



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 46 OF 2019

(Being an appeal from the ruling and order of the Hon. E. Malesi, Senior Resident Magistrate (SRM), in Kakamega CMCCC No.257 of 2013, delivered on 26th March 2019)

BERNADETTE NAMAJANJA.....APPELLANT

VERSUS

NICK OWUOR

t/a LAKE MOTORS GARAGE.....RESPONDENT

JUDGEMENT

1. In Kakamega CMCCC No. 257 of 2013, the trial court entered judgement in favour of the appellant, on 6th March 2018, for a sum of Kshs. 1,200, 000.00, plus costs and interests on the amount from the date of filing suit.
2. The respondent thereafter moved the court, by a Motion, dated 12th September 2018, seeking to be allowed to settle the decretal sum in monthly instalments of Kshs. 20, 000.00 until payment in full. His plea was granted in a ruling delivered on 8th January 2019. It was also ordered that interest stop to run on the judgement sum effective from 31st December 2018. The appellant then lodged a Motion, dated 31st January 2019, for review of the orders of 8th January 2019, for an order that the decretal sum be paid within six months and that the interest continue to run. The plea for review, and settlement of the entire debt within six months was disallowed, in a ruling that was delivered on 26th March 2019.
3. It is the said orders that provoked the appeal herein. The memorandum of appeal, dated 24th April 2019, lists several grounds. It is averred that the trial court did not address the principles that govern review, the appellant was entitled to the fruits of the litigation, the discretion granted by Order 45 Rules 1 and 2 of the Civil Procedure Rules was to be exercised judiciously, the ruling and orders denied the appellant a right to fair trial, the trial court failed to analyze pleadings and submissions, and the decision led to miscarriage of justice.
4. Directions were taken, on 11th November 2019, that the appeal be canvassed by way of written submissions. As at the time I settled to write the judgment herein, on 23rd June 2020, only the appellant had filed written submissions, dated 31st January 2020. I have read through them and noted the arguments made therein.
5. The primary issue for me to determine is whether the trial court properly exercised its discretion to allow the respondent liquidate the decretal sum by paying monthly installments of Kshs. 20, 000.00 until the said debt was fully settled. The secondary issue is whether the trial court had any jurisdiction to waive interest on the principal sum after having decreed it in the judgment. The argument by the appellant is that the decretal sum stood at Kshs. 2,239, 730.00, as at 30th October 2019, when the application, dated 12th September 2018, came up for hearing, and paying a sum of Kshs. 20, 000.00 per month would mean that the respondent would take over nine years to clear the debt. It was submitted that the terms of the order were unreasonable, and discretion was not exercised properly.
6. The provisions upon which the court exercises the discretion settlement of a decree in instalments are in Order 21 Rule 12(1)(2) of the Civil Procedure Rules, which says:

“(1) Where and so far as the decree is for payment of money, the court may for any sufficient reason at the time of passing the decree order payment of the amount decreed shall be postponed or shall be made in installments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

(2) After passing of any decree, the court may on the application of the judgement-debtor and with 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 interests, the attachment of the property of the judgment debtor or the taking of security from him, or otherwise, as

it thinks fit.”

7. The trial court cited *Jabali Alidina vs. Lentura Alidina* [1961] EA 565, where it had allegedly been stated that it was up to the person seeking to settle the debt instalments to show that he was deserving of indulgence under the rule. I say allegedly because there is no such decision in the (1961) EA Law report. What the trial court, with respect to the instant appeal, did, was to take into account the fact that the respondent was a person of meagre means, being a mechanic. The court noted that, although the appellant had argued that the proposal by the respondent was unreasonable, she made no counterproposal.

8. There is a wealth of case law on the principles that guide consideration as to whether discretion to settle the debt in installments should be exercised in favour of a judgment-debtor. The starting point should always be that the decree-holder has an order in his favour. It was said in *Diamond Star General Trading LLC vs. Ambrose DO Rachier carrying on business as Rachier & Amollo Advocates* [2018] eKLR, that:

“It is trite law that unless there are good, sufficient and adequate reasons, a judgment creditor should be allowed to enjoy the fruits of the judgment. Therefore, in as much as the court will consider the circumstances under which the debt was incurred, the court will also consider the right of the judgement creditor to prompt payment.”

9. The principles for exercise of discretion on whether to order payment in installments or not were set out in *Keshavji Jethabhai & Bros Limited vs. Saleh Abdullah* [1959] EA 260, as follows: (a) each case to be considered on its own merits, (b) mere inability to pay in full at once is not sufficient reason for exercising the discretion, (c) the debtor should show *bona fides* by arranging prompt payment and (d) though hardship may be a factor, the court should consider whether the indulgence should be given to the debtor without prejudice to the decree holder. Similar principles were stated in *A. Rajabali Alidina vs. Rehimtulla Alidina and another* [1961] EA 565, where the court stated the conditions to be considered to be (a) the circumstances under which the debt was incurred, (b) the conduct of the debtor, (c) the debtor's financial position, and (d) his *bona fides* in offering to pay a fair proportion of the debt at once.

10. In *Diamond Star General Trading LLC vs. Ambrose DO Rachier carrying on business as Rachier & Amollo Advocates* (supra), the judgment-debtor proposed to settle the decretal amount within four years. The court took into account the time when the debt was incurred and when the judgement creditor went to court to recover the same, as against the four years proposed, and noted that in aggregate the period added up to twelve years, from the date the debt was incurred or accrued to the date the debtor was proposing to clear the same. The court found the proposal to be unreasonable. The court further noted that the judgement-creditor had not made a counterproposal, but ruled that that ought not to be taken against that party, and pledged to balance the rights of both sides for the interest of justice, by working out reasonable amounts that would enable the judgement creditor enjoy the fruits of the judgment.

11. In the instant matter, the trial court appeared to take into account only one factor or condition, the financial position of the debtor. The court appeared to be oblivious to the factor that it was the appellant who had the upper hand. She went to court and obtained a decree against respondent. Amongst the factors that ought to have been considered was how the debt was incurred in the first place. The respondent was a mechanic who was entrusted by the appellant to repair her vehicle. He effected the repairs, but the vehicle was stolen while in his custody. It would appear that instead of keeping it in safe custody, to await its delivery to the appellant, he chose to go out with it on a frolic of his own, in the course of which the vehicle was stolen. No doubt, if he had taken precautions, of placing the vehicle in safe custody, it would not have been stolen. His conduct in this regard should have counted for something. His conduct too, with respect to the offer that he was, making, of settling the debt in a period that would span nine years should have been considered. Such an offer cannot be said to have been made *bona fides*. It bespeaks conduct of a debtor who had contempt for the loss that he had occasioned to the creditor, and of a lack of a genuine willingness to sort out the matter.

12. The interest of the appellant, as creditor, to a right to prompt payment of her debt was not considered. Her vehicle was lost in the hands of the respondent. The award was intended to compensate her by putting her back in the position she had occupied before the loss. The money, perhaps, could be utilized to acquire another vehicle. Here she was without her vehicle, and without the monetary equivalent of the same as compensation; and here she was being told that she had to wait for some nine years for full compensation. The trial court appeared to blame her for not making counterproposals, yet the burden, according to Order 21 Rule 12(2) of the Civil Procedure Rules, was not cast on her to justify anything. It is the judgement-debtor who is required to show sufficient cause under that provision, not the judgement-creditor. There can possibly be no justice in such an arrangement as that ordered by the trial court. In any event, under Order 21 Rule 12(2), the order on payment in installments ought to be with the consent or concurrence of the judgment-creditor/decreet-holder. The payment by installments ought not to be rammed down the throat of the decree-holder, as it were, against her will, particularly where the terms prayed are unreasonable. In this case she did not consent or concur with the said arrangement, that her decree be settled in installments. Settling the debt over a period of nine years was unreasonable, and, therefore, the order was unjust. The period allowed should have been no more than three years.

13. The court, in *African Banking Corporation Limited vs. Florence Wangari Wangai* [2012] eKLR, stated the burden on the applicant in the following terms:

“My view is, an applicant who wishes a court to exercise its discretion and order payment of a decretal sum by way of installments must be very candid with the court. Such an applicant must present to the court sufficient material to show that he/she is a person of no means, that whatever income she/he has is lawfully committed elsewhere. He/she must disclose to the court all his/her means and explain to the court why the proposed instalments are the best option available. Accordingly, the burden is on the applicant to prove/show that he/she deserves the order sought.”

14. The words of the Court of Appeal, in *E. Muiru Kamau & another vs. National Bank of Kenya Ltd* [2009] eKLR, are equally to the point, with regard to handing the parties before the court an even hand. The court said:

“The courts including this court in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principle aims of the overriding

objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on equal footing.”

15. Did the respondent candidly present sufficient material to the trial court to support his case that he was of meagre means as envisaged in *African Banking Corporation Limited vs. Florence Wangari Wangai*? In the affidavit that he swore on 12th September 2018, in support of the Motion, of even date, where he sought the order to settle the decree in monthly installments, and upon which such orders were made, the respondent merely averred that he was just a *jua kali* mechanic with no stable income and meagre resources, and described himself as a family man, with school going children. He was in the business of repairing vehicles, and he must have had an income. He did not provide any proof of what he earned from that business, and any other that he might have been running. No statement of accounts nor bank statement was filed, neither did he disclose whether he had other assets. It is, therefore, not clear the basis upon which the trial court arrived at the decision to allow him to liquidate the decretal sum at Kshs. 20, 000.00 per month until payment in full.

16. One of the orders made in the impugned ruling of 8th January 2019, which the appellant sought to have reviewed by the application of 31st January 2019, culminating in the ruling of 26th March 2019, was that interest on the decretal amount was to stop running as at 31st December 2018. Curiously, the respondent, in his Motion, dated 12th September 2018, did not pray for waiver of interest, and, in its ruling, the court did not give reasons for the order on waiver of interest.

17. Can a trial court waive interest on the decretal sum once it has decreed it in the judgement? Section 26 of the Civil Procedure Act empowers a court, where money decrees are concerned, in their discretion, in the decree, to 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 prior to the filing of suit. The provision is silent on whether, having exercised the discretion to order interest on the principal sum, the same court can, thereafter, make an order to waive the interest altogether.

18. For avoidance of doubt, Section 26 states as follows:

“(1) 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 so adjudged from the date of the decree to the date of the payment or to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sums 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.”

19. There is dearth of case law on the subject of waiver of interest ordered in the decree. I have chanced upon only two decisions where the issue arose directly. It was suggested in *Shamsudin Mithoowani vs. Avon Marketing Services “K” Ltd* [2004] eKLR, that a person seeking such waiver of interest on the principal sum would need to lay a basis for it, but the court did not dwell on whether or not the court had any discretion to order such waiver. In *Republic vs. Attorney-General & 2 others Ex parte Associated Architects & 3 others* [2018] eKLR, the court took the position that the court had no discretion to waive interest lawfully accrued and decreed by a court. The statute does not provide for it, and the position in case law is hazy. The dearth of case law would suggest, in my view, that the discretion to waive interest on the principal sum, in a decree already pronounced by a court, is not available. However, where a court would be tempted to purport to exercise such discretion, in view of the greyness of the area, the same must be done, if at all, reasonably and judiciously.

20. The trial court did order, quite properly, in the judgement delivered on 6th March 2018, interest on the principal amount, running from the date when the suit was filed in court. Having decreed interest on the principal sum, the trial court became *functus officio*, and could not revisit the matter later, unless it was faced with a review application, to correct errors or upon discovery of new evidence or other sufficient cause. The trial court, therefore, had no jurisdiction to waive interest on the principal sum on 8th January 2019, as it purported to, for variation of the judgement or decree could only be done on the basis of review, yet there was no review application before it, and the application it was entertaining did not seek such waiver. The trial court could not, *suo moto*, tinker with its own judgment, a year after its delivery, to purport to waive interest. Only an appellate court could interfere with the judgement in question in the manner that the trial court purported to. In any event, no reasons were advanced at all to justify the drastic action. The trial court exercised a power or discretion that it did not have, and that resulted in a miscarriage of justice.

21. It would appear that the trial court misconstrued the discretion that Order 21 Rule 12(1)(2) grants it. The provision is not a reproduction of section 26 of the Civil Procedure Act, which states that at the point of passing decree, the trial court has discretion to order payment of interest on the principal sum. Order 21 Rule 12(1)(2) is not about interest, but settlement of the decree, that is the principal sum and any interest ordered with respect to it. The same may be paid or settled in installments, should the court so order, in which case it would mean the court may give directions on whether the principal sum is to be settled through that mode of payment together with or separately from the interest ordered in terms of section 26, or payment of interest may be post poned, not waived.

22. I am persuaded that there is merit in the appeal before me, and I allow it. Consequently, I hereby set aside the orders made by the trial court on 8th January 2019, with respect to waiver of interest on the principal sum and liquidation of the debt in monthly instalments of Kshs. 20, 000.00 until payment in full.

23. As I do not have before me figures on the amounts that the respondent has paid so far, nor on the total amount due, I shall, therefore, refrain from making any orders in substitution thereof. Instead, I shall remit the trial court records to the Chief Magistrate’s Court, for that court to give fresh orders on the monthly installments to be paid by the respondent in liquidation of the principal amount, plus costs and the interest ordered in the judgement. The repayment period shall not exceed twelve (12) months, from the date of delivery of this judgement.

Let there be stay of execution pending further orders by the court below. The matter to be placed before a magistrate other than Hon. E. Malesi, SRM. The appellant shall have costs of the appeal.

24. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26th DAY OF June, 2020

W MUSYOKA

JUDGE