



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 97 OF 2015**

**QUANTUM PETROLEUM LIMITED.....PLAINTIFF**

**VERSUS**

**DIAMOND TRUST BANK KENYA LTD.....DEFENDANT**

**RULING**

1. On 23/7/2015 by a Notice of Motion dated the same date, the plaintiff sought for Court Orders that:-

- i) THAT this matter be certified as urgent and service be dispensed with in the first instance.**
- ii) THAT a temporary injunction do issue against the defendant, it's servants and or agents and more specifically GARAMA INVESTMENTS AUCTIONEERS and WESTMINSTER COMMERCIAL AUCTIONEERS or otherwise whosoever acting on its behalf from selling, disposing, alienating, wasting or dealing in any manner with motor vehicle registration no. KBN 873V make Nissan Navara being held by Mombasa due for sale by public auction on Friday 24<sup>th</sup> July 2015 or selling the plot number 4112 section I Mainland North Nyali Mombasa which is about to be undertaken by GARAM INVESTMENT AUCTIONEERS on Monday 27<sup>th</sup> July 2015.**
- iv) THAT a preservatory order do issue against the defendant its servants, agents, employees or otherwise whosoever acting on its behalf from selling, disposing, alienating, wasting or dealing in any manner with motor vehicle registration number KBN 873V make Nissan Navara as well as plot number 4112 section I Mainland North, Nyali Mombasa pending the hearing and determination of this suit.**
- v) THAT costs of this application be provided for.**

2. As can be seen, once prayer 2 was granted on the 23/7/2015, only prayer 3 remained outstanding and for determination by the court. When the parties attended court to urge the application by highlighting of the submissions filed Mr. Akanga for the plaintiff/applicant informed the court that he was abandoning the prayer for injunction concerning the motor vehicle because the hire purchase obligation had been cleared and therefore the motor vehicle had ceased to be a subject to the dispute. Therefore what the plaintiff seeks to protect is the property known as plot no. 4112 Section I Mainland North, Nyali, Mombasa.

3. The basis of that application was that the defendant had sought to realize the property by public auction

without due redemption notice or affording to the plaintiff the chance to complete a takeover by Chase Bank which actions the plaintiff contended was sure to expose it to substantial and irreparable loss unless the orders sought are granted.

4. Although the prayer now under consideration is vaguely and clumsily worded, as Conservatory Orders, the application is clearly expressed to be premised on the provisions of Order 40 Rule 1 & 2 as well as the overriding objectives of the court and inherent powers of the court. I will therefore consider and treat the application as one seeking an order of temporary injunction pending the hearing and determination of the suit.

5. The application was supported by the supporting affidavit of one JAMES DANIEL MTURI in which the applicant not only exhibited its certificate of incorporation and authority to swear the affidavit but also documents of title as well as letters of intent from Chase Bank Ltd showing intention to discuss how the plaintiff operations could be financed by the said bank. In summary the plaintiff does not dispute indebtedness and default but contends that a sale will prejudice it as the property have been undervalued and that it was negotiating the takeover of the defendants debt by another bank. That was the position as at July 2015.

6. By March 2016, the plaintiff sought and obtained leave to file a supplementary affidavit and improve on the case and did file a supplementary affidavit by the same JAMES DANIEL MTURI. That affidavit, unfortunately, does not change the face of the case at all. The supplementary affidavit reiterates that the debt was still outstanding in there sum of over 70,000,000 and adds that the amounts exclude arrears of principal amount and interests.

7. The application was opposed by the defendant Respondent who did file a Replying affidavit sworn by one MARIUS KAJIRA whose gist in relation to the sale of the parcel of land offered as security was to the effect that the plaintiff was accorded financial accommodation of an aggregate of Kshs.77, 500,000 payable within a period of 96 months with effect for the December 2013 and would be secured by a first legal charge over the suit parcels of land. The Defendant therefore agrees with the plaintiff that indeed as at January 2014 the facility had fallen into arrears of some Kshs.13,172,055 and the defendant then set in motion the process of realization by service of not only demand letters but also statutory notices which were all acknowledged by a director and guarantor of the plaintiff who sought indulgence for upto sometimes in March 2014. That request was granted but the plaintiff did not do as it promised hence an auctioneer was instructed to conduct an auction and did schedule an auction on the 29/9/2014.

8. When faced with the threat of imminent sale the plaintiff availed to the defendant a letter from the Co-operative Bank of Kenya, being a letter of offer, to finance the plaintiff's operations upto an aggregate some of Kshs.135,000,000. On the basis of that letter the auction scheduled for the 29/9/2014 was aborted to enable the plaintiff finalize its financial arrangements with the Cooperative Bank of Kenya Ltd, five months lapse without any progress made hence the realization was reignited and the plaintiff once again came with an arrangement by which Chase Bank now showed the intent to take over the defendants debt but due to the history and past experience, the bank was not willing to abort the auction once again hence the suit.

9. From those facts the defendants take the position that the suit and the application have no merits at all and no irreparable loss could be anticipated for the sale of a security is governed by strict provisions of the statute.

#### **Analysis and Determination**

10. In totality, the plaintiff doesn't deny the debt, acknowledges default and service of statutory notices but premises this suit on the fact that it needs time to arrange a takeover by another bank. The question this court has to pose and answer is whether that is a valid reason to grant to the plaintiff an order of injunction.

11. To answer that question one has no revisit the principles in ANIELA GIELLA VS CASMAN

BROWN & CO. LTD [1993] E A 358 whose principles are now well settled and need no reiteration.

12. I am in no doubt that with the debt and default acknowledged and no fault being laid on the obligations of the defendant to comply with the law under the Land Act, there cannot be said to exist a prima facie with a probability of success.

13. Even the conduct of the plaintiff, even if a prima facie case had been established, would still disentitle it to the equitable order of injunction. I say so noting that by the conduct set out by the defendant and not controverted by the plaintiff, the plaintiff has acted in a dilatory, dexterous and unconscionable manner with no sign of any clean hands. This I say noting that no explanation has been offered on how the arrangement with Co-operative Bank evaporated. Equally since 10<sup>th</sup> July 2015 when Chase Bank gave intent to take over the debt, this application was heard some 8 months later and no progress could be reported on the takeover. One need not wonder it that letter was not but a smokescreen. However that may itself not the reason for failing to discern prima facie case by the plaintiff. The reason is that a debt is only resolved by payment and where a debt is acknowledged, it would be unconscionable, unlawful and unjust to stop the creditor from collecting his debt unless the creditor is shown to act unlawfully. Here, in this case nothing has been shown to be unlawful in the conduct of the defendant and to grant an injunction on the facts revealed would be to re-write the contract between the parties. That is not the duty or right of this court. The Court of Appeal in *Mrao Ltd vs First American Bank [2003] eKLR* having cited with approval, Halburys Laws of England said:-

**“If courts are going to allow debtors to avoid paying debts buy taking some of the defences I have seen in recent times for instance challenging contractual interest rates, banks will be crippled if not driven out of business together and no serious investor will bring their capital into a country whose courts are a haven for defaulters”.**

14. Having come to the foregoing conclusion that there is no prima facie case disclosed, I am not in doubt that the application dated 23/7/2015 lacks merit and the same is dismissed with cost to the defendants.

**Dated and delivered at Mombasa this 31st day of March 2017.**

**HON. P.J.O. OTIENO**

**JUDGE**