



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 920 OF 2001

ORIENTAL COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

MOHAMMED ASHRAF.....1ST DEFENDANT

MOHAMED ANWAR.....2ND DEFENDANT

STELCO PROPERTIES LIMITED.....3RD DEFENDANT

RULING

1. Mohammed Ashraf, the 1st Defendant herein filed a Notice of Motion Application dated 4th April 2017, seeking for orders that;

a. THAT this Application be certified urgent and be heard exparte on priority basis in the first instance.

b. THAT, pending the hearing and determination of Application inter parties, the Honourable Court be pleased to issue an injunction order stopping the Plaintiff's, it's agents, employees, servants and advocates from proceeding with the sale of the suit properties either by private treaty or public auction or dealing in anyway with the properties the subject of this suit being Land Reference Number 209/7783, Land Reference Number 336/11 and Land Reference Number 21/37.

c. THAT in the alternative the Honourable Court be pleased to grant an interim injunction order to stay the vesting of the titles to any purchaser/purchasers of the suit properties pursuant to the exercise of the intended sale of Land Reference Number 209/7783; Land Reference Number 336/11 and Land Reference number 21/1/37 pending the hearing and determination of this Application.

d. THAT, pending the hearing and determination of this suit, this Honourable Court be pleased to issue an injunction order stopping the Plaintiff, it's agents, employees, servants and advocates from proceeding with the sale of the suit properties either by private treaty or public auction or dealing in any way with the properties the subject of this suit Land Reference Number 209/7783, Land Reference Number 336/11 and Land Reference Number 21/01/37.

e. THAT, in the alternative the Honourable Court be pleased to grant an interim injunction

order to stay the vesting of the titles to any purchaser/purchasers of the suit properties pursuant to the exercise of the intended sale of Land Reference Number 209/7783; Land Reference Number 336/11 and Land Reference Number 21/01/37 pending the hearing and determination of the main suit.

f. THAT this Honourable Court do issue an order that the Notice of Exercise of Statutory Power of Sale pursuant to Section 90 of the Land Act upon the Charge dated 12th September 1988 over Land Reference Number 209/7783 registered as L.R.No.30619 dated 19th October 2016 and issued by the Plaintiff's Advocates Messrs Gichuki King'ara & Company Advocates is null and void ab initio.

g. THAT this Honourable Court do issue an order that the 40 days notice under Section 96(2) of the Land Act being a Statutory Notice of Sale in respect of Land Reference Number 336/11 Mortgage dated 3rd September 1992 registered in Volume N38 Folio 145/14 File 11890 dated 24th January 2017 and issued by Messrs Gichuki King'ara & Company Advocates is null and void ab initio.

h. THAT this Honourable Court do issue an order that the 40 days' notice under Section 96(2) of the Land Act being a Statutory Notice of Sale in Respect of Land Reference Number 209/7783 charge dated 3rd September 1992 Registered in Land Registry as L.R. 30619/11 dated 24th January, 2017 and issued by Messrs Gichuki King'ara & Company Advocates is null and void ab initio.

i. THAT costs of the Application be in the cause.

2. Upon service of the Application on the Plaintiff, the Plaintiff/ Respondent filed a Notice of Preliminary Objection based on the grounds that:

a. There is no plea for injunction in the Defence and counterclaim so an injunction cannot issue.

b. That the said Application is incompetent and an abuse of the Court process.

c. The Application is overtaken by events.

d. That the prayers sought do not lie in view of the express provisions of the Land Act and the Land Registration Act.

e. Declaratory orders and/or final orders cannot issue in an interlocutory application.

3. The Learned Counsels representing the parties agreed to canvass the Preliminary Objection through written submissions, which they filed and highlighted on the 12th April 2017. The learned counsel Mr. Kingara representing the Plaintiff argued that, there is no competent Application before the Court, as the same is filed by a stranger in the suit. He cited the provisions of Order 9 Rule 5 of the Civil Procedure Rules, 2010 which provides that;

"A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal".

4. The Learned Counsel submitted that, the Application is made by the law firm of Messrs Oraro & Co. Advocates, yet the firm on record is of Nyachoti & Co. Advocates. There is no notice of Change of

Advocates filed. Therefore, the learned Senior Counsel Mr. Oraro is not properly on record and any documents filed by the said law firm of Oraro & Company ought to be expunged from record. He relied on the case of **Godfrey Tom Okeyo Obiero Vs Phillista Anyango Ndira 2016 eKLR**, where a Preliminary Objection was upheld on the ground that, the Notice of Motion in issue was found to have been drawn, and filed by a firm of Advocates not properly on record due to failure to serve the filed notice of Change of Advocates.

5. Mr. Kingara argued that, the 1st Defendant has no locus to lodge an Application in land matters. Locus Standi in land matters is pegged on proprietary rights. In the instant case, it is not disputed that the properties are registered in the 3rd Defendant's name. The 1st Defendant who has filed the Notice of Motion Application referred to herein, owns only one property LR.No.209/7783 yet the Application is made in relation to all suit properties, including properties that belong to the 3rd Defendant and who are represented by Nyachoti & Co. Advocates. Therefore, the firm of Oraro & Co. Advocates **"is a busy body in regard to LR.No.336/11 and LR.No.21/1/37, which belong to the 3rd Defendant"**. In that regard prayers 2, 3, 4, 5, 7, and 8 of the Application ought to fail. He made reference to the case of **Attorney General Vs KCB Ltd & 3 others 2004 eKLR**, where the Court held that, the Plaintiff had no Locus Standi to bring, prosecute and maintain the suit on the basis that the suit land was registered in the name of the 2nd Defendant (a Limited Liability Company, and a separate legal entity).

6. The Learned Counsel further submitted that, the Applicant is seeking in the Notice of Motion Application to strike out the Statutory Notices issued and yet declaratory orders cannot be granted at an interim stage of the case. In that regard prayers 6, 7, and 8 of the Application should not be entertained. He relied on the case of **Viro Energy (K) Ltd Vs Maloba Petrol Station Ltd & 3 others (2015) eKLR**, and the case of **Stephen Kipkebut t/a Riverside Lodge & Rooms Vs Naftali Ogala (2009) eKLR**, where it was held that an order which results in granting a major relief should not be granted at an interlocutory stage.

7. In further submission the Counsel argued that the first remedy available to a chargee is to realize the security and that is what the chargee herein is doing by instructing its Advocate to issue the statutory notices, prior to the sale and the suit herein can be stayed. He referred to the decision of this Court **Clesoi Holdings Vs Prime Bank Ltd HCCC NO. 148 of 2011** and **Kinyua Vs Patrick Thuita Gachure & Another CA No. 44 of 2014**. He averred that, the Plaintiff will be applying for stay of proceedings herein.

8. Finally the learned Counsel argued that, a Court cannot grant a remedy not applied for, nor determine issues, which are not pleaded. He cited Order 2 Rule 6 of Civil Procedure Rules, which provides that:

i. "No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.

ii. Subrule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative".

9. He submitted that each party is bound by its pleadings and a party cannot be allowed to raise a different case from that which is pleaded without amendment. Reference was made to the case of **Chaplain Harry Gandy Vs Caspar Air Charters Limited (1956) 23 EACA 139**, where the Court held:

"The trial Judge erred in reaching a decision based on a ground which was not pleaded but as both parties indicated that they did not desire a new trial but wished the Court of Appeal finally to determine the litigation, the Court made its own findings on the issues of fact concerned". and

Sinclair, the Vice-president of the Court, rendered himself as follows:

"As a rule relief not founded on the pleadings will not be given".

10. Similarly referred to is the case of **Gandy Vs Caspar Air Charters Ltd (1956) 23 EACA, 139**, where the Court observed that:

“The Object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he had to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given”.

“...the issues for determination in a suit generally flowed from the pleadings and that a trial court could only pronounce judgement on the issues arising from the pleadings.... unless pleadings were amended, parties were confined to their pleadings”.

11. Further reference was made to the case of **Marco Munuve Kieti Vs Official Receiver and Interim liquidator Rural Urban Credit Finance & another (2010) eKLR**, where the court stated that;

“The issue as relates to validity of the statutory notice was neither pleaded nor canvassed. The law is clear, that a court of law would normally base its decision only on the pleaded issues”.

12. The other cases cited are **Abdul Shakoor sheikh Vs Abdul Majeid Sheikh & Another Court of Appeal Civil Appeal No. 161 of 1991**, and **Mara Hippo Tented Camp Limited Vs Abdulrazak Hussein Omar (2014) eKLR**.

13. The Application was however opposed by the Learned Senior Counsel Mr. Oraro, who argued that, as regards the issue raised of lack of plea for injunction in the Defence and counter-claim is filed by the Defendant, that the Notice of Motion Application is brought pursuant to the Provisions of Order 40 Rule 2 and order 50 Rule 1 of Civil Procedure Rules 2010 and Section 1A, and Section 3A of Civil Procedure Act. That the Section 3A of Civil Procedure Act, gives the Court inherent powers to make such orders as may be necessary for the ends of justice and to prevent the abuse of the process of the Court. He relied on the case of **Kenya Power and Lighting Co. Ltd Vs Benzene Holdings Ltd CA No. 132 of 2014** and the Halbury’s Laws of England 4th Edition Vol. 37 Paragraph 14.

14. In response to the issue raised by Plaintiff’s/Respondent’s that, the prayers sought for in the Application do not lie in view of the express provisions of the Land Act, and Land Registration Act, the senior counsel submitted that, the Plaintiff is seeking for concurrent remedies under Section 90 of the Land Act, and the Common law doctrine of lis pendens, which prohibits any party to proceedings from dealing in any manner with the suit property. Reference was made to the case **Clesoi Holdings (supra)**, to submit that a chargee can pursue only one remedy at a particular time. The senior counsel argued the doctrine of lis pendens frowns upon any party to dealing with the suit property during the pendency of the suit. The intention of the said doctrine is to preserve the subject matter of the suit, as explained by Lord Justice Turner in the case of **Bellamy VS Sabirie 1857 I De 7, 566** and adopted in the case of **Margaret Wairimu Warime Vs Phyllis Wanjiru Thairu & others Civil Appeal No. 127 of 2014**.

15. The learned senior counsel further submitted that, with the promulgation of the Constitution 2010, and the enactment of the new land laws, the Court of Appeal held in **Naftali Ruthi Kinyua VS Patrick Thuki Gachure & another Civil Appeal No. 44 of 2014**, that, the

“Given that the concerned property involved land eligible prior to registration under the Registration of Titles Act (now repealed), having regard to Section 107(D) of the Land Registration Act, it is evident, the rights flowing from Section 52 of the ITPA including those under. The doctrine of lis pendens would remain applicable to the circumstances of this case”.

16. Mr. Oraro SC argued that although the Plaintiff/Respondent has raised a Preliminary Objection but dealt with factual matters relating to the representation from the bar. That he duly filed and served a Notice of Appointment. Order 9 of the Civil Procedure Rules deals with change of Advocate and require that he files a Notice of Appointment. He is a lead counsel, leading the firm of Nyachoti and Company

Advocates.

17. In relation to the issue of mandatory injunction, Senior Counsel Mr. Oraro submitted that, the purpose of the injunction is to preserve the dignity of the Court, and the issue herein is whether there is a Charge and the manner in which it arose. That under the provisions of Section 3A of Civil Procedure Act and the overriding objectives the Court has inherent power to preserve the subject matter of the suit and the Court cannot allow parallel proceedings

18. In reply to Mr Oraro SC submission, Mr. King'ara argued that a lead counsel files documents using the name of the firm on record. That the Rules make reference to a single Advocate. He reiterated that, there is a valid Charge relating to the suit property and that the 1st Defendant has no locus standi to sue in relation to the property he does not own.

19. At the conclusion of the arguments by the parties' Advocates, and in consideration of the same, I find that the Plaintiff has moved the Court through a Preliminary Objection. I will first address the issue as what constitutes a Preliminary Objection. In the Court of Appeal decision of *Mukisa Biscuit Manufacturing Co. Ltd. Vs. West End Distributors Ltd* [1969] E.A. 696, Law, JA (as he then was) stated as follows:

“I agree that the application for the suit to be dismissed for want of prosecution should have taken the form of a motion, and not that of a ‘preliminary objection’ which it was not. So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”. (Emphasis mine)

Newbold P, in the same matter observed that:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”.

20. Hon. Justice Onyancha in *El-Busaidy Vs. Commissioner of Lands & 2 others* [2002] 1KLR 508 stated that:

“The preliminary objection herein was raised by the Defendants. Can it be said that they do accept the facts as pleaded by the Plaintiff to be true; in which case they could then apply the provisions of section 136(1) to it to make the Plaintiff's pleadings a non-starter? But the Defendants defend this suit because they do not accept the Plaintiff's facts as pleaded. Clearly therefore, the Defendant's preliminary point is not based on a commonly accepted set of facts and the set of facts herein would not therefore be the basis of a preliminary point of objection and a point of law as understood and accepted in our jurisdiction.”

21. It is therefore clear from the fore going that, Preliminary objections relate to points of law, raised at the outset of a case by the Defence without going into the merits of the case. Preliminary objections do not take into account the validity the plaintiff's claim. Thus a Preliminary objection may be taken on the basis of the following:

- The jurisdiction of the particular court or tribunal to hear the case is lacking. Jurisdictional objections may be in regard to either territory (the Court chosen by the plaintiff has no authority to try a case in the place where the cause of action arose) or pecuniary (the Court chosen by the plaintiff does not have the authority to try the case because the value of the

- case in monetary terms is higher than the upper limit that can be tried by the Court).
- The suit discloses no cause of action because; there is no underlying basis or dispute for which the suit could have been initiated.
- The suit is time-barred by limitation. For example, many types of civil suits may be barred after a period of three years from the time the dispute or cause of action arose.
- The relief claimed by the claimant in the suit cannot be granted by the Court, either because it is barred in law or the Court has no jurisdiction to grant the relief claimed.
- The doctrine of Res Sub Judice. That, another suit by the same Plaintiff against the same defendant, disclosing the same cause of action, is pending before another court.

22. In the instant case, I have observed that the learned counsels have not only delved deeply into factual issues but have heavily canvassed the matters raised in the pending Notice of Motion dated 4th April 2017. I sum up the issues raised herein, as follows;

i. Whether the law firm of Oraro & Co. Advocate is properly on record.

ii. Whether, as a consequent of (i) above the Notice of Motion Application dated 4th April 2017 is incompetent and/or improperly filed or is an abuse the court process.

iii. Whether the 1st Defendant has the locus standi to file the Notice of Motion dated 4th April 2017 in relation to all the suit property, while he allegedly owns only one of the properties.

iv. Whether, there is a valid Charge in relation to the suit properties.

v. Whether, the Court can grant the prayers sought for in the Notice of Motion Application dated 4th April 2017 in the view of the fact that

- **There is no plea for injunction in the Defence and the Counter-claim.**
- **The express provisions of the Land Act, and the Land Registration Act.**
- **Declaratory orders and/or final orders cannot be granted in an interlocutory Application.**

23. In my considered opinion, the only issues that can be dealt with at this stage are whether, the firm of Oraro & Co. Advocates is properly on record and whether, the Application filed by the said firm is incompetent. The rest of the issue will have to await the prosecution of the Notice of Motion Application dated 4th April 2017.

24. As regards the issue of the firm of Oraro & Company Advocates, I find that, the Procedural provisions of order 9 Rule 9 relates to change of Advocate. In the instant case, there is no change of Advocate. Mr. Oraro Senior Counsel submitted that, he is on record as a lead counsel, leading the law firm of Nyachoti & Company who are on record. He has thus been appointed and filed and served Notice of Appoint. The procedural provisions of appointment of an Advocate are found under Order 9 Rule 7. These Rules provide that the provisions relating to a notice of change of Advocate shall apply to a notice of Appointment of Advocate with necessary modifications. The issue therefore is whether, having been appointed as a lead counsel, the firm of Oraro & Company Advocate need to file a notice of change of an Advocate. My answer is in the Negative. The firm of Orara and Co. Advocates is not taking over the brief, it is assisting. I have considered all the legal authorities cited and I find none that supports the argument that, the lead counsel has to file and serve a notice of change of Advocate.

25. However, I find that, the arguments by the Plaintiffs Counsel Mr Kinga'ra are not in vain. I hold the view that conduct of Court proceeding in relation to who the parties and counsels on record are must be done in a decent, organized, predicable manner. If for example, a party is allowed to appoint as many Advocates or law firms to represent them, as his financial means enables him and each law firm files pleadings without consultation with the other law firms(s), that will create anarchy and be a recipe for total confusion and should be discouraged.

26. However, Article 159 of the Constitution of Kenya calls for determination of Court matters on the substantive justice . It abhors striking out of pleadings on technicalities. In that regard, the Court has been given inherent powers under Section 3A of the Civil Procedure Act to uphold the substantive justice. The striking out of pleadings is a draconian act, which should only be applied as a last resort. Where a mistake or error has been made, the Court should readily be willing to allow the offending party an opportunity to make good the mistake or error, especially if in so doing, it will not cause any prejudice to the other party. And if such prejudice were to occur, then, the Court must still decide whether it can be compensated by costs.

27. This case has been on-going for 16 years and I believe both parties are anxious and desirous of expeditious disposal thereof. The overriding objectives under Section 1A and 1B require parties to a suit to assist the Court in the expeditious disposal of matters in a just and equitable manner.

28. I find that there are substantive issues herein, including but not limited to the validity of charges, and the mortgagee or chargee's right to realize the subject suit properties pursuant of its statutory power of sale. These issues should be addressed expeditiously in the main hearing of the case. They should not be decided on technicalities. I therefore hold that, no prejudice will be suffered by the Plaintiff which cannot be compensated by costs if I were to allow the Notice of Motion Application dated 4th April 2017 to proceed to full hearing. The firm of Oraro & Company Advocates should consider whether, they wish to come on record for the 1st Defendant, off the representation of Nyachoti & Company Advocates, or file the pleadings herein through the firm of Nyachoti & Company Advocates or jointly with that law firm.

29. I therefore order that, the issues raised in the Preliminary Objection, the submissions & arguments relating to the same be canvassed in relation to the Notice of Motion Application dated 4th April 2017. I therefore disallow the Preliminary Objection for the aforesaid reasons and bank the submissions raised on reserved issues. The costs thereof will await the determination of the pending Application or hearing of the main suit and in view of the age of the matter I direct the parties should proceed to prepare the case for the hearing of the main suit, so long as the same is not stayed or withdrawn.

30. Those are the orders of the Court.

Dated, signed and delivered in an open Court on this 20th April 2017 at Nairobi.

G. L. NZIOKA

JUDGE

In the presence of:

Mr. Oraro Senior Counsel for the 1st Defendant/Applicant

Mr. King'ara for the Respondent/Plaintiff

Ms. Osman for the 2nd Respondent/Defendant

No appearance for the 3rd Respondent/Defendant

Teresia Court Assistant