



REPUBLIC OF KENYA



Were & 2 others v The Board of Trustees of Postal Corporation of Kenya Pension Scheme (Civil Case 714 of 2009) [2022] KEHC 520 (KLR) (Commercial and Tax) (31 May 2022) (Ruling)

Neutral citation: [2022] KEHC 520 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 714 OF 2009
DAS MAJANJA, J
MAY 31, 2022**

BETWEEN

**TIMOTHY WERE 1ST PLAINTIFF
ROBERT MATANO 2ND PLAINTIFF
WINFRED MUTISO 3RD PLAINTIFF**

AND

**THE BOARD OF TRUSTEES OF POSTAL CORPORATION OF KENYA
PENSION SCHEME DEFENDANT**

RULING

1. On 16th October 2019, the court delivered judgment where the Defendant was allowed to adjust the monthly rent from KES 16,000.00 to KES 19,000.00 and further ordered that rent arrears amounting to KES 363,000.00 be paid by each of the Plaintiffs to the Defendant.
2. By a letter dated 17th October 2019, the Plaintiffs made a proposal to the Defendant to pay the decretal sum and arrears by monthly instalments in 72 months with effect from 1st November 2019. Consequently, the Plaintiffs have now filed an application by way of a Notice of Motion dated 24th February 2022 made under Order 21 Rule 12(1) and Order 51 Rules 1&3 of the *Civil Procedure Rules* (“the Rules”) and section 3A of the *Civil Procedure Act* seeking orders *inter alia* that the balance of the decretal sum be made by instalments in 32 months with effect from 1st March 2022 and that the Defendant be restrained from subjecting the Plaintiffs to any other form of execution.
3. The application is supported by the grounds on its face together with the supporting affidavit of the 2nd Plaintiff sworn on 28th February 2022 and opposed by the Defendant through the replying affidavit



of its Secretary, Elijah Koskey sworn on 24th May 2022. The parties' counsel also made oral arguments in respect of their positions

4. The main issue for determination is whether the Plaintiffs have made out a justifiable and sufficient case to enable the court order them pay the balance of the decretal sum in installments. The Plaintiffs' application is grounded under Order 21 Rule 12 of the Rules as follows:

Decree may direct payment by instalments [Order 21, rule 12.]

- (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 judgment or 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.
5. From the provisions above, it is upon the applicant to show sufficient cause why it should be allowed to pay the decretal sum in instalments and the court has a wide range of discretionary powers to either allow or disallow the application and issue such orders as it deems fit. This position was fortified by Law J., in *A. Rajabali Alidina vs Remtulla Alidina & Another* (1961) EA 565 when he set out some of the factors the court is to consider in granting such an application including; the circumstances under which the debt was contracted, the conduct of the debtor, his financial position and his bona fides in offering to pay a fair proportion of the debt at once. In the case of *Keshval Jethabhai & Brothers Ltd v Saleh Abdul* [1959]EA 260, the court also stated the principles that should apply in considering such an application, namely; each case must be considered on its own merit; mere inability to pay in full at once is not sufficient reason for exercising the discretion; the debtor should show bona fides by arranging prompt payment and that though hardship may be a factor, the court has to consider whether indulgence should be given to the debtor without prejudice to the decree holder.
6. Turning to the facts of the case, I find that Defendant does not dispute that the Plaintiffs have been paying the decretal sum in monthly instalments of KES 6,000.00 for the last 28 months. Quick math indicates that at least or almost half of the decretal sum has been paid and that the Plaintiffs state that they are willing to pay the balance within 32 months which translates to the said KES 6,000.00 every month. The Defendant's position is that the same should be paid 12 rather than 32 months. I did not hear the Plaintiffs claiming that they are unable to pay the balance of the decretal sum at once or that they are in such financial straits to accede to the Defendant's position.
7. Taking everything into account, including the Plaintiffs' bona fides to settle the decretal sum and the Defendant having held an enforceable decree since 2019 and which decree continues to accrue interest, I consider that it is reasonable that the Plaintiffs pay the balance of the decretal sum in 15 months.
8. I allow the Plaintiff's application dated 24th February 2022 to the following extent:



- a. The Plaintiffs be and are hereby ordered to pay the balance of the decretal sum in the judgment of 16th October 2019 by way of monthly equal instalments in 15 months with effect from 1st July 2022 until payment in full.
- b. Each instalment shall be paid on or before the 6th day of every month.
- c. In default of payment of any one instalment which is due and payable, the full amount outstanding to become due and payable and the Defendant will be at liberty to execute the decree.
- d. The costs of this application be borne by the Plaintiffs and are assessed at KES. 20,000.00 to be paid within 14 days from the date hereof.**

DATED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF MAY 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Kibet for the Plaintiff.

Mr Aloo instructed by Simba and Simba Advocates for the Defendant

