



**Juja Coffee Exporters Limited & 3 others v Bank of Africa Limited
& another; Adam & 2 others (Interested Parties) (Commercial Civil
Suit 57 of 2016) [2022] KEHC 9 (KLR) (25 January 2022) (Ruling)**

Neutral citation: [2022] KEHC 9 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL CIVIL SUIT 57 OF 2016
JM MATIVO, J
JANUARY 25, 2022**

BETWEEN

**JUJA COFFEE EXPORTERS LIMITED 1ST PLAINTIFF
TSS TRANSPORTERS LIMITED 2ND PLAINTIFF
TSS INVESTMENT LIMITED 3RD PLAINTIFF
TAHIR SHEIKH SAID AHMED 4TH PLAINTIFF**

AND

**KAAB INVESTMENTS LIMITED 1ST DEFENDANT
BANK OF AFRICA LIMITED 2ND DEFENDANT**

AND

**ABDULMAJID MOHAMED HAJI ADAM INTERESTED PARTY
SHAMI MOTORS LIMITED INTERESTED PARTY
IFI PARADISE PROPERTIES LIMITED INTERESTED PARTY**

RULING

1. This ruling determines the Plaintiffs' application dated 11th August 2021 seeking a temporary injunction pending the inter-parties hearing and determination of the suit restraining the 1st defendant, its servants, agents or employees from further advertising for sale, selling by public auction or private treaty, leasing or in any other way disposing all those parcels of land known as;
 - a. Plot No. 44 Section XXI Mombasa Island registered in the name of the 2nd Plaintiff.



- b. Plot No. 147 Section XXI Mombasa Island;
 - c. Plot No. 154 Section XXI Mombasa Island;
 - d. Plot No. 526 & 527 Section XXI Mombasa Island;
 - e. Plot No. 586 Section XXI Mombasa Island;
 - f. Title No. Mombasa/Block XXVI/381; (b) to (f) all registered in the name of Tahir Sheikh Said Investments Limited.
2. The Plaintiffs also pray for a temporary injunction pending the hearing and determination of the suit restraining the 1st, 2nd & 3rd Interested Parties, their servants, agents or employees from interfering with their enjoyment, interests, quiet possession or ownership of all those parcels of land known as Plot No. 147, Section XX1, Mombasa Island; Plot No. 154, Section XX1, Mombasa Island and Plot No. 44, Section XX1, Mombasa Island. They also seek an order that the 1st defendant be compelled to release to them and the court, the documents listed in the Schedule of Documents filed herewith. Lastly, they pray for costs of the application. Prayers (i), (ii) & (iii) of the application are spent since they sought orders pending hearing of the application.
3. On 17th August 2021, Nyakundi J granted an interim injunction restraining the 1st defendant, its servants, agents or employees from further advertising for sale, selling by any public auction or private treaty, leasing or in any other way disposing the above parcels of land.

The grounds

4. The Plaintiff's application is founded on the grounds that the 2nd defendant is the registered owner of Plot No. 44, section XX1, Mombasa Island while the 3rd Plaintiff is the registered owner of Plot No. 147 section XX1, Mombasa Island; Plot No. 154 section XX1, Mombasa Island; Plot Nos. 526 & 527 Section XX1 Mombasa Island; Plot No 586 Section XX1 Mombasa Island and Title No. Mombasa/Block XXV1/38. They state that vide letters of offer dated 15th December 2011, 3rd December 2012 and 28th April 2014, the 1st defendant purported to advance financial facilities to the 1st Plaintiff.
5. They also claim that the 2nd defendant purported to secure financial facilities by creating charges over the suit properties before issuance of the letters of offer. They state that on 21st July 2016, they obtained an injunction stopping the sale of properties pending the hearing and determination of the suit but the 1st defendant's appeal to the Court of Appeal against the said ruling being Civil Appeal No. 99 of 2016 was allowed on 25th January 2018.
6. They also state that on 5th March 2018, the 1st defendant advertised Mombasa/block XX1/526 & 527 for sale on 26th March 2018 but they challenged the intended sale vide an application dated 7th March 2018 which application was struck out on 5th April 2018 and the Plaintiffs appeal to the Court of Appeal vide Civil Appeal No. 158 of 2018 was dismissed on 18th June 2021. They claim that they were kept in the dark about the dealings leading to the alleged loans, that they lodged a complaint with the Directorate of Criminal Investigations in September 2019 and a follow up in August 2020. They state that the Directorate of Criminal Investigations applied for warrants to investigate the matter in Criminal Application No. 280 of 2020 which request was granted on 4th September 2020 and 30th September 2020 respectively.
7. They state that the investigations unearthed crucial information which was not hitherto available to them including- (a) the instructions mandate issued to the 1st defendant by the 1st Plaintiff on 16th May 2006 indicated that only the 4th defendant could issue instructions solely, and that, all other instructions



- required any two of the 1st Plaintiffs directors. They state that contrary to express instructions, the 1st defendant allowed a sum of USD 5,288,331 to be transferred from the 1st Plaintiff's account to the 2nd defendant's account at Imperial Bank Limited. Also, they state that the 1st defendant has evidence of unlawful instructions to support the transfer of USD 303,000 on 9th March 2012, USD 1,500,000 on 27th November 2012, USD 500,000 on 20th December 2012; and USD 1,500,000 on 29th April 2013. They state that there are no instructions to support the transfer of USD 600,000 on 28th February 2012 and USD 885,331 on 11th April 2012.
8. Additionally, the Plaintiffs state that even assuming one signatory could issue instructions, there was no documentary evidence to support the transfer of such colossal sums from the 1st Plaintiff to the 2nd defendant and even assuming the instructions were properly signed, the 1st defendant breached its duty of care to the Plaintiffs by allowing the overdraw of a poorly performing account for the purposes which were completely at variance with the terms of the lending contract. The Plaintiffs contend that despite the existence of an order specifically requiring the 1st defendant to provide the DCI with confirmed orders for purchase of tea from Egypt and Pakistan and the irrevocable confirmed Letters of Credit for the same tea, none has been supplied.
 9. Additionally, the Plaintiffs state that they instructed a forensic document examiner to examine the various documents supplied by the 1st defendant and in a report dated 27th December 2018, he found that signatures on six out of the 12 documents were forged, among them the letters of offer dated 15th December 2011 and 3rd December 2012. Also, they state that in another forensic document examination report dated 24th June 2019, the document examiner found that the signatures in the letters of offer dated 15th December 2011, 3rd December 2012 and 28th April 2014 were all forged.
 10. The Plaintiffs also state that they retained M/s Omenye & Associates Certified Public Accountants to audit the statements of account provided by the 1st defendant and in a report dated 26th September 2019, they found that save for 5 transactions, it was virtually impossible to tell from statements of account which payments related to the purchase and sale of tea and most transactions related to interest charged on un paid cheques. It also found that on 29th April 2013, USD 1,500,000 was paid to the 2nd defendant notwithstanding that such a payment would substantially exceed the 1st Plaintiffs withdrawal limits, and between 2012 and April 2013, a total of USD 5,288,330.50 had been transferred to the 2nd defendant without any evidence of business dealings between the 1st Plaintiff and the 2nd defendant.
 11. The Plaintiffs claim that the above information was not available to them prior to the hearing of the applications, nor could it have been available even with reasonable diligence, and, they had to lodge a complaint with the DCI before they could obtain the cited documents, and even then, the 1st defendant has not supplied all the information, hence the request for additional information.
 12. Also, they contend that even if the documents held by the 1st defendant were lawfully created, the 1st defendant's conduct on the 1st Plaintiff's account was unlawful because:- (a) the 1st Plaintiff did not provide the required pre and post shipment documents prior to draw down; (b) the 1st defendant continuously allowed the 1st Plaintiff to draw down the facility despite the non-compliance; (c) that the statement of account shows that there was no repayment of the facility allegedly advanced to the 1st Plaintiff, but despite the foregoing, the 1st defendant granted facilities to the 1st Plaintiff, and also allowed the 1st Plaintiff to overdraw the account to a tune of USD 1.5 Million. The Plaintiffs contend that the aforesaid actions by the 1st defendant, done without notice to or consent of, the 2nd, 3rd & 4th Plaintiffs, materially altered the lending agreement thus discharging the 2nd, 3rd & 4th Plaintiffs from their obligations as guarantors.



13. Also, the Plaintiffs contend that the facilities advanced to the 1st Plaintiff, (if any), were advanced contrary to the express provisions of the contract. They contend that without the production of the requisite documents, the 1st defendant could not and ought not to have disbursed the whopping amounts of USD 4.5 and by doing so, the 1st defendant intentionally disregarded the express conditions of the lending contract between it and the 1st Plaintiff. Also, they maintain that in the absence of supporting documents, the conclusion is that the 1st defendant was complicit in the 1st defendant's attempt to defraud the Plaintiffs. They claim that the Plaintiffs have also learnt that the 1st defendant purported to sell Mombasa/Block XXI/147 to the 1st Interested Party in an auction held on 18th November 2019 which is illegal because it was done without a forced sale valuation as required by section 97 of the Land Act¹ as read with the Auctioneers Rules 1997. They state that the 1st defendant's Replying Affidavit filed on 15th June 2016 states that the property was valued at Kshs. 95,000,000/= as at 29th April 2016.
14. They contend that the sale held on 18th November 2019 for Kshs. 68,000,000/= is evidently fraudulent, and there is no evidence that the said auction took place nor was a deposit of Kshs. 17,000,000/= paid on 18th November 2019 as alleged. Further, they state that the Certificate of Sale was purportedly issued on 19th November 2018, a year before the purported auction and the Memorandum of Sale dated 18th November 2019 was not signed by the successful bidder. They claim that the successful bidder at the auction in an affidavit sworn on 21st July 2021 in Msa ELC No. 203 of 2019, confirmed that he did not pay the balance within the 30 days and that the speedy transfer process suggests fraud.
15. Further, they state that the Banking Fraud Investigation Unit had, vide a letter dated 22nd April 2017, lodged a restriction against all dealings with the land, so, any sale or transfer to the 1st Interested Party, while the restriction was in place, in dispute or under litigation was illegal. They claim that Mombasa/Block XXI/154 was illegally sold to the 2nd Interested Party on 30th April 2018 without a forced sale valuation and the balance of the purchase price was not paid. Further, that, the 1st defendant advanced a loan of Kshs. 30,000,000/= secured by a Charge dated 10th July 2018 over the same property. Additionally, they claim that there is no evidence that Kshs. 21,000,000/= was ever paid within 30 days and that the Charge dated 10th July 2018 shows that the 2nd Interested Party was the registered owner of the Suit Property but the Certificate of Title shows that the 2nd Interested Party was registered as proprietor on 30th August 2018.
16. Also, they claim that the Banking Fraud Investigation Unit had, vide a letter dated 22nd April 2017, lodged a restriction against all dealings on the land, so, any sale or transfer to the 2nd Interested Party was illegal. They claim that an order was issued on 11th June 2018 in Msa HCC No. 29 of 2018 restraining the 1st defendant from disposing Mombasa/Block XXI/154, so, the transfer made on 30th August 2018 violated the said order. Further, they claim that Mombasa/Block XXI/44 was sold to the 3rd Interested Party on 1st April 2019 without a forced sale valuation, and the auction was intentionally advertised in the People's Daily which enjoys low readership to ensure the Plaintiffs do learn about the sale.
17. Additionally, they state that there was no auction on 1st April 2019, and the advertisement was merely a red herring. Also, they maintain that the sale was apparently concluded and transfer done on 14th June 2019, but as at that date, there were orders issued on 10th April 2019 in Msa HCC No. 80 of 2018 stopping any sale or transfer which were only discharged on 7th October 2019. They contend that the averments challenging the 1st defendant's right to sell the properties, if successfully proven, would mean that the 1st, 2nd & 3rd Interested Parties acquired no legal rights over the properties. They claim

¹ Act No. 6 of 2012.



that despite the evidence of fraud, forgery and breach of express contractual terms, the 1st defendant is threatening to sell the Plaintiffs' properties on 18th August 2021 (now past) and unless the injunction is granted, the Plaintiffs stand to suffer irreparable injury because no amount of money can compensate them. Lastly, they state that it is in the interests of justice and fairness that the orders sought be granted to give the Plaintiffs an opportunity to ventilate their very cogent and genuine grounds in a full trial.

The 1st defendant's Reply

18. The 1st defendant filed the Relying affidavit of Charles Waiyaki, a Senior Recoveries Officer at the Bank dated 1st September 2021. The crux of its case is five-fold. One, that an ex parte order cannot last for 14 days. Two, that the application is res judicata because the Plaintiffs filed numerous suits and applications in the Court of Appeal, High Court and Environment and Land Court seeking similar injunction orders over the same properties which suits/ applications have all been dismissed as follows: -
- a. Mombasa Civil Appeal No. 99 of 2016 Bank of Africa v Juja Coffee Exporters Ltd & 4 Others. On 25th January 2018 the Court of Appeal dismissed the Chargor's appeal for an injunction and allowed the bank's appeal paving the way for the sale of the charged properties.
 - b. Mombasa H.C.C No. 29 of 2018: Sabir Tahir Sheikh Said & 6 Others v Bank of Africa Ltd. The beneficiaries sought injunctive orders over the suit properties was dismissed with costs on 21st September 2018.
 - c. Mombasa Civil Application No. 48 of 2018: Juja Coffee Exporters Ltd & 2 Others v Bank of Africa & 2 Others. In this case, the Court of Appeal dismissed a second injunction over the suit properties on 7th March 2019.
 - d. Mombasa HCC No. 80 of 2018: Osman Tahir Sheikh Said & 2 Others v Bank of Africa Limited. The entire suit was dismissed and the orders of injunction given on 10th April 2019 set aside.
 - e. Mombasa HCC No. 86 of 2019: Osman Tahir Sheikh Said & 2 Others -Vs- Bank of Africa Limited. The application for injunction dated 29th October 2019 was dismissed on 15th November 2019 on grounds of res judicata.
 - f. Mombasa ELC No. 203 of 2019: TSS Investment Limited -Vs- Bank of Africa Limited & Another. The Plaintiff filed several applications which were all dismissed as follows: -
 - i. An application for injunction to stop the sale of the charged properties which was dismissed in a Ruling delivered on 20th July 2020 and struck out the entire suit on grounds of res judicata.
 - ii. An application seeking a stay of the ruling of 20th July 2020 pending the intended appeal was dismissed on 26th January 2021 and the court ordered the charged properties to be sold in the event the Plaintiff does not pay the entire debt owed to the Bank within 30 days of the Ruling.
 - iii. An application seeking review of the Ruling of 26th January 2021 and extension of time to pay the entire debt from 30 days to 180 days was dismissed on 26th July 2021.



- g. Mombasa Civil Appeal No. 158 of 2018: Juja Coffee Exporters Limited & 2 Others v Bank of Africa Limited & Another. Here, the appeal was sought to set aside a Ruling delivered on 5th April 2018 dismissing an application by the Plaintiffs herein on grounds of Res judicata. The Court of Appeal upheld the said Ruling and dismissed the appeal in a judgment delivered on 18th June 2021. The Court of Appeal also ordered the Plaintiffs to fix the matter for full hearing on its merits at the earliest opportunity instead of filing interlocutory applications for injunction which were in any event res judicata.
19. Three, that the Plaintiffs are guilty of material non-disclosure because they have deliberately refused to disclose the said cases in order to obtain the said injunction. Four, the application is an abuse of court process.
20. Five, the 1st defendant states risks suffering irreparable loss if the orders of 17th August 2021 are not vacated immediately because: - The outstanding amount of loan owed to the Bank is USD 3,851,816.91 plus Kshs 2,043,028.23 which totals approximately Kshs 387,224,719.00 at the exchange rate of Kshs 100.00 to the dollar as at 14th August 2020. It is the 1st defendants' position that the properties if sold by public auction can only fetch a maximum of Kshs 266,250,000/= being the Total Forced Sale Value. Further, it contends that even if the properties are sold, there will still be an outstanding balance of Kshs 120,974,719/= and, that the outstanding amount of loan has now outstripped the securities. It maintains that despite the Plaintiffs admitting the debt and promising to pay, they have refused to pay. Also, if the properties are sold and transferred, the Plaintiffs will not suffer any irreparable loss which cannot be compensated by damages. Also, the Plaintiffs have demonstrated inability to pay and if the injunction is granted, the Bank will suffer as it will be unable to recover the entire debt.
21. Lastly, the Bank continues to incur litigation costs because of multiplicity of suits filed by the Plaintiffs, and in some, costs were awarded to the Bank such as in HCC No. 80 of 2018: Osman Tahir Sheikh Said & 2 Others v Bank of Africa Limited which was dismissed with costs taxed at Kshs 7,376,763/= but the Plaintiffs have refused. Also, in HCC No. 86 of 2019: Osman Tahir Sheikh Said & 2 Others v Bank of Africa Limited the application for injunction was dismissed with costs, and Bank filed an application seeking security for costs for Kshs 7,376,763/=but the Plaintiffs have refused, failed and/or neglected to file a response to the said application. Lastly, the Bank continues to incur auctioneers' costs as a result of cancelled auctions hitherto totaling to Kshs 3,443,137/=.

The 1st Interested Party's Reply

22. Mr. Abdulmajid Mohamed Haji Adam, the 1st Interested Party swore the Replying affidavit dated 5th October 2021. The crux of his case is that he is the registered owner of LR No. Mombasa/Block XXI/147 having lawfully acquired it at a public auction for Kshs. 68,000,000/= and that the application is a blatant abuse of court process. It is his case that the auction was advertised in the Daily Nation of 4th November, 2019 to be conducted on 18th November 2019 at 12:00 pm at the offices of Five Eleven Auctioneers situated along Gathecha House Room No. 9 Off Moi Avenue, and, that a Mr. Amir Swaleh of Swaleh & Company Advocates attended on his behalf and he was the highest bidder at Kshs. 68,000,000/=, and the 25% deposit was paid to the 1st defendant and thereafter he was issued with a Memorandum of Sale dated 18th November, 2019 and he was also issued with a Certificate of sale and upon payment of the balance of the purchase price he become the absolute and legal owner of the property.



23. Further, it is his position that the third Plaintiff instituted *Mombasa ELC 203 OF 2019 Tahir Sheikh Said Investment Limited v Bank of Africa Limited* filed on 18th November 2019 over various properties including the subject property seeking:- a declaration that charges created over the suit properties were forgeries and therefore null and void; a cancellation of the charges registered against the suit properties; and An order of injunction against the defendant by itself, its servants and/or its agents or otherwise howsoever from selling, and disposing off by Public Auction or in any other manner dealing with the Charged Properties. Also, the 1st Interested Party states that the 3rd Plaintiff filed an application dated 18th November 2020 seeking interim injunctive orders against the 1st defendant by itself, its servants and/or its agents or otherwise howsoever from alienating, selling, and disposing off or in any other manner dealing with the Charged Properties and obtained *ex parte* interim orders on the said date effectively preventing any transfer of the property, and on 14th February 2020, the 1st Interested Party applied to be enjoined and to set aside the interim orders.
24. The 1st Interested Party states its joinder application was allowed on 25th February 2020 and on 20th July 2020, the court dismissed the 3rd Plaintiff's application and struck out the entire suit on grounds *inter alia* that it was *res judicata* and an abuse of the process of the court. The court set aside the orders issued of 18th November 2019 and thereafter the transfer was registered and a title issued on 30th July 2020 effectively making him the registered owner of the property, and he took its possession and management.
25. It is the 1st Interested Party's case that aggrieved by the above ruling, the Plaintiff filed a notice of appeal and an application dated 6th August 2020 seeking interim orders of injunction restraining the defendant from transferring or interfering with the subject property pending the appeal, and *vide* a ruling delivered on 26th January 2021, this court granted the Plaintiff the injunction on condition that the Plaintiff pays the defendant Kshs. 12,862,928.23, and USD 3,851,816.91 as well as Auctioneers charges within 30 days from the date of the ruling otherwise the injunction would be automatically discharged and the Plaintiff's application would stand dismissed with costs. He states that the Plaintiff failed to abide by the said conditions and the injunctive orders automatically lapsed and its application stood dismissed. Further, on 18th February 2021 the Plaintiff applied for review of the said ruling on grounds that the sums were colossal, but the application was dismissed. The 1st Interested Party maintains that he legally acquired the property.
26. Also, the 1st Interested Party states that he is protected by Section 99 of the Lands Act, that he was not involved in any fraud and that the allegations that no sale that took place on 18th November 2019, or there was no forced valuation report or the transfer was expedited are baseless and that under section 98(8) of the Lands Act, the property was deemed to have been sold upon acceptance of the bid at the Public Auction. Additionally, the 1st Interested Party states that the Plaintiff's or persons acting on their behalf have instituted several other suits over the same subject matter and raising the same issues and seeking similar orders, which suits have all been dismissed, and, the sale and transferee never occurred during the pendency of any active litigation. Also, the 1st Interested Party states that prayer (3) and (5) cannot issue as the subject property has already been transferred and a title issued, and, that he is currently in possession. Lastly, that the Plaintiff(s) approached the court with unclean hands and have not meet the tests in *Giella v Cassman Brown*.

The 2nd Interested Party's Reply

27. Mr. Amir Shahzad, a director of the 2nd Interested-Party swore the Replying affidavit dated 24th August 2021. The nub of his case is:- he acquired Plot No. 154 Section XXI Mombasa in a Public Auction on the 30th day of April, 2018 and a Title was issued to him on 30th August, 2018; on 21st July, 2016,



this court granted a conditional injunction to the Plaintiffs barring the 1st defendant from conducting the intended sale; on 25th day of January, 2018, the court of Appeal in Mombasa Civil Appeal No. 99 of 2016 set aside the conditional injunction and as at the 30th day of April, 2018, when the Public Auction was conducted, there was no orders barring the sale.

28. It is the 2nd Interested Party's position that the orders of 11th June, 2018, in Mombasa HCCC No. 29 of 2018 could not stop a sale which had happened over a month earlier nor could it serve as an appeal. It is the 2nd Interested Party's case that upon the fall of the hammer, the Chargors lost their right and equity of redemption, and their rights lies in a suit for damages because the 2nd Interested-Party's Title cannot be impeached on allegations that the Power of Sale was irregular. Also, the applicants are aware of injunctive orders barring the sale of all that parcel known as Mombasa/Block XXI/154 issued on the 6th July, 2018 in Mombasa High Court ELC No. 162 of 2018 wherein the 3rd applicant is a party, and further that the said orders are still in existence. Lastly, from the foregoing, it is clear the applicant is guilty of material non-disclosure and is definitely not deserving of the orders sought.

The 3rd Interested Party's Reply

29. Iftikhar Ahmed, a director of the 3rd Interested Party swore the Replying affidavit dated 4th October 2021 in opposition to the application. His case is that he is the registered owner of Mombasa/Block XX1/44 situated along Moi Avenue, Mombasa and that he is in possession of the same having purchased it at a public auction on 1st April 2019. Further, prior to the said auction, the property had been advertised for auction on 18th March 2019 and after a competitive process, he was declared the highest bidder at Kshs. 211,000,000/= and a Memorandum of Sale dated 1st April 2019 was executed and thereafter the transaction was completed. He states that he has never had any contractual relationship with the Plaintiffs and that the Plaintiffs have not met the threshold to warrant the injunction and that upon the fall of the hammer the applicants lost their right and equity of redemption and that remedy lies in a suit for damages.

The Plaintiff's supplementary affidavit

30. Nurein Tahir Sheikh Said, a shareholder and a director of the 1st, 2nd and 3rd Plaintiffs swore the supplementary affidavit dated 26th October 2021 in reply to the 1st defendant's Replying Affidavit sworn on 1st September 2021, 1st Interested Party's Replying Affidavit sworn on 5th October 2021, 2nd Interested Party's Replying affidavit sworn on 24th August 2021 and 3rd Interested Party's Replying Affidavit sworn on 4th October 2021. The substance of his response is that save for the technical objections, the 1st defendant has not responded to the substantive issues that have been raised by the Plaintiffs and in absence to answers to the substantial questions, there is prima facie evidence to doubt the existence of the 1st defendant's Statutory Power of Sale.
31. He also states that the 1st Interested Party failed to answer pertinent issues such failure to pay the 25% deposit; that his Certificate of Sale is dated 18th November 2018 yet the sale happened on 18th November 2019; that he did to sign the Memorandum of Sale dated 18th November 2019 nor did he pay the balance of the purchase price within 30 days as required by the conditions of sale. Lastly, that he registered a transfer despite the existence of a restriction on all dealings placed by the Banking Fraud Investigations Unit.
32. He also avers that it is for the 1st Interested Party to prove that a valuation was done; that section 99 of the Land Act does not protect titles which are acquired illegally which would offend Article 40(6) of the Constitution and section 26(1) of the Land Registration Act.²

² Act No. 3 of 2012.



33. He also averred that the 2nd Interested Party failed to answer the issues raised at paragraph 24(a) to (i) of his Supporting Affidavit; and on the issue replied by the 2nd Interested Party, he averred that the order issued on 11th June 2018 in Mombasa HCC No. 29 of 2018 was not an appeal from the decision in Court of Appeal Civil Appeal No. 99 of 2016 and until that order is set aside, as it ultimately was, it remained a valid order which had to be complied with. Further, that, it was not permissible for the 1st defendant and the 2nd Interested Party to proceed with the transfer as if the order did not exist.
34. Further, he averred that the 3rd Interested Party failed to answer pertinent issues raised by the Plaintiffs at paragraph 28(a) to (g) of his Supporting Affidavit. Additionally, he deposed that the advertisement was carried in the People Daily which does not enjoy nationwide circulation and that the conditions of sale required a bidding cheque of Kshs. 5,000,000/= which has not been presented by the 3rd Interested Party to confirm it attended the auction. Also, he deposed that the conditions of sale required a deposit of 25% and the balance payable in 30 days.

The 3rd Interested Party's further affidavit

35. Mr. Itikhar Ahmed swore the further affidavit dated 29th October 2021 in reply to the above supplementary affidavit. He deposed that it was not the duty of the 3rd Interested Party to ensure that a forced sale valuation was undertaken; that as at the time of registering the transfer, there was no restriction on the title; that a charge was registered in favour of the Bank; and the 25% deposit of Kshs. 52,750,000/= was paid as evidenced by the Memorandum of Sale.

The Plaintiffs' advocates' submissions

36. Mr. Gikandi, the Plaintiffs' counsel argued that the Plaintiffs have established a prima facie case with a probability of success. He proffered five grounds. One, that the 1st defendant breached the terms of the contract with the Plaintiffs. Two, that the lending contracts were forgeries. Three, that the auctions were conducted without current forced sale valuations. Four, that the auctions were fictitious. Five, that the transfers done in violation of court orders and subsisting restrictions.
37. He questioned the validity of the letters of offer and argued that the conditions precedent to disburse the facilities were not satisfied but instead USD 5,288,331.00 was transferred from the 1st Plaintiff's account to the 2nd defendant's account at Imperial Bank Limited. He argued that the 1st defendant acted contrary to the contract by allowing payments to be made, not for the purchase of tea, but for undisclosed purposes.
38. Also, he argued that the 1st defendant breached its duty by acting contrary to the signing mandate issued on 16th May 2006 on the operation of the 1st Plaintiff's account which was explicit that the only person who could give instructions alone was the 4th Plaintiff, yet it accepted and acted on instructions signed by single directors who were not the 4th Plaintiff and also approved the overdraw of the account beyond the limit. To fortify his argument, he cited *Sbalimar Flowers Self Help Group v Kenya Commercial Bank*³ and faulted the 1st defendant for acting on instructions not just by directors who had no authority to issue the instructions, but by strangers too. He submitted that such conduct prima facie, entitles the Plaintiffs to a claim against the 1st defendant.
39. Further, Mr. Gikandi submitted that the lending contracts were in fact forgeries. Counsel referred to the forensic document examiner's report dated 27th December 2018 which examined signatures on 12 documents, 6 of which he argued were found to be forgeries. He also referred to a document examiner's report dated 24th June 2019 examining the three Letters of Offer which he argued revealed that the

³ {2016} e KLR.



signatures on each of them were forgeries. He relied on *Arthi Highway Developers Limited v West End Butchery Limited & 6 others*⁴ in support of the holding that a fraudulent certificate could not give rise to any right. He urged the court not to shut its eyes to the possibility that the very lending contracts, founding the exercise of the statutory power of sale, are impeached on significant grounds. (Citing *Juja Coffee Exporters Limited & another v N.I.C. Bank Limited & another*⁵).

40. Further, counsel submitted that the auctions were conducted without current forced sale valuations and wondered why a copy of the valuation report was not availed. He cited *Francis Kiarie Kinyanjui v HFC Limited*⁶ in support of the proposition that the obligation to undertake the valuation is not optional. Additionally, counsel argued that the auctions were fictitious. He questioned why the 1st Interested Party's Certificate of Sale is dated 18th November 2018 yet the sale is said to have been on 18th November 2019 and a Memorandum of Sale dated 18th November 2019 which he did not sign.
41. He also argued that there is nothing to show that the Interested Parties paid the 25% deposit or the balance within 30 days. He argued that the allegations of fraud, illegality and unprocedural conduct by the 1st to 3rd Interested Parties, are not speculative.
42. Mr. Gikandi argued that the transfers were done in violation of court orders and restrictions and that under sections 76, 77 & 79 of the *Land Registration Act*, a restriction is not to be removed without notice to parties affected. He argued that there is a court order issued on 11th June 2018 in Msa HCC No. 29 of 2018 which restrained the 1st defendant from disposing the properties, but the transfer to the 2nd Interested Party was registered on 30th August 2018, while the order subsisted.
43. He argued that an order dated 10th April 2019 was issued in Msa HCC No. 80 of 2018 restraining the 1st defendant from disposing the properties, but a transfer in favor of the 3rd Interested Party was registered on 14th June 2019 while the order subsisted. He cited *Mugo Muiru Investments Limited v E W B & 2 others*,⁷ which held that those who defy a prohibition ought not benefit from defiance. He cited *Pauline Muthoni Njoroge v James Njoroge Kamoche & another*⁸ in support of the argument that anything done, in violation of a court order must be regarded as an illegality and cannot be allowed to stand.
44. Counsel cited the doctrine of lis pendens discussed in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others*⁹ which defeats auction sales conducted while there was active litigation. He argued that the above issues disclose infringement of rights by the 1st defendant and the 1st to 3rd Interested Party.
45. Additionally, the Plaintiff's counsel submitted that absent of an injunction, the Plaintiffs will suffer irreparable harm. He dismissed the defence offered by section 99 of the *Land Act* and relied on the proposition that a party should not be allowed to maintain an advantage he has gained by flouting the law and cited the *Said Ahmed Case (supra)*. He also cited *Coast Professional Freighters Limited v Welsa*

⁴ {2015} e KLR.

⁵ {2020} e KLR.

⁶ {2020} e KLR.

⁷ {2017} e KLR.

⁸ {2018} e KLR.

⁹ {2017} e KLR.



*Bange Oganda & 2 others*¹⁰ in which the court faulted the process leading to acquisition of a title and held that it could not confer a valid title. He also cited *Nyangilo Ochieng & another v Fanuel B. Ochieng & 2 others*¹¹ which concerned an auction conducted in the absence of a statutory notice and the High Court set aside the sale. (Also cited *Mugo Muiru Investments*),).

46. He also cited Article 40(6) of the Constitution in support of the position that the rights under the said Article do not extend to any property that has been found to have been unlawfully acquired and section 26(1) (b) of the *Land Registration Act* which permits for nullification of title where it is obtained illegally, unprocedural or through a corrupt scheme. He also argued that section 99 of the *Land Act* does not sanctify fraud and illegality, only niggling irregularities.
47. On balance of convenience, Mr. Gikandi cited *Alice Awino Okello v Trust Bank Ltd & Anor* in support of the holding that the balance of convenience is in favour of the applicant as the sale of one's property is a serious matter that deprives one of a right recognized in law and as such should not be allowed to proceed on doubtful circumstances.
48. Regarding the prayer for production of documents, he cited Section 22 of the *Civil Procedure Act*¹² and argued that the court has power to order a party to produce documents necessary for a fair trial. He relied on *United Airlines Limited v Kenya Commercial Bank Limited*¹³ in support of the argument that a Bank is an agent of its customers and it is obligated to disclose to the customer any information that may have any bearing on the customer's account. He cited *Barclays Bank of Kenya Limited v Christopher Orina Kenyariri & another*¹⁴ in support of the proposition that litigation is designed to do justice.

The 1st defendant's advocates submissions

49. The 1st defendant's counsel submitted that if an interlocutory injunction has been obtained by means of misrepresentation or concealment of material facts, as was the case herein, the orders so granted through such suppression of facts must be discharged. He submitted that the order issued on 17th August 2021 should be vacated forthwith because the Plaintiffs are guilty of serious material non-disclosure for not disclosing the previously filed suits in which the Plaintiff's sought similar orders. He also argued that the instant application is res judicata and relied on *Babadurali Ebrahim Shamji v Al Noor Jamal & 2 Others*¹⁵ where the court discharged orders that had been obtained through suppression of facts and underscored the duty to make full and frank disclosure of material facts.
50. He also submitted that the Plaintiffs have not established a prima facie case. He submitted that the Plaintiffs case is founded on the grounds that they are now in possession of crucial information regarding fraud and forgery of security documents by the 1st defendant which documents were used to obtain the loan which information they claim was not available to them at the hearing of previous applications for injunctions. He pointed out that the Court of Appeal has held twice that the said information was not new as it was part of the allegations of fraud and forgery relied upon by the

¹⁰ {2017} e KLR

¹¹ {1996} e KLR.

¹² Cap 21, Laws of Kenya.

¹³ {2017} e KLR.

¹⁴ {2017} e KLR.

¹⁵ {1998} e KLR.



Plaintiffs in their previous applications for injunctions which were dismissed. He relied on *Bank of Africa Limited v Juja Coffee Exporters Limited & 4 Others*¹⁶ in which the Court of Appeal stated:-

“3. The bone of contention is particularly about three tranches of financing facilities ostensibly provided by the bank to Juja Coffee in the years 2011, 2012, and 2014 at USD 4.5 million, USD 4.5 million and USD 7 million, respectively. The advances were all secured by further charges on the six properties and the personal guarantees of Tahir. But it is claimed that the finances were not given out for the intended purpose; part of it was given out for the unjust enrichment of Kaab Investments Ltd (KIL) which was a stranger; there was collusion and fraud between the bank and Juja Coffee or their rogue officers; different rates of interest were unlawfully charged and claimed on the three tranches; the six securities could not be utilized to secure the financing after the enactment of the *Land Act* in 2012; overdraft facilities were loaded on the debt without authority; and that neither TTL nor TIL whose securities were held by the bank had benefited from the finances liberally dished out by the bank to Juja Coffee. The actions of the bank, it is claimed, were careless and irresponsible as it allowed Juja Coffee to overdraw in excess of USD 5.8 million without questioning it on repayment plans, and ended up jeopardizing the equity of redemption of the six securities.”

51. He submitted that from the above excerpt, it is quite clear that the bone of contention by the Plaintiffs in the above appeal case was “collusion and fraud between the bank and Juja Coffee or their rogue officers” and the Court of Appeal observed: -

“26. On our own evaluation, after considering the affidavit in reply together with other documents on record, there is considerable doubt that the applicants had established a prima facie case with a probability of success. Even if they had, as the trial court found, it was necessary to consider whether the injury they would suffer if the injunction is not granted, will be irreparable. The law is that if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage.

27. The respondents’ main arguments appear to be based on impropriety of security documents and not whether any loans were disbursed on the basis of those securities; the accuracy of accounts; and assertions that the securities were unique and irreplaceable. We take the view, however, as this Court did in the case of *Ecomil Pasag Co. Limited & 2 others v UAP Insurance Co. Limited* [2017] eKLR, that the properties were offered as security in a commercial transaction and the consequence of alienation was anticipated if there was default. The value is quantifiable and there is no evidence that the bank is incapable of paying the damages if the main suit ultimately succeeds.”

¹⁶ {2018} eKLR.



52. Additionally, counsel argued that in the judgment delivered on 18th June 2021 in *Juja Coffee Exporters Limited & 2 Others v Bank of Africa Limited & Another*¹⁷ the Court of Appeal stated as follows: -

“27. According to the appellants, what distinguished the second application from the first application was discovery of new material, which was not available when the first application was heard. The new material, it was asserted, buttressed their claim that there was “fraud and collusion” between officers of the 1st appellant and those of the Bank. That material comprised of evidence that the Director of Public prosecution had commenced criminal proceedings and charged the officers involved with numerous criminal charges. That may very well be so. However, in our view, that did not alter the substratum on which the first application was based and with respect to which this Court in its judgment on appeal from the ruling of 21st July 2016 expressed that “there is considerable doubt that the [appellants] had established a prima facie case with a probability of success. Fraud and collusion were pleaded and canvassed in relation to the first application. The institution of criminal charges did not in itself justify re-litigating whether the Bank should be restrained, on interim basis from exercising its statutory power. In our view, the new material would perhaps be evidence that the appellants would be at liberty to tender during the trial of the main suit in support of their case. We are therefore in agreement with the learned Judge that the issue of fraud was deliberated on at an interim stage and that it would be deliberated upon again at the main hearing and “the doors on the said issue have therefore not been slammed shut on the faces of the.....plaintiffs.

31. In conclusion therefore, we are satisfied the learned judge did not err in upholding the preliminary objection that the second application for injunction pending the hearing and determination of the suit was res judicata. We think the interest of the parties will best be served by having the main suit pending before the High Court heard and determined on merits at the earliest opportunity.”

53. He submitted that instead of fixing the matter for full hearing as directed by the Court of Appeal, the Plaintiffs again filed another application for injunction in blatant abuse of the court process. Counsel argued that this court has inherent jurisdiction under Section 3A of the *Civil Procedure Act* to bar the Plaintiffs from filing injunction applications without the leave of the court. He relied on *James Mwashori Mwakio v Kenya Commercial Bank Ltd & another*¹⁸ where the litigant kept filing multiple applications at the Court of Appeal all of which sought interpretation of a judgment delivered by the same court. The Court of Appeal declared the Plaintiff/Applicant therein a vexatious litigant and ordered the court registry to desist from accepting any further applications from him.

54. Further, counsel submitted that if this court allows the application for injunction, it will have sat on appeal and reviewed the decisions of the Court of Appeal in *Bank of Africa Limited v Juja Coffee Exporters Limited & 4 Others*¹⁹ and *Juja Coffee Exporters Limited & 2 Others v Bank of Africa Limited*

¹⁷ Civil Appeal No. 158 of 2018, [Unreported].

¹⁸ {2014} e KLR.

¹⁹ {2018} e KLR.



& Another.²⁰ Additionally, counsel referred to *Osman Tahir Sheikh Said & 3 Others v Bank of Africa Limited*²¹ in which alleged beneficiaries of the estate of the late Tahir Sheikh Said filed the said case contemporaneously with an application for injunction to stop the Bank from exercising its statutory power of sale over the suit properties. In dismissing the application on grounds of res judicata. The court stated: -

“21. It is this Courts view that if the Plaintiffs are in discovery of new evidence as regards the issues of fraud and forgery; they ought to have approached the Court of Appeal to decide otherwise as the remedy lies in filing an application for review in the Court of Appeal and not filing a new suit. More so, the issues of forgery and fraud remain as allegations since the same are yet to be proved. To this extent, the issues of fraud remain res-judicata to this Court.

22. Also, if this Court were to allow the Applicants’ application, then it would amount to reviewing the other decisions over the same matter including this Court’s own decision in HCC NO. 80 OF 2018, without being asked to do so. And worse still, it would have the effect of having overturned the Court of Appeal’s decision in the Juja case.”

55. Further, counsel pointed out that the 3rd Plaintiff filed another suit in the Environment & Land Court namely, being *Tabir Sheikh Investments Limited v Bank of Africa Limited*²² seeking an injunction to stop the exercise of the Bank’s statutory power of sale which was dismissed and the entire suit struck out for being res judicata. The 1st defendant’s counsel argued that allowing the application shall flout the doctrine of stare decisis and cited and relied on *Mwai Kibaki v Daniel Torotich Arap Moi*²³ where the Court of Appeal held inter alia that the High Court has no power to overrule the Court of Appeal. (Also cited *Osman Tahir Sheikh Said & 3 Others v Bank of Africa Limited*²⁴).

56. The 1st defendant’s counsel submitted that even if an injunction is not granted, the Plaintiffs will not suffer any substantial loss that cannot be adequately compensated by an award of damages because the subject properties were offered as securities to be sold in the event of default and relied on the case of *Kitur v Standard Chartered Bank & 2 Others*. He argued that the balance of convenience tilts in favour of the bank, and if the injunction is granted, it will inflict greater hardship on the Bank because the outstanding debt continues to accumulate interest, while if an injunction is refused and it is found that the Plaintiffs were entitled to an injunction, the Bank can easily compensate the Plaintiffs for any loss and relied on *Thathy v Middle East Bank (K) Ltd.*²⁵

The 1st Interested Party’s advocates submissions

57. The 1st interested party states that after it purchased the subject property at a public auction, it later learnt that the 3rd Plaintiff had filed Mombasa ELC 203 of 2019; Tahir Sheikh Said Investments v Bank of Africa ltd against the 1st defendant seeking inter alia an injunction preventing the defendant

²⁰ Civil Appeal No. 158 of 2018, Unreported.

²¹ HCC No. 86 of 2019.

²² {2020} eKLR.

²³ {1999} e KLR.

²⁴ HCC No. 86 of 2019.

²⁵ {2002} 1 KLR, 595.



from dealing in any manner with the suit properties which application was dismissed on grounds or res judicata.

58. He submitted that immediately the defendant's statutory power of sale was activated, the Plaintiff's equity of redemption automatically lapsed, and upon the fall of the hammer and the acceptance of the interested party's bid, the suit property was deemed to have been legally sold by virtue of the mandatory provisions of section 98(8) of the Land Act. To fortify his argument, he relied on Joyce Wairimu Karanja v James Mburu Ngure & 3 others²⁶ and Savings and Loan Kenya Limited v Mayfair Holdings Limited²⁷ and submitted that the 1st Interested Party's rights are protected under section 99 of the Land Act. He submitted that the Plaintiffs have not met the tests in *Giella v Cassman Brown & Brothers Ltd* and that the 1st Interested Party holds a valid title protected by section 26 of the Land Registration Act.

The 2nd Interested Party's advocates submissions

59. Counsel for the 2nd Interested Party argued that prior to purchasing the property, the 2nd Interested party conducted due diligence and established that there were no orders stopping the sale, but later, he learnt about Mombasa ELC No. 162 of 2018 filed by Fatma Sufi Nur, Tahlil Ayan Ahmed, Sadi Safi and Mohamed Mohamed Mahamoud against the 3rd Plaintiff seeking adverse possession which suit is still pending.
60. He submitted that no material has been placed before this court to show that the 2nd Interested Party was part of the alleged fraud, and that, the grant of injunction is an exercise of judicial discretion, and the issue to be decided is whether the applicants has satisfied the requirement for an injunction set in *Giella v Cassman Brown & Company Limited*²⁸). Also, he submitted that the 2nd Interested Party's claim is protected by section 99 of the Land Act and relied on Mary Njeri Ngowi v Housing Finance Company of Kenya Limited & 2 Others²⁹ which failed to fault a purchaser for alleged fraud. He submitted that the Plaintiffs have their remedies in section 99 of the Land Act and cited *Bomet Beer Distributors Ltd & Anor. v Kenya Commercial Bank Ltd & 4 Others*.³⁰ He argued that the Plaintiffs have not disclosed an arguable case nor can it be said they will suffer irreparable harm. He submitted that the Plaintiffs lost their equity of redemption and that the balance of convenience tilts in favour of the 2nd Interested Party.

The 3rd Interested Party's advocates submissions

61. Counsel argued that upon payment of the entire purchase price of Kshs. 211,000,000/= to the 1st defendants, the suit property was transferred to the 3rd Interested Party, and that the 3rd Interested Party is a bona fide purchaser for value. He cited the definition of a bona fide purchaser in *Black's Law Dictionary*³¹ that:-

“one who buys something for value without notice of another's claim to the property and without actual or construction notice of any defects in or infirmities equities against the

²⁶ {2018} e KLR.

²⁷ {2012} e KLR.

²⁸ {1973} E.A. 358.

²⁹ HCCC No. 1864 OF 2000.

³⁰ {2005} e KLR.

³¹ 9th Edition.



seller's title, one who in good faith paid valuable consideration for property without notice of prior adverse claims.”

62. He also cited *Katenda v Haridar & Company Ltd*³² where the Ugandan Court of Appeal described a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. He also relied on *Hannington Njuki v William Nyanzi*³³ and the Court of Appeal in *Joseph Muriithi Njeru v Mary Wanjiru Njuguna & Sarah Kemuma Osiemo*.³⁴ Counsel submitted that the Plaintiff is seeking an interlocutory injunction against the 3rd Interested Party who is an innocent purchaser for value and relied, yet the application does not meet the tests in *Giella v Cassman Brown & Company Limited*. He submitted that the 3rd Interested Party is protected by section 99 of the *Land Act*.

Determination

63. My reading of the 1st Respondents and the Interested Parties' grounds in opposition to the Plaintiffs' application reveal that they cited several hurdles which the application must surmount to succeed the onslaught. First is the doctrine of res judicata, defined in the Black's law Dictionary as: -

“An issue that has been definitely settled by judicial decision; An affirmative defense barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transaction and that could have been but was not raised in the first suit. The three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties.”

64. Res judicata is provided for in Section 7 of the *Civil Procedure Act*.³⁵ Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The section contemplates 5 conditions which, when co-existent, will bar a subsequent suit. The conditions are:- (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.³⁶
65. The application of the doctrine of res judicata has been the subject of numerous judicial pronouncements in this country. In *Qayrat Foods Limited v Safiya Ahmed Mohamed & 6 others*³⁷ the

³² {2008} 2 E.A. 173.

³³ High Court Civil Suit Number 434 of 1996.

³⁴ Civil Appeal Number 145 of 2016.

³⁵ Cap 21, Laws of Kenya.

³⁶ See *Lotta v Tanaki* {2003} 2 EA 556.

³⁷ {2020} e KLR.



court cited *James Karanja alias James Kioi (Deceased)*³⁸ which delineated the elements of res judicata as: -

“For the doctrine of Res Judicata to apply, three basic conditions must be satisfied. The party relying on it must show: - (a) That there was a former suit or proceeding in which the same parties as in the subsequent suit litigated; (b) the matter in issue in the latter suit must have been directly and substantially in issue in the former suit; (c) that a court competent to try it had heard and finally decided the matters in controversy between the parties.”

66. The former East African Court of Appeal in *Gurbachan Singh Kalsi v Yowani Ekori*³⁹ stated: -

“Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”

67. Kenya's Apex court in *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* stated the following regarding res judicata: -

(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights.

(54) The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

(58) Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in

³⁸ {2014} e KLR.

³⁹ Civil Appeal No. 62 of 1958.



the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction

(59) That Courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in *E.T v. Attorney-General & Another*, (2012) eKLR, thus: “The Courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction.”

68. From the above jurisprudence, a key principle is visible. This is, if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is res judicata. It follows that if in any subsequent proceedings (unless they be of an appellate nature or review) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment or ruling is called in question, the defence of res judicata can be raised. This means in effect that the judgment or ruling can be pleaded by way of estoppel in the subsequent case.
69. Somervell L.J.⁴⁰ was more explicit when he stated that res judicata covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. A litigant will not be allowed to litigate a matter all over again once a final determination has been made. A party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue.⁴¹
70. The basic requirements for res judicata are the same cause of action, the same relief involving the same parties was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the ‘determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.
71. Res Judicata is one of the factors which limits a court’s jurisdiction. This doctrine serves a salutary purpose which is key to the due administration of justice. It requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again. The doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions. Res Judicata can apply in both a question of fact and a question of law, so, where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation.⁴²
72. The key point here is that a judicial decision made by a court of competent jurisdiction holds as correct and final in a civilized society. So, res judicata halts the jurisdiction of the court to protect the finality

⁴⁰ In *Greenhalgh vs Mallard (1)* (1947) 2 All ER 257.

⁴¹ *Caeserstone Sdot-Yam Ltd vs World of Marble and Granite 2000 CC and others* 2013 (6) SA 499 (SCA) paras 20-21.

⁴² <http://www.kenyalawresourcecenter.org/2011/07/res-judicata.html> -Accessed on 16 December 2017.



of the decision. That is why it is one of the factors affecting jurisdiction of the court. The effect is that the court is prevented from trying the case in limine.⁴³ The rule of res judicata presumes conclusively the truth of the decision in the former suit.⁴⁴ Res judicata, also known in the US as claim preclusion, is a Latin term meaning "a matter judged." This doctrine prevents a party from re-litigating any claim or defence already litigated. The doctrine is meant to ensure the finality of judgments and conserve judicial resources by protecting litigants from multiple litigation involving the same claims or issues.

73. Earlier in this ruling I mentioned various rulings by the High Courts and the Court of Appeal on substantially if not wholly similar applications filed by the Plaintiffs herein or persons acting on their behalf. These cases in which rulings were rendered include Mombasa Civil Appeal No. 99 of 2016 Bank of Africa v Juja Coffee Exporters Ltd & 4 Others. Here, on 25th January 2018, the Court of Appeal dismissed the Chargor's appeal against a ruling on an injunction and allowed the bank's appeal paving the way for the sale of the charged properties.
74. In Mombasa H.C.C No. 29 of 2018: Sabir Tahir Sheikh Said & 6 Others v Bank of Africa Ltd. Persons suing as beneficiaries of one of the parties herein or their privies sought injunctive orders over the same properties. The application was dismissed with costs on 21st September 2018. In Mombasa Civil Application No. 48 of 2018: Juja Coffee Exporters Ltd & 2 Others v Bank of Africa & 2 Others, the Court of Appeal dismissed an injunction application over the same properties on 7th March 2019.
75. In Mombasa HCC No. 80 of 2018: Osman Tahir Sheikh Said & 2 Others v Bank of Africa Limited, the entire suit was dismissed and the orders of injunction given on 10th April 2019 set aside, while in Mombasa HCC No. 86 of 2019: Osman Tahir Sheikh Said & 2 Others v Bank of Africa Limited, the application for injunction dated 29th October 2019 was dismissed on 15th November 2019 for res judicata. The list is longer. In Mombasa ELC No. 203 of 2019: TSS Investment Limited v Bank of Africa Limited & Another, the Plaintiffs several applications were all dismissed. Lastly, in Mombasa Civil Appeal No. 158 of 2018: Juja Coffee Exporters Limited & 2 Others v Bank of Africa Limited & Another, the Plaintiffs moved to the Court of Appeal seeking to set aside a High Court Ruling delivered on 5th April 2018 dismissing their application for being Res judicata. The Court of Appeal upheld the said Ruling and dismissed the application on 18th June 2021.
76. To underscore how low the Plaintiffs went to regurgitate the same issues not once, not twice but on several applications. A classic example is the earlier cited excerpts from the Court of Appeal Ruling in Juja Coffee Exporters Limited & 2 Others v Bank of Africa Limited & Another⁴⁵ in which the appellate court was emphatic that the issues raised were not new but a replication of previous cited issues. Similar findings were made in Bank of Africa Limited v Juja Coffee Exporters Limited & 4 Others⁴⁶ and Osman Tahir Sheikh Said & 3 Others v Bank of Africa Limited.⁴⁷ The same arguments which have been the subject of several previous decisions all the way to the Court of Appeal have been advanced here.
77. I have also carefully read the various High Court decisions mentioned earlier. In fact, both the High Court and the Court of Appeal were emphatic that the issues raised by the Plaintiffs in the said applications were res judicata. The Court of Appeal went further to advise that this matter be

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Civil Appeal No. 158 of 2018, [Unreported].

⁴⁶ {2018} e KLR.

⁴⁷ HCC No. 86 of 2019.



heard on merits. Instead of taking cue from the said ruling, the Plaintiffs filed the instant application citing substantially similar grounds, namely alleged fraud, abuse of signing mandate, unauthorized payments/withdrawals and discovery of new evidence premised of alleged police investigations and forensic auditing reports.

78. For starters, mere addition of parties in a subsequent suit or omission of a party or party's or introducing a new ground or a new prayer(s) does not necessarily render the doctrine of res judicata inapplicable because a party cannot escape the wrath or res judicata by simply undertaking a cosmetic surgery to his pleadings or introducing new grounds to secure the earlier refused orders. If the added grounds, or parties or prayers peg the claim under the same title as the parties in the earlier suit, the doctrine will still be invoked.⁴⁸ Res judicata covers issues which could have been raised in the earlier proceedings. The test here as I see it is whether had the earlier applications succeeded, the applicant would have filed the subsequent application(s). Certainly, the answer is no. I find no difficulty in concluding that the instant application is res judicata. On this ground alone, the Plaintiffs application collapses.
79. Perhaps I should mention that the Plaintiffs have hinged their application on alleged discovery of evidence which was not previously available to them, namely the alleged Police investigations and forensic investigation reports. This argument fails on three fronts. One, as was observed by the Court of Appeal and the High Court's differently constituted cited earlier, there is nothing new in the said allegations. Two, before me is not an application for review. And, even if the Plaintiffs had sought review, the application will still have collapsed because the same matters have been determined by the Court of Appeal and other High Courts, so, a review cannot lie before this court. Three, an application for review stands or falls on the limited scope provided under section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules, 2010*. Such a limited scope has no application in the material before me.
80. The second hurdle upon which the Plaintiffs application collapses is closely related to the doctrine of res judicata. As we all know, complementary to the doctrine of res Judicata is the conception that, when a judicial tribunal becomes functus officio in respect of a particular case, its powers and jurisdiction are exhausted in respect of that issue. A judicial tribunal, after giving a decision as to the merits of a case, ceases to exist as an instrumentality in its previous form or at all, or is deprived of all the judicial functions it previously possessed, it is functus officio in respect of the issues decided.⁴⁹
81. A court which, after a trial, has given a valid decision determinative of right, liability or status, has no jurisdiction to recall it whatever mistakes may have been made in facts or law.⁵⁰ This test is applicable only if there happens to have been a "final" and "determinative" decision, after a trial; and that a judicial tribunal becomes functus officio in this sense only in relation to a particular matter, not in respect of all matters. For a judicial tribunal to become functus officio, it must have delivered a valid judgment, decree or order of a final and conclusive nature and res judicata must have come into existence. The High court pronounced itself severally as evidenced by the various rulings mentioned earlier. The Court of Appeal added its voice on the matter. This court is being invited to overturn the decision rendered by the Court of Appeal or to sit on appeal on decisions pronounced by the High Court and

⁴⁸ *Republic vs Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 others* [2017] e KLR.

⁴⁹ See *Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation and Kenya Commercial Bank Group Limited Garnishee* Miscellaneous Civil Application No. 241 of 2019.

⁵⁰ (1943-4) 68 C.L.R. at p. 590.



the Environment and Land Court, a court of Equal Status. I decline the invitation to travel along this forbidden route. Again, on this ground, the Plaintiffs' application fails and is fit for dismissal

82. I will now address the next hurdle standing in front of the Plaintiffs' application, which is the question whether this application is an abuse of court process. It is common ground that this is not the first, second or the third application in a series of similar applications filed by the Plaintiffs seeking the same or substantially similar reliefs in the High Court, the Environment and Land Court, and also appeal(s) to the Court of Appeal. As severally pointed out, the Court of Appeal advised that this suit be heard on merits. But, undeterred by the many rulings, the Plaintiffs again came back to this court and sadly secured some orders on 17th August 2021.
83. Notwithstanding the fact that the High Courts and the Court of Appeal had already pronounced themselves and dismissed the Plaintiffs' applications which sought similar orders, the Plaintiffs undeterred filed the instant application. The civil justice system depends on the willingness of both litigants and lawyers to try in good faith to comply with the rules established for the fair and efficient administration of justice. When those rules are manipulated or violated for purposes of delay, harassment, or unfair advantage, the system breaks down and, in contravention of the fundamental goal of the Civil Procedure Rules, the determination of civil actions becomes unjust, delayed, and expensive. The issues raised in the instant application are the same issues which were heard and determined in the earlier applications.
84. The scenario presented in this case raises the question whether the instant application is an abuse of court process. The court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The Black's Law Dictionary defines abuse as "Everything which is contrary to good order established by usage that is a complete departure from reasonable use. Abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use".⁵¹
85. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.⁵²
86. In several decisions of this court, citing jurisprudence from various jurisdictions, I have stated that the situations that may give rise to an abuse of court process are indeed in exhaustive. They involve situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. Examples include: -
- a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
 - b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.

⁵¹ *Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11.*

⁵² *Public Drug Co V Breyerke cream Co, 347, Pa 346, 32A 2d 413, 415.*



- c. Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
- d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
- e. Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.⁵³
- f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- g. Where an appellant file an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
- h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.⁵⁴

87. Abuse of judicial process is a term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In the words of Oputa JSC, abuse of process can also mean abuse of legal procedure or improper use of the legal process.⁵⁵ As Justice Niki Tobi JSC⁵⁶ observed, abuse of court process creates a factual scenario where a party is pursuing the same matter by two court process. In other words, a party by the two-court process is involved in some gamble, a game of chance to get the best in the judicial process.⁵⁷

88. The point to underscore is that a litigant has no right to pursue paripasu more than once processes which will have the same effect at the same time or at different times with a view of obtaining victory in one of the process or in both. I have in previous decisions stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. Litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.

89. Multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse.⁵⁸ The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose

⁵³ *Jadesimi vs. Okotie Eboh* (1986) 1NWLR (Pt 16) 264.

⁵⁴ (2007) 16 NWLR (319) 335.

⁵⁵ In the Nigerian case of *Amaefule & other v The State*.

⁵⁶ *Agwusin vs Ojichie*

⁵⁷ Ibid.

⁵⁸ Ibid.



and aim of person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice.⁵⁹

90. Abuse of court process is an obstacle to the efficient administration of justice. Tinkering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistent with the good order of society.
91. The concept of abuse of process extends to the use of the court's processes in a way that is inconsistent with two fundamental requirements arising in court proceedings. These are, first, that the court protects its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence. The court's processes will be seen as lending themselves to oppression and injustice.⁶⁰The concept of abuse of process overlaps with the obligation of a court to provide a fair trial. How can a fair trial be guaranteed when parties drag each other to court over issues which have been litigated and determined between the same parties? How can fair trial be guaranteed when a litigant appeals to the Court of Appeal and after suffering a defeat he retreats to the High Court and now camouflaging the same old dispute as new evidence prays for the same orders which were denied by the appellate court. By now it's evident that the instant application fits the description of an abuse of court process as delineated in the decided cases discussed above. On this ground, the instant application is dismissed.
92. The application having failed to surmount all the issues discussed above, it is my strong position that it would be waste of judicial time, ink and paper to attempt to delve into the merits of the application. The infinite judicial resources should be deployed elsewhere in addressing deserving cases not already determined issues. However, notwithstanding the foregoing, I will address the application on merits because all the parties deployed a lot of energy addressing the merits of the application.
93. For starters, the object of an interlocutory injunction is to maintain the matters in question in the suit in statu quo, until the hearing of the cause. The proper standard on a motion for preliminary injunction depends on whether the relief sought is a "prohibitory injunction," which "preserves the status quo," or a "mandatory injunction," which goes well beyond simply maintaining the status quo pendente lite and is particularly disfavored. In the latter category of cases, the court should deny such relief 'unless the facts and law clearly favor the moving party. A "mandatory" injunction is seen as upsetting the status quo and is subjected to the heightened preliminary injunction standard.
94. From the facts before me, there is no contestation that the auction for the various properties took place and transfer of the titles was registered in favour of the Interested Parties who claim to have since taken possession. Viewed from this dimension, it is clear that the injunction sought against the Interested Parties is mandatory in nature, hence the applicable tests apply. The Plaintiffs did not view their application from this dimension, so, no argument was made before me on the heightened degree applicable in granting mandatory injunctions.

⁵⁹ Ibid.

⁶⁰ *Clark vs R* {2016} VSCA 96 at [14].



95. The test for granting a mandatory injunction is stated in *Halsbury's Laws of England*⁶¹ which reads: -

‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application.’”

96. In *Kenya Breweries Ltd & Another v Washington O. Okeyo*⁶² the Court of Appeal quoted with approval *Locabail International Finance Ltd v Agroexport and others*⁶³ thus: -

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly be granted, that being a different and higher standard than was required for a prohibitory injunction.”

97. In *Nation Media Group & 2 others v John Harun Mwau*⁶⁴ the Court of Appeal said: -

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

98. The principles of law arising from the above decisions is that a court considering an application for interlocutory mandatory injunction must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear and that the applicant has a good case with a likelihood of success. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy- until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great

⁶¹ Vol. 24, 4th Edition, paragraph 948.

⁶² {2002} eKLR

⁶³ {1986} 1 ALLER 901

⁶⁴ {2014} eKLR



injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are: -⁶⁵

- a. The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.
 - b. It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
 - c. The balance of convenience is in favour of the one seeking such relief.
99. Being essentially an equitable relief, the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive or complete or absolute rules, and there may be exceptional circumstances needing action, applying them as pre-requisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion.
100. As stated above, the sale for the three properties was completed and transfers registered in favour of the Interested Parties. The only issues raised by the Plaintiffs is alleged fraud on the part of the Plaintiffs or one of them and the Bank. (Curiously, the application is brought on behalf of the Plaintiffs and wild allegations of fraud are also being made by the “Plaintiffs” against “themselves” or one of them). Significantly, no tangible allegation of fraud have been directed against the Interested Parties save question as to whether they paid the deposits of purchase price which they answered. The allegations against the Bank and a Plaintiff of Plaintiffs (curiously made by the Plaintiffs) will have to be established at the trial. For now, what is clear is that the sale was done and Certificates of Sale issued. Legal ownership shifted. The law protects purchaser’s interest’s just as it protects the Plaintiff’s rights to challenge the sale. Whether the Plaintiffs will succeed in challenging the sale is a matter to be determined at the trial. Viewed from this perspective, the Plaintiffs cannot be said to have established a prima facie case to warrant a mandatory injunction which has the potential of divesting the purchasers their accrued rights. Differently, put, the Plaintiffs have not established special circumstances to qualify for a mandatory injunction. Consistent with established jurisprudence, a mandatory injunction can only be granted in the clearest circumstances of all. The facts before me do not satisfy the tests for granting a mandatory injunction.
101. Even if I were to treat the injunction sought as prohibitory in nature as it is presented, the purpose of an interlocutory injunction is to preserve the subject matter of a dispute and to maintain the status quo pending the determination of the parties’ rights. In granting such an injunction, the court is concerned both with: (a) the maintenance of a position that will most easily enable justice to be done when its final order is made; and (b) an interim regulation of the acts of the parties that is the most just and convenient in all the circumstances. The jurisdiction to grant injunctions is discretionary and very wide. However, this power does not confer an unlimited power to grant injunctive relief. Regard must still be had to the existence of a legal or equitable right which the injunction protects against invasion or threatened invasion, or other unconscientious conduct or exercise of legal or equitable rights.
102. The interlocutory injunction is merely provisional in its nature, and does not conclude a right. The effect and object of the interlocutory injunction is merely to keep matters in status quo until the hearing or further order. In interfering by interlocutory injunction, the court does not in general profess to anticipate the determination of the right, but merely gives it as its opinion that there is a substantial question to be tried, and that till the question is ripe for trial, a case has been made out for the preservation of the property in the meantime in status quo. A man who comes to the court for an

⁶⁵ *Jagdish Prasad v Shrawan Kumar & Anr* on 9 March, 2016.



interlocutory injunction, is not required to make out a case which will entitle him at all events to relief at the hearing. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the court that the property should be preserved in its present actual condition, until such question can be disposed of.

103. In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The jurisdiction to grant an injunction may be exercised “if it is just and convenient to do so.” In *Giella v Cassman Brown and Co. Ltd*⁶⁶ the court set out the principles for Interlocutory Injunctions. The principles as laid down in the said case are: -
- a. The Plaintiff must establish that he has a prima facie case with high chances of success;
 - b. That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages;
 - c. If the court is in doubt, it will decide on a balance of convenience.
104. The Canadian case of *R. J. R. Macdonald v Canada (Attorney General)*⁶⁷ laid down three-part test of granting an injunction as follows: -
- a. Is there a serious issue to be tried?
 - b. Will the applicant suffer irreparable harm if the injunction is not granted?
 - c. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called “balance of convenience”).
105. In *Mbutia v Jimba Credit Corporation Ltd*⁶⁸ Platt JA echoed the “serious question to be tried” test enunciated by Lord Diplock in *American Cyanamid*⁶⁹ and stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the party’s cases. The seriousness of the question, like the strength of the probability, depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought. How strong that probability (or likelihood) needs to be depends, no doubt, upon the nature of the rights the plaintiff asserts and the practical consequences likely to flow from the order he seeks.
106. Lord Hoffman in *Films Rover International Ltd v Cannon Film Sales Ltd*⁷⁰ stated that in determining whether to grant an interlocutory injunction, a court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong,” in the sense of granting an injunction to a party who fails to establish his or her right at trial (or would fail if there was a trial) or in failing to grant an injunction to a party who succeeds (or would succeed at trial). In determining which course carries the lower risk of injustice, the court is informed by, among other things, the well-established interrelated considerations of whether there is a serious question to be tried and whether the balance of convenience or justice favours the grant.

⁶⁶ {1973} E A 358.

⁶⁷ {1994} 1 S.C.R. 311.

⁶⁸ {1988} KLR 1

⁶⁹ {1975} AC 396 at 407.

⁷⁰ {1987} 1WLR 670 at 680-681.



107. To justify the imposition of an interlocutory injunction, the plaintiff must be able to show a “sufficient likelihood of success.” The plaintiff’s prospects of succeeding at trial will always be relevant “as a necessary part of deciding whether there is a serious question to be tried” and as an almost invariable factor in evaluating the balance of convenience. The assessment of the strength of the probability of success is an essential factor in deciding which course - whether or not relief should issue and, if so, on what terms – carries the lower risk of injustice. While this is the case, it is suggested that there will be other factors which are relevant having regard to the nature and circumstances of the case.
108. By now it is beyond doubt that the prima facie case test represents the law in relation to the grant of interlocutory injunctions. A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is sufficient that the plaintiff shows a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial rather than demonstrating that it was more probable than not that the plaintiff would succeed at trial. In *Mbutia v Jimba Credit Corporation Ltd (supra)* Platt JA stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the parties cases.
109. Applying the principles discussed above to the instant case, it is necessary to recall that the loan is not disputed. There is no contest that the Plaintiffs defaulted in repaying the loan. There is no dispute that a conditional injunction was flouted. Essentially, the Plaintiffs as borrowers never paid the loan. The allegations before me only attack the manner in which the auctions were conducted and the manner in which the accounts were managed. It’s on these allegations that the Plaintiffs seek to challenge the charge instruments citing inter alia fraud. At this stage, these allegations are to be weighed against the counter explanations proffered by the 1st defendant and the Interested Parties. The allegations of fraud are attractive. However, that is how far they go at this stage. The Plaintiffs are implicating themselves or part of them in fraud. Fraud must not only be pleaded, but must be strictly proved. This is the acid test to be surmounted at the trial. For now, the threshold for a prima facie case remains the test. Viewed from this perspective, the Plaintiffs’ allegations cannot be said to have disclosed a prima facie case with a likelihood of success.
110. The other important issue is whether the 1st defendant’s Statutory Power of Sale had lawfully arisen, and whether the 1st defendant legally advertised and sold the properties. Were the sale(s) lawful? These are pertinent questions upon which the Plaintiffs’ case will stand or fall. Similarly, the allegation that no sale took place or no money was paid are matters for trial to be proved by evidence. Viewed from the lens of what constitutes a prima facie case, and the available material tendered by both parties, I find no difficulty in concluding that the Plaintiffs have not demonstrated a prima facie case with a likelihood of success.
111. The other test is whether the Plaintiffs have demonstrated irreparable harm. The following excerpt from *Halsbury’s Laws of England*⁷¹ defines what constitutes irreparable harm: -
- “It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover

⁷¹ Halsbury’s Laws of England, Third Edition, Volume 21, paragraph 739, page 352.



damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”

112. In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured.⁷² Robert Sharpe, in "Injunctions and Specific Performance,"⁷³ states that "irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case." In my view, the Plaintiffs have not established that should their case succeed, they cannot be adequately compensated by way of damages. In fact, the contrary is true. In the event of their case succeeding, their loss (if any) can be quantified into monetary terms. The Plaintiffs have failed to demonstrate irreparable harm.
113. The third test is balance of convenience. Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right.⁷⁴ The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant.⁷⁵
114. The court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If an applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies.
115. If the court is satisfied that there is a serious question to be tried, (or that the plaintiff has made out a prima facie case) and that damages are not an adequate remedy, it must go on to consider whether the balance of convenience or justice favours the grant of an injunction. The balance of convenience is the course most likely to achieve justice between the parties pending resolution of the question of the applicant's entitlement to ultimate relief, bearing in mind the consequences to each party of the grant, or refusal, of the injunction. The strength of the applicant's case is relevant in determining where the balance of convenience lies. Where an applicant has an apparently strong claim, the court will more readily grant an injunction even when the balance of convenience is evenly matched. A weaker claim may still attract interlocutory relief where the balance of convenience is strongly in favour of it. The assessment of the likelihood of the plaintiff being successful at trial is critical in determining the first element. I have carefully applied the foregoing tests to this case. It is my conclusion that the balance of convenience is in favour of refusing the injunction.
116. Lastly, an injunction is a discretionary remedy. As was held in *Kenleb Cons Ltd v New Gatitu Service Station Ltd & another*,⁷⁶ "to succeed in an application for injunction, an applicant must not only make

⁷² Supra note 3.

⁷³ Robert Sharpe, *Injunctions and Specific Performance*, looseleaf, (Aura, On: Canada Law Book, 1992), P 2-27

⁷⁴ See Halsbury's Laws of England, Third Edition, Volume 21, paragraph 766, page 366.

⁷⁵ Ibid

⁷⁶ {1990} K.L.R 557



a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction. Lastly, as was held in *Njenga v Njenga*⁷⁷ “an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.”

Conclusion

117. In exercising the jurisdiction, the court does not pretend to determine legal rights to property, but merely keeps the property in its actual condition until the legal title can be established. The court interferes on the assumption that the party who seeks its interference has the legal right which he asserts, but needs the aid of the court for the protection of the property in question until the legal right can be ascertained. The courts’ power to interfere being founded on the existence of the legal right, a man who seeks the aid of the court must be able to show a prima facie case in support of the title which he asserts. He must satisfy the court that he has a fair question to raise as to the existence of the legal right which he sets up, and that there are substantial grounds for doubting the existence of the alleged legal right, the exercise of which he seeks to prevent. The court must, before disturbing any man’s legal right, or stripping him of any of the rights with which the law has clothed him, be satisfied that the probability is in favour of the case ultimately failing in the final issue of the suit.
118. In *Keet Gerald v Mohd Noor Abdullah*,⁷⁸ it was held that a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines. First, he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand, if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry.
119. Second, having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. If after weighing all matters, he comes to the conclusion that the Plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the Plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages.⁷⁹

See *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90).

120. Third, the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, an expression explained by Lord Diplock

⁷⁷ {1991} KLR 401

⁷⁸ {1995}1 MLJ 193.

⁷⁹ (content missing)



in *Garden Cottage Foods Ltd v Milk Marketing Board*.⁸⁰ Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the Plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial.

121. Also, not to be forgotten is the prayer for documents. At the pre-trial stage, parties will file their bundle of documents and comply with pre-trial directions (if it has not been done). For now, I find no reason to unleash such an order nor have the Plaintiffs established any basis to justify such an order.
122. Flowing from my analysis of the facts and the law discussed above and the conclusions arrived at, I find that the Plaintiffs' application dated 11th August 2021 is unmerited. Accordingly, I dismiss the Plaintiff's Notice of Motion dated 11th August 2021 with costs to the 1st defendant and the Interested Parties.
123. Before I conclude, it is important to mention that this case has a chequered history. It has been pending in this court since 2016. Parties have been busy with interlocutory applications culminating with the Court of Appeal ruling advising the parties to fix the matter for hearing on merit. Trial delays are the bane of our legal system. Trial delays should prick the conscience of any one who cares about speedy resolution of court disputes, a dictate under Article 159 of the Constitution. Taking cue from the Appellate Court directions to the parties that they fix this matter for hearing on merits, I direct the parties herein to fix this suit for hearing before a judge in the Commercial Division within the next 120 days.

Orders accordingly. Right of appeal

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH OF JANUARY 2022

JOHN M. MATIVO
JUDGE

⁸⁰ {1984} AC 130; {1983} 2 All ER 770; {1983} 3 WLR 143.

