



**ORIGINAL**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL CASE NO. 115 OF 2008**

**TRIAN BUILDERS LTD & ANOTHER.....PLAINTIFF**

**VERSUS**

**K-REP BANK LTD.....DEFENDANT**

**R U L I N G**

- 1). By an application dated 13-2-2013 the plaintiff/applicant prays that judgment be entered against the defendant as prayed in the plaint. The same is supported by the affidavit of Bernard W. Bifwoli sworn on 18-2-2013.
- 2). The history of the plaintiff and the applicants germinates from 31st July 2007 when the defendant granted the plaintiff a sum of Kshs. 4 million loan facility against the latter's security over **Kiminini/Kinyoro Block 3/Matisi/169**. The plaintiff further received Kshs. 3 million on 3-9-2007 against land parcel No. **LR 2116/11/57** Kitale Municipality as the collateral.
- 3). From the pleadings herein it appears that at some point and in particular after post election violence of 2007-2008 the plaintiff defaulted which led the defendant to issue statutory notice. The said notice was only suspended when the plaintiff made arrangements to pay the loan. In the meantime also the plaintiff filed this suit to forestall the auctioning of the security.
- 4). Apparently the defendant had conducted the services of **M/S Madume Traders** as well as **M/S Jone Brooks Consultants Ltd** to undertake the intended auction.
- 5). The defendant after the auction was stopped vide its letter dated 12-1-2009, proceeded to file a counter claim as the auctioneers were now demanding the payment for their services which amounted to Kshs. 411,588.25/=. The plaintiff had in the cause of time cleared the loan and had the securities discharged .

The contention therefore by the applicant is that in light of the above discharge, there is no substratum of this suit and therefore judgment ought to be granted in his favour.

- 6). The defendant has opposed arguing that there is still a counterclaim pending and that there is indeed triable issues and consequently this case ought to proceed to its logical conclusion.

It is now well settled that: **“No suit ought to be summarily dismissed unless it appears so hopeless**

**that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment". See D.T Dobbie Kenya Co. Ltd -VS- Muchina 1982 KLR.**

7). There are salient issues which in my opinion still needs to be addressed despite the securities being discharged. Fundamentally there is need to ascertain who frustrated the contract as clearly prayed for in the amended plaint. Equally, is the plaintiff entitled to damages?

In regard to the counter claim which I find extremely pertinent, is the defendant deserving the amount due to the auctioneers? Did the defendant legitimately instruct the auctioneers?

8). These are issues that cannot be summarily dealt with except through oral evidence. If the only issue was the discharge of title nothing would have been easier than granting the application. However as shown above salient issues are still outstanding and in particular the prayers in the counter claim and the question of damages which cannot be decided in such an application.

The upshot therefore is that this application is disallowed. The costs shall await the determination of the suit.

**Dated, signed and delivered at Kisumu this 12th day of February, 2014.**

**H.K. CHEMITEI  
JUDGE**

*HKC/va*