



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 399 OF 2016

CHEMI AND COTEX KENYA LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

RAPRA LIMITED.....1ST DEFENDANT/APPLICANT

SACHIN SUMARIA.....2ND DEFENDANT/RESPONDENT

RULING

1. The subject application herein is dated 9th September 2019. The applicant is seeking for orders,

(a) That the court be pleased to order and/or allow the 1st defendant/applicant to liquidate the judgment sum of Kshs. 19,904,290.31 plus interest at court rates by monthly installments of Kshs. 300,000 with effect from 10th October 2019 and thereafter on the 10th of every subsequent month until the whole admitted sum is fully paid;

(b) That costs be provided for.

2. The application is premised on the provisions of; Sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act, Order 13 Rules 1 and 2, Order 21 Rule 12 and Order 51 Rule 1 of the Civil Procedure Rules. It is supported by the grounds on the face of it and an affidavit of even date sworn by Sachini Sumaria. He avers that, parties reached a compromise to the effect that as at the end of April 2019, the debt owed by the 1st defendant (herein “the applicant”) inclusive of the judgment on admission entered vide ruling delivered on 30th August 2018 was Kshs. 23,500,865.70.

3. However, the decretal sum is colossal and owing to the economic conditions of the applicant, it is not able to pay the entire sum at once. The applicant is willing and ready to pay the claim by monthly installments of Kshs. 300,000, but the offer has been rejected by the Respondent, extracted a decree and commenced execution. Further, Timeless Dolphin Auctioneers has been instructed by the Respondent and commenced execution of the warrants of attachment and sale.

4. In that regard, on 9th September 2019, the Auctioneers served the applicant with the warrants of attachment and proceeded to proclaim movable assets at Supa Brite Limited; yet they are not a party to the instant proceedings.

5. The applicant reiterated that, the delay in effecting any payments to the plaintiff is attributed to its heavy debtors inclusive of Uchumi Supermarket (under Insolvency) whom the applicant supplied goods worth Kshs. 3,812,717 and at the instructions of the plaintiff. The applicant was forced to look for alternative funding to clear the debt due to the plaintiff. Further, it has a loan of Kshs. 65,000,000 from the Bank of Baroda which it is currently servicing inclusive of the accrued interest rates.

6. It is therefore in the interest of justice that, the court intervenes as a matter of urgency and stays the execution of the Judgment and the decree. Further, as a sign of good faith, it is only fair that the applicant is allowed to pay the respondent the sum owed by monthly installments and that the defendant will not suffer any prejudice.

7. However, the application was opposed vide a replying affidavit dated 23rd September 2019 sworn by Suresh Govindarajan, the Country Manager of the Plaintiff. He averred that, Judgment was entered in the sum of Kshs. 23,500,865.70 as at the end of April 2019 in favour of the plaintiff as against the applicant on 3rd July 2019 in the presence of Advocates of both parties and in accordance with the Mediation Settlement Agreement.

8. The debt has been outstanding since 2014 when the applicant acknowledged owing the sum of Kshs. 53,310,659.36. The applicant then effected various payments to the plaintiff between December 2014 and July 2016, leaving an outstanding debt of Kshs. 24,757,572 which the plaintiff claimed in the suit filed on 5th October 2016.

9. Further, the applicant admitted the sum of Kshs. 19,904,290.31 in its defence filed on 29th November 2016, and proposed to pay the respondent Kshs. 1,000,000 monthly installments towards settling the admitted sum. However, it has never made a single payment since July 2016 despite making the aforesaid proposal. Thus the debt has remained outstanding for an inordinately long period. Further, when the court ordered mediation, the applicant made another proposal to settle the agreed sum of Kshs. 23,500,865.70 by way of monthly installment of Kshs. 300,000, but has not honoured the same.

10. The Respondent argued that, the instant application has clearly been brought late and without any good faith. If the applicant were truly desirous of settling the judgment by way of monthly installments, it would have moved the court soon after partial judgment was entered on 30th August 2018 or immediately after the Mediation Settlement Agreement was adopted on 3rd July 2019.

11. Further, the applicant is seeking for discretionary orders and therefore it behoves it to act equitably and in good faith which has not been demonstrated. In addition the proposal herein is substantially lower than the one made in the defence and the respondent has reason to believe that the applicant has been deliberately mismanaged as a mischievous ploy to escape its financial obligations. There is also no evidence to support the allegation that the applicant is servicing a loan. Finally, the Respondent argued that, if the proposal is to pay the sum by monthly installments proposed, it will take at least sixty and half (6½) years to settle the sum.

12. However, the Respondent would indulge the applicant and allow it to liquidate the decretal sum of Kshs. 23,500,865.70 due as at the end of April 2019 in more reasonable terms including but not limited to the ones enumerated hereunder. That the applicant makes a lumpsum payment of at least Kshs. 5,000,000 immediately and pays the balance thereof in monthly installments of Kshs. 500,000 until payment of the decretal sum inclusive of accruing interest in full.

13. In the alternative, (a) the applicant pays the decretal sum by monthly installments of Kshs. 1,000,000 until payment thereof inclusive of accruing interest in full; (b) pay Kiriba Kariuki & Associates Advocates fees and auctioneer's charges in the sum of Kshs. 651,666 as particularized in the annexures marked "SG 1a", "SG 1b" and "SG 1c" immediately. Further that, the applicant and its financier, namely Supa Brite Limited to be restrained from disposing off any of their properties until the decretal sum inclusive of accruing interest is paid in full and Supa Brite Limited gives an unconditional guarantee for the decretal sum inclusive of accruing interest in full. In default of any single installment, execution to issue as against the applicant and its financier; Supa Brite Limited.

14. However, the applicant filed a supplementary affidavit dated 12th November 2019 sworn by Mr. Sachin Sumaria, in which he deposed that, he is a director at Supa Brite Limited which is not a party in the instant proceedings. He prayed to the Honourable court to direct that should any execution be permitted by the Honourable court, the same should not be against a party or individual who is unrelated to the current proceedings. That it is evident from the financial statements that the applicant is operating under extreme difficulty financially, forming the basis of approaching the Honourable court for leniency in ensuring that it meets its financial obligations nonetheless.

15. That the law permits and indeed the Honourable court has unfettered discretion to order postponement or payment of decretal sum by way of installments where sufficient cause and bona fides has been demonstrated by the applicant. The applicant agrees that installments proposed may seem low in relation to the outstanding debt but they are reasonable in the circumstances taking into account that the applicant is no longer in business but has undertaken to make arrangements to ensure that the monthly installments will never lack.

16. The applicant had offered to settle the balance at monthly installments of Kshs. 1,000,000 in the year 2016 but the same was declined by the respondent. Thereafter, the applicant's Managing Director suffered from a terminal illness that confined him to hospital for lengthy spells. This further contributed to the applicant's collapse of business. Upon being discharged from hospital, the applicant's director tabled another offer to the respondent to settle the outstanding debt at monthly installments of Kshs. 500,000. This offer was also rejected by the respondent.

17. Subsequently, the parties were heard orally on the application and repeated the averments in the affidavits. I have considered the arguments advanced and I find that the applicant does not dispute that it has defaulted in payment of the decretal sum. The Respondent's learned counsel told the court orally that, though the applicant had offered to be paying Kshs. 300,000 per month, but has not repaid any single installment. Thus they are in arrears of Kshs. 1,800,000 million. In response thereto, the applicant's learned counsel informed the court that, the applicant was ready to pay up the arrears.

18. However, the Respondent indicated it would accept that amount on a without prejudice basis. The parties agreed the sum be paid but could not agree on the repayment of the balance thereof.

19. Be that as it were, taking into account that the payment of the sum herein through installments of Kshs. 300,000 would take seven (7) years to fully settle the claim, I shall reduce that period to 3 ½ years. Therefore, the applicant shall pay the decretal sum as follows:-

(a) Kshs. 1,800,000 on or before the 28th February 2020;

(b) The balance shall be repaid through monthly installments of Kshs. 600,000 until payment in full;

(c) In default of payment of any single installment, execution to issue.

20. It is so ordered.

Dated, delivered and signed in an open court this 21st day of February 2020

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Wachira for the plaintiff/Respondent

Mr. Maina for the 1st defendant/applicant

Dennis -----Court Assistant