



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO.418 OF 2003

BEN PANPHILL
SIFUNA.....PLAINTIFF/
RESPONDENT

VS

HARAMBEE SAVINGS & CREDIT SACCO SOCIETY
LIMITED.....DEFENDANT/APPLICANT

RULING

1. The Defendant/Applicant through a Notice of Motion dated 28th February 2012 sought orders of this court for enlargement of time within which to pay a decretal sum of Kshs. 2,159,098.32 to the Plaintiff/Respondent from 16th February 2012 to 22nd February 2012. It also sought orders of this court that by making payment of the said sum of Kshs. 2,159,098.32, the defendant be declared to have fully complied with the order of the Court of Appeal in its ruling of 5th July 2011 which required that half of the decretal sum be paid to the Respondent pending hearing and determination of the appeal.
2. Grounds enumerated on the face of the application and an affidavit of Gladys Gichohi, the Chief Legal Officer of the defendant supported the application.
3. In opposition to the application, a replying affidavit sworn by the plaintiff on 9th March 2012 was filed.
4. The prayer for extension of time was based on the grounds that the defendant is a co-operative society whose funds could only be released upon a Board Resolution, which resolution was incapable of being procured within the time frame prescribed for the payment.
5. On 29th February 2012, the court granted orders of stay of execution of the judgment until hearing *inter partes* of the application. This effectively disposed of the prayer for extension of time as the *inter partes* hearing was fixed for 13th March 2012 which was way beyond the enlargement of time prayed for.
6. The application is therefore outstanding only in respect of the prayer that the defendant should, upon payment of the sum of Kshs. 2, 159,098.32, be declared to have fully complied with the order of the Court of Appeal in its ruling of 5th July 2011 that half of the decretal sum in this suit should be paid to the Respondent as a condition of stay pending appeal.
7. From the supporting affidavit, the prayers sought by the defendant were premised on the fact that the

plaintiff was threatening execution even after cheques amounting to the sum of Kshs. 2,159,098.32 had been deposited in the plaintiff's advocate's account.

8. The plaintiff opposed the application on grounds that the defendant's aim was to frustrate and harass him given that the issue of board resolutions had never been raised in previous payments. The plaintiff further averred that the plaintiff was deliberately refusing to comply with the court of appeal orders and was indeed yet to pay auctioneers' costs.

9. I have considered the application and the affidavit evidence tendered. I have also considered the written submissions by counsel for the parties.

10. In my view, if indeed the defendant has fully complied with the orders of the Court of Appeal by paying half of the decretal sum as ordered, the substratum of the present application is fully spent. The declaration sought in this court that the defendant has complied hence stay of execution should be grated is superfluous as the fact of compliance with the Court of Appeal orders is itself sufficient to accord the defendant the stay sought. If however the defendant has still failed to fully comply, whether as a deliberate move to frustrate the plaintiff or through genuine inadvertence, the defendant has exposed itself to execution and this court cannot come to its aid. The grounds put forth by the defendant for delay in making payments as ordered are not serious if the issues relate to mode of payment. Certainly, the internal approval procedures of the defendant cannot effectively found a basis for the defendant's failure to comply.

11. Having reviewed the application before the court in its entirety, I cannot help but wonder if it was really necessary for the defendant/applicant to file the application. The reliefs that the application sought were on issues that counsel should have easily agreed upon if the questions was merely time within which deposited cheques needed to clear, and, secondly, an arithmetical determination of whether the payments made met half the decretal sum that the Court of Appeal had ordered paid. Counsel for the defendant needed not drag the plaintiff to court and engage scarce judicial time on such mundane matters. Applications such as the present must be discouraged as they unnecessarily clog up the schedule of the court.

12. The upshot of the foregoing is that the Defendant /Applicant's Notice of Motion dated 28th February 2012 is hereby dismissed with costs.

IT IS SO ORDERED.

DATED, SIGNED and DELIVERED in Nairobi this 26th day of April 2012.

J. M. MUTAVA

JUDGE