



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Miscellaneous Case 658 of 2004**

**POSTAL CORPORATION OF KENYA.....PLAINTIFF**

**VERSUS**

**KIPKORIR, TITOO & KIARAADVOCATES.....DEFENDANTS**

**RULING**

There is a judgment issued in favour of the plaintiff for the sum of KShs.16,007,739.50. In execution of the decree herein, the plaintiff did on 4<sup>th</sup> November 2009 issue a bankruptcy notice to Donald Kipkorir, Joseph Titoo and Mwenda Kiara t/a Kipkorir, Titoo & Kiara advocates requiring them to pay the sum of KShs.13,007,739.50 together with interest thereon at court rates from 16<sup>th</sup> June 2005. The plaintiff required the defendants to pay the said amount within fourteen (14) days of the notice, failure of which the plaintiff would commence bankruptcy proceedings against the defendants. Upon receipt of the notice, the defendants moved the court by notice of motion made pursuant to the provisions of **Order XXIV Rule 6** of the **Civil Procedure Rules** seeking several orders from the court. The defendants sought to stay execution of the decree pending hearing interparties of the application. The defendant further sought an order of the court to declare that there is an agreement between the plaintiff and the defendants settling the decree and the mode of payment of the said decretal sum which bound the plaintiff in so far as the defendants were not in default of repaying the agreed monthly installments. The defendants therefore sought protection from the court in regard to the bankruptcy proceedings that the plaintiff intended to commence against them. The grounds in support of the motion are stated on the face of the application. It is supported by the annexed affidavit of Donald B. Kipkorir. The application is opposed. Hellen P. Ambasa, the acting corporation secretary of the plaintiff, swore a replying affidavit in opposition to the application.

At the hearing of the application, I heard rival submissions made by Mr. Ngunjiri for the defendant and Dr. Kiplagat for the plaintiff. I have considered the said arguments and the pleadings filed by the parties herein in support of their opposing positions. There is no dispute that the plaintiff has judgment in its favour for the sum of KShs.16,007,739.50. The judgment was entered in its favour by Waweru J on 16<sup>th</sup> June 2005. The learned judge ordered the defendants to pay the said amount with costs within fourteen (14) days of the determination of the application. Lesiit J did reiterate the decision of Waweru J on 16<sup>th</sup> May 2008 by directing the defendants to pay the decretal sum within seven (7) days thereof or in default the plaintiff was given the liberty to execute. According to the defendants, they entered into negotiations with the plaintiff with a view to amicably settling the matter. In that regard, the defendants wrote to the Chief Executive of the plaintiff on 17<sup>th</sup> March 2009 requesting indulgence from the plaintiff to pay the decretal sum in monthly installment of KShs.300,000/=. It is the defendants' case that the plaintiff responded vide its letter dated 19<sup>th</sup> March 2009 accepting their proposal to pay the decretal sum upon certain conditions, one of which was that the defendants would be required to withdraw the certain applications that they had filed in the Court of Appeal. The defendants were further required to pay costs of the suit. This letter was annexed to the affidavit in support of the defendants' application. The letter was however written on "*without prejudice*" basis. According to the defendants, pursuant to this communication, the defendants withdrew the applications pending before the court of appeal. It emerges that the defendants did not in fact withdraw the said applications but rather the applications were dismissed for want of prosecution.

On its part, it is the plaintiff's position that it did not agree to the suggestion by the defendants that they pay the decretal sum by monthly installments of KShs.300,000/= until payment in full. Upon my evaluation of the conflicting position taken by the plaintiff and the defendants, it was clear to this court that although the plaintiff had indicated to the defendants that it was amenable to having the decretal sum being paid by installment, there was no *consensus ad idem* on the monthly installment that the defendants were obligated to pay. The defendants cannot rely on communication made on "*without prejudice*" basis to support their contention that there was such an agreement. If indeed the plaintiff had accepted the defendants' proposal to pay the decretal sum by the installments indicated, nothing would have been easier than for such agreement to be reduced in writing and filed in court and adopted as the order of the court. The defendants do not therefore have any basis, either in fact or in law, to support their claim that such agreement to pay by the stated installments had in fact been reached.

Dr. Kiplagat indicated to the court that the plaintiff was not averse to favourably considering the defendants' plea that they be allowed to pay the decretal sum by installments provided that the defendants pay monthly installments of KShs.1,000,000/= until payment in full. On their part, the defendants informed the court that they would be willing to increase the payment of the monthly installments to KShs.500,000/=.

As stated earlier in this ruling, the parties herein had agreed in principle that the defendants may pay the decretal sum by installments. In exercise of my inherent jurisdiction, and with a view of doing justice to the parties, I hereby direct that the defendants shall pay the said decretal sum of KShs.16,007,739.50 plus costs and interests at court rates which shall be calculated from the 16<sup>th</sup> June 2005 by monthly installments of KShs.600,000/= with effect from 31<sup>st</sup> January 2010, and thereafter at the end of each subsequent month until payment in full. The plaintiff shall take into account the amount that has already been paid by the defendants in calculating the said interest. The costs shall be agreed or taxed if the same has not been so taxed or agreed. In default of any one payment of the due installment, the plaintiff shall be at liberty to execute against the defendants in the manner that it deems appropriate without further reference to the court. The plaintiff shall have the costs of the application.

**DATED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JANUARY 2010.**

**L. KIMARU**

**JUDGE**