



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

**CIVIL CASE NO. 57 OF 2013**

**AMRONA TRADING COMPANY LIMITED ..... PLAINTIFF/APPLICANT**

**V E R S U S**

**PARAMOUNT UNIVERSAL BANK LTD ... DEFENDANT/RESPONDENT**

**RULING**

1. By its plaint dated 17<sup>th</sup> May 2013, Amrona Trading Company, the Plaintiff, sought the following prayers:-
  - a. *An injunction to issue against the Defendant to be restrained by itself, servant and/or agent otherwise from selling, auctioning, disposing, alienating or in any manner dealing with the suit land known as L.R. NO. 3097/VI/MN.*
  - b. *An order that the Plaintiff be given adequate time to re-organize himself and be in a comfortable position to service the facility.*
2. The Plaintiff obtained from the Defendant an overdraft facility of Kshs. 8 million which was later converted into a loan. As security for that loan the Defendant obtained a charge over L.R. No. 1087/1/MN/NYALI Estate Mombasa. That property is registered in the name of Raymond Omollo Opiyo. Mr. Opiyo is not a party in this case. The Plaintiff admitted in the plaint that it failed to make payment of that loan due to difficulties it encountered. That the Defendant was seeking to exercise its statutory power of sale. The Plaintiff further pleaded in its plaint that it wrote, through an Advocate a proposal for repayment of the loan but since the Defendant failed to respond to that proposal it sought an injunction to be issued to restrain the Defendant from selling the charged property.
3. The Plaintiff filed the plaint simultaneously with an interlocutory application by way of Notice of Motion dated 17<sup>th</sup> May 2013. That application was brought under Certificate of Urgency. On 20<sup>th</sup> May 2013 Plaintiff's learned Counsel appeared in Court and argued that application ex parte. The Court on that date after certifying the application as urgent granted interim injunction restraining the Defendant from auctioning the suit property pending inter partes hearing on 5<sup>th</sup> June 2013. When however Counsel for the Plaintiff extracted that order he indicated that the injunction would subsist until hearing and final determination of the application.
4. I make the following comment in passing because I think it is important it be spoken. This is

because Counsels and on rare occasions Litigants proceed to extract orders that do not reflect the true order of the Court. The Legal profession is indeed a Nobel profession and as such it is unacceptable for Counsel to engage in such deceit of extracting orders that are contrary to the Judge's order. That is all I will say for now.

5. The Notice of Motion dated 17<sup>th</sup> May 2013 came before me on 11<sup>th</sup> July 2013 for inter partes hearing. It is important to note that on 5<sup>th</sup> June 2013 the Court granted leave to two parties to join this action as Interested Parties. They are Fuad Abdallah Brek and Fauz Abdallah Brek.
6. The Plaintiff acknowledges having received from the Defendant a loan of Kshs. 8 million. The Plaintiff also admits having defaulted in the repayment of that loan. This is well captured in paragraph 10 of the Plaintiff's affidavit in support of the injunction application. He stated-

***“That due to unforeseen circumstances and difficult economic times, I fell into arrears and received a letter from the Respondent to pay the sum due.”***

The Plaintiff proceeded to state that it seeks an injunction because the Defendant had failed to respond to its proposal for rescheduling of the loan repayment. It is important to note that the Plaintiff both in the plaint and in the Notice of Motion did not attribute any wrong doing by the Defendant in respect of the Defendant's process of exercising its statutory power of sale. Despite not faulting the Defendant the Plaintiff's learned Counsel in submissions before Court stated that the exercise of statutory power of sale was marred because notification of sale and the eventual auction was conducted by an auctioneer not authorized to conduct such auction in Mombasa. The Defendant, quite rightly submitted that the auctioneer by his licence which is one of the exhibits in this case was authorized to carry out ***“Repossession, realization and securities sale of moveable and immovable property by auction ... throughout the Republic of Kenya.”*** Indeed the only restriction on the conduct of auctioneering business of the auction firm trading as Integra Auctioneering (K) Company is execution of Court orders and distress for rent. In that case they are restricted to the Districts of Nairobi, Kajiado and Thika.

7. Learned Counsel again submitted, although the submission was not supported by the pleadings, that the Notification of Sale was not served upon the Plaintiff but that rather it was only served upon the registered owner of the suit property that is Raymond Omollo Opiyo. The simple response is that a Notification of Sale was rightly served on the owner of the property that was due to be auctioned. The Defendant cannot be faulted for that service.
8. The application was opposed by Defendants and the Interested Parties. They submitted that the Plaintiff's application ought to fail because the Plaintiff had no locus in seeking to injunct the Defendant since the Plaintiff was not the registered owner of the suit property. Secondly the application was opposed on the ground that the Plaintiff had failed to demonstrate a prima facie case with probability of success.
9. It ought to be noted that the Interested Parties purchased the suit property on the day set for auction; that was on 10<sup>th</sup> May 2013. The Plaintiff approached the Court under Certificate of Urgency on 20<sup>th</sup> May 2013 and obtained an injunction to stay the auction which had already occurred. Although Plaintiff's learned Counsel stated that the Plaintiff had no knowledge about the auction having actually taken place when the injunction was issued, in my view he had an obligation to make inquiry before coming to Court. His failure led the Court to issue an order in vain. Although the Plaintiff at inter partes hearing, amended the application by seeking an order that the alleged sale be declared as a nullity on the basis of irregularity, as stated above; Plaintiff failed to show any irregularity perpetrated by the Defendant. That being so the prayer for nullification of sale does fail.
10. Similarly the prayer to restrain the Defendant from selling the suit

property by auction does fail because the auction did take place on 10<sup>th</sup> may 2013. However the application wholly fails because the injunction is sought by the Plaintiff and yet the Plaintiff is not the registered owner of the suit property. For the Plaintiff to succeed in the application it needed to establish it had a legal right in the suit property. This was the holding in **Nairobi Mamba Village –Vs- National Bank of Kenya (2002)IEA**. The Court held-

***“A party seeking to prevent alienation, wastage or damage to the property in dispute under Order XXXIX (now Order 40) of the Civil Procedure Rules had to establish that it had legal rights in such a property. In this instance, the Plaintiff could not properly seek to restrain the chargee from selling the charged property as the intended sale was to be carried out pursuant to the exercise of the contractual and statutory power of the chargee contained in a charge which the Plaintiff is not a party. The only person who could legitimately challenge the exercise of the power of sale was the charger.”***

11.It is because of what is stated above that I find the Plaintiff has

failed to demonstrate a prima facie case with probability of success and has not shown that it will suffer irreparable loss if an injunction is not granted. The Plaintiff’s application dated 17<sup>th</sup> May 2013 is without merit and is dismissed with costs to the Defendant and the Interested Parties. The injunction granted on 20<sup>th</sup> May 2013 is hereby discharged.

**Dated and delivered at Mombasa this 23<sup>rd</sup> day of August, 2013.**

**MARY KASANGO**

**JUDGE**