



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Environmental & Land Case 224 of 2008

GERALD MUTURI MAINA PLAINTIFF/APPLICANT

VERSUS

MARGARET NJERI GACHOKA. DEFENDANT

AND

BANK OF BARODA (K) LTD.APPLICANT/INTENDED 2ND DEFENDANT

CAPE SUPPLIES LTD. APPLICANT/INTENDED 3RD DEFENDANT

R U L I N G

The application before the court is a Notice of Motion dated 16th September, 2009. It seeks several orders, the major and relevant ones presently being the following: -

- 1) That this Honourable court do join Diamond Trust Bank Limited to these suit as an Interested Party.
- 2) That there be a temporary stay of the orders issued by the court on 8th January, 2009 or any other consequential order pending the hearing and final determination of the application inter partes
- 3) That an order do issue directing the said Interested Party, through its appointed agent and/or officer(s) to register the Further Charges, Transfers and/or any other instruments on the register of titles relating to L.R. No. 36/VI/14(20A) within Nairobi.
- 4) That this court do discharge and/or set aside the injunction orders granted to the plaintiff herein on 8th January, 2009 or any other date.
- 5) Costs.

I have carefully perused the material in support of the application. The affidavit supporting the application sworn by one Elizabeth Hinga, the Head of the Debt Recovery Unit of the applicant bank, makes it clear that the bank indeed advanced sums to one M/S Cape Supplies Limited, the registered owner of L.R. No. 36/VI/14 (20A) in 2007. It registered a charge in its favour. It is possible to conclude from the records also that the last advance of Kshs. Ten Million Kenya Shilling from the applicant to the said Cape Supplies Limited may have been made and a further charge in respect thereof has not been registered, leaving the said sum unsecured.

Most important, however, is the fact that the Plaintiff/Respondent herein is really not opposed to the proposed joining of Diamond Trust Bank Limited as party since the latter is the registered Chargee of the suit property abovementioned. Mr. Oyugi who represents the plaintiff argued that the Diamond Trust Bank Limited has no *lucos standi* to seek for any substantive reliefs

as indicated in this application until it is made party.

I have considered the issues carefully. I am in full agreement that Diamond Trust Bank Limited is indeed, not in a position to ask for substantive reliefs until it has become party in this suit.

Mr. Oyugi's view however, that the application is fatally incompetent because it seeks other prayers that are unavailable, is not tenable. In my view this court has jurisdiction to sever part of the application and rule on it. In the process the court can for good reasons, defer the other prayers for hearing and determination later when the said Diamond Trust Bank Limited become party, if it all.

Having taken all relevant facts into account, I come to the conclusion that since Diamond Trust Bank Limited is clearly having a substantive interest to protect in the suit property, and since effectively the property is mortgaged to it and the mortgage is not yet discharged, no suit concerning the property can successfully be determined without making the same a party. Indeed enjoining Diamond Trust Bank Limited is imperative in law and cannot be avoided by any of parties herein mentioned.

For the above reasons, I hereby allow the application in terms of prayer (2).

ORDERS

1. The plaintiff shall amend the plaint within 30 days to include Diamond Trust Bank Kenya Ltd as an Interested Party.
2. The said Diamond Trust Bank Ltd shall file its claim or response within 14 days of service of the Amended Plaint.
3. Costs in the cause.
4. Status Quo extended.

Dated and delivered at Nairobi this 7th day of December, 2009.

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JUDGE