



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

Civil Case 427 of 2007

BALOZI HOUSING CO-OPERATIVE SOCIETY.....PLAINTIFF

VERSUS

THE COMPANY FOR HABITAT AND HOUSING

IN AFRICA (SHELTER AFRIQUE)DEFENDANT

RULING

On 16th day of August 2007 the plaintiff filed this suit together with an application under certificate of urgency seeking for orders restraining the defendant from advertising for sale, selling by public auction or otherwise, evicting or interfering with the plaintiff's ownership of all the 80 pieces of land mentioned in the earlier application. After hearing the position of the rival parties, His Lordship Justice Azangalala delivered a ruling on 15th November, 2007 granting injunction on terms;

- (1) The plaintiff to file an appropriate undertaking as to damages on or before 20th November, 2007 such undertaking to be under the plaintiff's seal.
- (2) The plaintiff to pay to the defendant a sum of Kshs.400,000/= at the end of each month with effect from the 30th November, 2007 pending the hearing and determination of this suit.
- (3) In default of compliance with any of the two conditions the injunction will stand as discharged.

The plaintiff duly paid the November installment on time. However, the events which triggered this application happened during the course of December, 2007. On 20th December, 2007 the plaintiff through its management committee made a request to its bankers **M/S Equity Bank Limited** to issue banker's cheque in the sum of Kshs.400,000/= in favour of the defendant. This was followed by a reminder dated 31st December 2007 to **M/S Equity Bank Limited** to prepare a banker's cheque in the name of the defendant to enable the plaintiff to pay the December 2007 installment.

It is alleged that due to the post election violence and circumstances beyond their control, the plaintiff was unable to secure the banker's cheque from its bankers **M/S Equity Bank Limited**. It is further contended by the plaintiff that even cheques they had deposited earlier for clearance were being returned un-cleared from Central Bank due to what they call political situation and lack of staff at the clearing house. The cheque for December 2007 installment was forwarded through a letter dated 10th January, 2008 by the Plaintiff's advocate. It is the case of the plaintiff that its cheques in favour of the defendant

could not be processed because of the political situation that was prevailing in the country during the month of December 2007 and January 2008.

However, it is clear that the plaintiff duly paid the installment for January on time on or before 31st January 2008 which cheque was duly received and acknowledged by the defendant's advocate. It is the position of the plaintiff that the failure to submit the installment for December, 2007 on time on or before 31st December, 2007 was not intentional or predetermined but was caused by circumstances beyond the control of the plaintiff and/or its bankers..

It is clear that the defendant, after the receipt of December, 2007 installment and January 2008 installment advertised the plaintiff's suit premises for sale on 26th February, 2008 through the Daily Nation of 7th February, 2008 on the grounds the plaintiff is in breach of the court order and secondly the injunction was discharged for failure to pay December, 2007 installment before the end of December.

The defendant filed a lengthy replying affidavit through its director of Operations Mr. Ositadnma Okinkwo who has narrated the events that led to the dispute between the parties and the circumstances the court considered in arriving in its decision of 15th November 2007.

I have considered the application, the affidavits by the parties herein in support and in opposition to the application. I have also considered the written skeleton submissions by the plaintiff and the defendant. I have also taken into consideration the documents and the submissions filed by the interested parties. The question for my determination is whether this court has the powers to entertain and grant the orders sought by the plaintiff in the application under my determination. No doubt the plaintiff had no option to pay monies and/or installments ordered by this court at their convenience. However, it is important to understand what has brought about the late payment of December 2007 installment by the plaintiff. In my mind, the plaintiff has explained the failure to pay the installment of December 2007 on time.

As clearly explained the delay was not intentional or predetermined but caused by circumstances that were prevailing in this country during the month of December, 2007 and January, 2008. It is also clear that the defendant received and acknowledged the installment of December 2007 and January 2008. Taking into consideration the general condition that were prevailing in this country during the time when the default was committed, I think the explanation given is reasonable and satisfactory. The Plaintiff has clearly demonstrated that it is entitled to the orders sought in the application by reason of explanation offered in the supporting affidavit.

I have also taken into consideration that the dispute giving rise to this suit is the interpretation of the lending agreement between the parties thus raising legal issues that require the court's interpretation and determination. It is also important to note that the main suit between the parties is yet to be heard on merit and since the plaintiff obtained an order of injunction on 15th November, 2007 till the determination of the suit, I think it is essential to ensure that the foundation and/or bedrock of this dispute is not destroyed by an event which was beyond the control of the parties to the dispute. That is what the plaintiff has sought in this application. The plaintiff is seeking the exercise of this court's discretion to ensure that justice prevails between the parties. It is therefore my decision that the inability by the plaintiff to pay the December 2007 installment by 31st December, 2007 was due to reasons or events beyond its control. This Honourable court has powers to remedy such a default so as to ensure that justice prevails between the parties.

Now, having taken into consideration or account the length of delay, the events giving rise to the default and the fact that the defendant has already received the installment for December 2007 and January 2008, I am in agreement with the plaintiff's advocate that this is a case which I should exercise my discretion so that the ends of justice are achieved.

In my humble of opinion there is no prejudice that has been occasioned by the delay of about 10 days in remitting the December 2007 installment to the defendant. In the circumstances it is my opinion that there is sufficient explanation and reasons offered by the plaintiff to enable me to exercise my discretion

in allowing the application under my determination. In my view this is a deserving case in which I should exercise my powers so that the plaintiff can have a chance to canvass its case during the main hearing on merit. I reckon that the plaintiff has shown a prima facie case with a chance of success at the trial and I think it is reasonable to afford the plaintiff an opportunity to present its side of the story on merit.

Order: The application dated 15th February 2008 is allowed with no orders as to costs. The parties shall revert to the position that was existing between them as at the time the orders of 15th November, 2007 were issued. I direct the plaintiff to pay all outstanding installments within the next 30 days and thereafter to continue with the installments as ordered by Azangalala J in his ruling of 15th November, 2007.

Dated, signed and delivered at Nairobi this 25th June, 2008.

M. A. WARSAME

JUDGE