

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE 2198 OF 2000

PROF. DAVID MUSYIMI NDETEI.....PLAINTIFF

- VERSUS -

DAIMA BANK LTD (IN LIQUIDATION)...DEFENDANT

R U L I N G

Before me is a notice of motion by the plaintiff made under provisions of **Section 35 (5) & (10)** of the **Banking Act and Order L rule 1** of the **Civil Procedure Rules** seeking orders of this court to compel the Deposit Protection Fund Board (*hereinafter referred to as DPF*), the liquidator of the defendant/judgment debtor to settle the decretal amount of Kshs.11,450,564.85 which was adjudged in favour of the plaintiff. The grounds of support of the motion are on the face of the application. The plaintiff argues that his suit against the defendant was successful. Judgment was delivered in his favour and on 31st January, 2006, his bill of costs was taxed. Thereafter, the DPF was appointed and duly gazetted as liquidator of the defendant. The plaintiff states that, under the provisions of **Section 35** of the **Banking Act** read together with **Part VI of the Companies Act**, the plaintiff was barred from executing warrants of attachment and sale as against the defendant which at the material time had been placed under liquidation. The plaintiff contends that despite filing proof of debt forms on 12th May, 2006, the defendant has declined or refused to pay the plaintiff. The plaintiff was of the view that failure by the liquidator to pay him is discriminatory of the plaintiff and hence illegal and unconstitutional. The plaintiff therefore craved for the court to intervene and order the defendant to pay him his dues. The application is supported by the annexed affidavit of David Ndetei, the plaintiff.

The application is opposed. Daniel Muguima, the liquidation agent of the defendant swore a replying affidavit in opposition to the application. He deponed that the plaintiff had failed to file any proof of debt forms in accordance with the law. He narrated how the plaintiff made several attempts to execute against the defendant despite the fact that under the law no such attachment can be effected against a company under liquidation. He deponed that since the process of liquidation began, the only persons who have been paid dividends were the protected depositors. He swore that none of the creditors of the defendant had been paid. He was in the process of evaluating the proof of debt forms. He deponed that the liquidator has intention of appealing against the judgment of the court. He denied the allegation by the plaintiff that the liquidator acted in any manner that was discriminatory or unfair to the plaintiff. He urged the court to dismiss the plaintiff's application with costs.

At the hearing of the application, I heard rival arguments made by Miss. Kamende for the plaintiff and Mr. Mbaka for the defendant. I have carefully considered the said submissions. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff made a case for this court to compel the defendant to pay the sum decreed in his favour by the court. Certain facts are not in dispute this application. It is not disputed that the plaintiff has a judgment in his favour. Costs were taxed in his favour by the taxing officer of this court. To-date, the defendant has not appealed against the said decision of the court. The defendant is liable, subject to the applicable law regarding companies in liquidation, to pay the said costs of the plaintiff. On careful perusal of the court record, it is evident that the plaintiff has made various

efforts to obtain payment of the said amount. For one reason or the other, the defendant has failed to pay the said decreed amount. It appears that it is the defendant's view that the plaintiff, being an unsecured creditor, cannot have priority when the time comes for creditors of the defendant to be paid. The defendant denied that it had received the proof of debt forms from the plaintiff to enable it consider whether the said decreed amount can be paid.

Having evaluated the facts of this application, as disclosed by the annexed affidavits, it was clear to this court that the claim by the defendant that the plaintiff had not submitted proof of debt forms is untrue. The proof of debt forms were filed with the defendant as far back as 12th May, 2006. It appeared to this court that the defendant has refused to exercise its statutory duty to consider making payment to the plaintiff of the said decreed amount. From the tone of the affidavit sworn in reply to the plaintiff's application, it was evident that the defendant is hiding behind the provisions of the law to justify its refusal to consider paying the plaintiff his just dues. Under **Section 35(5) (c)** of the **Banking Act**, the defendant has a duty to pay all classes of creditors, notwithstanding the provision of any other written law. Under **Section 35 (5) (d) & (e)** of the **Banking Act** (*which is pari materia with Section 241 (1) (e) & (f) of the Companies Act*), the defendant, as the liquidator of the bank has power to compromise, make arrangements with creditors and to settle any liability or debt due from the bank. It will not do for the defendant to refuse to exercise its statutory duty by citing other law which may or may not be relevant to the circumstances of this case.

I therefore hold that the plaintiff has established a proper case for this court to compel the Deposit Protection Fund Board, as the liquidator of the defendant, to perform its statutory duty and consider the claim lodged by the plaintiff with a view to settling the same. The plaintiff has a valid judgment of this court and is entitled to payment of the same. The liquidator is ordered to consider the proof of debt forms that was submitted by the plaintiff with a view to settling the same. For the avoidance of doubt, the defendant shall consider the proof of debt form that was filed by the plaintiff with the defendant on 12th May, 2006. It is the sincere hope of this court that the defendant will perform its statutory duty in good faith so as to avoid further litigation in this matter. The plaintiff shall have the costs of this application.

DATED at **NAIROBI** this 22nd day of **JULY**, 2009.

L. KIMARU

JUDGE