



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 268 OF 2000**

**NOTCO (K) LIMITED ..... PLAINTIFF**

**VERSUS**

**FINTEA LIMITED ..... DEFENDANT**

**RULING**

On 25th January 2002 the Applicant/Judgment Debtor filed this application by Chamber Summons under Order 1Xa, Rule 10 Order XXI Rule 22, Order XX Rule 2 all of Civil Procedure Rules and Section 3A Civil Procedure Act. The prayers sought are that the Applicant be allowed to liquidate the decretal amount by monthly installments and that there be a stay of execution pending the hearing of this application. At the hearing hereof counsel for Respondent decree holder submitted that the provisions relied upon do not apply to this application. I agree with him. Looking at the rules will reveal that these rules deal with different matters altogether. However counsel for Applicant suggested that there was a typing error and the applicable rule is Order 20 rule 11. She pleaded under Order 50 rule 12 that notwithstanding Court should ignore the technicalities and deal with the merits of the application. I have perused the application and affidavits in support. That of the Managing Director shows that on 29.3.2001 their advocate entered into consent to liquidate decretal amount reached by consent by installments of Shs.50,000/- per month. That the applicant did not honour the consent because business deteriorated due to general slump of economy. That the final position has now improved and the J.D. is now able to pay the agreed installments and that the Decree holder has already commenced execution proceedings against their goods. In an attempt to show their financial position the said managing Director swore a supplementary affidavit showing that a major client in Egypt has in 1998 failed to pay large sums of money. Another company in Pakistani failed them up to April 2001. Also they are owed money by another Pakistan customer. As a result of these failed transactions the company has been unable to make any payment. The court is informed from the bar that a single cheque in the sum of Shs.50,000/- was paid in the month of February this year to decree holder. The application is opposed by decree holder whose Managing Director Fernando O. Morques has sworn that there was no consent to liquidate the decretal sum by monthly installments of Shs.50,000/- each. The consent was for payment of 12 equal monthly installment with effect from 30th June 2001. Quick calculation shows that the monthly installment could be Shs.295,681.00 and not Shs.50,000/-.

My observation is that the decretal sum is now a large sum amounting to Shs.3,548,152/- plus costs of Shs.205,565/- totaling Shs.3,753,717/- with interest. It would take a very long time to liquidate the sum as the applicant proposes.

The conduct of the Applicant does not display any bona fides. The business transactions he mentions were entered into before the consent was entered into. Therefore at the time he entered into this consent he was well aware that the financial position was not good. No attempt has been made to show what income has been coming in. There is no full disclosure at all. Also having agreed to make installments from June 2001 but no payment has been made until the decree holder commenced execution. And no effort has been made to comply with the consent entered into as to payment of installments.

I have perused the authority relied upon by the Applicant namely HCC No. 373 of 1997 and I am inclined to come to the same conclusion with the learned Judge in that the present applicant has not shown any bona fides by arranging prompt payment of a fair proportion of the debt. The Shs.50,000/- I am informed

has been paid cannot be said to be a fair portion of the debt. The Applicant has not shown full disclosure of its assets or income. Only a few old bad deals disclosed and the consent was made with full knowledge of these deals. Again no reason has been put forward as to enable the court to interfere with consent as to payment entered by the parties freely.

In the circumstances I do find no merits in the application and the same is dismissed with costs.

**Dated at Mombasa this 20th Day of March, 2002.**

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**

Delivered in the presence of:

Ms. Katasi for Applicant.

Mr. Wameyo for Respondent.

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**