

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 2198 of 2000

PROF. DAVID MUSYIMI NDETEI.....PLAINTIFF

- VERSUS -

DAIMA BANK LTD (IN LIQUIDATION)...DEFENDANT

R U L I N G

This is a notice of motion brought by the defendant purportedly under the provisions of Order XX1 Rules 19 and 22, Order XLVIII Rule 3 and Order L Rule 1 of the Civil Procedure Rules seeking orders of this court to stay execution of the judgment and the decree of this court issued on 11th May 2005 pending the hearing and determination of the application. The defendant further sought the setting aside or review of the order issued by the Deputy Registrar of this court on 19th June 2008 allowing the plaintiff to execute the decree by way of attachment of the liquidator's (*Deposit Protection Fund Board*) property. The defendant further sought an order of the court permanently staying execution of the decree by the judgment creditor, by himself or through his agents or servants against the judgment debtor (*the liquidator*).

The grounds in support of the application are stated on the face of the application. The Deposit Protection Fund Board, the liquidator of the defendant contends that it was statutory appointed by the Central Bank of Kenya to liquidate the defendant bank. It contends that an order of execution cannot in law be issued against an entity under liquidation or against the liquidator. It stated that it had no moveable property of its own that could be attached to satisfy the decretal sum. It therefore asserts that the issuance of the warrant of attachment against it was an abuse of the due process of the court as the liquidator, the Deposit Protection Fund Board was not a party to the suit.

The application is supported by the annexed affidavit of Daniel Muguima, the Liquidation Agent of the defendant. In the said affidavit, he narrated the efforts the plaintiff had made to secure the decretal amount that was adjudged in his favour by the court. He deponed that the plaintiff had severally been notified that it could not attach the property of the defendant on account of the fact that it was under liquidation. He stated that the amount owed to the defendant pursuant to the decree of this court placed the plaintiff in the same position as other unsecured creditors and therefore he cannot be allowed to be accorded priority over other creditors by being given leave to execute the decree herein. He urged the court to allow the application with costs.

The plaintiff, Prof. David Musyimi Ndetei filed a lengthy replying affidavit in opposition to the application. He opposed the application. He accused the defendant of not being candid with the court by failing to disclose the fact that although the liquidator was served with notice to show cause, the defendant failed to attend court as required by the law thereby leaving the Deputy Registrar of the court with no other option than to allow the application by the plaintiff to attach the liquidator's property to settle the decretal sum awarded to him by the court. The plaintiff took issue with the defendant's failure to settle the decretal sum despite having the mandate to settle the same as provided by the law.

The plaintiff was of the view that the defendant was prevaricating from settling the decretal sum and had in fact treated the plaintiff unfairly and discriminatorily. He deponed that the defendant's protestation that it did not have any money to settle the decretal sum was debunked by the fact that it had dispatched

the first dividend on 18th May 2006. The plaintiff asserted that under the law, the defendant was mandated to settle the decretal sum due to the plaintiff. He reiterated that, the Deposit Protection Fund Board, as the Liquidator of the defendant, was liable to settle the decretal sum. He urged the court to dismiss the application with costs since, in his view, he had been prevented from enjoying the fruits of his judgment from the time judgment was rendered in his favour.

At the hearing of the application, I heard the submissions made by Mr. Mbaka for the defendant and Ms Kamende for the plaintiff. I have carefully considered the submissions made. I have also read the pleadings filed by the parties in support of their respective cases. The issue for determination by this court is whether the plaintiff was entitled to execute against the Deposit Protection Fund Board, the Liquidator of the defendant. In the first instance, it should be noted that the Deposit Protection Fund Board was and is not a defendant in this suit. The Deposit Protection Fund Board was appointed by the Central Bank to liquidate the defendant. The Deposit Protection Fund Board is a statutory body corporate established under Section 36 of the Banking Act. Under Section 35(1) of the Banking Act, the Central Bank of Kenya has power to appoint the Deposit Protection Fund Board as a Liquidator of a Bank which is deemed to be insolvent within the meaning of Section 220 of the Companies Act.

The powers of the Deposit Protection Fund Board as Liquidator are spelt out in Section 35 of the Banking Act. In particular, Section 35(5) of the Banking Act gives power to the Liquidator to, *inter alia*, pay any class of creditors in full or make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only whereby the institution may be rendered liable. It should be noted, that in performing its duties, the Deposit Protection Fund Board has the overriding and principle objective of providing a deposit insurance scheme for customers of member institutions and liquidate and wind up the operations of any institution in respect of which the board is appointed as a liquidator in accordance with the Banking Act. The Deposit Protection Fund Board as a Liquidator, is required to rank the creditors, and after liquidating the assets of the defendant, pay the said creditors in depending on the available funds.

In the present application, the Deposit Protection Fund Board argued that the plaintiff, being an unsecured creditor, cannot jump the gun by seeking to attach the properties of the defendant without being subjected to the process of having his debt ranked and thereafter proved after submitting proof of debt forms to the liquidator. On his part, the plaintiff contends that the defendant has treated him in a discriminatory and oppressive manner in that it had failed to consider his claim despite the fact that the plaintiff has submitted proof of debt forms to the liquidator. The plaintiff justified his decision to execute against the Deposit Protection Fund Board on the basis that the defendant had failed to settle the decretal amount as required by the law.

I think the plaintiff has misapprehended the law. As unsecured creditor, he cannot seek the intervention of the court to compel the defendant to pay the decretal sum by applying to execute against the Deposit Protection Fund Board. The plaintiff must await the proof of his debt by the liquidator. In the event that the plaintiff is aggrieved by the defendant's failure to properly exercise his power by considering his request for payment, the plaintiff is at liberty to make an appropriate application to this court under the proviso in Section 35(5) of the Banking Act.

The plaintiff therefore fell in error when he purported to execute against the Deposit Protection Fund Board, which in the first instance is not a party to this suit. As the liquidator of the defendant, the Deposit Protection Fund Board cannot be held liable for the acts of omission or commission by the defendant. The plaintiff has no option but to deal with the defendant as required by the law. The Deposit Protection Fund Board is a separate legal entity from the defendant. The plaintiff cannot in law therefore justify its decision to execute against the Deposit Protection Fund Board. The application by the liquidator has merit and is hereby allowed. The order issued by the Deputy Registrar of this court on 19th June 2008 allowing the execution of the decree by way of attachment and sale of the liquidator's property is hereby set aside. The warrants of attachment issued pursuant to the said order of the court is hereby recalled and cancelled. The defendant shall have the costs for the application.

DATED at NAIROBI this 24th day of SEPTEMBER, 2008.

L. KIMARU

JUDGE