



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE 189 OF 2011**

**GATHECHA HOLDINGS LTD.....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....DEFENDANT**

**Coram:  
Mwera, J.**

**Juma for Plaintiff**

**Ojiambo for Defendant**

**Court Clerk Furaha**

### **RULING**

In the notice of motion dated 21<sup>st</sup> April, 2012 brought under Order XI rule 3 Civil Procedure Rules and sections 1A, 1B, 3A of Civil Procedure Act the plaintiff company had one prayer:

- that an injunction do issue against the defendant bank so that it should not sell property LR MBA/BLOCK XXI/423 M.I.

It was stated in the grounds that the subject property was registered in the name of the plaintiff. The defendant held a legal charge over it for Shs. 47,201,434/07 which was fully paid on 23<sup>rd</sup> April, 2012. Accordingly, the defendant should not sell that property on 30<sup>th</sup> April, 2012.

The managing director of the plaintiff annexed to her supporting affidavit evidence that the debt in question was paid by two bank entries on 23<sup>rd</sup> April, 2012 of Shs. 15 million and 32.1 million respectively, and the defendant issued two computer generated advices (annexure PNN1). That the bank was nonetheless demanding a further Shs. 1,421,348/= to cover auctioneer's charges and legal fees. The plaintiff could not understand how that could be open to the intended auction sale as if it was part of the loan facility. These fees can be claimed and paid either by way of agreement or taxation. On the same 26<sup>th</sup> April, 2012 an interim order against the intended sale was granted.

Before the application came for *inter partes* hearing, the defendant filed some six grounds of objection in that the applicant had not made out a case to warrant an injunction and that the intended sale was by the parties consent. The auctioneer issued a notification of sale incurring expenses. These were not exorbitant sums; they were payable under the charge in question.

Parties were directed to file written submissions on 26<sup>th</sup> May, 2012. Nothing happened and the matter came for mention on 18<sup>th</sup> July, 2012. Only the plaintiff had filed its script. The court granted the defendant time to do so by 19<sup>th</sup> July, 2012. It did not do so and the court proceeded to pen a ruling as per the application and the submission by the plaintiff. The submission more or less repeated what was set out in the motion.

Having perused all material placed before this court, it is inclined to grant the orders sought. The whole decretal sum has been paid. If the defendant wishes to pursue auctioneer's and legal fees, may that be by way of agreement or taxation – not to sell the charged property as it is attempting to do now. Of course if the certified payable fees/expenses are not paid, then the defendant has the usual known courses to move to recover them. Accordingly, this application succeeds with costs. And with this the main dispute here appears to have come to an end.

Delivered on 29<sup>th</sup> May, 2012.

**J. W. MWERA**

**JUDGE**