



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

**CIVIL SUIT NO. 570 OF 1998**

**PELICAN INVESTMENTS .....1ST PLAINTIFF**  
**KHAMINWA AND KHAMINWA ADVOCATES .....DECREE-HOLDER**  
**VERSUS**  
**NATIONAL BANK OF KENYA LTD. .... DEFENDANT**  
**MEREKA & CO. ADVOCATES .....JUDGEMENT-DEBTOR**  
**ANDDEE-EM INVESTMENTS LIMITED .....OBJECTOR**

**RULING**

On 13.05.2005, I dismissed the Plaintiff's application dated 9.11.2004, and I reserved my reasons for doing so.

By an order made by Consent before Mbaluto J. on 14th January 2002, the parties agreed inter alia as follows –

" 1 .....3

4. THAT the contents of the letter dated 6th August 2001 from National Bank of Kenya Ltd. to Mr. H. H. Abdi be and are hereby recorded as a compromise settlement and/or judgement of this suit.

The material parts to this Ruling of the said compromise letter are paragraphs 2, 3, 9, and 10 and 11 which I reproduce here for completeness and ease of reference as to what is relevant to this Ruling. The said paragraphs are as follows –

2. THAT as discussed as agreed, the balance of the debt payable in full and final settlement is Kshs.140 million .... However, this is subject only to the charged properties failing to fetch a higher price than the said Kshs.140,000,000.00/= (one hundred and forty million Kenya Shillings).

3. THAT the said amount of Kshs.140 million being the minimum acceptable figure, shall be raised through the sale of the charged properties by way of private treaty and firm you own means. (The properties are specified).

8. THAT payment of the agreed debt of Kshs.140 million (minimum) should be achieved

within a period of twelve (12) months from the date of signing this letter.

**9. THAT in consideration of your making full and prompt payments of the above sums within the said period of twelve (12) months the Bank accedes to stop further interest accrual on the debt.**

**10. THAT you hereby irrevocably and unconditionally authorise the Bank to sell the said properties by way of private treaty and undertake further to give the Bank all the necessary assistance required to facilitate the quick disposal of the properties.**

**11. THAT in default of the above conditions, the Bank will be at liberty to sell the properties held without further notice or indulgence to you for the recovery of the full debt outstanding and at your costs. Further, in the event of default, interest may be charged at the discretion of the Bank (emphasis mine).**

These were the same grounds reiterated by Mrs. Zipporah Mogaka, Manager – Legal Services, of the Defendant in her Replying Affidavit sworn on 16.11.2004, and relied upon by Mr. Ojiambo, learned Counsel for the Defendant.

Albert Khaminwa, learned Counsel for the Plaintiff passionately urged the Court to grant the injunctive orders sought in the Plaintiff's application to restrain the Defendant from breaching the **Consent Orders** set out above.

In this learned Counsel's understanding, with which I entirely agree, once Consent orders have been made, and entered by the parties, they constituted binding contracts between the parties and which could only be set aside on the same grounds as would a contract, such as fraud, collusion or any reason which would enable the Court to set aside an agreement – on this proposition learned Counsel cited the case of **BROOKE BOND LIEBIG (T) LTD. –VS- MALLYA** [1975] EA 266.

For the proposition that upon a consent order, the only remedy open to the parties was to set aside the consent order by either review or by bringing of a fresh suit as a Court can only interfere with a consent judgement in such circumstances as would afford a good ground for varying or rescinding a contract between the parties. Counsel also relied upon the case of **MUNYIRI –VS- NDUNGUYA** [1985] K.L.R. 370.

Learned Counsel for the Plaintiff also relied upon the case of **Commercial Bank of Africa Ltd. – vs.- Isaac Kamau Ndirangu** (Civil Appeal No. 157 of 1991) Where the Court held that the Consent order did not give the Bank the power to sell in the event the chargor failed to get a buyer, that the Bank was at liberty to apply for further orders (Muli J.a.). Court orders must be obeyed as a cardinal basis for endurance of judicial authority and dignity and the blatant disobedience of the consent order rendered the sale void.

So where there is a conflict whether the Court should uphold the rules of natural justice (that is right to be heard), or obedience to the Court Orders, orders of Court must be obeyed for if any flagrant disobedience of a Court order is allowed unchecked may result in the onset of an erosion of judicial authority per Cockar J.A.

Learned Counsel for the Plaintiff placed much emphasis on the similarities between that case, and the present suit. In that case (CBA –vs- Isaac Kamau Ndirangu) the consent order (paragraph 7) was very clear. The Plaintiff, Commercial Bank of Africa Ltd. was to sell the suit property for a sum of not less than Kshs.4,000,000/= within 60 days. The order did not say what would happen if the Plaintiff failed to sell the property within the said sixty (60) days. This is how it was framed

**"7. THAT sale of LR No. 12241 be and is hereby stayed. The Plaintiff be and is hereby at liberty to procure the sale of LR. No. 12241 for a higher price than Kshs.4,000,000/= within the next 60 days and the said sum to be deposited with the defendant and that**

**condition to be stipulated in the agreement for sale by the plaintiff."**

I would not disagree with the interpretation to this clause by Platt Ag. JA that the plain meaning of that order was that if the Respondent (Plaintiff) failed to sell within that period of 60 days the property reverted to the ambit of the order. The Bank could indeed then exercise its right to and liberty to apply to the Court for leave to sell. It certainly did not permit the Bank, or in the event, the Respondent after failing to get a buyer to sell the property without the intervention of the Court. That is I think quite plain from that wording of paragraph 7 above.

The situation in this case is quite different from that of the **CBA –vs- Isaac Kamau Ndirangu case**. In this case, the Consent Orders clearly and quite plainly provided –

- (1) firstly, that the minimum amount of debt would be Shs.140 million;
- (2) secondly, that the Plaintiff would sell the designated properties by private treaty;
- (3) thirdly, the Plaintiff would pay the said sum from his own means apart from the sale of the designated properties;
- (4) the repayment of the agreed debt of Kshs.140 million (minimum) should be achieved within a period of twelve (12) months from the date of signing the letter (17.08.2001);
- (5) in consideration of the Plaintiff making prompt payment of the said sum of Kshs.140 million, within the said twelve (12) months, no interest would accrue;
- (6) in default of any of the above conditions, the Bank would be at liberty to sell the security properties **held without further notice or indulgence to you for the recovery of the full outstanding debt at the Plaintiff's cost.**

**Further in the event of default, interest may be charged, at the discretion of the Bank"**  
(emphasis mine).

Those were the material terms in the Consent Order in this case. Those terms, and in particular paragraph 7, (or 6 as summarised above), did not reserve any condition that the parties would revert to the Court in the event the Plaintiff failed to pay the agreed sum of Kshs.140 million. If the said paragraph bore or had the meaning that each time the Plaintiff defaulted the Defendant Bank were to go to Court, the game would become cyclical and would never end. The court would even in the clearest of languages as in this case be pandering to the whims of the Plaintiff. There has to be an end to some forms of litigation, like the present application.

Finally, the application was incompetent for another reason, Order XXI Rule 22 only applies to applications for stay of execution when a decree has been sent from one Court to another for execution. It is not applicable in this matter. Likewise, the cases cited by the Plaintiff/Applicant were correct in their respective contexts. They are wholly inapplicable in this application.

For these reasons, I, on 13.05.2005 dismissed with costs the Plaintiff's application dated 9.11.2004 when it was urged before me on by Albert Khaminwa learned Counsel for the Plaintiff/applicant and Ojiambo learned Counsel for the Defendant/Respondent. I also declined to grant of stay of my said order. The said application therefore stands dismissed with costs as of 13.05.2005 and there is also no order of stay against the said order. There shall be orders accordingly.

Dated and delivered at Nairobi this 17th day of May 2005.

**ANYARA EMUKULE**

**JUDGE**