



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 3 OF 2020

ESTHER MARINGA KINYUA.....APPELLANT

VERSUS

LILIAN GAKII MARETE.....RESPONDENT

(Being an appeal from the Ruling of the Chief Magistrate's Court at

Meru in Meru CMCC Civil Case No. 228 of 2016 delivered

on 18th December, 2019 by Hon. Abuya, CM)

JUDGMENT

Introduction

1. The Respondent secured judgment in her favour on 11th April 2018, wherein the Appellant was ordered to pay her the sum of Ksh 1,120,000/=. This amount constituted the balance of the refund of purchase price earlier paid to the Appellant, who was the vendor in a failed sale agreement for land between the two parties.

2. The Appellant made an application in the trial Court seeking to be allowed to settle the decretal sum by way of monthly instalments of Ksh 20,000/=. By a Ruling delivered on 18th December 2019, the Appellant was ordered to pay to the Respondent the sum of Ksh 500,000/= lump sum and thereafter to pay the balance in monthly instalments of Ksh 100,000/= each. The Appellant failed to comply with the Ruling.

3. She has filed the instant appeal urging the following 3 grounds of appeal: -

i) That the learned trial magistrate erred both in law and in fact in finding that the Appellant had shown the Court sufficient cause why she should be allowed to pay the decretal sum by instalments but impose onerous terms thereon.

ii) That the learned trial magistrate erred both in law and in fact in failing to exercise her discretion judicially/correctly in the circumstances of the case.

iii) That the learned trial magistrate erred both in law and in fact in failing to find that the orders sought by the Appellant would not prejudice the Respondent.

4. She prays for the appeal to be allowed and for the Ruling of the trial Court of 18th December 2019 be set aside and her application be allowed as prayed.

5. The appeal was opposed by the Respondent who claims that she has a right to enjoy the fruits of her judgment.

Appellant's Submissions

6. The Appeal was canvassed by way of written submissions. The Appellant filed submission dated 25th June 2021. She gave a brief background of the matter urging that her application dated 9th September 2019 filed before the trial Court sought stay of execution of the decree and an order to be allowed to liquidate the decretal sum by way of monthly installments of Ksh 20,000/= until payment in full. That on 18th December 2019, the trial court delivered a Ruling ordering inter alia that she pays the Decree Holder/Respondent a lump sum of Ksh 500,000/= within 30 days from the date of the Ruling and to liquidate the balance of the decretal sum after paying the sum of Ksh 500,000/= in monthly installments of Ksh 100,000/= with effect from 30th February 2020 until payment in full.

7. She urges that she cannot afford to pay the aforesaid sums as ordered by the trial court. She urges that in her aforesaid application before the trial court, she demonstrated to court in paragraphs 5 and 7 that she was inter alia a house wife, 58 years old, sickly, dependent on her daughter for her medical bills and upkeep, that she had no sources of income due to her medical conditions and age, and that she had availed medical documents. She urges that the trial Court found that she had shown the court sufficient cause why she should be allowed to pay the decretal sum by installments.

8. She urges that the trial court, therefore, erred in imposing the aforesaid onerous terms against her and exercised discretion wrongly in the circumstances. She urges that she is ready and willing to pay a lump sum of Ksh 100,000/= within 30 days of being ordered to do so by the Court and thereafter to liquidate the balance of the decretal by way of monthly installments of Ksh 20,000/= until payment in full.

Respondent's Submissions

9. The Respondent filed submissions dated 12th June 2021. The Respondent urges that she entered into an agreement for sale of 10 acres of Land parcel no. NKUENEZMITUNGUU-KITHINU/215 on 6th February 2015 with the Appellant. That the Appellant was the seller. That the consideration agreed upon was Ksh 3,500,000/- which would be paid in two installments of Ksh 1, 750, 000/=. One upon signing of the agreement and the other on 6th April, 2015. That the parties herein later fell off and signed a revocation of the sale agreement on 23rd July 2015, terms of which were that she, the plaintiff/respondent would receive a full refund of the amount paid to the defendant/appellant, that is Ksh 1,120,000/= and the defendant/appellant would get back the parcel of land. That she reverted the land back to the defendant/appellant. However, the defendant/appellant has never refunded back the amount paid to her that is Ksh 1,120,000/=. That she then filed Civil Case No. 228 of 2016 so as to recover the said amount in which the court delivered Judgment on 11th April 2018 against the defendant/appellant ordering her to pay Ksh 1,120,000/= and costs of the suit. That the decretal sum then amounted to Ksh1, 364, 104/=.

10. She urges that the defendant/appellant herein did not file an appeal within the stipulated time but filed an application before the trial court praying that the court allows her to pay decretal sum by way of monthly installments of Ksh 20,000/= until payment in full. That the trial court then delivered a ruling on 18th December 2019, in which it ordered the defendant/applicant to pay a lump sum of Ksh 500,000/= within 30 days from the date of the ruling and the balance in monthly installment of Ksh 100,000/=.

11. She urges that the appellant has never complied with the Judgment of the court delivered on 11th April 2018 and the ruling of 18th December 2019 and that neither has the appellant taken any step or made any effort to pay even a single cent to the respondent and has now come to this court for redress.

12. She urges that the appellant is in possession of the subject land and she, therefore, has no reason to withhold the amount paid to her by the respondent herein. She urges that the proposition that the Appellant is sickly and therefore not able to pay the decretal sum and the proposal to be allowed to pay Ksh 20,000 monthly is not viable. She urges that no good explanation has been tendered as to why the said amount or even part of it has not been paid to-date or prior to her alleged sickness since 23rd July 2015 when the agreement between the parties was revoked. That the trial court had on several occasions given the judgement debtor time to pay the decretal sum but the same has not born any fruits, specifically on 19th December 2018, 30th January 2019 and 1st April 2019, and that no effort whatsoever was made to clear the decretal sum.

13. She urges that it is worthwhile to note that the notice to show cause dated 17th August 2018 was issued and served upon the appellant herein, but she did not attend court to show cause why the said decretal sum had not been paid prompting issuance of an arrest warrant. After which she rushed to this court to appeal against the court's ruling.

14. She cites *Rajabali Alidina vs Remtulla Alidina & Another* [1961] EA 565 quoted in *Nicholas Gitonga Murongi vs Susan Wairimu & 4 Others* [2021] eKLR for the considerations to be made in an application seeking to settle the decretal sum via installments which she urges are as follows: -

i) The circumstances under which the debt was contracted.

ii) The conduct of the debtor

iii) His financial position, and

iv) His bona-fides in offering to pay a fair proportion of the debt at once.

15. She urges that in the present case, the appellant has not been serious in making an attempt to clear the decretal amount. That the amount suggested of Ksh 20,000 per month will take a period of five (5) years to clear the decretal sum yet the appellants parcel of land was reverted back to her. She urges that no financial statements were provided to the Court for proof of the financial difficulties the appellant alleges to be experiencing or current medical reports not forgetting the amount stands unsettled since 2015. She urges that the amount of Ksh 20,000/= is not a reasonable monthly installment payment and the same is not a fair proportion, and that she is entitled to enjoy the fruits of her judgment.

16. She relies on *Lavington Security Limited, Hildegard Ndelut vs Letkina Dairies Ltd & Another* also quoted in *Nicholas Gitonga Murangi vs Susan Wairimu & 4 others* (2021) eKLR. She prays that the appellant be ordered to pay the whole decretal sum of Ksh 1,364,104/+, plus the accrued costs to date and the costs of the appeal herein failure to which the respondent be allowed to proceed with execution. She also prays for dismissal of the appeal herein with costs to herself.

Issue for Determination

17. The only issue of determination in this appeal is whether to vary the terms of payment of the decretal sum herein as per the proposal made by the Appellant.

Determination

18. The existence of a debt owed to the Respondent by the Appellant is not in dispute. The principal debt as per the trial Court's judgment was Ksh 1,120,000/=. As at 11th April 2018, the debt had accrued interests and the total amount due was Ksh 1, 364, 104/=. It is apparent that from the time of delivery of Judgment in April 2018 to date, the Appellant has not made any payment. This Court further observes that it took the Appellant a whole year and 3 months to make an application to be allowed to pay the decretal amount in installments. Further, despite proper service, she failed to attend to the notice to show cause. These factors do not demonstrate the qualities of good faith to clear the debt on the part of the Appellant.

19. The Court has perused the Ruling of the trial Court. The trial Court was convinced that the Appellant had shown sufficient cause as to why she should be allowed to pay the decretal amount in installments on the grounds that she was sickly, elderly, a housewife and had no source of income and she depended on her daughter for upkeep. This Court agrees that on a balance of probabilities, these factors may have been persuasive to make the trial Court find that sufficient cause had been shown. However, this Court is also mindful of the fact that the Appellant was the same person who had earlier on intended to sell property to the Respondent. Although the Court is aware that ownership of property may not directly translate to cash, this Court finds that there was reason to doubt her alleged inability to settle the decretal amount. The Court however considers that the Covid-19 pandemic came with harsh economic constraints and her claim for inability to pay may have been genuine.

20. Seeing that the sale agreement was entered into in 2015, almost 6 years ago, this Court finds that the interests of justice demands expedited payment of the decretal amount. The proposal of payment of a lump sum figure of Ksh 100,000/= followed by installments of Ksh 20,000/= per month is not a viable option, because it would take over 5 years to have the entire debt settled, assuming there are no further defaults in payment. That would not be beneficial to the Respondent as she would have waited for over 10 years to get back her cash. The Court considers that justice delayed is justice denied. A Court should not make orders which result in unreasonable delay in the enforcement or implementation of its judgment or orders and the Court considers a delay of over one year to be unreasonable.

21. This Court will, therefore, order that the Appellant pays the Respondent half of the decretal amount due as at the date of this Ruling, and thereafter to settle the balance by way of 12 equal monthly installments so as to have the entire debt cleared in 12 months.

ORDERS

22. Accordingly, for the reasons set out above, this Court makes the following orders: -

i) The Appellant is hereby ordered to pay to the Respondent half (50%) of the decretal sum plus interests accrued as at the date of this Ruling, within the next thirty (30) days.

ii) The Appellant will thereafter pay to the Respondent the balance, together with interests accrued and costs, in twelve (12) equal monthly installments in such manner as to ensure that the entire debt is cleared in 12 months from the date of the payment in i) above.

iii) In default of payment in i) and ii) above, the Respondent shall be at liberty to execute for recovery of the decretal sum.

iv) The Respondent shall have the costs of the Appeal.

Order accordingly.

DATED AND DELIVERED THIS 18TH DAY OF NOVEMBER 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S John Muthomi & Co. Advocates for the Appellant

M/S Mbaabu M'Inoti & Co. Advocates for the Respondent