



Mugendi Karigi & Co. Advocates v Doric Industries Limited (Miscellaneous Application E057 of 2021) [2023] KEELC 19186 (KLR) (31 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19186 (KLR)

CIVIL CASE NO. 507 OF 2013

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MISCELLANEOUS APPLICATION E057 OF 2021

MD MWANGI, J

JULY 31, 2023

IN THE MATTER OF THE MILIMANI ELC CASE NO. 686 OF

2017 FORMERLY MILIMANI CIVIL CASE NO. 507 OF 2013

BETWEEN

MUGENDI KARIGI & CO. ADVOCATES ADVOCATE

AND

DORIC INDUSTRIES LIMITED CLIENT

(In respect of the Client's Notice of Motion Application dated 16th May, 2023 seeking payment of the decretal amount by instalments)

RULING

Background

1. The application before me is a Notice of Motion dated 16th May, 2023 brought under the provisions of Sections 1A and 3A of the *Civil Procedure Act*, Cap 21, Order 21 Rule 12 (2) and Order 22 Rule 22 of the *Civil Procedure Rules*, 2010. Substantively, the Client prays for orders that it be allowed to pay the decretal amount of ksh 5,735,020. 76 by installments as follows: -
 - i. To pay a sum of ksh 500,000/= before the end of July, 2023
 - ii. The balance thereof to be liquidated on a quarterly basis i.e. a sum of ksh 300,00/= after every three (3) months commencing from the end month of October, 2023 until full and final payment
2. The application is premised on the grounds on the face of it and is supported by an affidavit sworn by Francis J. Ngigi deponed on the 16th May, 2023. The deponent avers that Advocate represented



the Client in Milimani ELC. Case no 686 of 2017, which matter is still ongoing. That the basis of the suit was that the Client was illegally and unlawfully evicted causing it to loose goods valued at ksh 106,554,875.30/=.

3. As a result of the said eviction, the operation of the Client's business diminished to a capacity of 20% and it has since been struggling to keep afloat amidst other debts. Further that there are four other taxation matters pending before the High Court Division, whose ruling is set for September 2023.
4. The deponent avers that the Applicant is ready and willing to settle the decretal sum save that it has been experiencing financial challenges and continues to accumulate significant losses. He therefore prays that the Applicant be granted adequate time to settle the Judgement sum.

Replying Affidavit

5. The application is opposed by the Advocate who filed a Replying Affidavit sworn on 2nd June, 2023 by Morris M. Karigi. The Advocate states that the application is defective, bad in law and does not conform to the requirements of stay of execution. That the Client intention is to stall the Advocate from enjoying the fruits of the decree issued herein in his favour.
6. The deponent further asserts that the proposal to pay the decretal sum as proposed by the Client is unreasonable and unacceptable. That this court ought to balance the weighty right of the decree holder to enjoy the fruits of the Judgement with that of the Applicant. The proposal to settle the decretal sum as suggested by the Client will result in the decretal sum being paid in a period of over 53 months.
7. Further, that the Client has not shown good faith in the matter by paying a lump sum deposit prior to approaching this court. The Advocate proposes that the Judgement Debtor be directed to immediately pay a lump sum of ksh 2,000,000/= by the end of June, 2023 and the balance thereafter to be paid in monthly installments of ksh 500,000/= subsequently.

Supplementary Affidavit

8. The Client/Applicant filed a Supplementary Affidavit deponed on the 12th June, 2023. The deponent avers that the Advocate will not be prejudiced as he is also waiting to be paid in other taxation matters against the Client herein. That due to the destruction of its machinery and other properties, the Client can only be able to pay the decretal sum as proposed.

Court's direction

9. The court directed that the application be canvassed by way of written submissions. The Client filed its submissions dated 19th June, 2023. However, the Advocate did not file any.

Issues for Determination

10. I have carefully considered the application and the response by the Advocate as well as the submissions by the Client. The sole issue for determination in this matter is whether the Applicant should be allowed to pay the decretal amount by installments as proposed.



Analysis and determination

11. The applicable provision of the law in respect of the application before the court is Order 21 Rule 12 of the *Civil Procedure Rules* (2010). The rule 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. It is clear that the court has the discretion to allow settlement of a decree by installments where sufficient cause has been shown by an Applicant for such orders. The discretion being judicial discretion must at all times be exercised judicially and in the interest of justice. It is incumbent upon the Applicant to show sufficient cause in order to benefit from the discretion of this court.
13. The Applicable principles for the grant of orders as sought by the Applicant herein were set out in the cases of *Botanics Kenya Ltd v Ensign Food (K) LTD* (1959) as follows: -
 - (a) The circumstances under which the debt was contracted
 - (b) The conduct of the debtor
 - (c) His financial position
 - (d) His *bona fides* in offering to pay a fair proportion of the debt at once.
14. In the case of *Freight Forwarders Ltd v Elsek & Elsek (K) Ltd* (2012) eKLR, the court defined what amounts to ‘sufficient cause’ to include the following;
 - a. the debtor is unable to pay in lump sum
 - b. the debtor can pay by reasonable monthly installments
 - c. the application is made in utmost good faith
14. In an earlier decision in the case of *Keshvaji Jethabhai & Bros Limited v Saleh Abdulla* [1959] EA 260 the court had restated the principles that should guide the court in exercising its discretion as hereunder:
 - 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.
15. From the above cited authorities, the burden is upon the Applicant to justify the court's exercise of its discretion in his favour.
16. The Bill of costs that gave rise to the decree herein was taxed and a ruling delivered way back on the 4th July, 2022. The Certificate of Taxation was issued on 4th August, 2022. The Client's attempt to set it aside was not successful. This court after considering the application by the Client delivered its Ruling on 21st February 2023 striking out the application with costs. Subsequently, judgement was entered in favour of the Advocate against the Client. It is only after the entry of judgement that the Applicant moved this court seeking to pay the decretal amount by installments. The Applicant has not, since the taxation of the bill of costs against it made any payments to the Advocate. No evidence has been presented before the court to prove such payments, if any.
17. The Applicant cites financial constraints on its end hence the inability to pay the decretal sum in a lump sum. The Advocate has however extended an olive branch to the Applicant and stated that the Applicant should deposit a sum of ksh 2.0 Million then subject the payment of the balance of decretal amount to monthly installments of ksh 500,000/=. The Applicant in its further affidavit reiterated that it could only afford to pay as proposed in its application.
18. Whilst the court considers the hardship of the debtor as a factor in making its determination it is also bound to weigh the same against interests of the decree holder who hold a lawful decree of this court in his hands and is entitled to the fruits of his judgment. It is a delicate balancing act.
19. This court, having carefully considered the plea by the Client/Applicant and the circumstances of this case makes the following orders;
- a. That the Client/Applicant to pay 20% of the decretal amount to the Advocate/Decree Holder by 31st August, 2023.
 - b. Thereafter to pay the balance in equal installments of ksh 500,000/= after every three months, the first installment being due, on or before 30th November, 2023. Subsequently thereafter, on or before the last day of every third month until payment in full.
 - c. In case of default, the decree holder will be at liberty to execute without any further reference to this court.
 - d. The costs of this Application be borne by the Applicant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Kamau holding brief for Mr. Machira for the Client/Applicant.

Mr. Njagi for the Advocate/Respondent.

Court Assistant – Yvette.

M.D. MWANGI



JUDGE

