



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL CASE NO. 481 OF 2000**

**INDUSTRIAL & COMMERCIAL**

**DEVELOPMENT CORPORATION .....PLAINTIFF**

**VERUS**

**SHARIF HASSAN ALWI**

**T/A STARLIGHT HOTEL LIMITED .....DEFENDANT**

**RULING**

This hearing of application inter-parties seeking orders to review a court Judgement entered into on 18-9-2001 and to lift the attachment made by Mwaru Auctioneers.

The supporting affidavit shows that decree debtors are willing to abide by court order made on 18-9-2001 and that they have been doing so. However, there has been delay from time to time some month and the latest delay has been for 21 days. The payments are from rental income and sometimes there is delay by tenants in payments of rents. That since December, 2002 when delay occurred the Respondent did not complain but suddenly in June, 2003 a proclamation was issued.

The applicant has annexed exhibit SHA 1 in which all payments are made according to schedule up to 4-6-2003. These payments are paid directly by Applicant rent collection agent. I have examined the documents annexed together with application supporting affidavit warrants of attachment issued. I have also examined the Replying Affidavit and considered the arguments of counsel. I notice application of execution was made on 6-5-03 a deny from 5-5-2003 when the money should have been payable. I also notice that on 5-5-2003 cheque number 005293 in the sum of shs. 20,000/- was paid. On 4-6-2003 a cheque No. 5595 was paid in the same amount. There is no allegation by Respondent that these sums have not been paid. What the Respondent now is complying is that interest is too low and the same to be reviewed upward to shs. 200,000/- per month. I find the Respondent decree holder has not acted in good faith in making application for execution. No single instalment has been unpaid since the consent order. Every month the Applicant shows he has paid. At the time the Respondent made an execution application no payment was outstanding. The court order says "In default of any one instalment". There is no evidence of such default. The Respondent has to comply with the court order just as he expects the Applicant to comply. There is in the Replying affidavit evidence that the Respondent finds the consent judgement disagreeable and intends to get it changed. For the benefit of both parties it is worthwhile to remind them that a consent once signed by the parties and approved by court it cannot light he interfered with. Only on proof of fraud and misrepresentation such as can invalidate a contract can approve the court to interfere.

On the issue of extension of time, my view is that there is no need for extension sought. The applicant does not wish to extend the period of monthly installment. He anticipates slight delay because his income is by collection of rents. In every transaction, there are days of grace. Payments here is made within reasonable days of grace. On the issue of the legal personality of the auctioneer, I find the name of auctioneer written as "Esther Gathoni Gicimu". I reject the objection to attachment on that ground. However, I must point out that the items attached as of such small value compared to the amount of decree that not even the auctioneer's charges (15,000/\_) can be covered. The purpose for attachment appears oppressive and totally in bad faith.

From the above reasons, I find that the consent order is not breached. I also find that the attachment

made by Respondent through their agent is premature and not justified and the same is lifted forthwith.

I order the costs of the attachment and this application to be paid by the Respondent.

**Dated 22-7-2003.**

**J. KHAMINWA**

**JUDGE**

**Mr. Munyithya**

**Ms Osuma for Omamo**