



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 32 OF 2009

**NYANZA PETROLEUM DEALERS
LTD..... PLAINTIFF/APPLICANT**

VERSUS

PAYLESS CAR HIRE AND TOURS LTD.

**T/A BUDGET RENT A CAR OF
KENYA.....DEFENDANT/RESPONDENT**

RULING

This application is brought by a Chamber Summons dated 29th April, 2010, and taken out under Order XXXIX Rule 1 (a); Order XXI Rule 36 of the Civil Procedure Rules; Sections 3A, 44(1) and 63 (e) of the Civil Procedure Act, and all other enabling provisions of the law. The applicant thereby seeks from the court the following orders –

- 1. A temporary injunction do issue to restrain the Defendant from utilizing, spending, paying out, remitting or otherwise disposing of the proceeds of sale of the Defendant's immovable property L.R. No. 25192/1, Mombasa Road, pending the hearing and determination of this application.**
- 2. The Defendant's financial controller, Aniz Manji or Nominee do attend court for his examination as to the sale of the Defendant's immovable property L.R. No. 25192/1 Mombasa Road and production of the documents relating to such sale.**
- 3. The Defendant do forthwith pay to the Plaintiff the remaining balance of decretal amount of Kshs 3,200,000/- plus interest at court rates in full from the proceeds of sale of the Defendant's immovable property L.R. No. 25192/1, Mombasa Road.**
- 4. The costs of this application be borne by the Defendant.**
- 5. Any other order be made as this Honorable court shall deem fit to grant.**

In its response to the application, the Respondent filed grounds of opposing on 11th May, 2010, which were followed by a replying affidavit sworn on 26th May, 2010 by one Jai Radia, the Respondent's Managing Director, and filed in court on the same day. In that affidavit, he deposes that negotiations to dispose of the Defendant's immovable property L.R. No.25192/1, Mombasa Road to a third party were

going on even before the proposal to liquidate this claim by monthly instalments was made. The amount to be received from the sale is intended to liquidate the Plaintiff's debt with financiers so as to enable the Plaintiff restructure and refinance its operations. He further avers that the Defendant negotiated a payment plan with the Plaintiff in the light of its entire debt obligation and the proposal was accepted by the Plaintiff and all the postdated cheques deposited with the Plaintiff. The proposal was made in good faith and all previous cheques have been honoured.

After considering the pleadings and the submissions on record, I note that the Respondent has a record of going back on its word. When the Plaintiff's Advocates first wrote a letter of demand in 2008, the Defendant responded by stating that they had already agreed with the Applicant that the debt of Kshs 4,843,801.00, then owing, would be settled by five postdated cheques of Kshs 800,000.00 each **“dated the last day of the month of September, 2008 to January 2009 respectively and the final balance of Kshs 843,801.00 on the last day of February, 2009.”** After paying the first installment, the Respondent went back on its proposal and never made any further payment, thereby precipitating this suit. Against this background, one has reason to doubt that the Respondent will really keep its word, even though some postdated cheques may have been deposited with the Plaintiff.

It is also significant that the agreement for disposal of its property, L.R. No. 25192/1, was made on 18th January, 2010. That was before the arrangement for depositing the post dated cheques with the Plaintiffs and the Respondents do not seem to have disclosed to the Applicant that the former were disposing off one of their properties. If this disclosure had been made, it may well be that the applicants might have declined the receipt of the postdated cheques, preferring instead the prompt payment of all the sums due from the proceeds of the sale of the property.

For these reasons, I find that the Applicant has a reasonable cause to seek to revise the agreed mode of payment, especially in the context of the Respondent's antecedent breach of promise in the same matter. Prayer 1 of the application is already overtaken by events. The Defendants have admitted the sale of their property L.R. NO. 25192/1 in the replying affidavit and also produced a copy of the agreement for sale. In the circumstances, I do not think that it is necessary, at this juncture, to summon the Respondent's financial Controller to attend court for examination on the sale of the said property.

In the circumstances, I direct that the Defendants do forthwith pay to the Plaintiff the full amount of the remaining balance of the decretal amount, together with interest at court rates, from the proceeds of sale of the Defendants immovable property i.e., L.R. 25192/1, Mombasa Road.

Since the parties had earlier on agreed on a mode of settlement, there will be no order as to costs of this application.

Orders accordingly.

Dated and Delivered at Nairobi this 14th day of December, 2010

L NJAGI

JUDGE