



Power Governors (Kenya) Limited v Tracking Solutions Africa Limited (Miscellaneous Application 491 of 2016) [2022] KEHC 12268 (KLR) (Commercial and Tax) (5 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12268 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 491 OF 2016**

A MSHILA, J

AUGUST 5, 2022

BETWEEN

POWER GOVERNORS (KENYA) LIMITED APPLICANT

AND

TRACKING SOLUTIONS AFRICA LIMITED RESPONDENT

RULING

1. The applicant filed a Notice of Motion dated June 9, 2021 pursuant to order 9 rules 9 & 10, order 21 rule 12 of the [Civil Procedure Rules](#) and sections 1A, 1B and 3A of the [Civil Procedure Act](#) for the following orders;
 - a. The court to grant leave to the firm of W J Ithondeka & Co Advocates to come on record for the applicant / judgment -debtor in place of Liko & Anam Advocates.
 - b. Pending hearing and determination of this application, the court to issue an order for stay of execution.
 - c. The court to grant leave to the applicant to liquidate the decretal sum of kshs 4, 766,427.40 in instalments of kshs 50, 000 per month.
 - d. Costs of this application be in the cause.
2. The application was supported by the sworn affidavit of Crispus Kinene who stated that following an arbitral award, the court entered judgment against the applicant for a sum of kshs 2, 320,000 with interest at 12% per annum from August 2, 2016, on July 8, 2019.



3. In pursuit of the judgment, the respondent has instructed M/s Igare Auctioneers to attach the applicants assets towards liquidation of the decretal sum. On May 31, 2021 the said auctioneers issued a proclamation notice for the applicants assets towards the settlement of the decretal sum.
4. The applicant is facing great financial difficulties and is not in a position to liquidate the decretal sum in lump sum and if the execution is allowed to proceed, the applicant's tools of trade will be attached and paralyze its operations making it impossible to liquidate the decretal sum.
5. The respondent filed a Replying Affidavit dated August 20, 2021 and stated that the applicant's application is an afterthought and intended to delay the matter further and with ill motive against the respondent. Since the inception of this matter there has been calculated moves to frustrate the respondent by filing several applications and making applications for adjournments to derail the matter.
6. The application is made in bad faith with intention to confuse the pleadings and issues in contestation in this matter. A determination in this matter was made in 2019 almost three years ago and the applicant has been well aware of the existence of the said determination. The delay in this matter will deny the respondent the right to enjoy the fruits of its judgment that was duly entered in favour of the respondent.

Applicant's case

7. The applicant submitted orally that through the application it seeks leave of court to settle decretal sum of monthly instalments of kshs 50, 000 to settle the amount of kshs 4, 766,427.40 resulting from the arbitral award dated February 2, 2016 and adopted as a judgment of the court on July 8, 2019.
8. The reasons availed by the applicant for settlement of the amount in instalments was that due to Covid-19 pandemic, it suffered financial challenges as its business was affected.
9. The applicant asked the court to consider that even during the pendency of the application, the applicant made regular payments in form of cheques to the respondent in kshs 100, 000 every month. To date the applicant has paid kshs 1, 050,000 and none of the cheques paid to the respondent has been returned unpaid.
10. It was the applicant's prayer that the court exercises its discretion and grant its prayers sought to pay kshs 100, 000 until payment in full.

Respondent's case

11. In its oral submissions, the respondent submitted that the amount of kshs 100, 000 was not consensual as the payments made by the applicant were not consistent. By its tabulation the amount received in cheques to date is kshs 900, 240.
12. The respondent proposed that the applicant should remit kshs 300, 000 per month.

Issues for determination

13. The court has considered the application and the submissions and the issues for determination are; -
 - a. Whether leave should be granted to the firm of W J Ithondeka & Co Advocates to come on record for the applicant / judgment -debtor in place of Liko & Anam Advocates?
 - b. Whether the applicant has demonstrated sufficient ground for the grant of an order for stay of execution?



- c. Whether the applicant should be granted leave to liquidate the decretal sum of kshs 4, 766,427.40 in instalments of kshs 50, 000 per month?

Analysis

Whether leave should be granted to the firm of W J Ithondeka & Co Advocates to come on record for the applicant / judgment -debtor in place of Liko & Anam Advocates?

14. The applicant was until the delivery of judgment represented by the firm of Liko & Anam Advocates. Thereafter, the firm of W J Ithondeka & Co Advocates filed the current application in which at prayer 2 the firm seeks to come on record for the respondent in place of the firm of Liko & Anam Advocates.
15. The change of advocates after judgment has been delivered is provided for under order 9 rule 9 of the Civil Procedure Rules as follows;
- “9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—
- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
16. The provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates after judgment has been entered to be effected, there must be an order of the court upon application with notice to all parties.
17. It is noteworthy that although the prayer by W J Ithondeka & Co Advocates seeking to come on record was combined with the main application before the determination whether the firm was properly on record, the same is not fatal. Order 9 Rule 10 of the Civil Procedure Rules provides:
- “An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”
18. The Court therefore grants the firm of W. J. Ithondeka & Co. Advocates to come on record for the Applicant/Judgment Debtor.

Whether an order for stay of execution should issue?

19. Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice and the same position was echoed in the case of *Global Tours & Travel Limited versus Five Continents Travel Limited* [2015] eKLR where it was held that:
- “... Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind



such factors as the need for expeditious disposal of the case, the *prima facie* merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”

20. Further, a similar position was taken in [Elena Doudoladova Korir vs Kenyatta University](#) [2014] eKLR where the Court had this to say: -

“the application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & another vs Thornton & Turpin Ltd* where the Court of Appeal (Gicheru J A Chesoni & Cockar Ag JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely: - sufficient cause, Substantial loss would ensue from a refusal to grant stay. The applicant must furnish security; the application must be made without unreasonable delay.”

21. The applicant stated that on May 31, 2021 the auctioneers issued a proclamation notice for the applicants assets towards the settlement of the decretal sum.

22. The applicant in its affidavit stated that the proclaimed assets are not sufficient to satisfy the decretal sum in its entirety but will have the effect of grinding the applicant’s operations to a halt and making it impossible to settle the decretal sum.

23. Upon being served with proclamation notice, the applicant filed the present application dated June 9, 2021. There has therefore been no delay in making this application.

24. The court is satisfied that the applicant has met the grounds for grant of an order of stay of execution.

Whether the applicant should be granted leave to liquidate the decretal sum of kshs 4, 766,427.40 in instalments of kshs 50, 000 per month?

25. The decision on whether a court should allow a party to settle a decree by instalment is really an issue of discretion to be exercised judicially. Whether or not to allow a party to settle a decree by instalment, is a matter of exercise of discretion. And the court must be satisfied that the applicant deserves exercise of that discretion. The law on settling the decree by way of installments is contained in order 21 rule 12 of the Civil Procedure Rules as follows;

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 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.

26. The factors listed by the court in *Keshral Jetha alias & Brothers Ltd v Saleh Abdul* (1959) E A 260 attempt to answer the requisite guidelines in which exercise of discretion to decline or grant the order could be based.

“That is 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 its possibly true that



hardship to pay may account for the court to consider the application, but the Judgment debtor must demonstrate good faith or bonafide 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 installments should not prejudice the judgment creditor”.

27. The principles that should apply in considering such an application are namely;
- i. Each case must be considered on its own merit;
 - ii. Mere inability to pay in full at once is not sufficient reason for exercising the discretion;
 - iii. 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.
 - iv. The judgment debtor to show sufficient cause and justify indulgence.
28. The applicant argued that it is in the public transport industry and was greatly affected by the closures in the country due to the Covid-19 Pandemic. The applicant’s business and cash flows were greatly affected and it is therefore impossible for the applicant to settle the decretal sum in lump sum.
29. In addition, the applicant filed a Supplementary Affidavit dated March 29, 2022 and attached copies of cheques indicating that it had made payments monthly as follows;
- | Date | Cheque No | Amount |
|------------------|-----------|---------|
| June 23, 21 | 002912 | 80,120 |
| July 05, 21 | 024934 | 220,000 |
| July | Cash | 150,000 |
| July 05, 21 | 002933 | 220,000 |
| August 26, 21 | 025131 | 100,000 |
| September 29, 21 | 025199 | 100,000 |
| September 29, 21 | 003011 | 100,000 |
| October 22, 21 | 025277 | 100,000 |
| October 22, 21 | 003031 | 100,000 |
| November 26, 21 | 003053 | 100,000 |
| November 29, 21 | 025736 | 100,120 |
| January 31, 22 | 003117 | 100,000 |
| | 003152 | 100,000 |
| February 28, 22 | 025886 | 100,000 |
| March 29, 22 | 025912 | 100,000 |
30. In *Hildegard Ndelut v Letkina Dairies Ltd & Another* [2005] eKLR it was stated that;

“ 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 debtor 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.”

31. Similarly, in *Singh Gitau Advocates vs City Finance Bank Limited* [2013] eKLR, the court stated the following in regard to what constitutes sufficient cause-

“It is trite law that apart from looking at the peculiar circumstances of the case, the court when considering what sufficient cause amounts to, must consider a number of factors. This includes how the debt was incurred, the bona fides of the judgment debtor, the financial position of the debtor and the judgment creditor, the conduct of the parties and the hardship that may result from enforcing the decree. It is also my considered view that applications of this nature ought to be made without undue delay.”

32. The applicant expressed that it is facing great financial difficulties and is not in a position to liquidate the decretal sum in lump sum. On hardship to the debtor, it is evident that the respondent/applicant has no capacity to liquidate the decretal sum at once or do so in huge amounts in light of its financial position but it is also clear that the amount proposed as monthly instalment of kshs 50,000/- would while indulging the debtor greatly prejudice the creditor.
33. The decree holder does not dispute the payment of the decretal sum by instalments and proposed a higher figure of kshs 300,000/-. In the interest of justice that the applicant’s application is allowed and the monthly payments should be kshs 150,000/- after making a lump sum deposit of kshs 300,000/-

Findings and determination

- i. The application is found to be with merit and it is hereby allowed.
- ii. The court therefore grants the firm of W J Ithondeka & Co Advocates leave to come on record for the applicant/judgment debtor.
- iii. The applicant is hereby granted an order of stay of execution on condition that a lump sum deposit of kshs 300,000/- be made within 14 days from the date hereof; thereafter the applicant to make payments of kshs 150,000/- on the last day of each and every succeeding month; in default of any installment the decree/holder at liberty to proceed with the execution of the decree.
- iv. The applicant shall bear the costs of this application.

Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 5TH DAY OF AUGUST 2022.

HON A MSHILA

JUDGE

In the presence of;

Ithondera for the applicant

No appearance for the respondent

Lucy.....Court assistant

