by the Plaintiffs.
50. The Application was supported by the grounds therein and a Supporting Affidavit of an even date sworn by Daniel Njuguna Gitau, the 1st Defendant's chairperson who adopted and reiterated verbatim the contents of his Replying Affidavit dated 14th August 2023 to depone that the entire suit was an abuse of the court process.
51. The 1st Plaintiff opposed the Application vide its Replying Affidavit dated 5th October, 2023 sworn by Divyesh Indubhai Patel, the 1st Plaintiff's Managing Director for reasons that it was not only mischievous but was also an abuse of the court process, baseless and legally unfounded for having



been filed in the absence of a substantive pleadings. That further, the reasonable cause of action that the Plaintiffs had raised against the 1st and 3rd Defendant in their Plaint had not been rebutted or controverted. That as had been demonstrated by the Plaintiffs, the instant suit was not res judicata since the court would have to look into evidence beyond the scope of Order 2 Rule 15 to determine the same. That further, the said order did not give the court jurisdiction to grant orders of eviction as prayed. He then proceeded to reiterate the contents of his supporting and Further Affidavit to urge the court to dismiss the Application with costs.

52. Vide its Notice of Preliminary Objection dated 6th October, 2023 the 1st Plaintiff adopted and reiterated verbatim the grounds contained in its Notice of Preliminary Objection dated 5th October 2023 to the effect that the Application was misconceived, bad in law, an abuse of the court process and should be struck out.
53. The three Applications and the Preliminary Objections were canvassed by way of written submissions which I shall summarize as hereinunder.

Plaintiffs' Submissions.

54. The Plaintiffs, vide their submissions dated 15th September, 2023 in support of their Application dated 2nd August, 2023 placed reliance on the principles governing the grant of temporary injunction as was laid down in the case of *Giella vs. Cassman Brown (1973) EA 358* as well as the definition of a prima facie case in the decided case of *Mrao Limited Vs. First American Bank of Kenya (2003) KLR 125* to submit that the factual basis of the Application having not been challenged, they had demonstrated that prima facie the sale and transfer of the suit land herein had been fraudulent and done in favour of an amorphous institution. That the instant Application was embedded on the pleadings for which the transfer documents and certificate of completion had been issued long before the purchase price had been paid thus the 1st Plaintiff stood to lose the suit property valued at over Kshs. 700,000,000/= as well as the business and clientele therein which loss was incapable of being remedied by way of damages. That the 2nd Plaintiff also stood to lose a similar amount of money in factory machinery, equipment, raw materials and finished products situate in the suit property. Further reliance was placed in the decided case of *Michael Gitere & another v Kenya Commercial Bank Limited [2018] eKLR* to submit that since no proper valuation had been conducted, the Plaintiffs had established a prima facie case.
55. On allegation of the instant Application being res judicata, they submitted that the circumstances of the instant matter were completely different from the other suits and previous Applications touching on the suit property. They placed reliance on the provisions of Section 7 of the *Civil Procedure Act* to submit that conditions and scope set therein had not been met. They maintained that it was trite law that adjudication of previous application for injunction was not a bar for similar applications in the future provided the circumstances were different. Reliance was placed in the decided case of *Kibundi v Mukobwa & another [1993] eKLR* to submit that the previous suits and Applications were not between the parties herein neither were the issues and orders sought therein the same with those sought in the instant suit.
56. That the Application for injunction was not considered on merit since the suit under which the Application was brought had been marked as settled before the said Application had been considered. That further, the BTRT Ruling in BTRT Reference No. 035 of 2022 that had been relied upon to claim res judicata had been dismissed for want of jurisdiction and that it was trite law that without jurisdiction the court must down its tools hence a ruling where the tribunal had downed its tools for want of jurisdiction could not form basis of allegations that the instant suit was res judicata. Reliance was placed in a combination of decisions in the case of *Super Drill International Limited v Sidian Bank Limited [2021] eKLR*, and *Nyali Construction & Ele v Barclays Bank Limited [2015] eKLR -*



- [*Civil Case 315 of 2007*](#) to submit that in Equip Agencies Limited v I 8 M Investment Bank Limited & 2 others [2019] eKLR, the Application had been dismissed on the basis that the matters had not been pleaded. That the Application for amendment of Plaintiff had been dismissed on the basis that the suit had been settled. That no other Application seeking injunction from further transfer of the suit property had been filed and determined
57. On the allegation that the instant matter had been settled vide a Deed of Settlement, they submitted that the instant suit had not been among the suits settled by the impugned Deed of Settlement under Clause 6 therein. That further, the 5th Defendant had admitted that the settlement amount which was the precondition for settlement of the dispute between the parties had not been cleared. That the High Court Civil Suit Nos. 417 of 2018 and 87 of 2019 had only been marked as settled in terms of the Deed of Settlement hence the impugned Deed having not been performed, parties had been taken back to the drawing board as had by the court in its ruling dated and delivered on 16th June, 2023 annexed in the Plaintiff's Further Affidavit.
58. That other than the 1st Plaintiff and the 5th Defendant, the other parties were not parties to the impugned Deed of Settlement and that the issue of sale and transfer of the suit property was not part of the terms and conditions of the settlement. That further, in HCCC. No. 418 of 2018, the court in dismissing the 5th Defendant's Application determined that the Deed of Settlement did not settle the suit against or by the 2nd Plaintiff since it had not been a party to the said Deed of Settlement which ruling had not been overturned hence the court should hold the same. That the legality of the sale being in contention, the instant suit and Application had not been overtaken by events. Reliance was placed on the decision in the case of John Major Mukenya v Clerk-County Assembly of Bungoma & e others; Florence Fulano Wekesa & 4 others (Interested Parties) [2020] eKLR.
59. With regards to the 1st Plaintiff's equity of redemption and lack of proper valuation, they placed reliance on the provisions of Section 99(3) of the [*Land Act*](#) to submit that the suit raised issues of fraud and illegality which could result to cancellation of the sale once proved. That Chargor's equity of redemption could not be extinguished through fraud and illegality and that the fraud had been further demonstrated by the fact that the suit property had been sold at a gross under value. Reliance was placed in a combination of decisions in the case of Kenya Commercial Bank Ltd v Osede [1982] eKLR, Mbutia v Jimba Credit Finance Corporation & another [1988] eKLR and Koileken ole kipolonka orumoi v Mellech Engineering & Construction Limited & 2 others [2015] eKLR to reiterate that the suit property had been transferred to an amorphous institution before the purchase price had been paid and that the auction had been conducted by a person who was not a licensed auctioneer. That further, the 5th Defendant was still having undisclosed interest over the suit property and the 1st Defendant had intended to subdivide and further dispose the suit property which would render the instant suit nugatory. He thus submitted that the Plaintiffs had demonstrated a prima facie case that the sale and transfer of the suit land had been illegally and fraudulently done in collusion.
60. Regarding the 2nd Plaintiff's Factory, equipment and machinery, they reiterated the contents of their Supporting and Further Affidavit to the effect that the same had not been part of what had been sold in the impugned auction neither had they been valued. That indeed no final determination had been rendered as to what formed part of the impugned sale and that no legal steps had been taken to evict the Plaintiffs from the suit property. That the Defendants had only resorted to criminal and illegal activities of destruction of property and obstruction of business activities.
61. On the illegal eviction of the Plaintiffs, reliance was placed in the decided cases of Cycle Importers Limited v Kalson Properties Limited & 3 Othes [2009] eKLR and Kanthilal Bhundia t/a Niki Wear & 2 others v Joseph Mwaniki Ndegwa & another [2014] eKLR to submit that whereas the law did



not permit a person who had acquired proprietary interest in the manner that the 1st Defendant had purportedly acquired to evict the tenant, the said 1st Defendant had breached the rule of law by handling the tenants. That further, the actions of the 1st Defendant's agents of destroying and interfering with the business operations had breached the mandatory provisions of Section 96 of the *Land Act* as read together with section 152E and 152G of the *Land Act* since the 2nd Plaintiff had never been served with any notice under the said provisions. That without such Notice and moving the Environment and Land Court, the alleged 1st Defendant's rights had not accrued.

62. That damages was not an adequate remedy as illegality and fraud could not be compensated by damages. That a challenge of legality or otherwise of an act goes to the root of the rule of law which if not addressed, the harm caused could not be compensated by damages. That as it had been demonstrated, the 5th Defendant's statutory power of sale had not arisen or become exercisable, the sale was not by a qualified person, the transfer documents had been issued before the completion of the sale to an amorphous institution that could not own property in its name under the law and that the 1st Plaintiff had also denied that it had been in default thus raising concerns in relation to the conduct of the Defendants which had high chances of success at the trial. They placed reliance in a combination of the decisions in the case of *Waithaka v Industrial and Commercial Development Corporation* [2001] eKLR and *Joseph Mbugua Gichanga v Co-operative of Kenya Ltd* [2005] eKLR to submit that the suit property's location being in the heart of Gilgil Central Business District coupled with the fact that it was fully developed and occupied by the Plaintiff and its tenants partly as a business premises and a factory, it would be impossible to replace the same in the event of sale and the Plaintiffs could not be adequately be compensated by damages. They thus submitted that they had established a prima facie case with a probability of success and that damages could not compensate them for any loss suffered if the injunction was not granted.
63. With regard to where the convenience lied, reliance was placed in the decided case of *Paul Gitonga v Gathuthia Tea Factory Company Ltd & 2 others* [2016] eKLR, to submit that having established that they had a prima facie case with high probability of success and that the instant Application had sought to preserve the subject matter of the suit from further disposition and dissipation, that it was thus more convenient to save the suit property and sustain the status quo while the title remained in the Defendants' hands, than it was to allow the substratum of the suit to be taken away. That in any case, the Defendants were not likely to suffer any loss were the orders for injunction granted and that even if they did suffer, the same could be compensated by damages.
64. They thus urged the court to find that if the Defendants were to dispose the suit property whilst the suit was still pending, the instant case would be no more than an academic exercise. Reliance was placed in the decided case of *Dhaliwal Hotels Limited v Southern Credit Banking Corporation*. They thus urged the court to allow their Application dated 2nd August 2023 with costs.
65. With regard to the Notice of Preliminary Objection dated 5th October, 2023 in objection to the 2nd and 5th Defendant's Application dated 28th August, 2023, the 1st Plaintiff vide its submissions dated 19th October, 2023 submitted that the Application had been filed in vacuum and placed their reliance on the decisions in the case of *Proto Energy Limited v Hashi Energy Limited* [2019] eKLR and *Triton Petroleum Ltd v Charter House Bank Ltd* [2008] eKLR to submit that it was trite law that an interlocutory application could only be embedded on pleadings hence in the absence of any substantive pleading presented to court by the 2nd and 5th Defendants, the application had no base on which to be anchored.



66. That the 2nd and 5th Defendants had circumvented and contravened the mandatory requirements of Section 152E and 152G of the Land Act for without notices and moving the Environment and Land Court, their eviction rights had not crystallized.
67. That in the absence of substantive pleadings, the instant Application was fatally defective since no party could seek to procure any order in a suit which orders had not been impleaded and captured in a substantive pleadings and neither could a party seek orders outside the pleadings that had been filed as the same was prohibited by the doctrine of departure. Reliance was placed in the decided case of Ngati & 4 others v Mutie & 7 others (Environment and Land Case Civil Suit 63 of 2018) [2022] KEELC 13486 (KLR) (6 October 2022) (Ruling)
68. That the 2nd and 5th Defendants' lacked the locus standi to seek any injunctive relief orders over the suit property, having admitted that they had they no longer had interest in the suit property either in the form of proprietary or equitable rights.
69. That their application was not known in law, as the 2nd and 5th Defendants had contravened the provisions of order 51 Rule 14(10) of the Civil Procedure Rules, in that they had sought to challenge the Plaintiffs' Application for injunction through an Application despite interim orders having had been granted by the court in favour of the Plaintiffs. Reliance was placed on the decision in Mwalungu Mwambui Nyiyo & 201 others v Total Oil Products (East Africa) Limited & another [2021] eKLR. That the 2nd and 5th Defendants' application was omnibus rendering it cumbersome and fatally defective.
70. The Plaintiff submitted that this was their case and not the advocate's case and that no party should be condemned unheard. That further, Order 2 Rule 15 of the Civil Procedure Rules did not confer upon the court any power to grant the injunction or set aside orders as sought. That the 2nd and 5th Defendants having not invoked any laws to the contrary, the orders sought were omnibus and the court lacked the requisite jurisdiction to entertain the instant Application.
71. That the Plaintiff raised a reasonable cause of action against the 2nd and 5th Defendants hence the Application seeking to strike it out was an abuse of the court's process. That the allegations brought forth in the Application were unsubstantiated and could only be determined at the trial. Reliance was placed in the decided case of Taj Villas Management Limited v Taj Mall Limited [2018] eKLR to urge the court to hold that all the annexures to the Application were inadmissible, and thereafter dismiss the Application.
72. That pursuant to the provisions of Section 99 (3) and (4) of the Land Act, the 5th Respondent's equity of redemption could only be lost if the sale was legal and not fraudulent. That they had demonstrated that the chargee had duly studied the suit property but later went ahead to purport exercise their statutory power of sale in a process that had contravened the law. That section 99(3) of the Land Act did not protect a purchaser in a fraudulent or illegal sale as was held in the case of Koinange Investments and Developments Limited vs Nairobi City Council & 3 Others [2009]eKLR.
73. That their averments as contained in their Plaintiff had not been rebutted or controverted and that the said Plaintiff raised a reasonable cause of action against the Applicants and as such the 2nd and 5th Defendant's Application should be dismissed with costs.
74. Regarding the 1st and 3rd Defendant's Application dated 18th September, 2023, the 1st Plaintiff adopted its submissions dated 15th September, 2023 which had been in support of the Preliminary Objection dated 5th October, 2023 and in opposition to the Application dated 28th August 2023, in its entirety.



75. The 2nd Plaintiff on the other via its submissions dated 10th November, 2023 in opposition to the 1st and 3rd Defendants' Application dated 18th September, 2023 submitted that the Application was fatally defective since the prayers sought were premised in a vacuum as the 1st Defendant was yet to file defense or counterclaim. Reliance was placed in a combination of decision in Proto Energy Limited case (supra) and Patrick Ngumba Mweni v Hellen Jepkosgei Kiplangat & 2 others [2007] eKLR to submit that since their application was fatal, even the late filing of the Defence could not cure it.
76. That the prayers sought were permanent and final and not conservatory, where the 1st and 3rd Defendants sought to evict the 2nd Plaintiff, thus were the court was to find in favour of the Plaintiffs, the damage would have already been done. Reliance was placed in the decided case of Ajuoga John Edwin & another v George Odero Malano 7 another [2015] eKLR to submit that a competent court of law should not be quick to issue eviction order in land matter before judgment is given.
77. That the Application offended the mandatory provisions of Section 152 A, B and E of the [Land Act](#). The 2nd Plaintiff who was as a tenant had a right to be safeguarded against unlawful evictions and therefore upon the issuance of the obligatory notices, it had a right to seek relief pursuant to the provisions of Section 152F of the [Land Act](#). That subsequently, the 1st and 3rd Defendants' assertion of ownership and control over the suit property had been premature and unlawful hence the instant Application was fatally flawed as it sought to condone an illegal act and that the court should so declare.
78. That it not having been a party to the Deed of Settlement, the 1st Defendant could not enforce any of the terms thereon upon it by virtue of privity of contract. Reliance was placed in the decided case of Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd [1915] AC 847. That further, the 1st Defendant was an entity incapable of acquiring title to property in its name since it had identified itself as a self-help group. In law, only a corporate or an individual was eligible to own property. That subsequently, the title that had been presented by the 1st Defendant was evidently flawed hence the said 1st Defendant could not legitimately attempt to evict the 2nd Plaintiff.
79. The 2nd Plaintiff thus submitted that the 1st and 3rd Defendants' Application was misconceived and an abuse of the court process hence it should be dismissed with costs.
80. On the 23rd April, 2024, the 1st Plaintiff's Advocate highlighted all their submissions dated 15th October, 2023 for Application dated 2nd August, 2023, submissions.

1st and 3rd Defendants Submissions.

81. In opposition of the Plaintiffs' Application dated 2nd August, 2023, 1st and 3rd Defendants reiterated the contents of their Replying Affidavits dated 14th August, 2023 sworn by Daniel Njuguna Gitau and Patrick Njenga respectively submitting that the Plaintiffs had not disclosed material facts to the court but had approached the court with dirty hands. Reliance was placed in the decided case of [Sarah v Multiple Hauliers \(E.A.\) Limited & another \(Environment & Land Case 12 of 2021\)](#) [2022] KEELC 3807 (KLR) (28 July 2022) (Ruling)
82. That they had filed the Application dated 18th September, 2023 to assist the court to achieve the overriding objective of the Act, which was to resolve disputes in a just and expeditious manner. That parties should not mislead the court to grant conflicting orders or orders that could embarrass it (the court.) That the Plaintiffs had converted themselves into vexatious litigants, a conduct that the court should frown upon. That litigation must come to an end as was held in the case of William Koross (Legal personal Representative of Elijah C.A. Koross) v Hezekiah Kiptoo Komen & 4 others [2015] eKLR.



83. On 23rd April, 2024, the 1st and 3rd Defendants' Advocates highlighted on their submissions in opposition of the Application dated 2nd August, 2023 and in support of their Application dated 18th September, 2023 that the instant matter had been determined in many other matters and was therefore Res Judicata and an abuse of the court process.
84. That they had filed a Defence and Counter claim dated 23rd October, 2023 hence their application was neither in vacuum or premature. That the suit property had been sold and transferred to the 1st Defendant which had given rise to a decree making the orders therein final hence the present suit was Res judicata and that the Plaintiffs were vexatious litigants.
85. That they had sought an eviction order because whereas the matter herein had been finalized, the Plaintiffs kept on filing a multiplicity of suits and therefore the Application dated 2nd August, 2023 and the Preliminary Objections had no merits and should be dismissed.
86. The 2nd and 5th Defendants did not file any submissions but highlighted on their Application dated 28th August, 2023 to the effect that justice served in piece meal was not justice served. That the Plaintiffs had enjoyed their day in court and that there was a pending suit in Milimani law court over this matter making the instant suit res judicata hence the court had no jurisdiction to determine the issues herein.
87. That further, the Plaintiffs did not have locus standi to institute the instant suit as they had no proprietary interest over the suit land neither were they in charge of the same. That the Plaintiffs' earlier suit having been dismissed, the instant suit and application was just but an outright abuse of the court process hence the same should be dismissed. That the Application dated 2nd August, 2023 was devoid of the court process and should be dismissed with costs.

Determination.

88. What is before me for determination are three applications, wherein for ease of reference the parties and shall be referred to as they appear in the suit. The first application is the one dated the 2nd August 2023, filed by the Plaintiffs herein who seek interim orders of injunction against Defendants restraining them whether by themselves, their employees, servants, agents or auctioneers from advertising for sale, selling or further alienating whether by public auction or private treaty, subdividing, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging, entering into, evicting, invading, destroying in any way, barricading entrance or otherwise howsoever interfering with their possession and ownership or title to land reference L.R No. Gilgil Township Block 2/210.
89. The second application is the one dated 28th August 2023 brought by the 2nd and 5th Defendants seeking orders to discharge and/or set aside the interim orders of injunction granted by the court on 7th August, 2023 and extended on 21st August 2023 and for the entire suit as against them to be struck out.
90. The last application dated the 18th September 2023 was filed by the 1st and 3rd Defendants wherein they sought that the Plaintiff's Application dated 2nd August, 2023 and the entire suit as against them be struck out and there be an order compelling the Plaintiffs to deliver vacant possession of property known as Title No. Gilgil Township Block 2/210 (the suit property) to the 1st Defendant within 30 days and in default, the said Plaintiffs be evicted from the said land under the supervision of the Officer Commanding Gilgil Police Station.
91. The 4th Defendant chose not to file any Replying Affidavit and or application.
92. I have considered the applications herein, their responses and preliminary objections raised there to. I have further considered the parties submissions, the authorities cited and the applicable respective law.



93. The Plaintiffs application is premised on the averment that the 1st Plaintiff had charged the suit property to the 5th Defendant to secure maximum principle amount of Kshs. 324,000,000/= wherein it had dutifully and diligently repaid all the sums. That after clearing the said facility, instead of discharging the security, the 5th Defendant had unlawfully and unilaterally consolidated the said loan with other loans and was now demanding money in excess of Kshs. 1,000,000,000/= contrary to the law.
94. That subsequently, by an omnibus Statutory Notice dated 13th May, 2016, the 5th Defendant had demanded that within 3 months, the 1st Plaintiff pays to it a sum of Kshs. 555,393,923.46/= for Account No. 006251491201 and Kshs. 677,283,313/= for Account No. 006002514940206 failure to which it would sale the suit property in exercise of its statutory power of sale.
95. That thereafter, the 2nd Defendant had on the instruction of the 5th Defendant and without proper valuation, advertised the suit property for sale by public auction for the 24th January 2019 wherein the suit property had been fraudulently sold to the 1st Defendant at a gross under value of Kshs. 353,000,000/= despite the suit property's current value being over Kshs. 800,000,000/= in an auction that had been marred by massive irregularities and flawed mandatory provisions of the law.
96. That the assessment and valuation of the 2nd Plaintiff's running factory, machines and equipment did not fall within the purview and function of a valuer licensed under the Valuers Act but in the purview of assessment by Mechanical Engineers, hence no valuation had been done on the said equipment, the purchase price had been too low evidencing fraud, there had been no known or specific criteria through which the 1st Defendant had been identified or sourced as the highest bidder, that the purported auction had been a private arrangement between the 1st 2nd and 5th Defendants and therefore the said auction/action was incapable of conferring any title or proprietary rights to the alleged successful bidder.
97. The reason given by the 2nd and 5th Defendants through their application dated the 28th August 2023 for opposing the Plaintiffs' application was that the court had no jurisdiction to entertain the Plaintiff's application as well as the entire suit which was the preserve of the jurisdiction of the High Court of Kenya. Secondly that the Plaintiff lacked the locus standi to seek relief against them because they had no legal interest on the suit property, and lastly that the instant Application and the entire suit was res-judicata Nakuru ELC No. 166 of 2017: Gilgil Treatment Industries Limited vs. I&M Bank Limited & Another and Naivasha HCC No. 6 of 2018; Gilgil Treatment Industries Limited vs I&M Bank Limited and Another in which the 2nd Plaintiff's Applications seeking injunctive orders had been dismissed the on 25th May, 2018 and 6th December 2018 respectively wherein there had been no Appeal or orders to set aside.
98. That the instant Application and the suit was also res-judicata HCC No. 417 of 2018; Equip Agencies Limited v I&M Bank Limited, HCC No. 87 of 2019; Equip Agencies Limited v I&M Bank Limited and HCC. No. E943 of 2021; Equip Agencies Limited & 5 Others v I&M Bank Limited & Another in which the court had vide its rulings dated 16th June, 2023, 30th September, 2022 and 3rd June, 2022 respectively held that the suit had been marked as settled in terms of the Deed of Settlement dated 10th June, 2021 thereby acknowledging the 1st Defendant as the legal proprietor of the suit land.
99. The Plaintiffs' application had been opposed by the 1st and 3rd Defendants' application dated 18th September, 2023 for reasons that 1st Defendant was the registered leasehold proprietor of the suit property having purchased it on 24th January, 2019 through a sale by public auction wherein it had been issued with a certificate of lease on 21st February, 2020 for a term of 99 years.



100. That the dispute between the 5th Defendant and the 1st Plaintiff over the monies outstanding from loans that had been advanced to the 1st Plaintiff had been a subject of many litigation having been considered before the court in Nairobi High Court Comm Case No. 87 of 2019; Equip Agencies Limited v I&M Bank and 2 others. That vide a Deed of Settlement between the 5th Defendant, the 1st Plaintiff and other parties, the court had pronounced itself on the issue of ownership of the suit property when it conferred ownership of the same upon the 1st Defendant through its Decree, which pronouncement was binding to all hence in the absence of a successful appeal/review of the same, the present suit was res-judicata and incapable of being determined by the court.
101. That the said 2nd Plaintiff had instituted proceedings against the 1st Defendant and the 1st Plaintiff before the Business Premises Tribunal Case No. E035 of 2021 wherein on the 28th July, 2023 the tribunal had held that it had no jurisdiction and discharged all the interlocutory orders that had been in place at the time that had prevented the eviction of the 2nd Plaintiff.
102. That subsequently the 2nd Plaintiff had then sought from the 1st Defendant a period of 40 days to consolidate their equipment, which was bulky, so as to vacate from the suit property. On humanitarian grounds this request had been granted but instead of removing their machines and equipment, this suit had been filed. That the suit property as sold had constituted the land and immovable assets therein and not the 2nd Plaintiff's equipment and chattels. That the prohibitory orders sought by the Plaintiffs amounted to curtailing the 1st Defendant's right to use its property as it wished.
103. The applications by the 1st, 2nd, 3rd and 5th Defendants had been opposed by the Plaintiffs' preliminary objection to the effect that, they were misconceived, bad in law, an abuse of the court process and should be struck out and dismissed with costs because they had been filed in vacuum there being no counterclaim/cross suit, that they were fatally defective for seeking to circumvent and contravene the mandatory requirements of Section 152E and 152G of the *Land Act*. That they were prohibited by the Doctrine of departure, that the 2nd and 5th Defendants claim that they had no interest in the suit property rendered them devoid of locus standi to seek any injunctive orders over the suit property. That the Applications were an affront to the law, and fatally defective and premature in law for seeking to challenge another Application and or/to set aside orders of court granted in another application. That the Defendants had sought orders against parties who were not parties to the suit and had also cited provisions of law that did not confer the court with jurisdiction to grant the prayers sought. The Plaintiffs' argument was that their Plaint raised triable issues which had not been controverted hence the Applications were an abuse of the court process.
104. Upon giving the background of the matter in issue, I find the issues that stand out for determination as being;
- i. Whether the Plaintiffs' application and suit should be dismissed for being res judicata.
 - ii. If the answer in (i) above is in the negative, whether this court should grant the interim orders of injunction sought by the Plaintiff.
105. On the first issue for determination as to whether the Plaintiffs' application and suit should be dismissed for being res judicata, the provisions of Section 7 of the *Civil Procedure Act* 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.”

106. The court has been referred to matters previous litigated between some of the parties herein over the same suit property to wit;
- i. Nakuru ELC No. 166 of 2017: Gilgil Treatment Industries Limited vs. I&M Bank Limited & Another.
 - ii. Naivasha HCC No, 6 of 2018; Gilgil Treatment Industries Limited vs I&M Bank Limited & Another
 - iii. HCC No. 418 of 2018; Equip Agencies Limited v I&M Bank Limited,
 - iv. HCC No. 87 of 2019; Equip Agencies Limited v I&M Bank Limited
 - v. HCC. No. E943 of 2021; Equip Agencies Limited & 5 Others v I&M Bank Limited & Another

107. It is clear that in the Naivasha High Court Civil Case No. 9 of 2016 formally Nakuru HCC No 82 of 2016, reported as Equip Agencies Limited v I & M Bank Limited [2017] eKLR, after the court had dismissed the Plaintiff/Applicant’s Notice of Motion, which was primarily seeking an injunction to prohibit the Defendant/Respondents, from inter alia advertising for sale, selling, disposing of or completing by conveyance or transfer of any sale, appointing receivers, leasing, letting or interfering with the Plaintiff’s ownership of the land parcel described L.R. No. Gilgil Township Block 2/210 via its ruling of 9th December, 2016, the Plaintiff had brought before it an application seeking interim orders of stay pending appeal wherein the court had held as follows;

“As earlier indicated in this ruling, prayer 4 of the Notice of Motion cannot be granted by this court as I believe that a similar prayer is in the application pending before the Court of Appeal. Neither am I persuaded, considering all the matters foregoing, that I should grant Prayer 3 of the Notice of Motion in the terms therein.

In the interest of justice, and to allow the Plaintiff to agitate its application under Rule 5 (2) (b), now pending in the Court of Appeal, I would grant a temporary injunction against the Defendant, for a period of SEVEN (7) DAYS with effect from 25th March 2017, restraining the Defendant from selling by public auction or private treaty the land known as L.R. No. GILGIL TOWNSHIP BLOCK 2/210. To that extent only the application has succeeded.”

108. In an application filed at the Nakuru Environment and Land Court as ELC No. 166 of 2017 reported as Gilgil Treatment Industries Ltd v I & M Bank Limited & another [2018] eKLR the parties therein had been Gilgil Treatment Industries Ltd suing I&M Bank Limited & Equip Agencies Limited as the 1st and 2nd Defendants respectively and wherein the Plaintiff had again sought for temporary orders junction restricting the Defendants from among other prayers, dealing with the subject property land parcel L.R No. Gilgil Township Block 2/210. In its ruling, the court had held as follows:

“I have already found that the properties that the Plaintiff claims to belong to it were and are subject of the litigation in Naivasha HCCC No. 9 of 2016. The court in the said case has already found that an injunction cannot issue to stop the 1st Defendant herein from exercising chargee’s statutory power of sale in respect of the said properties. The matter is therefore res judicata. The application is for striking out. I am alive to the drastic nature of the remedy of striking out. Still, in an appropriate case such as the present one, the court should not hesitate to strike out.”



109. Upon the delivery of this ruling, the matter had been transferred to Naivasha and registered as Civil case No. 6 of 2018 also reported as Gilgil Treatment v I & M Bank Limited & another [2018] eKLR wherein an application had been filed therein seeking to stay an intended auction scheduled for 6th December 2018, of the Charged Land by the 1st Defendant bank pursuant to its statutory powers of sale and orders of a temporary injunction restraining the Defendant from selling or transferring the Charged Land pending the lodging, hearing and determination of an application in the Court of Appeal under Rule 5 (2)(b) of the Court of Appeal Rules; and also pending the hearing and determination of the said appeal in the Court of Appeal. The court had held as follows;

“A final matter before I conclude. In HCCC No. 9 of 2018, which as earlier pointed out is inextricably intertwined with this case, I have declined to grant the injunction sought therein to stop the auction sale. If the Chargor (2nd Defendant) herein has been deprived prima facie of the grant of an interim injunction, can the tenant of the Chargor unprotected by an unregistered tenancy agreement find succor of such protection? I think not.

Ultimately, and looking at the matter holistically, and for all the reasons given herein, I hereby determine that prayer 1 is res judicata. As for prayers 2 and 3 of the application herein I am not persuaded to grant the same.

Accordingly the application fails in its entirety and is hereby dismissed with costs.”

110. In Naivasha Civil case No. 9 of 2018 also reported as Gilgil Treatment v I & M Bank Limited & another [2018] eKLR the court had allowed the sale of the suit property by public auction when it held as follows;

“Taking into account all the foregoing circumstances and for the reasons enumerated, I decline to allow the application which is hereby dismissed with costs. Further, I consider that the following order should be given to safeguard the sale by auction, namely:-

a. The court hereby orders that the sale by public auction shall be conducted on the basis that the reserve price shall be the forced sale value indicated in the valuation by Dunhill Africa Surveyors Ltd of Shs 352,500,000/=.

b. This reserve price shall be a condition of sale herein”

111. I have also perused the ruling by the High Court at Nairobi in Commercial & Admiralty Division HCC. No. 87 of 2019 reported as Equip Agencies Limited v I&M Investment Bank Limited & 2 others [2019] eKLR where the parties therein were Equip Agencies Limited as the Plaintiff vs I&M Investment Bank Limited as the 1st Defendant, John Gikonyo T/A Garam Investments Auctioneers as the 2nd Defendant and Tower Sacco Society Limited [Lucas Kiiru Ngigi, Paul Mbugua, Mary Wangari Githume sued on their own behalf and in their capacities as office bearers of Gilgil Total Investments Self Help Group as the 3rd Defendant.

112. In the said ruling of 26th July, 2019. the court had noted that after the Applicant’s applications had been dismissed, the dismissal orders had paved way for the exercise of the chargee’s statutory power of sale wherein the suit property herein had been sold and the Applicant filed an application based on the dissatisfaction of the Sale by auction wherein the court had observed as follows:

“ This Court has familiarized itself with the various rulings made in relation to this matter and note that in so far as the substantial issue herein is about the legality of the actual auction which allegedly took place on 24th January 2019, the main issue herein is not res judicata the previous proceedings. The grievance of Equip in respect to that auction, and as pleaded, is that the property was sold at an under-value. Second, that no auction took place or if it did then it is fraught with illegalities and irregularities.



In respect to the latter complaint, this would be a new matter that had not arisen at the time of the filing of the previous suits and also in so far as two new parties are involved, that is the Auctioneer and the Purchaser, the filing of a new suit may have been inevitable or at least understandable.

113. The court then went on to state that;

“This statement by the valuer taken together with the details of improvements in the report must lead to the question whether in fact the valuation and the sale included the sale of any assets other than land and buildings. While, I am may be unable to agree with Equip that the advertisement of the auction was vague as to what was up for sale, its argument that the sale was only restricted to land and buildings is not idle. I think that the can be lively debate as whether buildings in the context of this case would include the treatment plant and equipment.

Otherwise the Amended Notice of Motion dated 6th March, 2019 is dismissed with costs.”

114. This ruling was appealed to the Court of Appeal in Civil Appeal (Application) No. 412 of 2019 reported as Equip Agencies Limited v I & M Investment Bank & 2 others [2019] eKLR wherein the court via its ruling of 6th December 2019 found the application bereft of merit and proceeded to dismiss it.

115. In *Equip Agencies Limited v I & M Bank Limited & 2 others; Attorney General (Garnishee) (Civil Case 87 of 2019)* [2023] KEHC 18549 (KLR) (Commercial and Tax) (16 June 2023) (Ruling) The court had confirmed as follows;

“It is not in dispute that the Judgment in favour of the 1st Defendant is grounded on a Deed of Settlement dated June 10, 2023 under resolving to settle several suits including this suit. In consideration, the 1st Defendant would waive interest on the debt due to it and which secured by several securities, inter alia, Gilgil Township Block 2/210, LR No MN/VI/3075 Changamwe, Mombasa, LR No 209/8755 and LR No 209/4535, Nairobi. The 1st Plaintiff, its related companies and its directors would pay a discounted sum of Kshs 875,000,000.00 in instalments; Kshs 100,000,000.00 within 15 days of execution of the Deed, Kshs 50,000,000.00 within 120 days from the date of execution of the Deed and then Kshs 725,000,000.00 within 180 days from the date of execution of the Deed. Upon receipt of the settlement amount, the 1st Defendant would then discharge the securities and the parties would record consents marking the pending suits as settled.

In due course filed the application dated June 7, 2022 seeking, inter alia, that this suit be marked as compromised and or settled in terms of the Deed of Settlement. By the ruling dated September 30, 2022, I allowed the application on terms that, ‘judgment is entered for the 1st and 2nd Defendants on terms that this suit is marked as settled in accordance with terms set out in the Deed of Settlement dated June 10, 2021.”

116. These are just but a few applications filed by the parties herein, the main issue having been that the Suit property herein was sold in a public auction, there has been no Appeal or orders to set the said auction aside, and finally judgment was entered for the 1st and 2nd Defendants in accordance with terms set out in the Deed of Settlement dated 10th June 2021 by a court of competent jurisdiction.

117. In its Plaintiff, the Applicant herein seeks for judgment against the Defendants jointly and severally for a declaration that the sale by public auction of the suit property herein being Gilgil Township Block 2/210 was illegal and fraudulent, that there be the cancellation of the transfer to the 1st Defendant and the 3rd and 5th Defendants execute a discharge of charge on or encumbrance wherein the Land Registrar reverts the title to the Applicant/Plaintiff and there after an injunction be issued against the Defendant from whatsoever dealing with the said parcel of land.



118. I have consciously considered, the prayers sought by the Plaintiff/ Applicant in its plaint as against the previous orders herein issued in the previous matters herein above cited and I find that in order therefore to decide as to whether this case is res judicata the previous matters, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;
- i. What issues were really determined in the previous case;
 - ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.
 - iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.
119. The doctrine of res judicata is important in adjudication of cases and serves two important purposes;
- i. It prevents multiplicity of suits which would ordinarily clog the courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and;
 - ii. It ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.
120. The Supreme Court in the case of John Florence Maritime Services Ltd & Another v Cabinet Secretary Transport and Infrastructure & 3 Others, Petition 17 of 2015 (2021) KESC 39 KLR (Civ) 6 August 2021 (Judgement) at paragraph 59 had held as follows:
- “For res judicata to be invoked in a civil matter the following elements must be demonstrated:
- a) There is a former Judgment or order which was final;
 - b) The Judgment or order was on merit;
 - c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
 - d) There must be between the first and the second action identical parties, subject matter and cause of action.”
121. And in In Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment) At paragraphs 8 and 9 the Supreme Court had also observed as follows:

“The doctrine of res judicata was founded on public policy and was aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation. The doctrine of res judicata may be pleaded by way of estoppel so that where a judgment had been delivered, subsequent proceedings were estopped. Where res judicata was pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounted to an allegation that all the legal rights and obligations of the parties were concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact, that was a form of action estoppel. Res judicata, was embodied in section 7 of the [Civil Procedure Act](#).



The elements to be proven before a court could arrive at the conclusion that a matter was res judicata were to be conjunctive rather than disjunctive before a suit or an issue was to be deemed res judicata on account of a former suit. It must be demonstrated that there was a former judgment which was final, it was on merit and by a court having jurisdiction and had identical parties, subject and cause of action.”

122. I find that the issues in the previous suits/Applications which were substantially the same in the subsequent suit were determined and covered by the respective decisions therein. I also find that parties in the subsequent suit were similar hence estopped from litigating pursuant to the provisions of Section 7 of the Civil Procedure Act. Finally, I find that the previous decisions were determined by courts of competent jurisdiction and the same was not challenged on Appeal and the said decisions not having been overturned by an appellate court remain judgment of court and is enforceable.
123. Indeed in the case of Omondi Vs National Bank of Kenya Limited & Others (2001) EA 177 the court held that:
‘.....parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’
124. Indeed the rule of res judicata serves the salutary aim of bringing finality to litigation so as to afford parties closure and respite from the spectra of being vexed, haunted and hounded by issues that had already been determined by a competent court. That it was designed as pragmatic and common sensical protection against wastage of time and resource in an endless round of litigation at the behest of intrepid pleaders hoping by a multiplicity of suits to obtain at last, outcomes favorable to themselves. Any attempt to revive a cause of action in relation to the same subject matter despite having different Defendants, that had already been adjudicated and determined to its finality would qualify to be res judicata and thus assume the analogy of waking a sleeping dog which would bite.
125. Plaintiffs’ Application dated the 2nd August 2023, is herein dismissed and the entire suit struck out with costs, for being Res judicata and with the result that the interim orders of injunction granted by the court on 7th August, 2023 and extended on 21st August, 2023 are herein set aside. In this regard, the Applications dated 28th August 2023 and 18th September 2023 partially succeed.
126. In regard to the 2nd limb of the application dated the 18th September 2023 wherein the 1st and 3rd Defendants’ sought for an order compelling the Plaintiffs to deliver vacant possession of property known as Title No. Gilgil Township Block 2/210 to the 1st Defendant within 30 days and in default, the said Plaintiffs be evicted from the said land under the supervision of the Officer Commanding Gilgil Police Station, this limb is denied for reason that upon striking out the Plaintiff’s suit, there is no substantive suit upon which a decree capable of being executed can issue under Order 22 of the Civil procedure Rules. Further, the court cannot issue substantive orders under a notice of motion application as was held in the persuasive case In Tatecoh Housing and Co-op Sacco Ltd Vs Qwetu Sacco Ltd (2021) eKLR, where it had been held as follows;

“Without much ado, I will agree with the position of the respondentthat the appellant cannot seek the orders sought in the miscellaneous application without going through the process of filing suit. It will be observed that among the orders sought are orders of eviction.one will ordinarily only obtain an order of eviction after a full hearing of the case.



What the appellant needed to do was therefore to file a substantive suit for eviction through a plaint. It is upon the hearing of such suit and If successful, that an order of eviction would issue.”

127. This limb of the Application dated the 18th September 2023 is struck out.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 18TH DAY OF JULY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

