



**REPUBLIC OF KENYA**

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

**COMMERCIAL SUIT NO. 71 OF 2018**

**KENNEDY ONYANGO OBIERO.....PLAINTIFF**

**-VERSUS -**

**AFRICAN BANKING CO-OPERATION LTD.....DEFENDANT**

**R U L I N G**

1. On 23<sup>rd</sup> June 2017 the plaintiff, **KENNEDY ONYANGO OBIERO**, commenced these proceedings by filing a Plaint.
2. The subject matter of the suit is a piece of land, L.R NO. KISUMU/OJOLA/4330, which the plaintiff says he is the registered proprietor of.
3. According to the plaintiff, the suit property was charged to the defendant, AFRICAN BANKING CORPORATION, by way of an instrument of charge dated 9<sup>th</sup> September 2011.
4. Through this suit, the plaintiff has sought declaratory reliefs that the defendant had varied the applicable rate of interest that was applicable to the loan which he had borrowed, and that the said variation was not in accord with the terms and conditions of the Charge.
5. The defendant had taken steps with a view to realizing the security, because the defendant was convinced that the plaintiff was in arrears.
6. The plaintiff appears to acknowledge that he was in arrears, but attributes that position to the fact that the defendant had varied the quantum of the monthly repayments, by increasing the said quantum.
7. Therefore, the plaintiff intends to ask the court to declare that he is entitled to continue remitting repayments in accordance with the terms and conditions of both the letter of offer and of the Charge instrument.
8. It is the will of the plaintiff that the Court should order the parties to jointly appoint a Licensed Auditor to take accounts and to compute the correct outstanding amounts. If the parties should be unable to find consensus on a joint auditor, the plaintiff intends to ask the court to direct the INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA (ICPAK) to appoint an auditor, who would calculate the correct outstanding amount.
9. Simultaneously with the plaint, the plaintiff filed an application for an interlocutory injunction to restrain the bank from realizing the security.
10. After being served with the plaint, the defendant raised a Preliminary Objection to the application and also to the plaint.
11. The primary basis for the preliminary objection was that this suit and the application herein raised issues which had been decided in;  
***(a) ELSA OTIENO OBIERO VS AFRICAN BANKING CORPORATION LIMITED AND KENNEDY ONYANGO OBIERO, KISUMU ELC CASE NO. 156 of 2013; and the subsequent appeal;***  
***(b) ELSA OTIENO OBIERO VS AFRICAN BANKING CORPORATION LIMITED AND KENNEDY ONYANGO OTIENO, CIVIL APPEAL NO. 45 of 2015.***
12. According to the plaintiff, the parties to the ELC Case was Elsa Otieno Obiero, who is a different person from Kennedy Onyango Obiero.
13. Secondly, the plaintiff reasoned that the reliefs he was seeking in this case were different from the reliefs that were sought by the plaintiff in ELC Case No. 156 of 2013.

14. In his understanding, the issue that was determined in ELC Case No. 156 of 2013 was one about Fraud, and that that case never dealt with the issue concerning whether or not the bank could exercise its right to realize the security through an auction.

15. In conclusion, the plaintiff reasoned that the defendant had failed to make out a case of Res Judicata. He therefore invited this court to dismiss the preliminary objection.

16. The subject matter of this suit is clearly the property L.R. NO. KISUMU/OJOLA/4330.

17. That property was also the subject matter in Kisumu ELC Case No. 156 of 2013.

18. The plaintiff argued that he was not the plaintiff in ELC Case No. 156 of 2013.

19. In that respect, the plaintiff is factually correct.

20. However, as the plaintiff noted in his submissions, the doctrine of Res Judicata is not premised strictly on the grounds that each of the parties in a previous suit must have sued or been sued in exactly the same capacity.

21. After citing the case of BENARD MUGO NDEGWA VS JAMES NDERITY GITHAE AND 2 OTHERS 2010 eKLR, the plaintiff pointed out that the party alleging res Judicata must show that:

***“the parties are substantially the same.”***

22. Although Kennedy Onyango Obiero, (the plaintiff herein) was not the plaintiff in ELC NO. 156 of 2013, he was a party in those earlier proceedings.

23. In a Ruling dated 20<sup>th</sup> August 2015, Kaniaru J. dismissed the plaintiff’s application for an interlocutory injunction. He noted, inter alia, that the plaintiff in that earlier case was probably the mother of Kennedy.

24. She had brought the suit and the application with a view to stopping the bank from realizing the security.

25. ELSA OTIENO OBIERO had claimed ownership of the suit property, and alleged that Kennedy had acquired title thereto, through fraud.

26. The learned judge noted that Kennedy never made any response to the application. He also did not file any Defence to the suit. That situation led the court to make the following comment;

***“In such scenarios, the courts need to be circumspect. It is easy for close family members to contrive a stratagem to circumvent justice. Such family members are willing to lay bets with the judicial system with a view to bottlenecking justice. The aim is to make sure that the lender loses both the money and the property given as security. In the meantime, the defaulting party goes scot-free.”***

27. Elsa was dissatisfied with the Ruling delivered by the ELC Judge, and she lodged an appeal to the Court of Appeal.

28. Elsa also filed an application under **Rule 5(2) (b) of the Court of Appeal Rules**, seeking an injunction to restrain the respondents from disposing of the suit property.

29. In their considered Ruling, the learned Judges of Appeal declared that they were unable to discern any fraud, at least against the bank.

30. The court also said;

***“The charge appears to have been regularly and properly registered.***

***On the second criterion, we also find that the applicant’s intended appeal will not be rendered nugatory. Any property offered as collateral for a financial facility becomes a commercial item, the loss of which can adequately be compensated by an award of damages.”***

31. The point I am making is that both the suit property and the Charge featured in the previous suit.

32. The plaintiff in this suit could have said something about the attempt by the bank to realize the security, however, he chose to remain silent.

33. Pursuant to the provisions of Section 7 of the Civil Procedure Act;

***“No court shall try any suit or issue in which the matter 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, has been heard and finally decided by such court.”***

34. I am alive to the fact that in the earlier suit, the primary issue for determination is whether or not Kennedy had acquired proprietorship of the suit property through fraud.
35. If the court were to come to the conclusion that the title was acquired through fraud, such finding may have a bearing on the charge which has been registered against the title.
36. However, in the meantime, it has been determined, on a prima facie basis, and at an interlocutory stage that no fraud was discernable in the manner in which the title was acquired by Kennedy.
37. Assuming for the moment, that the courts will ultimately hold that the plaintiff, Kennedy, had not defrauded his mother, Elsa, of the title to the suit property that would imply that Kennedy was entitled to have offered the said title as security to the bank.
38. I must now ask myself whether or not the plaintiff was trying to evade the doctrine of res judicata by introducing new causes of action, so as to seek the same remedy from the court.
39. I find that Elsa was not concerned about the questions of the applicable rates of interest. Her sole issue was about the title of the suit property. In other words, whether or not the bank was charging lawful interest on the facility which it had accorded the plaintiff herein, Elsa was saying that her son, Kennedy, had no right to offer the suit property as security.
40. The question did not arise and was therefore not determined.
41. In effect the doctrine of res judicata is not applicable to this case.
42. Nonetheless, it cannot be ignored that the earlier case touches on the title to the suit property. It has already been determined that that issue was not a basis for the grant of an interlocutory injunction. But that determination is still at the stage of an interlocutory application.
43. In my considered view, the plaintiff had an obligation to disclose the existence of that earlier suit and earlier application.
44. Instead, the plaintiff stated in paragraph 21 of the plaint, that there was no other pending proceedings or previous proceedings between the plaintiff and the defendant over the same subject matter.
45. As I have already held, the subject matter in this suit, as well as in the earlier case, (which is still subsisting) was the suit property.
46. Accordingly, the plaintiff is guilty of material non-disclosure. That fact would be relevant when the court would be giving consideration to the merits of the suit and of the interlocutory application.
47. In the result, although the plaintiff is guilty of some material non-disclosure, I find that that is not a basis for striking out the suit or the application.
48. The preliminary objection has succeeded partially.
49. As the suit and the application remain alive, I order that each party will pay his or her own costs of the preliminary objection.

**DATED, SIGNED and DELIVERED at KISUMU, this 18<sup>th</sup> day of September 2018.**

**FRED A. OCHIENG'**

**J U D G E**