



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

**AT MOMBASA**

**CIVIL CASE NO. 522 OF 2011**

**BAWAN LIMITED ..... PLAINTIFF**

**V E R S U S**

**COUNTY COUNCIL OF KWALE ..... 1<sup>ST</sup> DEFENDANT**

**KINYUA & CO. AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Notice of Motion dated 23<sup>rd</sup> September 2011 is filed by the Plaintiff. The Plaintiff seeks by that application restraining order to restrain the Defendants from selling by auction or advertising for sale Plot No. 42 Tiwi Beach (**the property**).
2. The Plaintiff by its plaint has pleaded that the 1<sup>st</sup> Defendant advertised for sale the property by public auction. That sale was pursuant to orders of the Court issued in **Kwale SRMCC No. 148 of 2009**.
3. The auction which the Plaintiff alleges took place on 13<sup>th</sup> September 2011 was conducted by the 2<sup>nd</sup> Defendant. The Plaintiff pleaded that it gave its bid in that auction. That the 2<sup>nd</sup> Defendant although it declared the Plaintiff's bid as the highest refused to accept the Plaintiff's deposit on the ground that the 2<sup>nd</sup> Defendant needed to get the 1st Defendants Advocate approval. The Plaintiff alleges to have forwarded through its Advocate to the 2<sup>nd</sup> Defendant cheques totalling Kshs. 5.4 million. That amount represented 25% deposit of the sale price. The Plaintiff further alleges that the 2<sup>nd</sup> Defendant returned those cheques on the ground that the bid was below reserve price. It is on that basis that the Plaintiff prays for a declaration that the 2<sup>nd</sup> Defendant cannot reject the Plaintiffs bid once it had accepted it. The Plaintiff also prays for an injunction to restrain the Defendants from selling the property. Finally the Plaintiff sought a prayer to compel the Defendants to accept the price that allegedly the property was allegedly sold during the auction of 13<sup>th</sup> September 2011.
4. It is in that background that the Plaintiff seeks interlocutory injunction by its Motion dated 23<sup>rd</sup> September 2011. The Plaintiff annexed documents relating to the order made in **Kwale SRMCC No. 148 of 2009**. That order authorized the sale of the property by public auction. The Plaintiff also annexed its six bankers cheques payable to the 2<sup>nd</sup> Defendant each for Kshs. 900,000/-.
5. The application is opposed by both Defendants. In opposing the Defendants allege that the

auction did not take place on 13<sup>th</sup> September 2011. The reason they gave for not proceeding with the auction was because of the difficulty experienced by the 1<sup>st</sup> Defendant in that it was unable to obtain valuation for the property. The opposition to the Plaintiff's application is best captured by the following depositions- The 1st Defendants clerk deponed as follows-

**“5. THAT I, as the CEO of the instructing client**

***encountered a major problem while preparing for the sale by public auction as the 1<sup>st</sup> Defendant was not able to prepare a valid and conclusive Valuation Report for the property as the Green Card and indeed or the documentation of title relating to the Plot No. 42 – Tiwi Beach was missing in Lands Registry Kwale and I am told that the same can not be found in Mombasa or Nairobi though the value of the plot is said to be over Kshs. 50,000,000/-. In view of this, it was not possible to get any reserve price and the 1<sup>st</sup> Defendant could not sell a third party's property illegally as the 1<sup>st</sup> Defendant would need to pass a good title.***

**6. THAT faced with this hardship, and taking into**

***account the anticipated value of the property, and considering that the 1<sup>st</sup> Defendant only wanted to recover less than Kshs. 4,000,000/-, I decided that the sale be called off to a later date to enable further due diligence be conducted and all parties who made the enquiries to the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant's Advocates, on record and the auctioneer were all duly informed that the auction was put off and the reasons duly elucidated.***”

The 2<sup>nd</sup> Defendant deponed as follows-

**“3. THAT it is true as stated by the Plaintiff herein that**

***on 13<sup>th</sup> August, 2011, we did advertise for sale, in the daily newspaper of 20<sup>th</sup> August, 2011 and concerning the sale of immovable property known as Plot No. 42 Tiwi Beach by way of Public Auction.***

**4. THAT it is also true that the proposed auction was**

***pursuant to a decree emanating from a suit filed by our instructing client the County Council of Kwale against a rate defaulter known as Mainland Estate Limited. The short title of the aforesaid suit was SRMCC NO. 148 OF 2009 County Council Of Kwale V Mainland Estate Limited.***

**5. THAT however to enable us proceed with the said**

***auction, we did on 2<sup>nd</sup> day of August, 2011 request the Advocate for the 1<sup>st</sup> Defendant Mr. Njoroge Mwangi to furnish us with a current Valuation Report of the suit property since it is a mandatory requirement under the Auctioneers Act and Rules to carry out a Valuation Report which must not be more than 12 months old from the date of Auction. I annex hereto true Photostat copy of the letter dated 2<sup>nd</sup> August, 2011 to support this position which is now annexed and marked as annexure “PK-1”.***

**6. THAT on the 15<sup>th</sup> August, 2011 the firm of Njoroge Mwangi & Company Advocates being the Advocate for the 1<sup>st</sup> Defendant wrote a letter to the County Council of Kwale and had the same copied to us wherein the said Advocates required of the said 1<sup>st</sup> Defendant with immediate effect avail a Valuation Report to enable us proceed with the Auction. I annex hereto true**

*Photostat copy of the letter dated 15<sup>th</sup> August, 2011 to support this position which is now annexed and marked as annexure “PK-2”.*

7. *THAT on the 9<sup>th</sup> September, 2011 we received instructions from the 1<sup>st</sup> Defendant Advocates the firm of Njoroge Mwangi & Company Advocates aforestated with clear and tacit instructions not to proceed with the auction since among other reasons the 1<sup>st</sup> Defendant had been unable to procure a Valuation Report in good time or at all. I annex hereto true Photostat copy of the letter dated 9<sup>th</sup> September, 2011 to support this position which is now annexed and marked as annexure “PK-3”.*
8. *THAT I hereby confirm to this Honourable Court that on the basis of the instructions from 1<sup>st</sup> Defendant advocate not to proceed with the auction sale of 13<sup>th</sup> September, 2011 we did not conduct or hold an auction at all and the same was called off.”*
6. What the Plaintiff seeks by the present application is an injunction. Before proceeding to consider the parties submissions I will take note of the caution that was stated by the Court of Appeal in MBUTHIA -VS- JIMBA CREDIT FINANCE CORPORATION & ANOTHER [1988]KLR1. In that case the Court stated as follows-

*“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions. The lower Court judge in this case had gone far beyond his proper duties and made final findings of undisputed affidavits.”*

7. The Plaintiff has to satisfy the principles of granting an injunction which are set out in the case of Giella -Vs- Cassman Brown [1973]EA 358.
8. The 1st of those principles is that an applicant is required to show a prima facie case with probability of success. In my view the Plaintiff has satisfied that principle. The Plaintiff annexed banker’s cheques in the name of the 2<sup>nd</sup> Defendant for total amount of Kshs. 5.4 million. I need to state that I have noted as stated in the Defendants submissions that those cheques were dated 12<sup>th</sup> September 2011. That was a day before the auction. In my view the fact that they were dated that date does not reduce the reliance upon which the Court can give them at this interlocutory stage. The fact remains that the Plaintiff has on a balance of probability proved that it was ready to pay the deposit of the auction price of the alleged auction. But I believe that the letter of the 2<sup>nd</sup> Defendant dated 15<sup>th</sup> September 2011 sways this Court to favour the Plaintiff. That letter was addressed to the Plaintiff’s Advocate. It was in the following terms-

*“Our Ref. KA/WA/051/011*

*15<sup>th</sup> September, 2011*

*Your Ref. YAA/2011*

*Y. A. Ali*

*Advocates*

*MOMBASA*

*Dear Madam,*

**RE: SRMCC NO. 148 OF 2009**

**PLOT NO. 42 TIWI BEACH**

**COUNTY COUNCIL OF KWALE –VS- MAINLAND ESTATES LTD**

*Your letter dated 14<sup>th</sup> September refers.*

*Your attention is drawn on condition of sale No. 3 on the Daily Nation advertisement copy of 29<sup>th</sup> August 2011 page '25' that reads "The sale is subject to a reserve price and note that the Auctioneer reserves the right to reject any bid without explanation."*

*Your client bid was lower than the reserve price (forced sale value) as per the Valuation Report carried on the property hence rejected.*

*Your cheques are returned herewith for onward transmission to your client.*

*Yours faithfully,*

**KINYUA & CO AUCTIONEERS**

**PETER KINYUA**

*Encls."*

The plain reading of that letter suggests that there may have been an auction on 13<sup>th</sup> September 2011. The content of the letter however will need to be tested in cross examination at a full hearing. In such cross examination the Court will be able to determine whether or not there was a contract between the Plaintiff and the Defendants for the sale of the property.

9. Again I caution myself by reference to the holding in the case **MRAO -VS- FIRST AMERICAN BANK LTD & 2 OTHERS (2003)eKLR** where the Court stated-

*"In considering whether the Plaintiff has established a prima facie case with a probability of success the Court must exercise caution to avoid making definite finding of either fact or law as doing so would encroach into the province of the trial Court. The Court at this interlocutory stage is only investigating if the Applicant has, by his pleadings, made out a prima facie case."*

10. In the supporting affidavit sworn by one of the Plaintiff's Directors it

was stated that the Plaintiff had developed a special attachment to the property and had made all effort to retain it. The Plaintiff does not specifically state that it will suffer irreparable loss if an injunction is not granted. The Plaintiff also does not state that damages would not compensate it.

11. It is because I entertain some doubt in respect of the second principle of

the case of **Giella -Vs- Cassman Brown** (supra) that I will proceed to consider where the balance of convenience lies. In my view it lies in granting an injunction. The land is described as a 25 acre piece of land. The Plaintiff alleges that the Defendant sold the same to it through an auction. It is clear that if an injunction is not granted the Defendant may sell the same through auction or otherwise before the determination of this case. That would be disposing of the subject matter of this case. What becomes clear in considering the submissions before Court is that the Plaintiff in transacting with the Defendants was bargaining for a property and not for damages. It is because of that view that the Court finds an injunction should be granted.

12. In my view having considered the parties pleadings, affidavits and

submissions the interest of justice would best be served by granting that injunction. In my view it matters not that the property is not in the name of the 1st Defendant. The fact is the 1st Defendant has registered a prohibition order over the property in preparation of auctioning the property

in order to recover outstanding rates. That prohibitory order is equivalent to a charge on the property.

13. I therefore grant the following orders-

- a. **The Defendants are hereby restrained by an injunction from advertising or selling Plot No. 42 Tiwi Beach until determination of this case or for one year whichever occurs first. The order of injunction herein will also stop any other person from selling or disposing Plot No. 42 Tiwi Beach.**
- b. **The Plaintiff is granted costs of the Notice of Motion dated 23<sup>rd</sup> September 2011.**

**Dated and delivered at Mombasa this 17<sup>th</sup> day of October, 2013.**

**MARY KASANGO**

**JUDGE**