

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 646 of 2007

CITY CHEMIST (NBI) LTD.....1ST PLAINTIFF

MOHAMMED KISABULI

(Suing for and on behalf of the Estate of

HALIMA WAMUKOYA KISABULI (Deceased)....2ND PLAINTIFF

VERSUS

ORIENTAL COMMERCIAL BANK LTD.....DEFENDANT

R U L I N G

The plaintiffs filed suit against the defendant seeking declaratory orders of the court that the plaintiffs owe no money to the defendant in respect of the overdraft facility granted to the 1st plaintiff by BCCI Limited. The plaintiffs further prayed to be an order of the court for a discharge and a reconveyance of the mortgage registered in respect of the parcel of land known as LR NO.2/280 Kilimani, Nairobi (*hereinafter referred to as the suit property*) by BCCI Limited to the estate of the Halima Wamukoya Kisabuli – deceased, the mortgagor absolutely. The plaintiff further prayed to be paid damages on account of unlawful maintenance, assignment, transfer, sale or acquisition of the ‘subject’ mortgage. The plaintiffs further sought orders of permanent injunction to restrain the defendant from auctioning, selling or in whatever manner dealing with the suit property. The plaintiffs sought to be refunded the excess monies which they claimed the defendant had received on their account.

Contemporaneous with filing suit, the plaintiffs filed an application under the provisions of ***Order XXXIX Rules 1, 2, 3, 5, 7 and 9 of the Civil Procedure Rules*** seeking orders of interlocutory injunction to restrain the defendant by itself, its servants and/or agents from disposing by way of sale, public auction, or private treaty the suit property pending the hearing and determination of the suit. The plaintiffs *inter alia*, claimed that they had not been served with the requisite statutory notice and further that the defendant had no legal right to exercise the statutory power of sale in respect of the suit land. They claimed that the instrument of mortgage did not entitle the plaintiffs to charge interest on the amount advanced. They further claimed that the defendant was guilty of laches, negligence, neglect, acquiescence, indulgence and concession by not diligently taking prompt steps to recover the alleged loan arrears. The plaintiffs claimed that they were prejudiced by the defendant’s inaction. The application is supported by the annexed affidavit of Mohamed Kisabuli, the administrator of the Estate of Halima Wamukoya Kisabuli – deceased.

The application is opposed. Atulkumar Dave, the deputy general manager of the defendant swore a replying affidavit in opposition to the application. In the said affidavit, he swore that the plaintiffs truly owed the defendant the sum which was noted in the statutory notice. He deponed that the defendant had taken over the operations of Delphis Bank which had in turn had previously taken over the operations of BCCI to which the suit property had been charged to secure a loan of KShs.500,000/=. He deponed that the plaintiffs filed several suits which succeeded in frustrating the defendant from realizing its security. He listed the cases which the plaintiffs had filed against the defendant. He swore that the plaintiffs had made proposals to repay the debt owed to the defendant but failed to honour their said proposals hence the defendant’s decision to realize the security. He urged the court to dismiss the application since it was yet another attempt by the plaintiffs to frustrate the defendant from realizing its security.

At the hearing of the application, I heard the rival argument made by Mr. Okeyo on behalf of the plaintiffs and Mr. Bundotich on behalf of the defendant. I have carefully considered the said submissions made. I have also read the pleadings filed by the parties in support of their respective cases. This application will be disposed of by an aspect of the plaintiffs' case which came to the attention of the court during the hearing of the application. The plaintiffs have previously filed two suits against the defendant seeking similar orders to the present ones. One of the suits is **Nairobi HCCC No.3609 of 1995 City Chemists (NBI) Ltd & Mohamed Kisabuli vs. Oriental Commercial Bank**. After filing the suit, the plaintiffs obtained injunction and thereafter took no action until the suit was dismissed by the court for want of prosecution on 4th April 2000. The plaintiffs filed an application seeking to amend the plaint in the dismissed suit. The court ruled on 22nd May, 2007 that the suit having been dismissed for want of prosecution, it was not open for the plaintiffs to make an application to amend their plaint. The court struck out with costs the plaintiffs' amended plaint. The defendant had in 2003 again attempted to sell the suit property in exercise of its statutory power of sale. The said suit being Nairobi **HCCC No.370 of 2003** was filed by the 2nd plaintiff against the 1st plaintiff and the predecessor of the defendant. The suit was later withdrawn.

It is clear from the foregoing that the plaintiffs, in filing the present suit, are seeking to relitigate matters which were previously before this court and which this court made a determination when it dismissed the plaintiffs' suit with costs. It is apparent that the plaintiffs are abusing the due process of this court by seeking to bring matters which it was given an opportunity to present to the court but failed to do when they failed to prosecute their case. Whatever the merits of the plaintiffs' case, they cannot be allowed to bring matters which had previously been dealt with by the court in another forum. It is evident that the plaintiffs failed to disclose this material fact in their application for injunction. They failed to disclose the proceedings that had taken place in the previous suit was similar to the application now before court. They further failed to disclose that the previous suit was in relation to the property, which is the subject matter of this suit.

The plaintiffs are seeking an equitable remedy from this court. One of the principles of equity is that a party must come to court with clean hands. In the present application it is clear that the plaintiffs' hands are soiled. They have abused the due process of the court by attempting to dupe the court into granting them orders of injunction sought in the application. They failed to disclose facts which are material to this case. I decline to exercise my discretion in their favour. The application for injunction is unmeritorious and is hereby dismissed with costs.

DATED at NAIROBI this 25th day of June 2008.

L. KIMARU

JUDGE