

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Civil Suit 122 of 2004

NELION SOAP INDUSTRIES LIMITED.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK KENYA LIMITED.....DEFENDANT

R U L I N G

By an application dated 14th December 2004 Nelion Soap Industries Limited hereinafter referred to as the Applicant seeks an order of temporary injunction restraining Diamond Trust Bank Kenya Limited (*hereinafter referred to as the Defendant/Respondent*) and or their servants, agents employees or workmen from selling by public auction motor-vehicle KAL 138P or any other property of the Plaintiff pending the hearing and determination of the application or further orders of the court. The applicant also seeks orders for the taking of accounts to ascertain the amount outstanding in respect of the Applicant's debt to the Defendant.

The Defendant has raised a preliminary objection to the hearing of the application.

In its notice of preliminary objection filed on 15th December 2004. The Defendant has raised 3 grounds as follows:-

(a) That the Plaintiff lacks locus standi to stop the sale of the

repossessed motor-vehicle.

(b) That the court lacks the jurisdiction to grant prayer (b)

of the application.

(c) That the Chamber Summons is an abuse of the process of the Court.

Mr. Rimui who appeared for the Defendant submitted that the Court lacks jurisdiction to grant prayer (b) for a temporary injunction as the orders sought were at variance with the prayers in the plaint since the plaint did not seek any order for an injunction, with regard to the ground relating to *locus standi*, the prayer was not pursued as it was apparent that it was based on the chattels mortgage copy of which was not exhibited.

No submissions was also made in respect of the third ground relating to whether the application was an abuse of the court process. Mr. Rimui relied on the case of ***Dismas Oduor Owuor v/s Housing Finance Company (K) Limited & Another High court Civil Suit No. 630 of 2001 (Milimani Commercial Court)*** in support of his ground relating to jurisdiction.

In response Mr. Mburu who appeared for the applicant maintained that the applicant was entitled under order XXXIX of the Civil Procedure Rules to the prayers for interlocutory injunction for purposes of preserving the suit property until the matter is heard and accounts taken and that there was no precondition for the applicant to seek an injunction in the plaint.

I have considered the preliminary objection ground (a) on *locus* was not pursued as it was submitted

that material information was not availed. Ground (c) relating to abuse of the court process was also not argued. In any case that is not a preliminary issue as it relates to facts which may be in dispute.

The main ground is therefore the one relating to jurisdiction. In my view the preliminary objection based on this ground is misconceived. It is apparently based on a misunderstanding of the authority relied upon of Dismus Odour Owuor. Contrary to the counsel's submission the authority did not lay a precedent that an applicant praying for an order of interlocutory injunction must seek an order for injunction as one of his prayers in the plaint. Indeed that would have been contrary to order XXXIX rule 1 which empowers a court to grant an order of interlocutory injunction to preserve the subject matter of a suit. The ratio decidendi of the authority cited is that the interlocutory prayers sought in an application should not be at variance with the final prayers in the plaint. In the authority of Dismus Oduor Owuor the prayers in his application was inconsistent with the plaint because the plaint sought to restrain the Defendant from selling the charged property, the application sought to restrain the Defendant from transferring the property to the auction purchaser and other consequential or subsequent dealings with the property and the Hon. Judge ruled that the prayers were inconsistent as the applicant could not be allowed to injunct a transfer by the chargee to the auction purchaser without amending his plaint to challenge the auction sale complained of. In the instant case the applicant merely seeks an interlocutory injunction to restrain the sale of the motor-vehicle pending the taking of accounts.

This is inconsistent with the main prayer in the plaint which is for a declaration that the Plaintiff has cleared the debt due to the Defendant or alternative an order for the taking of accounts to ascertain the Plaintiff's indebtedness to the Defendant. I find no inconsistency or variance between the prayers. I find that the preliminary objection raised has no merit. Same is accordingly overruled.

Dated, signed and delivered this 23rd day of December 2004.

H. M. OKWENGU

JUDGE