



**REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS**

Civil Suit 282 of 2010

AFRICAN BANKING CORPORATION LIMITED PLAINTIFF

VERSUS

COUNTRYSIDE SUPPLIERS LTD 1ST DEFENDANT

HON. JOHN MUTUTHO 2ND DEFENDANT

DANIEL NJENGA 3RD DEFENDANT

RULING

On 7th December, 2011 this court entered summary judgment against the defendants jointly and severally in the sum of **Kshs.4,058,059.57** together with interest thereon at the rate of 24% per annum from 24th April, 2010 until payment in full. Following that ruling, on 23rd April, 2012 the 2nd defendant filed an application seeking the following orders:

“1.

2. That there be a stay of execution of the judgment herein and all other consequential orders pending hearing and determination of this application.

3. That this honourable court be pleased to allow the 2nd defendant/applicant to liquidate the decretal sum in equal instalments of Kshs.250,000/= until payment in full.

4. That the court do make any other orders it may deem fit.

5. Costs of this application be provided for.”

The application was supported by an affidavit sworn by the 2nd defendant. He deponed, *inter alia*, that after entry of the summary judgment execution proceedings were commenced and he has so far paid a sum of Kshs.750,000/=. He further stated that the 1st defendant is willing to settle the balance of the decretal sum by monthly instalments of Kshs.250,000/= beginning 5th April, 2012 and thereafter 5th of every month until payment in full.

The application was opposed by the plaintiff. A replying affidavit was sworn by **Steve Luseno**, an advocate practicing in the firm of Majanja, Luseno & Company who are on record for the plaintiff. He stated that the receipt of the 2nd defendant's cheques totaling to Kshs.750,000/= was not an indication of any accommodation being given to the defendants but the payment was made on account. He added that the defendants have not shown any cause why the orders sought should be granted. There is no material provided by the defendants on which the court could base its discretion in considering the application, counsel stated. He added that the 2nd defendant is a man of means with a palatial home in Karen and other properties elsewhere.

Mr. Luseno submitted that even before judgment was entered the 2nd defendant had made representations to the plaintiff that he would settle the debt that was then outstanding by reasonable monthly instalments but did not honour his word.

Furthermore, the plaintiff had on 9th December, 2011 obtained leave to execute the judgment sum before costs of the suit are taxed because the assets of the 1st defendant cannot be traced and the 2nd defendant, being a sitting Member of Parliament, his term is about to expire. The assets of the 3rd defendant, who is a son of the 2nd defendant, are unknown. If this application is allowed, Mr. Luseno stated, the same will render the ruling of 9th December, 2011 futile.

I have considered the affidavits and submissions by both parties.

In an application seeking satisfaction of decretal amount by instalments an applicant must lay before the court such material as would enable the court make a fair determination of the propriety of such an application. The applicant should provide for example, bank statements and other financial records as may be necessary to convince the court that he is unable to pay the decretal amount at once but is able to satisfy the same by reasonable instalments. In this case, none of the defendants availed their bank statements or any other material as may enable this court exercise its discretion in their favour. There is no disclosure as to whether the 1st defendant has any attachable assets. The 3rd defendant did not also swear any affidavit. The 2nd defendant's contention that the 1st defendant is willing to settle the decretal amount by monthly instalments of Kshs.250,000/= does not have any weight since willingness to pay must be accompanied by demonstration of ability to pay and that is lacking.

As for the 2nd defendant, his financial status is unknown to the court. The inventory that was prepared by Messrs Kiriyu Merchants, Auctioneers when they went to the 2nd defendant's house on 14th February, 2012 with a view to attaching his goods in execution of the decree shows that the 2nd defendant has motor vehicles Reg. Nos. KAQ 313B and KAM 888E. Several household items were also included in the inventory.

On 9th of December 2011 this court granted leave to the plaintiff to commence execution before the costs of the suit were taxed for reasons already stated hereinabove. I agree with Mr. Luseno that the 2nd defendant, being aware of the said ruling, ought to have brought before the court sufficient material to demonstrate that, other than reliance on his salary as a Member of Parliament he is capable of raising a sum of Kshs.250,000/= per month if the court were to grant the orders sought.

In the circumstances, the court is unable to exercise its discretion in his favour and consequently this application is dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JUNE, 2012.

D. MUSINGA

JUDGE

In the presence of:

Alex – Court Clerk

Mr. Luseno for Plaintiff

Mr. Odhiambo for Defendant