



**Otieno Ragot & Company Advocates v Das Group Kenya Limited (Miscellaneous Application E143 of 2016) [2024] KEHC 13354 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13354 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS APPLICATION E143 OF 2016  
MS SHARIFF, J  
OCTOBER 31, 2024**

**BETWEEN**

**OTIENO RAGOT & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**DAS GROUP KENYA LIMITED ..... RESPONDENT**

**RULING**

1. The Application before court is that of the 18<sup>th</sup> January 2023 by the Client/ Respondent (hereinafter the Applicant) seeking the following orders: -
  1. Spent
  2. Spent
  3. Spent
  4. That an order be made allowing the Respondent/Applicant to liquidate the judgment by paying equal monthly instalments of Kshs 100,000/= reviewable every three months until payment in full.
  5. That there be no orders as to costs.
2. This application is premised on a garnishee order nisi issued against the Applicant's bank account on 16th November 2022, amounting to Kshs.1,644,936.72./=
3. The Applicant argues that its ability to satisfy the decree has been significantly hampered by reduced income resulting from the COVID-19 pandemic and the tensions surrounding the electioneering period.
4. Given these circumstances, the Applicant contends that settling the entire decree at once would cripple its operations and deprive its employees of their livelihood.



5. Therefore, the Applicant seeks to satisfy the decree through monthly payments of Kshs 100,000, subject to review every three months until the total amount is paid in full.
6. The Applicant asserts that it will suffer irreparable damage if the orders sought are not granted and if the Respondent proceeds with execution.
7. In opposition to the application the Respondent filed a replying affidavit sworn by Jude Ragot in which he deposed that since 2016 the applicant has made no efforts to address the decree and was only prompted to act following the garnishee proceedings.
8. It is deponed on behalf of the Respondent that judgment in the matter was entered two years before the onset of the Covid 19 pandemic hence the applicant is being disingenuous by blaming the Covid 19 Pandemic.
9. Moreover, the Respondent deposes that no evidence has been adduced to prove that the Applicant is unable to pay or would be crippled if payment is made.
10. The Respondent contends that the Applicant's conduct over the past seven years renders it undeserving of the orders sought, as it has failed to take any steps towards payment.
11. Furthermore, Jude Ragot deposes that there is no evidence, such as bank statements either from the bank (the garnishee) or the Judgment Debtor evidencing inability to pay.
12. Lastly, the Respondent asserts that the application has been overtaken by events, as execution has already commenced.
13. On the 8/5/2024 directions were taken to the effect that the application be canvassed through written submissions.
14. On the 5/6/2024 when the matter was mentioned for compliance only the Decree Holder's advocate was present and he indicated that he had filed submissions.
15. By the time of writing this ruling, there were no submissions on record from the Judgment Debtor.

#### **Respondent/decree Holder's Submissions**

16. The Respondent submits that the claim linking Covid-19 and the electioneering period to the Judgment Debtor's business difficulties is unfounded, as the judgment was delivered in 2016.
17. Furthermore, the Respondent submits that in the 4 years leading up to the onset of Covid-19, the Judgment Debtor made no efforts or proposals to settle the debt, indicating a lack of intention to settle the decree.
18. In respect of the averment that the Judgment Debtor's operations stand the risk of being paralyzed thus rendering their employees destitute if execution was to proceed, the Respondent submits that no evidence has been provided to support this claim. The respondent emphasizes that the Judgment Debtor has not submitted any audited accounts to demonstrate its inability to pay and this deliberate omission undermines the request for an order to pay in instalments. This court has nothing to work with in assessing the applicant's supposed financial constraints.
19. Additionally, the Respondent submits that no basis for the specific amount of Kshs.100,000/= and not more has been provided and it is unwise to just pluck figures from the air without first establishing a factual basis therefor.



20. In further opposition to the application the Respondent submits that the Judgment Debtor's failure to pay the decree for 8 years negates extension of the courts indulgence to pay in instalments.
21. Consequently, the Respondent concludes that the application is misguided and should be dismissed in its entirety.

### **Analysis And Determination**

22. After careful analysis of the application the supporting affidavit, replying affidavit and the submissions filed by the decree holder/ respondent, the only issue that arises for determination is whether the Applicant is entitled to the orders sought.
23. The Judgment Debtor seeks to be allowed to settle the decree in monthly instalments of Kshs 100,000/ = reviewable every three months. He bases this prayer on difficulties occasioned by the Covid 19 pandemic and tensions of the electioneering period.
24. The Judgment Debtor bases his application on amongst others Order 21 Rule 12 which provides as follows: -

“ 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”.
25. It is apparent from the above provision that the court has discretion to order for payment of a decreed amount in instalments upon provision of sufficient cause. Additionally, the court has latitude upon consideration of the peculiar circumstances of each case to order for payment in instalments on such terms that it deems fit.
26. The import of the foregoing legal provision therefore is that the Judgment Debtor is required to show sufficient cause to draw this court's discretion in its favour.
27. The applicable principles guiding the court in such circumstances were well set out in the cases of *Botanics Kenya Ltd v Ensign Food (K) LTD (1959)* and *A. Rajabali v Remtulla Alidina & Another (1961) E.A 565* in the following terms: -
  - a. The circumstances under which the debt was contracted
  - b. The conduct of the debtor
  - c. His financial position
  - d. His bona fides in offering to pay a fair proportion of the debt at once
28. In applying the above principles to the circumstances of this case, the issue of contraction of the debt is not disputed and was a consequence of a regular judgment.
29. In respect of the conduct of the debtor, it is evident from the record that judgment was entered on 12<sup>th</sup> April 2018, almost 6 years down the line no amount has been paid. In as much as on the 8/5/2024 an indication was made that a proposal had been issued, no evidence was provided in court.



30. With regard to the financial position of the Judgment Debtor, no evidence of financial hardship has been availed for interrogation by the court. It is therefore impossible for the court to know the exact financial situation of the Judgment Debtor. Therefore proposal of payment by monthly instalments of Ksh.100,000/ has no factual basis.
31. Lastly on payment of a fair proportion or the whole amount at once, save for the statement of financial hardships brought about by Covid 19 and the electioneering period, no proposal has been made for payment of a fair proportion of the decretal sum at once, followed by the monthly instalments of Kshs 100,000. It is incumbent upon the applicant to demonstrate sufficient reason so as to attract the court's discretion. In the circumstances of this case non has been availed.
32. It is instructive to note that the court must weigh the interests of both parties herein and any indulgence given to the Judgment Debtor must not prejudice the Decree Holder. It should be noted that Judgment in this matter was delivered in 2018 and six years down the line, the Decree Holder is yet to enjoy the fruits of the judgment. This court will not condone such delay in the realisation of the fruits of judgment by the respondent.
33. On the balance I do find that this application is devoid of merit and is thus dismissed with costs to the Decree Holder assessed at Ksh.20,000.
34. The above orders to apply mutatis mutandis to Kisumu High Court Misc. App No 142 of 2016.
35. Orders accordingly.

**DELIVERED, SIGNED AND DATED AT KISUMU THIS 31<sup>ST</sup> DAY OF OCTOBER 2024.**

**MWANAISHA S. SHARIFF**

**JUDGE**

