



Reliable Concrete Works v Ngewanji Company Ltd (Civil Case 69 of 2016) [2022] KEHC 12594 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 12594 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 69 OF 2016
HK CHEMITEI, J
JULY 28, 2022**

BETWEEN

RELIABLE CONCRETE WORKS APPLICANT

AND

NGEWANJI COMPANY LTD RESPONDENT

RULING

1. This court in its ruling dated February 10, 2022 adopted as an order of the court the arbitration award dated May 11, 2021. As a result of the same a decree and warrants of attachment and sale were issued on February 11, 2022 and March 15, 2022 respectively.
2. In the said decree, a decretal sum of Kshs 520,000/= was to be paid to defendant by the plaintiff/applicant within 60 days of the date of the award and in default interest was to accrue at court rates.
3. The plaintiff/applicant through its advocate forwarded six cheques of Kshs 86,666/= each which were due from March 21, 2022 to August 21, 2022 towards settlement of the decretal amount.
4. The defendant *vide* its letter dated March 21, 2022 as annexed in the plaintiff/applicant's supporting affidavit, returned the said cheques and demanded for payment of Kshs 788,100/= in full. That further, the defendant instructed auctioneers who went and proclaimed its motor vehicle.
5. The plaintiff/applicant thereafter filed the instant application under certificate of urgency *vide* notice of motion dated March 23, 2022 seeking the following orders;
 - a. Spent.
 - b. Spent.
 - c. That the Applicant be allowed to liquidate the decretal amount in monthly installments of Kshs 86,000/= from March 21, 2022 till payment in full.



- d. That the decree be reviewed and the interest be tabulated from July 12, 2021 at court rates.
- e. That costs of this application to be in the cause.
6. The application was based on the grounds on the face of it and the supporting affidavit of Irene Njeri Kimani, a director of the plaintiff/applicant.
7. The defendant filed a replying affidavit dated March 29, 2022 sworn by one Esther Gathoni Mwangi its advocate. She deposed that the award in this matter was read on May 11, 2021 almost one year ago and that the plaintiff/applicant was given 60 days to pay the sum of Kshs 520,000/=. That the plaintiff/applicant herein did not pay the said sum and on March 15, 2022 the court issued warrants of attachment of the applicant's properties and M/s Nasioki Auctioneers proclaimed the applicant's motor-vehicle.
8. She deposed further that the plaintiff/applicant had on March 18, 2022 without seeking their consensus wrote 6 postdated cheques directly to their client, by passing her office, intending to pay only Kshs 520,000/=. That the applicant was ignoring a clear order of the arbitrator to the effect that interest would start accruing from the date of the award till payment in full and that this court had assessed the interest and issued the warrants to the auctioneers.
9. She went on to depose that the interest assessed were in conformity with the law more particularly S 26(1) of the Civil Procedure Act. That the applicant had delayed in paying the decretal sum and that there was no court order for it to pay by instalments, thus their reason for returning the cheques. She stated that the plaintiff/applicant was a man of immense wealth with a massive factory producing concrete works on a minute to minute basis and was able to pay the whole amount in one instalment but was determined to delay the same.

Plaintiff/Applicant's Submissions

10. The plaintiff/applicant in its submission identified two issues for determination namely; whether the plaintiff/applicant should be allowed to liquidate the decretal amount in monthly instalments and whether the interest should be reviewed.
11. On the first issue, the plaintiff submitted that it acknowledged its obligation to pay the decretal amount but it was not able to pay the whole amount in one instalment due to the hard economic times. That the respondent had rejected its proposal to settle the decretal amount in six instalments and returned the cheques that it had issued. The plaintiff cited Order 21 rule 12 of the Civil Procedure Rules which empowers the court to order that monies due and pursuant to the judgement of the court be paid in instalments where sufficient reason was given. Additionally, that it had already paid 200,000/= and the balance to be cleared in four instalments.
12. On the second issue, the plaintiff submitted that there was an error apparent on the face of the records on the interest awarded of Kshs 264,600/=. The plaintiff submitted that the respondent had stated at paragraph 11 of her replying affidavit that interest started accruing from July 11, 2021 till payment in full. The plaintiff submitted further that the respondent had conceded that interest was to accrue on the award made of Kshs 520,000/= at court rates at the lapse of 60 days from the date of the award. According to the plaintiff the said interest started accruing from July 11, 2021.
13. He went on to submit that it was the respondent's case that interest had been assessed in conformity with the law more particularly section 26 of the Civil Procedure Act. While placing reliance on the said section of the law and the case of B O G Tambach Teachers Training Collage v Mary Kipchumba [2018] eKLR, the plaintiff/application submitted that court interest was 6% and therefore the interest



tabulated for 1 year ought to be Kshs 31,200/= and Kshs 72,800/= if the same is calculated at 14%. It urged the court to review the interest of Kshs 264,600 which was erroneous as it was over 50% interest rate per annum.

Respondent's Submissions

14. The respondent identified the only issue for determination as the one on interest. It is the respondent's submission that the plaintiff/applicant did not pay Kshs 520,000/= within 60 days and that one year had lapsed since the date of the decree. That the interest awarded by the arbitrator on the decretal amount was to run from July 10, 2021 at court rates. That further section 26 of the Civil Procedure Act gives the court wide and unfettered discretion to order any amount as interest as long as it was reasonable.
15. The respondent submitted further that the amount of Kshs 264,600/= as assessed by the deputy registrar was reasonable considering that this suit was filed in July 2016, a period of over 7 years. It urged the court not to disturb the same and dismiss the instant application taking into account that it had not been awarded costs.

Analysis and Determination

16. I have perused carefully the applicant's application herein, the affidavits and submissions by both parties and two issues arise for determination namely; whether this court should allow the plaintiff/applicant to pay the decretal amount in instalments and whether the interest should be reviewed.
17. In addressing the first issue, Order 21 rule 12(1) and (2) of the Civil Procedure Rules provides as follows:
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 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 installments, 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 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.
18. In view of the above, under Order 21 rule 12(2) the court has power and discretion to order payment of the decretal sum in instalments on application by the judgment-debtor with or without the consent of the decree holder. The judgment-debtor however has to show sufficient cause as to why he should be allowed to pay the decretal sum in instalments and/or why the payments should be postponed. Further in my opinion, this court discretion to order payment in instalments and/or on such terms it deems fit must be exercised judiciously having regard to the facts and circumstances of each individual case.
19. In the case of Diamond Star General Trading LLC v Ambrose D O Rachier carrying on business as Rachier & Amollo Advocates [2018] eKLR, G L Nzioka J relied on order 21 rule 12(2) to exercise his discretion to allow the applicant pay the decretal sum in instalments. The Judge cited with approval the case of Keshvaji Jethabhai & Bros Limited V Saleh Abdulla [1959] EA 260 which laid down the principles that should guide the court in exercising its discretion 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.
20. In the present case, the plaintiff/applicant has not demonstrated any reason for its inability to settle the decretal sum in one lump sum. There is no iota of evidence save the statement that it is was in an environment of tough economic hardship. This statement is relative. One must demonstrate sufficient reason so as to attract the courts discretion. In this regard this court is unable to do so for these observations.
21. On the second issue, whether this court should review the interest. Section 26 of the *Civil Procedure Act* provides as follows;
- i. Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
 - ii. Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.
22. In the instant case the deputy registrar assessed the interest which was to accrue at court rates after 60 days from the date of the award, on May 15, 2022 for Kshs 264,600. However, i do agree with the applicant that the interest was on the higher side. The award was delivered to the parties on May 11, 2021 and clearly interest was to accrue 60 days thereafter in the event that the decretal sum was not paid.
23. That being the case the interest was to be computed from July 11, 2021 till the date of payment. Simple arithmetic would indicate that the same based on the 14% being the court rates would be in the region of Kshs 72,800 and not what was indicated in the decree.
24. Consequently, this court reviews the interest as assessed by the deputy registrar downwards from Kshs 264,600 to Kshs 72,800.
25. The application is allowed only in terms of variation of interest stated above. The prayer on payment by instalments is disallowed. The respondent shall have the costs of this application.

DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 28TH DAY OF JULY 2022.

H K CHEMITEI

JUDGE

