



**Awuonda v Kenya Commercial Bank Limited (Civil Appeal
9 of 2018) [2023] KEHC 3136 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3136 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 9 OF 2018
RE ABURILI, J
MARCH 27, 2023**

BETWEEN

JULIUS ODHIAMBO AWUONDA APPELLANT

AND

KENYA COMMERCIAL BANK LIMITED RESPONDENT

RULING

1. This Ruling determines the Notice of Motion Application dated April 12, 2022 brought under the provisions of Sections 1, 1A, 3, and 100 of the [Civil Procedure Act](#) (Cap 21) Laws of Kenya, and all other enabling provisions of the Law.
2. The Applicant who is the judgment debtor herein seeks the following orders:
 1. That the application be certified urgent be heard on priority basis.
 2. That pending the hearing and determination of the application, there be stay of execution and/or proceedings.
 3. That the Honourable Court be pleaded to order that the applicant do liquidate the decretal sum herein by way of equal monthly instalments of Kenya shillings 15,000 per month with effect from May 30, 2022, or such other reasonable sum considering the status of the applicant herein.
 4. That the costs of the application be provided for.
3. The Application is predicated on the grounds on the face thereof and the affidavit sworn by the applicant Julius Omondi Awuonda on April 12, 2022, reiterating the said grounds.
4. The applicant asserts and deposes in acknowledging that there is a valid decree of this court and the total outstanding sum is Kshs 366,531 against him. That he does not wish to challenge the same but



that the Respondent had since taken out a Notice to Show Cause why the judgment debtor/ applicant herein should not be committed to civil jail for non-payment of the said decretal sum in full.

5. That the applicant is a retired civil servant and not currently engaged in any economic activity but is determined to liquidate the decretal sum in monthly installments of Kshs 15,000 until payment in full, which is the only sum that he can afford considering his current economic status; and that the application is made in good faith.
6. The applicant reiterates the grounds in his supporting affidavit maintaining that in these harsh economic times, as a retired civil servant, he is unable to raise the entire decretal sum at once hence the prayer that he be allowed to liquidate the same in instalments as proposed.
7. Opposing the application, the decree holder /respondent filed a replying affidavit sworn by Linda Agatha advocate on March 8, 2023 deposing in contention after giving the history of this matter, that it is almost two years since the appellate Court ordered the applicant herein to refund the decree holder the sum of Kshs 100,000 initially awarded to him by the trial court as general damages and to bear costs of the appeal and the cross appeal. That the applicant has made no efforts to settle the said sum since judgment was delivered on February 10, 2021 and that he only came to court with the present applicant after receiving a notice to show cause.
8. It was deposed further that the judgment debtor has all along been aware of the decree against him but took no steps to settle the decree and that being retired and not being in gainful employment is no reason to default since he has not presented any evidence before this court for it to exercise discretion.
9. It was deposed that this application is not made in good faith and that the decree holder needs the money for its business hence should the court allow the application, then it will take two years to settle the outstanding amount.
10. It was further deposed that should the court be inclined to allow the application, then the applicant should be ordered to pay Kshs 200,000 lump sum and liquidate the remainder plus accrued interest in three equal instalments.
11. The parties' counsel relied on the pleadings and affidavits filed and urged the court to make the orders as appropriate with the applicant's counsel urging the court to grant the orders sought while the Respondent's counsel urged this court to dismiss the application with costs.

Analysis and Determination

12. I have considered the application as presented and the opposition thereto. In my view, the issue for determination is whether this court should allow the applicant judgment debtor to settle the decree against him by monthly installments as sought.
13. It is not in doubt that the applicant herein is the judgment debtor on appeal after the appellate court dismissed his suit in the lower court and allowed a cross appeal as a result of which the general damages which were awarded and paid to him in the lower Court were ordered to be refunded to the Respondent herein and the applicant was also ordered to pay costs of the appeal and of the cross appeal. The Respondent then filed its bill of costs which were assessed and hence the decretal sum now due.
14. It is also not in dispute that the applicant did not challenge the judgment of this court setting aside the decree issued by the lower Court.
15. What is in dispute is whether the applicant judgment debtor should be allowed to settle the decretal sums due by instalments of Kshs 15,000 monthly. The applicant deposes that he is a retired civil servant with no other source of means of livelihood hence his inability to settle the over Kshs 300,000 at once.



- He therefore seeks for the discretion of this court to be exercised in his favour to allow him liquidate the sums due by instalments.
16. On the part of the Respondent decree holder, it contends that the applicant has not come to court in good faith as he has taken long to settle the decree and that if the court allows the application, then it will take more than two years to clear the whole amount which is prejudicial to the decree holder as its business needs the money in issue.
 17. I observe that in his testimony in chief, the applicant stated that he was a nursing officer. He acknowledges that once judgment is made, such as herein, ‘it follows that payment should be made so that the Plaintiff can receive its award, as per the convectional principle that no decree should remain barren and that a decree holder should enjoy the fruits of his lawful judgment.’
 18. Nonetheless, the judgment debtor laments that he is unable to raise the whole amount due to his poor financial health status and the harsh economic times.
 19. Although the applicant relied on sections 1, 3 and 100 of the *Civil Procedure Act* in support of his application, I find no relevance in the section 100 of the Act which relates to general power to amend. There is no prayer for amendment here. In my view, the relevant procedural provisions which should have been cited at Order 21 Rule 12 of *Civil Procedure Rules, 2010* which empowers the Court to order that monies due and pursuant to the judgment of the Court, be paid in installments where sufficient reason is given. This provision gives the court discretion to order for settlement of a decree in installments where sufficient reason is shown.
 20. In the cases of *Keshavji Jethabbhai & Bros Limited v Saleh Abdullah* (1959) EA 260 and *A Rajabali Alidina v Remtulla Alidina & Another* (1961) EA 565, the court laid down principles that guide the discretion of the Court in ordering for payment by installments. Further in *Sawatram Ramprasad v Imperial Bank of India* the court held that the prompt payment of a fair proportion of the debt is not a condition precedent for the exercise of the discretion of granting payment by installments.
 21. In the case of *Rajabali Alidina v Remtulla Alidina & Another* (1961) EA 565, the court set conditions to be considered as follows:
 - 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.
 22. However, in the case *Keshavji Jethabbhai & Bros Limited v Saleh Abdullah* (1959) EA 260, the Court of Appeal held that:

“The mere fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reason...; ordinarily, he should be required to show his bonafides by arranging prompt payment of a fair proportion of the debt...”
 23. Order 21 Rule 12 of the *Civil Procedure Rules* provides that:

“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 installments 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.”

24. As earlier stated, Order 21 Rule 12 (2) of the *Civil Procedure Rules, 2010* empowers the court to determine whether payment of the amount decreed will be postponed or settled by way of installments. However, this discretion must be exercised judiciously and not arbitrarily or whimsically.
25. In *Keshavji Jethabhai & Bros. Limited v Saleh Abdullah (supra)*, the Court set out principles that should guide the Court in the exercise of discretion in such matter and states 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.
26. It is also trite law that in seeking for orders as is the case here, the onus is on the defendant to show that he has sufficient cause and is entitled to indulgence under this Rule (see *A. Rajabali Alidina v Remtulla Alidina & Another (supra)*). The question that arises is: what constitutes sufficient cause under Order 21 Rule 2(2) of the *Civil Procedure Rules*?
27. *Woodroffe & Anir Ali’s on Civil Procedure In British India*, 2nd Edition, P states that sufficient reason or cause will be based on the circumstances referred to herein as stated in the case of *Rajabali Alidina (supra)*.
28. In *Hildegard Ndalut v Lelkina Dairies Ltd & Anor*(2005) eKLR, the Court observed that:

“Both parties have referred to the case of *Keshavji Jethabhai & Bros Limited v Saleh Abdullah* (1959) EA 260, which is a case from a High Court of Tanganyika. That case followed the principles laid down in the Indian case of *Sawatram Ramprasad -vs - Imperial Bank of India* (1933) AIR Nag 33 - that a defendant should be required to show his bona fides by arranging fair payment of the proportion of the debt - in persuading the court to allow payment by way of installments. This, in my view, is the proper test to apply in granting orders for payment of a decretal amount by way of installments. A judgment creditor is entitled to payment of the decretal amount, which he should revive promptly to reap the fruits of the judgment. The judgment creditor might genuinely be in a difficult position in paying the decretal amount at once. However, he has to show seriousness in paying the amount. In that event he should show his bona fides by arranging fair payment proposals to liquidate the amount.” (Emphasis mine).
43. Further, in *Keshavji Jethabhai & Bros Limited vs. Saleh Abdullah (supra)*, the Court stated that:

“Defaults if due to the recession (if such it can be called) might be no fault of the debtors and in some circumstances might have been properly taken into consideration by the court in favour of the debtor when consideration was given to an application for installments;



hardship is a factor which has been recognized by superior courts. It is a question in each case whether some indulgence can fairly be given to the debtor without unreasonably prejudicing the creditor, who can be granted compensation by way of interest on the amount at any time outstanding. There are some instances in which debts are.....”

29. There has been delay in the disposal of this application but this has been due to absence of the Hon Judge was in conduct of the matter following his elevation to the Court of Appeal. However, in this case, there is no evidence that the applicant has raised any of the instalment monies as proposed in his application, to be liquidated to cover the period May 1, 2022 to date when his application was being argued. No undertaking was made. The applicant in my view is still living in May 2022 and is not clear when he will start remitting the Kshs. 15,000 even if an order for payment by instalment was made.
30. I totally agree with the respondent that the applicant only came to court to seek for discretion of the court after a notice to show cause was filed one year after the judgment that ordered him to refund the general damages paid to him was entered on February 10, 2021. No reasons have been advanced for the delay.
31. No court of law should allow a decree to remain barren. The applicant is guilty of inordinate unexplained delay and in my view, there is no good faith on his part as he has never made efforts one year after filing of this application to settle any part of the decree. Article 159 of the *Constitution* mandates this Court to administer justice without undue delay. In addition, a party seeking the discretion of the Court must come to court with clean hands and in good faith, not with the intention of delaying and eventually denying justice to the adversary justice seeker. No person who seeks justice from the courts should be rendered a mere pious explorer in the judicial process.
32. I find this application to be an afterthought and intended to deny the decree holder fruits of its lawful judgment. The applicant judgment debtor does not deserve the discretion of this court to be exercised in his favour owing to his conduct in these proceedings.
33. I find that the application dated April 12, 2022 is an afterthought and is devoid of any merit as no sufficient reasons have been advanced to the satisfaction of this court why an order for payment by instalments should be issued, now that by effluxion of time, the settlement of the said decree was postponed by the delay of hearing and determination of this application which was filed under certificate of urgency. The applicant judgment debtor has not shown good faith by payment of a fair proportion of the debt. If he had done so even by the instalments that he sought, by now, the debt would have drastically reduced.
34. I find this application dated April 12, 2022 and filed in court on July 5, 2022 not merited. It is hereby dismissed. I will however excuse the applicant from paying costs of this application to avoid escalation of costs and thereby protracting this matter further in court. The Decree holder is at liberty to execute decree for recovery.
35. So as this file may not be dormant, I hereby fix the matter for Notice to show cause why execution should not issue, on April 18, 2023.
36. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF MARCH, 2023

R.E. ABURILI

JUDGE

