



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 734 of 2002**

**WAB HOTEL LIMITED.....1<sup>ST</sup> PLAINTIFF**

**JOSEPH WAMBUA MULUSYA.....2<sup>ND</sup> PLAINTIFF**

**- VERSUS -**

**INDUSTRIAL DEVELOPMENT**

**BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**LAWRENCE ODORI NABWANA.....2<sup>ND</sup> DEFENDANT**

**PONANGIPALLI VENKATA**

**RAMANA RAO.....3<sup>RD</sup> DEFENDANT**

**KOLLURI VENKATA**

**SUBBARAYA KAMASASTRY.....4<sup>TH</sup> DEFENDANT**

**R U L I N G**

On 30<sup>th</sup> May 2008, the plaintiff and the 1<sup>st</sup> defendant entered into the following consent:

*“By consent, the applicant (the plaintiff) is hereby granted ninety (90) days to redeem the suit property, being LR No.Nairobi Block 75/1031 by paying the sum of KShs.46 million in default thereof, the respondent (the 1<sup>st</sup> defendant) shall be at liberty to exercise statutory power of sale by disposing of the suit property either by public auction or private treaty.”*

On 2<sup>nd</sup> September 2008, the plaintiff moved the court by motion under the provisions of **Section 3A** and **Section 63(e)** of the **Civil Procedure Act** and **Section 72** of the **Registered Land Act** seeking an order of this court to extend the period by which he (*the plaintiff*) was required to redeem the suit property for a further period of one month. The grounds in support of the application are stated on the face of the application. The plaintiff stated that the delay in paying the agreed sum of KSh.46 million was caused by avoidable delays attributable to the receiver manager and the financiers.

Joseph Wambua Mulusya, the plaintiff, swore an affidavit in support of the application. In the said affidavit (*and a supplementary affidavit which he filed on 9<sup>th</sup> September 2008*), the plaintiff amplified the grounds in support of the application by stating that further delay was caused by lack of linen printing materials at the planning department of the City Council. He further deponed that the Chairman of Tarakuet Limited, Mr. Geoffrey Karikia Kariithi, a company associated with the financiers of the plaintiff, was hospitalized at Karen Hospital from 11<sup>th</sup> to 27<sup>th</sup> August 2008 and was therefore unable to transact the business relating to the disbursement of funds to be paid to the 1<sup>st</sup> defendant. The

plaintiff therefore urged the court to exercise its inherent jurisdiction and extend the period by which he was expected to redeem his property by a further period of one month. The plaintiff reiterated that he was still interested in redeeming the suit property pursuant to the consent which was entered in court.

The 1<sup>st</sup> defendant opposed the plaintiff's application. Pricilla Nduru Njuguna, the 1<sup>st</sup> defendant's manager in charge of legal affairs swore a replying affidavit in opposition to the application. In summary, it was the 1<sup>st</sup> defendant's case that the plaintiff had been given more than sufficient time to redeem the suit property. The 1<sup>st</sup> defendant was of the view that since 2002, the plaintiff had used one excuse or the other to frustrate the 1<sup>st</sup> defendant from realizing its security. The 1<sup>st</sup> defendant was skeptical that even if the plaintiff were given more time, he would not be able to redeem the suit property. She deponed that after the expiry of the ninety (90) days moratorium given to the plaintiff, the 1<sup>st</sup> defendant duly exercised its statutory power of sale and sold the suit property to one James Gachiri. She therefore urged the court to disallow the plaintiff's application with costs.

At the hearing of the application, I heard submission made Mr. Mutua for the plaintiff and Mr. Maweu for the 1<sup>st</sup> defendant. In his submission before court, the plaintiff appeared to have shifted goal posts by not making submissions in accordance with the application he filed in court. Instead, the plaintiff made further submissions to the effect that he should be given more time beyond the thirty (30) days period that he had sought in his application. The plaintiff sought to introduce a new ground in support of this application by in effect asking the court to direct the 1<sup>st</sup> defendant to issue another statutory notice so as to enable him to redeem the suit property within a further period of ninety (90) days i.e. the statutory period as contemplated by **Section 74 of the Registered Land Act**. Mr. Maweu for the 1<sup>st</sup> defendant was naturally opposed to the change of tact by the plaintiff. He urged the court to dismiss the plaintiff's application with costs.

I have carefully considered the rival argument made before me. This case has a chequered history. When the parties to this suit appeared before this court on 28<sup>th</sup> May 2008, and after considering the plea by the plaintiff seeking to be given chance to redeem the suit property, this court advised the parties to explore possibility of amicably arriving at a specific timeline upon which the plaintiff would be given an opportunity to redeem the suit property. The plaintiff gave impression to the court that he had already secured a financier who was willing to pay the said sum of KShs.46 million that was being demanded by the 1<sup>st</sup> defendant. It was the plaintiff himself who made the suggestion that he should be given ninety (90) days to redeem the suit property. It was upon that understanding that the parties entered into the consent of 30<sup>th</sup> May 2008 that was adopted as an order of this court.

It now appears to this court that the plaintiff was not serious when it indicated to the court that it had secured a financier to pay off the debt due to the 1<sup>st</sup> defendant. In his application, the plaintiff sought an extension of thirty (30) days to enable him pay the sum of KShs.46 million due to the 1<sup>st</sup> defendant. The thirty (30) days which he sought extension expires on 1<sup>st</sup> October 2008. Today is 30<sup>th</sup> September 2008. In the intervening period between the time the plaintiff filed his application for extension of time (*i.e. on 2<sup>nd</sup> September 2008*) and today, when the application was being argued, the plaintiff has done nothing towards realizing the objective of settling or repaying the sum due to the 1<sup>st</sup> defendant. Instead, the plaintiff has come up with yet another excuse in a bid to secure further indulgence from the court. I think the plaintiff should by now realize that the end of the road is nigh. He cannot postpone the day of reckoning indefinitely. It appears to this court that it was misled into believing the plaintiff's plea that he should be allowed time to redeem the suit property. It is clear that the plaintiff never intended to abide by the terms of the consent agreement.

No grounds have been placed before this court to enable it set aside or vary the consent of the parties to this suit which was adopted as an order of this court. The plaintiff made no allegation of fraud, collusion, misapprehension or ignorance of material facts or any other reason that would enable this court set aside a duly entered consent (See **Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd & Anor CA Civil Appeal No. 276 of 1997**). Further, the plaintiff was given more than ample opportunity to redeem his property. Six years is sufficient time for a person who seriously intends to redeem his property to do so. The 1<sup>st</sup> defendant cannot be made to wait indefinitely for the plaintiff to repay the loan that was advanced to him. It should be given an opportunity to exercise its statutory power of sale to recover the amount that it had advanced to the plaintiff.

I therefore find no merit with the application by the plaintiff to be given more time to redeem his property. The plaintiff's equity redemption has been extinguished. The said application is dismissed with costs. The interim orders granted by this court on 2<sup>nd</sup> September 2008 is hereby set aside.

It is so ordered.

**DATED at NAIROBI this 30<sup>th</sup> day of SEPTEMBER, 2008.**

L. KIMARU

JUDGE