



REPUBLIC OF KENYA



Bruce Odeny & Co Advocates v MCtough (Miscellaneous Application E168 of 2021) [2023] KEHC 27154 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27154 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS APPLICATION E168 OF 2021
RE ABURILI, J
DECEMBER 20, 2023**

BETWEEN

BRUCE ODENY & CO ADVOCATES APPLICANT

AND

WILLIAM ROMAN MCTOUGH RESPONDENT

RULING

1. The applicant/Client herein William Roman McTough moved court *vide* an application dated October 30, 2023 brought under the provisions of sections 1A, 1B and 3A of the [Civil Procedure Act](#) as well as order 21 rule 12 of the [Civil Procedure Rules](#) seeking the following orders:
 - i. Spent
 - ii. Spent
 - iii. That the honourable court be pleased to issue an order for payment of the decretal sum by way of instalments of Kshs. 100,000 per month until payment in full.
 - iv. That the costs of this application be in the course.
2. The application is premised on the grounds on the face of the application and the applicant's affidavit sworn on the October 30, 2023. The applicant's case is that the certificate of costs herein was converted into a judgement for Kshs. 3,638,008.50 after which the respondent extracted the decree and has obtained warrants of attachment in the sum of Kshs. 4,446,933.
3. It was the applicant's case that the debt arose out of an advocate client Bill of Costs as taxed that has since escalated to the amount of over 4 million.



4. The applicant averred that on the October 25, 2023, the respondent instructed auctioneers who proceeded and proclaimed assorted items at the applicant's Hotel premises.
5. It is the applicant's case that he is willing to pay the decretal sum, but owing to the economic challenges facing the hospitality industry and a general down trend in the economy largely precipitated by inflation, the business has been affected greatly thereby hindering the decree in lump sum.
6. The applicant further avers that the situation has been exacerbated by the fact that the hotel was built through a financing facility which is being serviced and thus the hotel's income fluctuates.
7. It is the applicant's case that he is willing to settle the outstanding amounts by monthly installment of Kshs. 100,000 till payment in full. The applicant averred that to demonstrate goodwill, he had already paid to the respondent Kshs. 650,000.
8. In response, the respondent filed a replying affidavit sworn on the November 15, 2023 in which the advocate contends that the costs were taxed on March 3, 2022 and that no payment was made until the execution process was commenced with proclamation of the goods done.
9. The respondent deposed that the inability of the applicant to settle the decretal amount had not been as the entity disclosed was not the applicant.
10. The respondent further deposed that they were amenable to payment by installments but not the sum of Kshs. 100,000 proposed by the applicant which they deemed was too low and which would take 5 years to satisfy the debt. Alternatively, the respondent proposed settlement of the debt in two equal installments as the applicant had taken 2 years without settling the taxed costs and that the applicant ought to meet the auctioneer's charges.
11. The parties' counsel argued the application orally on 22/11/2023, reiterating the grounds and depositions as reproduced above.

Analysis & Determination

12. Having considered the application and opposition thereto and the arguments for and against the application, the issue for determination is whether the application is merited.
13. Order 21 rule 12 of the *Civil Procedure Rules* 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 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.”
14. The above provisions of order 21 rule 12 (2) of the *Civil Procedure Rules, 2010*, therefore give the court a wide discretion as to whether payment of the amount decreed will be postponed or settled by way of installments. However, this discretion must be exercised in a judicial and not an arbitrary manner.
15. The case of *Keshvaji Jethabhai & Bros Limited v Saleh Abdulla* [1959] EA 260 lays down the 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.
16. It is also trite law that in seeking for orders as herein however, the onus is on the defendant to show that he has sufficient cause and is entitled to indulgence under this rule (see *Rajabali Alidina v Remtulla Alidina & another* (1961) EA 565. The question that arises is: what constitutes sufficient cause under order 21 rule 2(2) of the [Civil Procedure Rules](#)?
17. In the text book by Woodroffe & Amir Ali's on Civil Procedure in British India, 2nd Edition, it is stated that sufficient reason or cause will be based on the circumstances referred to herein as stated in the case of *Rajabali Alidina* (supra).
18. In the case of *Hildegard Ndalut v Lelkina Dairies Ltd & anor* (2005) eKLR, the Court observed that:
- “Both parties have referred to the case of *Keshavji Jethabbhai & Bothers Limited v Saleh Abdulla* [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 v 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 receive 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 added).
19. Finally, in the case of *Keshavji Jethabbhai & Bros Limited v Saleh Abdullah* [1959] EA 260 the Court stated as follows:
- “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 contracted without any specific agreement as to the time of payment, and when it is shown that dealings have been conducted on this footing and no injury is done to the creditor by ordering payment by installments, the court may be well entrusted with discretion to arrange the payment of a debt by installments, but when a contract is distinctly made for payment on a date certain for purpose of enabling the creditor to obtain punctual payment, the circumstances that the payment is secured by an hypothecation of property ought not deprive him of that right. If the reason assigned amounts to nothing more than an inability



to pay that is not sufficient reason why execution should not at once proceed...The length of time for repayment is a consideration and where the rate of installments which had been ordered would have taken some ten years to pay off the appeal court directed the sale of the property hypothecated. If the debtor is hopelessly embarrassed in his circumstances, there is little use in attempting to save him from the consequences of his own improvidence or misfortunes...The mere fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reason for granting installments and ordinarily he should be required to show his bona fides by arranging prompt payment of a fair proportion of the debt although this is not a condition precedent for the exercise of the discretion of granting installments. Each case has to be decided on its own merits, the predominant factor being the bona fides of the debtor.

Another consideration would be the ability of the debtor to pay substantial installments so that the repayment of the decretal sum would not be unreasonably delayed... The existence of sufficient reason will depend upon the facts of the particular case. The court will consider the circumstances under which the debt was contracted, the conduct of the debtor, his financial position, and so forth, and installments should be directed where the defendant shows his bona fides by offering to anything like a fair proportion of his debt at once...Because a person has been doing big business it does not follow that he should be able to pay his debts, which might well be proportionately larger". (emphasis added).

20. Guided by the legal principles in the above case, I have considered the circumstances of this case and the judicial pronouncements and I find that basically, all that the Applicant states is that the amount he is supposed to pay is enormous, and that he is unable to, due to the tough economic times that are prevailing and affecting the hospitality industry. He avers that, he is unable to pay all that lump sum money and that he showed good faith by paying the respondent the sum of Kshs. 650,000.
21. The Respondent on the other hand, submitted that, the Applicant has not shown that he is not in a financial position to pay the debt and has not shown good faith in a bid to settle the debt as he only paid the Kshs. 650,000 following proclamation of his goods. That despite continuous demand, the applicant has for the past two years failed to settle the debt. Finally, the Respondent argues that the proposed payments of 100,000 will keep it out of its money for a long time, a period of about 5 years.
22. I have considered these rival arguments and I find that first and foremost, it is a fact that the liability to pay the decretal sum herein arose out of a Certificate of Costs entered against the applicant following the taxing of a Bill of Costs prepared by the respondent for services rendered to the applicant and is thus a primary liability. Secondly, in my considered opinion, and by all means and standards, the amount herein of Kshs 4,446,933 is substantial. Thirdly, I take into account the fact that the Applicant is ready and willing to pay the amount sought in one full lump sum, but is unable to do so as he is in business which is affected by the current harsh economic times.
23. The applicant has also filed Financial Statements for a business he contends he owns, Suqomuqo Enterprises Limited in an attempt to demonstrate his financial position to enable the Court ascertain the reasonable amount that he can pay.
24. It is trite law that unless there are good, sufficient and adequate reasons, a judgment debtor should be allowed to enjoy the fruits of the judgment. Therefore, as much as the Court will consider circumstances under which this debt was incurred, the Court will also have to consider the right of the judgment creditor to prompt payment.
25. I note that since the Certificate of Costs was issued on the 3rd March 2022, the applicant failed to make any payments to the respondent and was only moved into making a payment of Kshs. 650,000



once until the execution process was commenced with proclamation of the goods done on the 25th October 2023, a period of over a year and 7 months later. This by all means will not be just and fair to the Respondent.

26. The Respondent in rejecting the offer made by the applicant to settle the decretal amount in monthly installments of Kshs. 100,000 made a proposal that the same should be settled in two lump sum installments. However, based on the above factors, it will be in the interest of justice to balance the rights of the parties by allowing the Applicant to make payments by installments but upon payment of reasonable amounts that will enable the Respondent enjoy the fruits of the Judgment.
27. It is against this background and in the interest of justice, that I make the following orders:
 - a. Having made a deposit of Kshs. 650,000, the applicant still owes the respondent Kshs. 3,796,933; and Taking into consideration the expected boom in the business of the hospitality industry over the Christmas period, the applicant shall make a lump sum deposit of Kshs. 1,500,000 within one month of today, thus, by the January 19, 2024;
 - b. The balance of Kshs. 2,296,933 shall be paid in 6 equal monthly installments of Kshs. 382,822 at the end of each month.
 - c. In default, execution shall issue.
28. Mention on 1/2/2024 to confirm compliance.
29. Each party to bear their own costs of the application.
30. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 2023

R.E. ABURILI

JUDGE

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