



REPUBLIC OF KENYA



**National Oil Corporation of Kenya Limited v Futurerock Limited  
(Formerly Futureway Limited) (Miscellaneous Application 532 of 2018)  
[2024] KEHC 9947 (KLR) (Commercial and Tax) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9947 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION 532 OF 2018**

**A MABEYA, J**

**JULY 31, 2024**

**BETWEEN**

**NATIONAL OIL CORPORATION OF KENYA LIMITED .... JUDGMENT  
DEBTOR**

**AND**

**FUTUREROCK LIMITED (FORMELY FUTUREWAY LIMITED) .... DECREE  
HOLDER**

**RULING**

1. Before Court is an application dated 27/3/2024 brought under section 1A, 1B and 3A of the [Civil Procedure Act](#) CAP 21, Order 21 rule 12(2) and Order 51 of the [Civil Procedure Rules](#) 2010.
2. The application sought leave for the judgment-debtor to come up with a payment plan in order to settle the decretal amount in periodic instalments within 90 days from the date of the application to avoid crippling its operations.
3. In support of the application, the judgment-debtor relied on the grounds on the face of the Motion and the supporting affidavit of Robai Musilivisworn on 27/3/2024. It was the judgment-debtor's contention that the Court entered judgment against it for Kshs. 62,560,708/- and garnishee proceedings were instituted by the decree holder.
4. That on 18/12/2023, a ruling was delivered making a garnishee order nisi absolute and a sum of Kshs. 43,286,554.20 was recovered leaving a balance of Kshs 25,104,479. That on 19/3/2024, the Court ordered that a garnishee order nisi be made absolute against Co-operative Bank and National Bank whereby Kshs 6,942,087.39 and Kshs 203,828.10 was attached.



5. The judgment debtor stated that it had not refused to pay the decretal sums however it needed time to make arrangement for effecting payments without destabilizing it. That the garnishee proceedings had caused it financial constraints as a state corporation. That it was desirous of paying the balance within 90 days.
6. In opposition, the decree holder filed a replying affidavit sworn on 6/5/2024 by Maryanjeline Barasa. She deposed that the decree holder held a valid judgment and decree which was issued 15 months ago and the judgment debtor had not challenged it. That the parties had previously engaged in multiple rounds of negotiations on settlement of the decree but were fruitless.
7. It was contended that the application for stay of execution could not be granted since the judgment-debtor did not satisfy the test required. That there was undue delay in bringing the application, no evidence that the judgment-debtor would suffer loss or irreparable harm and no security of had been offered.
8. The application was canvassed by way of written submissions. The judgment -debtor submitted that the law applicable in this instance was Order 21 rule 12 of the *Civil Procedure Rules* 2010 which grants the court discretion to grant appropriate orders.
9. The decree holder did not file any submissions. I have considered the parties' contestations and the submissions on record. What is in issue is whether the decree holder should be allowed time to make payment by instalments on the balance of the decretal amount.
10. The judgment-debtor's argument is that part of the decretal sum has already been paid and in order for it to manage its operations a 90day period should be granted for payment of the sums due to the decree holder. The judgment-debtor further informed the Court that, the decree had already been factored in the budget.
11. The judgment-debtor invoked Order 21 rule 12 of the *Civil Procedure Rules* 2010 which provides that:

“(1) Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments with or without interest notwithstanding anything contained in the contract under which the money is payable.

(2) After passing of any such decree, the court may on the application of the judgment debtor and with the consent of the decree-holder or without the consent of the decree holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment debtor or the taking of security from him, or otherwise, as it thinks fit.”

12. From the foregoing, it is clear that a judgment debtor has a duty to demonstrate sufficient cause to warrant the Court exercise its discretion in its favour. In *Singh Gitau Advocates v City Finance Bank Limited* [2013] eKLR, it was stated: -

“It is trite law that apart from looking at the peculiar circumstances of the case, the Court when considering what sufficient cause amounts to, must consider a number of factors. This includes how the debt was incurred, the bona fides of the Judgment Debtor, the financial position of the debtor and the judgment creditor, the conduct of the parties and



the hardship that may result from enforcing the decree. It is also my considered view that applications of this nature ought to be made without undue delay.”

13. In *Keshvaji Jethabhai & Bros Limited v Saleh Abdulla* [1959] EA 260, the court laid down the principles that should guide a court in the exercise of its discretion in such matters as follows: -
- “ a) whilst creditors’ rights must be considered each case must be considered on its own merits and discretion exercised accordingly;
  - b) the mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of the discretion;
  - c) the debtor should be required to show his bona fides by arranging prompt payment of a fair proportion;
  - d) hardship of the debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.”
14. From the record, it is not disputed that the judgment- debtor is indebted to the decree holder. That the amount became due over 5 years ago when arbitral proceedings were concluded. That these proceedings were then commenced in 2018 to enforce the award after the applicant failed to honour the same. That the judgment-debtor has not made even one payment. That any payments received by the judgment-creditor was through execution.
15. Further, that the present application was made in March, 2024, over 90 days ago. The judgment-debtor has not made any payment in the intervening period. In the circumstances, where is its bona fides?
16. For the judgment-debtor, sufficient reason was that it did not want its operations to be destabilized and it produced its yearly budget for the 2023/2024 stating that it had incorporated the amount owing it that budget. The Court has considered the evidence relied upon by the judgment-debtor. It is clear that a huge amount of the decretal sum was garnished from the judgment debtor’s accounts.
17. In the view of this Court, there was no evidence to show that the judgment-debtor would be greatly prejudiced if the remainder of the decretal sum is recovered. Further, it was not enough to state that a payment proposal be entered, the judgment-debtor ought to have given its own concrete proposals how it intended to liquidate the balance.
18. In any event, the judgement-debtor failed to produce the current statements of account to show its financial position. Considering the evidence on record, it is clear that the judgment-debtor did not prove sufficient cause as to why it should be allowed to pay the decretal sum in instalments. In any event, it did not propose the exact instalments.
19. Accordingly, the Court finds no merit in the application and the same is dismissed with costs.
- It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

