REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CIVIL SUIT NO. 89 0F 2011

KENNETH OUMA WANDERA……1ST PLAINTIFF
WABWIRE WANDERA……2ND PLAINTIFF
VERSUS
NATIONAL BANK OF KENYA LIMITED……DEFENDANT

RULING

1. On 18th July 2016, a judgment was delivered herein, by F. Tuiyott J, where the suit by the plaintiffs was declared to have succeeded, to the extent of the sale of the charged property being stopped until the defendant issued proper statutory notices, and the counter-claim was stayed until the bank exhausted or abandoned its remedy of sale.

2. On 19th September 2022, the plaintiffs lodged an application herein, dated 19th September 2022, seeking a declaration that the interest charged by the defendant was exorbitant; an order for the defendant to render accounts with respect to the charged property; an order directing the plaintiffs to pay a sum of Kshs. 150, 000.00, being the principal amount due, so as to clear the debt; and an order commanding discharge of the charged property. The grounds on the face of the application are that the defendant had written to the plaintiffs evincing an intention to foreclose; the threat to sell has no force in law; and the defendant is barred by the Limitation of Actions Act, Cap 22, Laws of Kenya, from commencing action to recover the debt. It is averred that this suit had been settled in favour of the plaintiffs, and, although the defendant had been given time to serve a statutory notice, it has never done so. The plaintiffs concede being indebted to the defendant. They aver that accounts have never been rendered with respect to the charge, for they have never been given a statement of account.

3. There is a response to the application, by the defendant. It is averred that the suit herein was heard fully, and a judgment was delivered on 20th July 2016, where the sale of the charged property was stopped, and the counterclaim was stayed. It is argued that the court is now *functus officio*, until the conditions set out in the judgment are met. It is further argued that the orders sought are founded on facts that were not pleaded in the plaint herein, and which can only be agitated in a fresh suit.

4. Directions were given for disposal of the application by way of written submissions. The plaintiffs submit that the judgment of 20th July 2016 restrained the defendant from disposing of the charged property before serving a statutory notice. It is asserted that no notice of that nature has been served. The defendant submits that the court is *functus officio*, in view of the said judgment, and cites *HMI vs. KBH* [2022] eKLR (Onyiego, J). It is submitted that the plaintiffs ought to have filed a fresh suit, and further that parties are bound by their pleadings.

5. The suit herein was commenced in 2011, seeking an order for discharge of the charge registered against the charged property, with an alternative prayer for stoppage of the proposed sales of the charged property. In its defence, filed in 2012, the defendant counterclaimed for payment of what it considered to be the outstanding amount, with interests. The matter went to full hearing, where witnesses took to the witness stand. In the end, the court declined to discharge the charge, as the plaintiffs were still indebted to the defendant, but ordered stoppage of the sale of 1 asset, as the other had already been sold, on grounds that the sale was premature, as the appropriate notices had not been given. On the counterclaim, the court took the position that the defendant could not be seeking to foreclose, and, at the same time, prosecute the plaintiffs for a decree for payment of the amount due. It could only pursue 1 remedy at a time. The counterclaim was stayed for that reason.

6. The application before me seeks a variety of orders, which are substantive in nature. The suit by the plaintiffs was fully determined. The discharge order it sought was denied, but the stoppage of the sale was allowed. That completely disposed of the suit set out in the plaint. A judgment fully determines a matter. It can only be revisited with a view to review it. What is before me is not review of the judgment. I agree with the defendant. The matter was determined on the issues that the plaintiffs had placed before the court, and the plaintiffs should have appealed, if they were aggrieved by the orders made, and if new issues arose, they are better off filing a fresh suit. This court is effectively *functus officio*, with respect to claims by the plaintiffs.

7. The plaintiffs appear to misapprehend the judgment, in terms of treating the orders made in it as interlocutory. The stoppage of the sale was not interlocutory. It was final. What the court was saying was that the sale, contemplated in 2011, was premature, for lack of a proper statutory notice of sale, and it stopped it. It was pointed out that any future sale had to be preceded by a statutory notice. If the defendant is contemplating another sale, and the plaintiffs are of the view that no proper statutory notice has been served, that would be a fresh cause of action. The judgment on record was with respect to the sale contemplated in 2011, when the instant suit was filed. The decree obtained did not bar the defendant from mounting other sales, and, should the sales not comply with the law, for want of appropriate notices, then recourse should not be had to this suit, but the plaintiffs ought to initiate another suit addressing the new situation.

8. The instant application prays for a declaration that the interest charged was exorbitant. In the judgment herein, the court emphasized that parties are bound by their pleadings. In the plaint, the issue of interest being exorbitant was not raised. It cannot be introduced now, through an interlocutory application, after the suit in the plaint herein was disposed of in a judgment delivered in 2016. This is a new issue, which should be placed before the court by separate suit. In any case, a declaration is a substantive order, which cannot be obtained in interlocutory proceedings. The plaintiffs also ask for orders for accounts. That was not prayed for in the plaint filed

herein in 2011. It cannot be introduced now through an interlocutory application, 6 years after the final judgment was delivered. They also pray for an order to direct them to pay Kshs. 150, 000.00, being the principal debt according to them. That is a substantive prayer, which cannot be granted in an interlocutory application. It boils down to a prayer for taking of accounts, after which the court can then order the amount to be paid by the plaintiffs. That was not raised in the plaint of 2011. It cannot arise now in this suit, which, in any case, has already been determined. They pray for discharge of the charged property. The plaintiffs admit being indebted to the defendant. They have not settled the debt, how then will the court order discharge of the charged property before the debt is cleared.

9. With respect to the counter-claim, the court stayed it. Stay presupposes that the claim is held in abeyance, as opposed to dismissing it. It suggests that the counterclaim was not dismissed, but was held in abeyance, to await a decision by the defendant on whether it would abandon the remedy of foreclosure, or to await exhaustion of the other remedies. With respect to the counterclaim, it would appear that the suit is still alive. However, that does not give the plaintiffs a platform to agitate the case set out in their application, dated 19th September 2022. The claims in that application can only be canvassed in a fresh suit.

10. I have said enough to demonstrate that there is no merit in the application, dated 19th September 2022. I hereby dismiss it. Each party shall bear their own costs.

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DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS……26TH……DAY OF ……MAY……2023

WM MUSYOKA
JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances
Mr. Ipapu, instructed by Ipapu P. Jackah & Company, Advocates for the plaintiffs.
Mr. Bogonko, instructed by Bogonko Otanga & Company, Advocates for the defendant.