



**Kiprotich v Council of University of Eldoret & another; Kiyapi (Applicant)
(Petition 6 of 2015) [2022] KEHC 11088 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11088 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION 6 OF 2015
RN NYAKUNDI, J
JULY 28, 2022**

BETWEEN

CHERARGEI KIPROTICH PETITIONER

AND

COUNCIL OF UNIVERSITY OF ELDORET 1ST RESPONDENT

TERESA AYUKO ODUOR AKENGA 2ND RESPONDENT

AND

JAMES OLE KIYAPI APPLICANT

RULING

1. What is before the court is an application dated 23rd February 2022 expressed to be brought under order 21 rule 12 of the [Civil Procedure Rules](#). The applicant seeks the following orders in a nutshell;
 1. Spent
 2. Spent
 3. The Honourable court be pleased to grant leave to the applicant to liquidate the costs awarded by the Deputy registrar to the Respondent and the interested party being kshs. 1,287, 810/- paid in monthly instalments of kshs. 50,000/- to the 1st and 2nd Respondents and kshs. 50,000/- to the interested party until full settlement.
 4. Costs of the application be provided for.
2. The application is supported by an affidavit and based on the grounds that there is a contained therein.
3. The applicant's case is that he instituted a suit vide petition 6 of 2015 wherein the interested party was enjoined. The same was dismissed with costs vide a judgment delivered on 5th December 2019. He is in



the process of appealing the judgment. the respondents and the interested party filed their bill of costs and the same was taxed at kshs. 849,405/- for the 1st and 2nd respondent and kshs. 438,405/- totalling to kshs. 1,287,810/-.

4. The applicant is unable to pay all the money as a lump sum and seeks to be allowed to offset the amount in instalments of kshs. 50,000/- to the 1st and 2nd respondents and kshs. 50,000/- to the interested party until settlement. The amounts proposed by the respondents are too high based on what the applicant earns as per annexure CK2 being his payslip. He asks the application be allowed as prayed.
5. The 1st and 2nd respondent opposed the application vide a replying affidavit and submissions filed on 4th March 2022. They contend that the matter is res judicata as the court dismissed a similar application on 15th February 2022. The mere fact that the applicant is hard pressed to pay in full at once is not sufficient reason to grant instalments and he should show bona fides by arranging prompt payment of a fair proportion of the debt.
6. The proposal of kshs. 50,000/- instalments is not in good faith as it will take the applicant 2 and ½ years to pay the debt in full. They are willing to accept instalments of kshs. 400,000/- per month. They contend that the application be dismissed as it is an abuse of the court process.
7. The 3rd respondent opposed the application vide a replying affidavit dated 4th march 2022 where he deposed that the proposed instalment of kshs. 50,000/- is unreasonable as it will take 9 months to complete. The matter has been in court for six years and the applicant aims at denying him the fruits of the ruling. He is amenable to instalments of kshs. 146,135/-

Upon perusing the pleadings, responses thereto and the submissions I have identified the following issues for determination;

Whether the application is res judicata

Whether the order for payment in instalments should be granted

Whether the application is res judicata

8. Section 7 of the *Civil Procedure Act* states;

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. — (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.



Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

9. There is an application dated 6th July 2021 where the applicant herein sought orders for stay of execution pending determination of the intended appeal. In the present application the applicant seeks an order for stay of execution pending determination of the application and to be granted leave to liquidate the costs.
10. The issue of stay was already determined by the court in its ruling of 15th February 2022. It was determined on its merits and therefore is clearly *res judicata*. In the premises the application is *res judicata* insofar as the prayer for stay is concerned.

Whether the order for payment in instalments should be granted

11. The application is expressed to be brought under Order 21 rule 12 of the Civil Procedure Rules 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. The applicant herein has not made an attempt to settle the decretal sum and if he has he has not demonstrated the same to this court. Whereas the court acknowledges the hardship that may befall the applicant in paying the decretal sum, it is also alive to the fact that that is not a reason for the orders sought to be granted.

In *Freight Forwarders Ltd vs Elsek & Elsek (K) Ltd* (2012) eKLR, the court laid down the principles regarding what amounts to ‘sufficient cause’ as follows: -

- (a) The debtor is unable to pay in lump sum.
- (b) The debtor can pay by reasonable monthly instalments.
- (c) The application is made in utmost good faith.

In *Keshral Jetha alias & Brothers Ltd vs Saleh Abdul* (1959) E.A 260 the court stated as follows regarding the exercise of discretion: -

“That in each case must be weighed on its merits and facts. The inability to pay the decretal sum at once may not be considered as a sufficient reason. While it is possibly true that hardship to pay may account for the court to consider the application, but the Judgment debtor must demonstrate good faith or bona fide on his conduct to make arrangements for prompt payment and in a variety of ways such leave to permit the judgment debtor to pay the debt by way of instalments should not prejudice the judgment creditor”.



13. The question before this court is therefore; what would amount to reasonable instalments? I find that the applicant proposing kshs. 50,000 as instalments will delay the respondents from enjoying the fruits of the ruling. The applicant has not shown any good faith towards the settlement of this debt. I do take note that he has annexed his payslip as evidence of how he is unable to pay.

Court orders are not to be given in vain however and given that the main aim is to ensure that the respondents get to enjoy their fruits of judgment I grant the order to pay in instalments on the following conditions;

- a) The applicant pays a deposit of kshs. 350,000/- to the 1st and 2nd respondents, and kshs. 250,000/- to the 3rd respondent within 45 days from today's date. The balance to be paid in staggered monthly instalments of kshs. 80,000 and kshs. 70,000/- until payment in full together with costs incurred and interest on the decretal sum. Leave to apply in any event granted.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF JULY, 2022.

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R. NYAKUNDI

JUDGE

In the presence of

1. Mayga for Mwangi for the 1st and 2nd respondent
2. Wanjiku Karuga for the petitioner

