



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

**AT MOMBASA**

**CIVIL CASE NO. 39 OF 2012**

**JIMMIESON MKUMBO MBOGHO**

**T/A ZIOTECH MOTORS.....PLAINTIFF/APPLICANT**

**-V E R S U S-**

**BARCLAYS BANK LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Application before court is dated 9/10/2013 (hereinafter “**the Application**”) and it is for the following main order:

**“THAT a temporary injunction do issue restraining the Respondent either by itself, its servants, agents, assigns and/or any person claiming under it from advertising for sale, selling by public auction, disposing off or in any other manner interfering with the Applicant's property known as Subdivision Number 3774 (original number 838/29) Section 1 Mainland North (CR Number 18629) Nyali, Kongowea Area together with the buildings and/or improvements thereon pending the hearing and determination of the appeal filed herein.”**

2. In response, the Respondents filed a Notice of Preliminary Objection (P.O) dated 23/10/2013. The P.O is on the grounds that the issues raised in the Application had been considered and dismissed hence the court is *functus officio*; that the issues raised in the Application are *res judicata*; and that the Applicant has relied on Order 42.6 of the Civil Procedure Rules but sought orders under Rule 40.1

**ISSUES**

3. There are three main issues for determination; whether the prayers sought in the Application had already been heard and determined by the court; whether this court has jurisdiction to grant the order sought in the Application; and whether the Applicant has invoked the correct provision of the law.

**ANALYSIS**

**Whether the prayer had been heard and determined**

4. It is not in dispute that the Applicant had filed an application dated 2nd February 2012 in which he sought orders of injunction against the Respondent. That application was heard and a ruling delivered by

this court on 20/9/2013 whereby the same was dismissed with costs.

5. I have carefully studied the two applications. It is not true that the orders sought in both applications are the same. While in the first application dated 2/2/2012 the Applicant sought orders of injunction against the Respondent pending hearing and determination of the suit, in the instant application the Applicant is seeking an order of injunction against the Respondent pending hearing and determination of the appeal. While the effect of both orders would be to restrain the Respondent, it is not true that the prayer in the instant application has been heard and determined. The court has not heard any application for injunction pending appeal. I therefore disagree with the Respondent that the court is *functus officio*. It is also equally not true that the prayer is *res judicata*.

### **Whether the court has jurisdiction**

6. It is now well established that the High Court has jurisdiction to grant an order of injunction pending appeal even in instances where the application for interlocutory injunction had been heard on merit and dismissed.

7. The case that has guided Kenyan courts in that regard is the case of of **ERINFORD PROPERTIES LTD VS CHESHIRE COUNTY COUNCIL [1974] 2 ALL ER 448** where it was held that it would not be incompatible for a court which had dismissed an application for injunction to grant the unsuccessful applicant injunction pending the hearing of an appeal against the dismissal. That case was cited with approval by the Court of Appeal in **MADHUPAPER INTERNATIONAL LTD VS KERR [1985] KLR 840** where it was held that a judge who dismisses an application for injunction has jurisdiction to grant the unsuccessful applicant an injunction pending the hearing of the intended appeal so as not to render the decision of the appellate court, should the appeal be successful, nugatory.

8. The principle enunciated in those two leading cases has been adopted by the High Court in many cases. In the case of **CHRISTOPHER NDARATHI MURUNGARU v KENYA ANTI-CORRUPTION COMMISSION & ANOTHER [2006] eKLR**, the High Court, while referring to the two cases observed as follows:

**“The ratio in both cases is that where a Judge dismisses an interlocutory motion for an injunction he has jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal it is not necessary for the applicant to apply to the Court of Appeal and that there is no inconsistency in granting such an injunction after the dismissal.”**

9. In **Re UMOJA SERVICE STATIONS LIMITED [2008] eKLR**, the court held that the High Court has jurisdiction to grant an order of injunction pending appeal. Hon. Justice Kimaru held as follows:

**“That this court has jurisdiction to grant injunction pending the hearing and determination of the intended appeal is not in doubt. In Madhupaper International Limited –Vs- Kerr [1985] KAR 840 the Court of Appeal held that the High Court had jurisdiction to grant an injunction pending the hearing of an appeal even after dismissing such an application for injunction in the suit.”**

10. In the case of **RAMESH DATT VASHIST & ANOTHER V FINA BANKLIMITED [2005] eKLR** the court held that:

**“The test to consider when an application such as the one before is brought is as clearly stated in the MADHUPAPER case on page 846. The court of appeal having stated that the High court has jurisdiction to hear an injunction pending appeal stated:**

**“There are cases, however, where it would be wrong to grant an injunction pending appeal. These would include where the appeal is frivolous or to grant it would inflict greater hardship than it would avoid. And there will be others which we have not experienced yet.”**

11. From the foregoing cases, is clear that the High Court has jurisdiction to grant an order of injunction

pending appeal. No prayer to grant an order of injunction pending appeal had been made before hence the court is not *functus officio* and neither is the matter *res judicata*.

**Whether the Applicant has invoked the correct provision of the law**

12. The Respondent argues that the Applicant has relied on the provision of Order 42 Rule 6 of the Civil Procedure Rules but sought orders under Order 40 Rule 1 of the Civil Procedure Rules. Order 42 Rule 6 deals with stay pending appeal while Order 40 Rule 1 deals with temporary injunction pending hearing and determination of the case. As already discussed, this is an application for injunction pending appeal and not an interlocutory injunction pending hearing of the case. The Applicant could not invoke the provisions of Order 40 Rule 1.

**CONCLUSION**

13. In view of what is stated above, I find that the Preliminary Objection has no merit. The same is dismissed with costs and the application dated 9<sup>th</sup> October 2013 should be set down for hearing on its merits.

**DATED and DELIVERED at MOMBASA this 20<sup>TH</sup> day of MARCH, 2014.**

**MARY KASANGO**

**JUDGE**