



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL & TAX DIVISION)
CIVIL CASE NO. 504 OF 2005

ROSE WAGUTHIII MWANGI NJUNU (suing as the administratrix of the estate of the late

JULIUS W MWANIG
NJUNGU.....PLAINIFF

VERSUS

EDWARD GITHINJI1ST
DEFENDANT

HOUSING FINANCE CO. OF KENYA LTD.....2ND
DEFENDANT

ABDILLAHI WARSAME ALI t/a NADHIA AUCTIONEERS.....3RD
DEFENDANT

RULING

This application is brought by a Notice of Motion dated 28th September, 2010, and taken out under Sections 1A, 1B, 3, and 3A of the Civil Procedure Act, and Order XXI Rule 1 (1) (a), and (2) of the Civil Procedure Rules. The applicant seeks Orders that this Honourable court be pleased to allow the 2nd Defendant/Applicant to deposit the decretal amount of Kshs Shillings Nine Hundred and Thirty Nine Thousand, Five Hundred and Sixty Nine (Kshs 939,569/-) into court as final satisfaction/compliance of this Honourable Court’s Judgment delivered on the 14th October, 2009 by the Honourable Justice Kimaru. It also applies for the costs of this application to be provided for.

The application is supported by the annexed affidavit of JOSEPH KANIA, the Corporation Secretary and Head of Legal Affairs of the 2nd Defendant herein, and is based on the following grounds –

1. **That the Plaintiff/Respondent has declined to accept payment as decreed by this Honourable Court in the Judgment by the Honourable Justice Kimaru delivered on the 14th of October, 2009.**
2. **That the Plaintiff/Respondent has frustrated the 1st Defendant in its attempt to obey and implement the decree of this Honorable Court.**

3. That it is only just and equitable that the money be deposited in court as an indication of good faith on the part of the 2nd Defendant/Applicant in compliance with the judgment of this Honourable court.

The application is opposed through the replying affidavit sworn by Rose Wakuthi Mwangi Njunu.

At the hearing of the application, Mr Muganda appeared for the applicant while Mr Mugo appeared for the Respondent. Mr Muganda argued that in the judgment herein, the court made an order that the 2nd Defendant/Applicant would pay some Kshs 939,569.20 to the Respondent. The Applicant drew a cheque in favour of the Administrators of the Estate of the deceased on 12th November, 2009, and sought to effect the same on the Plaintiff's Advocates, but the latter declined to accept the cheques. The Applicants also sought to do so on 6th May, 2010 when the court directed that they file this application. In a nutshell, they wish to comply with the court order and prayed that the orders sought be granted as prayed.

In his response, Mr Mugo for the Respondent argued that since the amount in the contract differs from the amount awarded by the court, that issue remained for determination by the Court of Appeal, and that the said court would deal with the issue of when the money would be paid by the Applicant. He contended that the issue of deposit did not arise from the judgment or from any other source. If the issue had been raised before the Honourable Kimaru J., or the Court of Appeal, it would have been determined by now. But it is now that it is arising out of nowhere. He submitted that there was no basis for the Applicants to pay the money now after refusing to pay it for six years.

In a short reply, Mr Muganda submitted that all they want to do is to comply with the court order and that no prejudice would be suffered by the Respondent. He therefore asked for orders as prayed.

I have considered the pleadings and the submissions of counsel. In order to place the matter in its proper perspective, I note that the Honourable Justice Kimaru said at page 20 of his judgment –

“The 2nd Defendant is ordered to pay the Plaintiff the sum of Kshs 939,569/-. This is the balance of the sum of Kshs 1.5 million that the 2nd Defendant had agreed to pay to the deceased less expenses of Kshs 560,431/-. The said amount should be paid to the Plaintiff within forty five (45) days of today's date or in default thereof the Plaintiff shall be at liberty to execute.”

From these words, it is self evident that the payment of the money in question is not the 2nd Defendant's idea. It was the court itself which ordered the 2nd Defendant to effect the payment within 14 days from 14th October, 2009. The Applicant's effort to make the payments were thwarted by the blatant refusal by the Respondent to accept payment. One can therefore understand the Applicants concerns about complying with a court order.

Since the Respondents have refused to co-operate in the discharge by the applicants of a court order, and in order to facilitate the compliance with that order, the Application is hereby allowed as prayed. The Applicant is accordingly granted leave to deposit the decretal amount of Kshs 939,569.00 into court in compliance with this court's judgment delivered on 14th October, 2009, by the Honorable Justice Kimaru. The Respondent will bear the costs of this application.

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

L NJAGI

JUDGE