



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

**Civil Case 80 of 1998**

**TRUST BANK LIMITED ..... PLAINTIFF**

**- Versus -**

**MOHAMED BAKARI MBWANA ..... DEFENDANT**

**R U L I N G**

This application is made by a notice of motion dated 29<sup>th</sup> June, 2007 and brought under Order L rule 1 of the Civil Procedure Rules, section 3A of the Civil Procedure Act, and all enabling provisions of the law. The applicant seeks orders that the liquidator of the plaintiffs herein be ordered to sign a discharge in respect of parcel of land Ref. No. KWALE/MRIMA/578 and also sign a transfer of motor vehicle Registration No. KAH 575M, Mitsubishi Canter in favour of the defendant/applicant, and that the costs of this application be provided for.

The application is supported by the annexed affidavit of the applicant, Mohammed Bakari Mbwana, sworn on 26<sup>th</sup> June, 2007, and is premised on the grounds that –

- (a) On 15<sup>th</sup> October, 2004, the court ruled that the plaintiff had no basis for holding motor vehicle Registration No. KAH 575M and parcel of land No. KWALE/MRIMA/578 as securities herein.
- (b) Subsequently the plaintiff released the documents but failed to discharge and transfer the same to the defendant/applicant.
- (c) The plaintiff's actions are a contravention of the court ruling.

In opposition to the application, the assistant liquidation agent with the plaintiff/deed holder, one Henry Kirimi Mukindia, swore a replying affidavit on 4<sup>th</sup> December, 2007. In that affidavit, he deposes that the applicant is still indebted to the respondent, and that it would be inequitable if he were to be discharged from his obligations without first settling the decretal sum in full.

During the oral hearing of the application, Mr. Kenzi appeared for the applicant and Mr. Mwangi appeared for the respondent. After considering the application and the submissions of counsel, the only issue to be determined is the interpretation which ought to be accorded to the court ruling of 15<sup>th</sup> October, 2004. I would hasten to add that such interpretation would not involve itself with an evaluation of the merits or demerits of that order. Such an exercise would be beyond the jurisdiction of this court. The case of NABRO PROPERTIES LTD. v. SKY STRUCTURES LTD. & ORS [2002] 2 KLR 299 is not

relevant to the circumstances of this matter .

The relevant passage from the ruling which is the subject matter of this application reads as follows –

“It is my view the Bank for whatever reason opted to recover its debt from the applicant personally through court action. There were no two debts but one which was secured by a chattels mortgage and a charge. By entering into a consent judgment the rights to execute securities were extinguished. The provision for execution in default of payment require that the plaintiff do return to court and apply to execute his decree whereby the defendant decree-debtor would have a chance to put his case forward ...”

In my view, what the court was saying is summarised by the sentence stating, “By entering into a consent judgment the rights to execute securities were extinguished.” The corollary to that is that if the right to execute securities is extinguished, then the bank had no locus in clinging to those securities. They have to follow the route for execution of decrees, which is what they opted for through the consent judgment. It was pursuant to that understanding that on 15<sup>th</sup> October, 2004, the court made, inter alia, the following orders –

(1) ...

(2) That the attached motor vehicle registration No. KAH 575M Mitsubishi Canter be forthwith reinstated to the applicant by KINYUA & COMPANY AUCTIONEERS.

(3) That the plaintiff Trust Bank Limited forthwith return the logbook to motor vehicle registration No. KAH 575M and Title deeds to plots KWALE/MRIMA/578 and KWALE/MWANA NYAMALA/29.

(4) ...

Since the rights to execute securities were extinguished, to give back the title deed(s) and log book without effecting the discharge is obeying the court order only half way. In order to ensure full compliance with the court order, I therefore order the Official Liquidator of the plaintiffs to sign a discharge in respect of parcel of land KWALE/MRIMA/578 and a transfer of motor vehicle registration number KAH 575 Mitsubishi Canter in favour of the defendant/applicant.

The plaintiff/respondent will pay the applicant’s costs of this application.

Dated and delivered at Mombasa this 20<sup>th</sup> day of June, 2008.

**L. NJAGI**

**JUDGE**