REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 351 OF 2012

DIAMOND TRUST BANK…….….APPELLANT

VERSUS

PAUL WAITHAKA KIMITI …….....……1ST RESPONDENT

THEOFILO MUCHIRI MBAABU

T/A METROPOLITAN AUCTIONEERS…….……2ND RESPONDENT

R U L I N G

The application before the court for determination is the Notice of Motion dated 12th July 2012 brought under **order 42 Rule 6 of the Civil Procedure Rules, Section 1A, 1B, 3A and 63(e) of the Civil Procedure,** seeking stay of further proceedings pending the hearing and determination of this appeal.

The application is supported by the affidavit of Elizabeth Hinga, the head of Debt Recovery Unit of the 2nd Defendant. She stated that the 1st Respondent filed proceedings in the Chief Magistrate's court being Nairobi CMCC No.6839 of 2010. The 1st Respondent thereafter sought temporary and mandatory orders restraining against the Defendant from holding, controlling or in any way, dealing with motor vehicle registration number KBB 066X, isuzu D-Max.

The Applicant deponed that, the 2nd Respondent acting as court bailiff under a decree in a separate suit, being Nairobi CMCC No.14360, failed to exercise sufficient duty off care as would be reasonably expected when attaching goods belonging to any judgment debtor in order to satisfy the warrant of attachment.

The Applicant complains that on 21st June, 2012 the court delivered a ruling against the appellant allowing mandatory injunction at the interlocutory stage without any special circumstances. The Applicant was aggrieved by the ruling and filed the current appeal which they believe is arguable.

The application was prosecuted by way of written submissions. The Applicant submitted that the application was filed without any delay given that the ruling was delivered on 21st June 2012 and the current application was filed on 12th July 2012. The Applicant also submitted that it will suffer irreparable loss if the order is executed. The Applicant referred the court to the decision in **Mpaka Road Development Ltd Vs Bharat Rach & Another (2005) eKLR.**

The Applicant maintained that it was the rightful owner of the subject motor vehicle before the 1st Respondent who claims to have bought the motor vehicle in public auction and that it never gave

authority for the motor vehicle to be sold in a public auction. The Applicant stated that ownership was disputed and the issue could only be resolved in trial. The Applicant further submitted that the pending appeal will be rendered nugatory causing a substantial harm to the Applicant if stay is not granted.

The Applicant argued that the 1st Respondent case in the lower court was not clear cut to order a mandatory injunction at an interlocutory stage. On the issue of security, the Applicant submitted that being a bank it is capable of providing such security as the court may order for the due performance of the decree.

The 1st Respondent on the other hand submitted that this court will interfere with courts discretion in awarding an interlocutory relief only if the lower court had misdirected itself in some matter and arrived at a wrong decision. The 1st Respondent stated that in this case he lawfully purchased the motor vehicle in a public auction and the Applicant opted to unlawfully seize and detain the vehicle without any court order. The 1st Respondent stated also that an Applicant seeking prohibitive injunction, needs to establish that he has a prima facie case with probability of success and he also needs to show that if the orders are not granted, then he stands to suffer irreparable loss or damage.

The 1st Respondent further submitted that it had satisfied the special conditions to enable the court grant mandatory injunction. He stated that he purchased the motor vehicle in a public auction and there was no order issued by the court to stay the execution and stopping the public auction and further argued that under Section 58 of the Sale of Goods Act, it is provided that a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer of which in this case, the 1st Respondent obtained title to the vehicle at a lawful auction sale. The Respondent also submitted that the Applicant has not demonstrated any substantial loss likely to be suffered by it if the stay is not granted.

The 2nd Respondent on its part, submitted that the Applicant repossessed the motor vehicle without following due process. It did not have any court order to repossess it. The Respondent argued that since the Applicant is seeking equitable orders it must itself come to this court with clean hands. It submitted that the Applicant's conduct and the conduct of its agent do not demonstrate clean hands in that they unlawfully seized the vehicle without a court order. Further the Applicant did not seek to be enjoined in the objection proceedings in the lower court which would have demonstrated that they had a chance of success. Also selling the vehicle to a third party while the suit was still pending demonstrated *mala fides*. I have also considered the said submissions which I have carefully considered.

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory. However, in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment. The court is called upon to ensure that no party suffers prejudice .This was well stated in the case **M/S Portreitz Maternity -VS- James Karanga Kabia Civil Appeal No. 63 of 1997** where the Court had this to say-

> ***"That right of appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depreving the Plaintiff of that right."***

A court will only grant stay of execution of a decree or order if the conditions set out under Order 42 Rule 6 (2) are fully satisfied, it states:

> ***(2) No order for stay of execution shall be made under subrule (1) unless—***
>
> > ***(a) The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and***
> >
> > ***(b) Such security as the court orders for the due performance of such decree or***

order as may ultimately be binding on him has been given by the Applicant.

Applying the same to the facts of this case, it is the Applicant contention that it will suffer substantial loss since the subject matter was jointly owned by the Bank and the third party. On the other hand the 1st Respondent also claims ownership of the subject matter stating that he acquired it lawfully through a public auction. In **Mukuma Vs Abuoga (1988) KLR 645 the court held that:**

> ***"…the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."***

The 1st Respondent stated that the Applicant unlawfully seized and detained the motor vehicle which together with the documents of ownership were released and registered jointly in the names of Faulu Kenya Limited and Matu Monique, thus making the Applicant interfere with the subject matter of this appeal. The correct situation then is that, the Applicant will not suffer any substantial loss since he no longer owns the subject matter having itself sold it to the Third Parties.

On the issue of security the Applicant submitted that it is capable of providing such security as the court may order for the due performance of the decree. In my view there is no doubt that the Applicant will be capable of providing any security that the court will order. I accordingly, find that this is not an appropriate case in which this court should exercise the discretion sought. See **Sankale Ole Kantai T/A Kantai & Co. Advocates Vs Housing Finance Co. (K) Ltd [2014] eKLR.** I do agree with the Respondent in this case that the Applicant in seeking equitable orders must also come to this court with clean hands. The Applicant cannot be heard to be seeking stay of execution pending appeal which it has interfered with by selling the subject property without any court order. In passing also the statement in **Suleiman Vs. Amboseli Resort Limited [2004] 2 KLR 589** has attracted my interest. **Ojwang, J as he then was,** expressed himself as follows:

> ***"It is quite clear to me that, if all the Court looked at was the technical legal objections of the Defendant, then the Applicant's case would not have much of a chance and his prayers would have had to be dismissed. But it is equally clear to me that the several legal objections raised by the Defendant do not sit in a vacuum, in terms of the relations of the parties. The plaintiff has averred that all along during his occupancy of the suit shop, the Defendant has noted, acknowledged, acquiesced in, and approved the alleged sub-tenancy; and that on the strength of that status quo of business relations, the plaintiff has over the years set up what appears to be a large and successful business on the suit premises dealing with curios and gifts – items intimately linked with the tourist industry. That fact is nowhere disputed; and neither is it denied that the plaintiff's trade is a unique and sensitive one which, as at now, has a substantial goodwill that is greatly endangered if the plaintiff should be evicted.***
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> ***In law, in these circumstances, new rights may have emerged which ought, as a vital question of ends of justice, to be litigated and determined by the best method of the judicial system. That method is the full trial, with examination of witnesses, taken through examination-in-chief, cross-examination and re-examination. At the end of that process the question of rights and liabilities will be determined with finality, and a new status quo in relations amongst the parties will have been put in place. I have to state that it is the business of this Court, so far as possible, to secure that any transitional motions before me do not render nugatory that ultimate end of justice."***

I entirely agree and adopt the same principle. I find ultimately that the ends of justice will be best served by refusing to order the stay sought in this application, which I hereby dismiss with costs. Orders accordingly.

Dated and Delivered at Nairobi this 9th day of July, 2015.

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D A ONYANCHA

JUDGE