



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**COMMERCIAL CASE NO 74 OF 2018**

**TERESIA OUMA OLIECH**

**JOSEPH OKELLO OLIECH**

**STEPHEN ORUKO.....PLAINTIFFS**

**-VERSUS-**

**ANDREW OLIECH OPIYO.....1<sup>ST</sup> DEFENDANT**

**BANK OF AFRICA KENYA LTD.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. In their Notice of Motion dated 4<sup>th</sup> January 2021 and filed on 29<sup>th</sup> January 2021, the Plaintiffs sought that an order that a caveat/prohibition/restriction is hereby issued for registration of all parcel of land known as West Kisumu/Ojola 1168, 1350, 945, 1335 and 958 (hereinafter referred to as “ the subject premises”) currently registered in the name of Andrew Oliech Opiyo, that the District Land Registrar Kisumu East/West is directed/ordered to immediately register the said caveat/prohibition/restriction against the said title pending final or further orders of this court and that the 2<sup>nd</sup> Defendant/Respondent be hereby restrained from releasing, parting with possession and or giving out the title document, Title Deed, in respect of all that parcel of Land known as West Kisumu/Ojola/1168 to the 1<sup>st</sup> Defendant herein and Nathaniel Oluoch Oliech who were the Chargor and Borrower respectively or to any other person or third party until further orders of this court.

2. On 4<sup>th</sup> January 2021, the 2<sup>nd</sup> Plaintiff swore an affidavit on his own behalf and on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs herein. The Applicants averred that the parcel of Land known as West Kisumu/Ojala/1168 was registered in the name of the 1<sup>st</sup> Defendant herein and that the same was charged in favour of the 2<sup>nd</sup> Defendant with the 1<sup>st</sup> Defendant being the Chargor while Nathaniel Oluoch Oliech was the Borrower.

3. They further contended that the subject premises stood to being interfered with by the Defendants and/ or their agents by way of recharging, pawning, mortgaging, and or parting with both title and possession in favour of third parties and unless they are restrained, their actions would render the suit herein nugatory and of no legal/equitable effect.

4. It was their further assertion that during the pendency of this suit and specifically on 4<sup>th</sup> October 2019, Nathaniel Oluoch Oluoch (hereinafter referred to as “the Borrower”) caused a caution that had been lodged and registered against L.R No. Kisumu/Ojola/945 to be removed whereupon the said parcel of land was charged in favour of Kisumu County Trade Loan Fund for a sum of Kshs. 100,000/=. They annexed a copy of the official search to that effect.

5. They also stated that they were currently residing in some of the parcels listed in the Plaint and had been making payments to the 2<sup>nd</sup> Defendant with a view of repaying the loan in full to be able to redeem the said parcel of Land and to avoid the re-advertisement of sale on account of default in repayment of the said loan. They asserted that the orders they were seeking were geared at preserving the sub-stratum of this suit and thus urges this court to grant to allow their application.

6. In response to the said application, on 15<sup>th</sup> March 2021, Janet Kimunyu, Recoveries Officer working at Bank of Africa Kenya Limited swore the Replying Affidavit on behalf of the 2<sup>nd</sup> Defendant herein. The 2<sup>nd</sup> Defendant argued that the orders that had been sought by the Plaintiffs in respect of their present application would amount to rewriting the contracts between it and the 1<sup>st</sup> Defendant herein, which action is not supported by law.

7. It added that following dismissal of the Plaintiff’s application dated 9<sup>th</sup> September 2015 seeking for interlocutory orders of injunction, the 2<sup>nd</sup> Defendant was at liberty to proceed with the sale of the suit property. It averred that it had put on hold the sale of Title Number West

Kisumu/Ojola/1168 in good faith to allow parties to resolve their family issues. This was on condition that they continued making the repayments.

8. It contended that as at 11<sup>th</sup> March 2021, the loan balance was Kshs 652,453.40/= and that should there be default, it was still at liberty to exercise its right of sale as provided under the charge documents and under the Land Act. It averred that granting a stay against its statutory right to recover the loan balance would unduly prejudice it.

9. It thus urged this court to dismiss the Plaintiff's present application as it has not met the conditions for grant of interlocutory injunction and had failed to disclose any right that was threatened with infringement.

### **LEGAL ANALYSIS**

10. None of the parties filed any Written Submissions despite the court having proposed to give directions relating to the same. The Ruling herein is therefore based on the affidavit evidence that was placed before it.

11. Notably, on 14<sup>th</sup> September 2015, Kibunja J had dismissed their Notice of Motion application dated 9<sup>th</sup> September 2015 in **ELC 319 of 2014 Teresa Auma Oliech & 2 Others vs Andrew Oliech Opiyo & Another** which was subsequently transferred to the High Court of Kenya Kisumu. They had raised similar issues as in this matter.

12. In that Ruling, Kibunja J rendered himself as follows:-

**“That in the case the 1<sup>st</sup> Defendant did not get the Plaintiff's blessing at the time of the transaction, the best was they could do at this stage is held the 1<sup>st</sup> Defendant, and the borrower for that matter, to clear the outstanding payments so as to have the charge over the suit property discharged. That it is only after the discharge that they could then engage the 1<sup>st</sup> (sic) Defendant over the implementation of the family agreement over the suit land.”**

13. Section 7 of the Civil Procedure Act Cap 21 (Laws of Kenya) provides that:-

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

14. The parties herein and the subject matter were the same in the application that was before Kibunja J as well as what is in issue in the present application. The end result that was desired was an interlocutory injunction which had been considered and dismissed by Kibunja J. It was therefore clear to this court that the present application was *res judicata* despite it having been couched in a different manner.

15. However, despite having found that the application herein had failed on a technicality, it nonetheless found it fair in the circumstances of the case to determine the merits or otherwise of the Plaintiffs' present application.

16. Notably, the 2<sup>nd</sup> Defendant advanced the Borrower a loan facility of Kshs Three Hundred Thousand (Kshs 300,000/=) and a further facility of Kshs Seven Hundred Thousand (Kshs 700,000/=) which was secured by a charge and further charge over title Number West Kisumu/Ojola/1168 registered in the name of the 1<sup>st</sup> Defendant and the same was duly registered.

17. The borrower defaulted in repaying the loan facility extended whereupon the 2<sup>nd</sup> Defendant to issue him and the 1<sup>st</sup> Defendant a statutory notice reminding them to repay the outstanding loan amounts but it yielded no response. The Plaintiffs were clearly not parties to the contract between the 1<sup>st</sup> Defendant and the Borrower on one hand and the 2<sup>nd</sup> Defendant on the other hand.

18. The 1<sup>st</sup> Defendant who was privy to that contract had not challenged the steps likely to be taken by the 2<sup>nd</sup> Defendant in realising the security, it at all. The 1<sup>st</sup> Defendant had also not challenged the Borrower's actions of causing the removal of caution on L.R No. Kisumu/Ojola/945, and having the said parcel of land charged in favour of Kisumu County Trade Loan Fund for a sum of Kshs 100,000/= as had been contended in the Supporting Affidavit.

19. As the 1<sup>st</sup> Defendant was and still is the registered proprietor of the subject premises which he offered as security to secure the financial facility that the Borrower was given by the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Defendant could not be fettered from realising its securities in the event its statutory right of sale had crystallised upon the 1<sup>st</sup> Defendant and the Borrower defaulting in repaying the loan. Any order restraining the 2<sup>nd</sup> Defendant from exercising its statutory power of sale was tantamount to re-writing the contract between the parties which was not only illegal but it also had no legal basis.

20. This court thus found and held that the Plaintiffs had not demonstrated that they had met the threshold of being granted an order for interlocutory judgment as had been set out in the case of **Giella vs Cassman Brown & Co Ltd (1973) E.A 360**. This was that :-

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

21. They had failed to establish a *prima facie* case against the 2<sup>nd</sup> Defendant with a probability of success. They had also not established that they would suffer irreparable injury that was unlikely to be compensated by way of damages in the event the present application was not allowed. They did not also demonstrate that the 2<sup>nd</sup> Defendant would not have the capacity and ability to compensate them in the event they were successful in the suit herein.

**DISPOSITION**

22. For the foregoing reasons, the upshot of this court's decision was that the Plaintiffs' Notice of Motion application dated 4<sup>th</sup> January 2021 and filed on 29<sup>th</sup> January 2021 was not merited and the same be and is hereby dismissed with costs to the 2<sup>nd</sup> Defendant herein.

23. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 29<sup>TH</sup> DAY OF APRIL 2021**

**J. KAMAU**

**JUDGE**