



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 41 of 2010

**DILSHAD AMANULLA SUBEDAR.....PLAINTIFF/
APPLICANT**

-VERSUS-

**DIAMOND TRUST BANK LTD.....1ST
DEFENDANT/RESPONDENT**

**STEPHEN KARANJA T/A DALALI TRADERS.....2ND
DEFENDANT/RESPONDENT**

RULING

By an application dated 30th June, 2010 and brought by way of Chamber Summons taken under **XXXIX Rules 1,2,3 & 8, Civil Procedure Rules, Sections 3 & 3A, Civil Procedure Act, and the Government Lands Act.** The Applicant thereby seeks from the Court *inter alia* orders that-

- 1. That this Honourable Court be pleased to grant and issue an interlocutory injunction restraining the 1st and 2nd Defendants, their workers, agents, nominees and all others from advertising, organizing, performing or in any manner whatsoever conducting or attempting to conduct a Repeat Auction or Sale by Private Treaty of the Plaintiff's property, known as FLAT NO. 17 situated on L.R. NO. 2/656, KILIMANI, NAIROBI; pending the hearing and determination of this Application inter partes, or of this suit, or until further orders herein.**
- 2. That this Honourable Court be also pleased to grant a Permanent Injunction restraining the 1st and 2nd Defendants herein from advertising for sale or from selling by Public Auction or by Private Treaty the said property of the plaintiff, namely: FLAT NO. 17 situated on L.R. NO. 2/656, KILIMANI, NAIROBI; so long as the Plaintiff continues to honour her obligations under the terms and conditions of the Loan Agreement; and so long as the Borrower SANCO ELECTRICAL LIMITED continues regularly repaying the instalments as provided under the Loan Agreement and all its variations and extensions pending hearing and determination of this suit, or until further orders herein.**
- 3. That this Honourable Court be further pleased to grant and issue a Mandatory Injunction reversing, cancelling and removing the purported auction of the Plaintiff's FLAT NO. 17 situated on L.R. NO. 2/656, KILIMANI, NAIROBI; scheduled to be illegally conducted on 2nd July 2010 and hence reinstate the ownership, right and title in the said property to the Plaintiff/Applicant herein pending the hearing and determination of this suit, or further Orders herein.**

The application is supported by the annexed affidavit of SUHEL AMANULLA SUBEDAR sworn on 1st July, 2010, and is based mainly on the ground that by a Consent Order made on 27th April 2010 the Plaintiff/ Applicant was required to pay and settle outstanding liability of the borrower within 30 days from the date of the Consent Order . Which order has not been obeyed.

In opposing the application, the Defendants filed Grounds of Opposition on 9th July, 2010 basically to the effect that the application is misconceived, lacks merit and is an abuse of the court process.

After considering the pleadings and the submissions of both counsels, I take the view that the main issue for determination is whether the applicant has made out a case for the grant of interlocutory injunction.

In the leading case of **GIELLA v CASSMAN BROWN & CO. LTD [1973] E.A. 358**, it was held that the conditions for the grant of an interlocutory injunction were well settled in East Africa:-

“First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

The applicant has admitted that he is indeed indebted to the Respondent even though there is dispute as to the amount due. It is also clear that the applicant has defaulted. It is apparent that there was a consent order obtained in this court which provided *inter alia* that the Applicant would settle the payment within 30 days and the Respondent was restrained from offering the said charged property for sale and would only be offered for sale after sixty days from the date of the said consent order. The property was offered for sale and sold on 2nd July, 2010.

It is obvious from the state fact that the Applicant failed to pay the debt has been agreed and as a result he breached the consent order. He only said he was ready and willing to clear the debt but did not keep his word. In those circumstances, he is not entitled to an interlocutory injunction and this application is hereby dismissed with costs.

It is so ordered.

L. NJAGI

JUDGE

DATED and DELIVERED at NAIROBI this 11th day of September, 2012

G.V. ODUNGA

JUDGE