



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 18 of 2007

KENYA SUGAR BOARD..... PLAINTIFF

VERSUS

MARK TOO.....DEFENDANT

R U L I N G

This ruling relates to an application brought through notice of motion under Order XXXV rules 1, Order XII rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The said application seeks the following orders.

1. THAT judgment be and is hereby entered for the Plaintiff against the Defendant for Kshs. 3,500,000.00 being part of the claim in the plaint.
2. THAT in the alternative judgment be entered on admission against the Defendant/Respondent for Kshs. 3,500,000.00.
3. **THAT** the Defendant do bear the costs of the application.

During the hearing of the application, Mr. Midikira, the applicant's counsel submitted that they are relying on the following grounds:

- That the defence as filed by the defendant does not apply to part of the plaintiff's claim – Kshs. 3.5 million.
- Secondly, the defendant issued the plaintiff with Cheque No. 100517 of Kshs. 3.5 million which was towards settling the plaintiff's claim.

Unfortunately the cheque was later returned unpaid. According to the learned counsel, the defendant does not have any reasonable defence for the amount of Kshs. 3.5 million. Further to the above, the applicant has also relied on the supporting affidavit of Rosemary Mkok dated 10th November, 2009. Besides the above, the applicant's counsel also referred the court to the Bill of Exchange Act, Cap 27. In support of his submissions, he quoted the case of:

- Modern Distributors Limited vs. Ndungu Njeru t/a Ndungu Njeeru Filling Station- HCCC Nakuru No. 27 of 1999.

As far as the replying affidavit is concerned, Mr. Midikira submitted that one cannot be forced to issue a cheque for Kshs. 3.5 million. Secondly, he also submitted that by then, the defendant was the Chairman of the plaintiff company. Thirdly, he also took issue with the fact that the defendant had not produced any evidence before this court to show that at the time of producing the cheque, there were doubts that he actually owed the plaintiff that are claimed in the plaint. Apart from the above, the applicant's counsel also urged the court to take judicial notice of the fact that monies advanced to a public officer on account of imprest must either be returned or accounted for. It was due to the above that the defendant issued a cheque No. 100517 for Kshs. 3.5 million which was later returned unpaid.

On the other hand, the defendant/respondent has opposed the application while relying on the replying affidavit of Mr. Mark Too dated 24th November, 2009. That apart, the Respondent's counsel, Mr. Shivachi also submitted that there is no specific pleading pertaining to cheque No. 100517. Besides the above, the learned counsel has also explained that the respondent has not denied issuing the above cheque. He referred the court to paragraphs (5) to (7) of the replying affidavit. In addition to the above, the respondent took issue with the

fact that the applicant never complied with section 87 of the Bills of Exchange Act which requires that a notice of dishonour must be given. According to him, the effect of the above is that the drawer of the cheque is discharged.

This court has carefully considered the above submissions by the learned counsels. From the record, it is crystal clear that the defendant used to be the Chairman of the plaintiff company from May 1999 up to May 2001. In fact in his defence the defendant conceded that the imprests constituted claims in this matter. Though the respondent claimed in his replying affidavit, paragraph 5 that he did not issue the cheque willingly, the above seems ridiculous and definitely an attempt at subterfuge. Firstly, it is rather unusual and out of the ordinary for any member of staff of a parastatal to push around the Chairman of the Board of Directors. That is because, the same will constitute insubordination and that employee is likely to lose his job. Secondly, the Chairman's Imprest Account is very explicit on how the defendant took money from the Sugar Board. The same gives the details of the amounts taken and the dates. Thirdly, the argument that the respondent never had notice that the cheque bounced is not believable at all. The said cheque was for Kshs. 3,500,000/-. At the outset, the said amount is not negligible in any language. More significantly, when the said cheque was not honoured, the same must have been reflected clearly in the account of the respondent. Not only that, the bank must also have charged a penalty given the fact that there were insufficient funds in that account. Lastly, it is not everyday that ordinary Kenyans issue cheques for Kshs. 3,500,000/-. Naturally, one would ensure that such a cheque is honoured.

From the above analysis, it is crystal clear that the respondent issued the cheque No. 100517 for Kshs.3,500,000/- to pay for part of the imprest that he had taken. No doubt, imprests have to be accounted for or surrendered within a reasonable period. Unfortunately, the respondent's account never had sufficient funds to pay the above amount. The upshot is that I hereby concede to the application in terms of Prayer No. 1. Specifically, I hereby enter judgment for the plaintiff against the defendant for Kshs. 3,500,000/- being part of the claim in the plaint. Costs to the plaintiff in any event.

Those are the orders of the court.

**MUGA APONDI
JUDGE**

Ruling read signed and delivered in open court in the presence of: Midikira- Applicant's Counsel

Shivachi - Respondent's Counsel

**MUGA APONDI
JUDGE
2ND FEBRUARY 2010**