



**REPUBLIC OF KENYA**  
**AT MALINDI**  
**ENVIRONMENT AND LAND COURT**  
**CIVIL CASE NO. 5 OF 2013**

**WEBWAKA TRADE LTD.....PLAINTIFF**

**=VERSUS=**

**DIAMOND TRUST BANK LTD.....DEFENDANT**

**R U L I N G**

**Introduction:**

1. What is before me is the Plaintiff's Application dated 14<sup>th</sup> February, 2014 filed pursuant to the provisions of Order 40 and 51 Rule 1 of the Civil Procedure Rules, 2010. The Application is seeking for the following reliefs:

**i. THAT** an order of temporary injunction do issue to restrain the Defendant whether by itself, and its servants, agents or Auctioneers or any other person acting on the authority of the Defendant from proceeding with the intended sale of public auction scheduled for 18<sup>th</sup> February 2013, from re-advertising, selling, alienating howsoever at any other time or by completing by conveyance to transfer of any sale concluded by public auction or leasing, letting, evicting or otherwise howsoever interfering with the Plaintiff's ownership of title and/or interest of the properties known as Subdivision Number 451 (Original Number 442/10), Subdivision Number 455 (Original Number 442/14), Subdivision Number 456 (Original Number 442/15), Subdivision Number 460 (Original Number 442/19), Subdivision Number 461 (Original Number 442/20), Subdivision Number 462 (Original Number 442/21) Section IV Mainland North, pending the hearing and determination of the suit herein.

**ii. THAT** the costs of and occasioned by this application be borne by the Defendant.

2. The Application is supported by the Affidavit of the 1<sup>st</sup> Plaintiff's Managing Director sworn on 14<sup>th</sup> February 2013.

**Plaintiff's/Applicant's case:**

3. According to the Supporting Affidavit of the Plaintiff's director, the Plaintiff is the proprietor of land known as sub-division number 451 (Original Number 442/10), Sub-division number 456 (original number 442/9 and subdivision number 462 (Original number 442/21) section IV mainland North (the suit property).

4. It is the Plaintiff's deposition that it acquired an overdraft facility from the Defendant for the sum of Kshs. 65,000,000/= which was supposed to be repaid over a period of 4 years and 9 months. The suit property was offered by the Plaintiff as security for the said sum.

5. The Plaintiff's director has stated that the Plaintiff was unable to pay the loan as expected; that the Plaintiff proposed to subdivide and dispose of the properties by sale through private treaty and that the Defendant's advocate rejected the proposal to have the suit property sold by way of private treaty.

6. Although the negotiations on the conveyance between the intended purchaser and the Plaintiff were at an advanced stage, the Plaintiff's director has deponed that the Defendant advertised the property for sale by way of public auction which act has made the prospective purchaser uncertain as to whether he should proceed with the transaction or not; that if the Defendant proceeds with the intended auction, it will scuttle the arrangements which the Plaintiff had with the intended purchaser and that there is a collusion between some bank officers to sale the Plaintiff's property at a throw away price to the detriment of the Plaintiff.

7. In the Supplementary Affidavit, the Plaintiff's director deponed that the court should give the Plaintiff at least 60 days to dispose of the suit property and pay the Defendant's/Respondent's case.

8. The Defendant's head of the Debt Recovery Unit deponed in her Replying Affidavit that the Plaintiff fell into arrears of Kshs.21,172,055.90 as at 2<sup>nd</sup> July, 2012 and that the Plaintiff did not respond to the demand letter of 9<sup>th</sup> July 2012.

9. It is the Defendant's representative's deposition that the failure by the Plaintiff to settle the arrears within the statutory period of 90 days left the Defendant with no option other than instructing the auctioneers to sale the suit property by public auction.

10. It is the Defendant's further deposition that to date, the Plaintiff has not entered into a binding written agreement with the proposed purchaser and consequently the Plaintiff's Application is not meritorious at all.

11. The Defendant's Head of the Debt Recovery Unit finally deponed that the sale of the suit property by way of public auction is grounded by statute and the bank is obliged to obtain the market value of the suit property.

12. The Plaintiff's advocate filed his submissions on 20<sup>th</sup> March 2014 while the Defendant's advocate filed his submissions on 27<sup>th</sup> February 2014 which I have considered.

### **Analysis and findings:**

13. It is not in dispute that the Plaintiff is currently indebted to the Defendant in the sum of Kshs. 18,926,074.93 on the Term Loan Facility and Kshs.74,437,173.44 as at 20<sup>th</sup> February 2013. It is also not in dispute that the Plaintiff charged the suit property in respect to the said sum.

14. It is trite law that for the Applicant to be granted an interim order of injunction, the Applicant has to show that he has a *prima facie* case with chances of success and that it is likely to suffer irreparable loss that cannot be compensated by way of damages. If the court is in doubt about the two principles, it ought to decide the case on a balance of convenience.

15. The Court of Appeal defined what a *prima facie* case is in the case of **Mrao Ltd. -vs- First American Bank of Kenya Ltd. & 2 others (2003) KLR 125** as follows:

**“I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or**

**rebuttal from the latter”.**

16. The Defendant in this case charged the suit property, a fact which the Plaintiff has not disputed. The Plaintiff has also not disputed that in selling the suit property by way of public auction, the Defendant is exercising its statutory power of sale as provided for in the charge documents and the statutes.

17. In the **Mrao** case (*supra*), the Court of Appeal quoted with approval the Halsbury's Laws of England, Vol, 32, 4<sup>th</sup> Edition, paragraph 725 the circumstances under which the mortgagee may be restrained from exercising its power of sale as follows:

**“The Mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action or because the Mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however if the Mortgagor pays the amount claimed in court, that is, the amount the Mortgagee claims to be due to him, unless on the terms of the Mortgagee, the claim is excessive.”**

18. Where there is a clear case of default by a chargor, this court cannot grant an injunction to prevent the Defendant from exercising its statutory power of sale, because, in doing so, the court would be re-writing the contract for parties.

19. The Plaintiff's advocate submitted that the Defendant intentionally caused the Plaintiff to believe that it had approved its proposal to sell the suit property by way of private treaty and that the Plaintiff acted upon that believe by entering into a contract of sale with the intended purchaser. Consequently, it was deponed, the Defendant is estopped from denying the truth of that fact.

20. In its letter dated 8<sup>th</sup> January, 2013, the Plaintiff's advocate informed the Defendant that the Plaintiff was ready and willing to dispose of the charged property by way of private treaty. The Defendant's advocate responded to that letter by way of a letter dated 21<sup>st</sup> January, 2013 rejecting that proposal on account that the proposal had the effect of delaying the recovery of the outstanding debt.

21. At no particular moment did the Defendant or its advocate unequivocally agree to have the Plaintiff sell the suit property by private treaty. The defence of estoppel does not therefore arise in this matter. The Plaintiff's has not therefore shown that it has a *prima facie* case with chances of success.

22. There is a long chain of authorities by the High Court and the Court of Appeal which have held that once a property is offered by the chargor as security, the same becomes a commodity whose value is ascertainable. The chargor's loss is ascertainable even if it is proved at the hearing of the suit that the sale was improper or irregular.

23. The issue of collusion by the Defendant's officers in selling the suit property by way of public auction to recover the amount due and owing does also not arise. Section 97(1) of the Land Act provides that a chargee while selling a property by public auction should obtain the best price reasonably obtainable at the time of sale. The Act then provides the remedies that the chargor has in the event the chargee sells the property below the market value.

24. In view of the fact that the Plaintiff has a recourse under section 97 (1) (b) of the Land Act to apply to the court for an order that the sale is void, this court cannot at this stage stop the said sale.

25. In the circumstance and for the reasons I have given, I dismiss the Plaintiff's Application dated 14<sup>th</sup> February, 2013 with costs.

Dated and delivered in Malindi this **11<sup>th</sup>** day of **April**, 2014.

**O. A. Angote**

**JUDGE**