



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 112 OF 2013

PNN (Suing as the guardian ad litem of FRNN)....PLAINTIFF/RESPONDENT

-VERSUS-

CHARLES JOHN MUSEE.....DEFENDANT/APPLICANT

RULING

1. Before me for determination is the Notice of Motion dated 8th November, 2019 lodged by the defendant/applicant herein and supported by the grounds set out on its face and the facts stated in the affidavit of the applicant. The applicant sought for the following orders:

(i) Spent.

(ii) Spent.

(iii) Spent.

(iv) THAT in settling the decretal sum due, the applicant be ordered to pay a sum of Kshs.3,000,000/ within 90 days and the balance be paid in monthly instalments of Kshs.150,000/.

(v) THAT an order do issue stopping accrual of interest on the decretal sum.

(vi) THAT costs of the application be in the cause.

2. In his affidavit, the applicant stated that he has been able to raise the sum of Kshs.3,000,000/ which sum he is ready and willing to pay to the respondent as part of the decretal sum.

3. The applicant further stated that he is ready and willing to clear the balance of the decretal amount in monthly instalments of Kshs.150,000/ until payment in full, and urged this court to review its earlier order made on accrual of interest by ordering that interest on the decretal amount do stop accruing.

4. To oppose the Motion, the respondent put in a replying affidavit in which he stated that the application is a mere attempt at stalling the proceedings since the applicant has so far not demonstrated any seriousness in settling the decretal sum.

5. The respondent averred that should this court grant the orders sought in the application, then it would be fair to have the applicant ordered to pay the sum of Kshs.3,000,000/ forthwith and the balance of the decretal sum be paid in monthly instalments of Kshs.1,000,000/.

6. It is the position of the respondent that the applicant has not demonstrated the reason as to why the accrual of interest ought to be stopped and that in any event, it is only fair that the respondent be allowed to enjoy the fruits of his judgment which was delivered back in 2017.

7. The Motion was dispensed with through the filing of written submissions. On his part, the applicant argued that since delivery of the judgment in favour of the respondent and against him, he has been unable to pay the decretal sum due to financial challenges and family commitments.

8. The applicant reiterated his willingness to pay the sum of Kshs.3,000,000/ and thereafter, monthly instalments in the reasonable sum of Kshs.150,000/ and urged this court to consider his proposal. In so submitting, the applicant referred to the case of **Abdisalan Abdi Ali Ismail v Guhart Abdi Ali & 2 others [2019] eKLR** where the court considered among others, the circumstances under which the debt was contracted; the conduct of the debtor; and his financial position in determining whether there was sufficient reason to order payment of the decretal sum in instalments.

9. It is the contention of the applicant that in view of the colossal nature of the decretal sum, the continual accrual of interest will put a great strain on him thereby making it extremely difficult for him to fully clear the same.

10. The respondent on his part submitted that pursuant to the provisions of **Order 21, Rule 12(1) and (2)** of the **Civil Procedure Rules**, the courts have discretionary power to order a party to pay the decretal sum in instalments where sufficient cause has been shown by an applicant. On this note, the respondent submitted that the burden of proving sufficient cause rests with the applicant and cited the case of **Lavington Security Limited v Nairobi City Water & Sewerage Co. Ltd [2014] eKLR** in which the court held that the applicant is responsible for showing sufficient reason as to why the court should exercise its discretion in his favour.

11. The respondent is of the view that in the present instance, the applicant has not provided sufficient reasons to show his inability to meet his financial obligations on the decree. It is the view of the respondent that since the applicant has made no payments towards the decree to date, he is not deserving of the indulgence of this court. To the respondent, there has been no show of good faith from the applicant.

12. It is the contention of the respondent that if the applicant is allowed to pay the decretal sum in the proposed instalments, the respondent will suffer prejudice since he continues to incur hospital related costs which continue to escalate with time. The respondent went further on to submit that the proposed instalments fall on the lower side and it would take the applicant quite a long time to fully pay the decretal sum.

13. It is further the contention of the respondent that in the event that this court finds in favour of the applicant, then he should be obligated to pay the accruing interest on the decretal sum since he has not in any way demonstrated to this court why the same ought to be reviewed.

14. I have duly considered the grounds as presented in the Motion, the facts deponed in the supporting and replying affidavits and the competing written submissions and authorities relied upon.

15. A brief background of the matter is that the dispute between the parties arose out of a road traffic accident. This court, upon hearing the parties on the same, entered judgment in favour of the respondent and against the applicant on 20th December, 2017 in the sum of Kshs.16,968,382 plus costs of the suit and interest on the general damages awarded.

16. Thereafter, the respondent commenced the execution process, thereby prompting issuance of a notice to show cause against the applicant in respect to the then outstanding decretal sum of Kshs.24,283,342/ inclusive of interest. Before this court could deliver its ruling on the notice to show cause, however, the applicant brought the present application.

17. The crux of the Motion lies in payment of the decretal sum and interest arising out of the aforesaid judgment. Reference was made to the provisions of **Order 21, Rule 12(1) and (2)** of the **Civil Procedure Rules** which express 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.”

18. **Sub-rule 2** of the above provision would be more relevant to the current circumstances since the Motion has been filed long after the decree was passed. Suffice it to say that it is clear from the foregoing that the power of this court in considering the Motion is discretionary and is guided by sufficient cause to be shown by the applicant. The onus is on the applicant to show sufficient cause, as emphasized by the court in the case of **Lavington Security Limited v Nairobi City Water & Sewerage Co. Ltd [2014] eKLR** relied upon by the respondent, when it held thus:

“...the power to order payment by instalments of the decretal amount is purely a matter of discretion by the Court. Except, the exercise of discretion is circumscribed; sufficient cause must be shown and the indulgence to pay by instalments may be on such terms that the Court thinks fit.”

19. In determining an application of such nature, this court is also required to consider various other factors which were listed in the case of **Abdisalan Abdi Ali Ismail v Guhart Abdi Ali & 2 others [2019] eKLR** cited by the applicant and with reference to the authority of **A. Rajabali Alidina v Remtulla Alidina & Anor. (1961) EA 565** as follows:

“the circumstances, under which the debt was contracted, the conduct of the debtor, his financial position, and his bona fides in offering to pay a fair proportion of the debt at once.”

20. I note the applicant's submission as to his readiness to pay part of the decretal sum in the sum of Kshs.3,000,000/ and his indication that he is unable to make lumpsum payments on the balance citing financial constraints and family responsibilities, hence the proposal to pay in the monthly instalments stated hereinabove. The applicant made reference to annexures to his replying affidavit previously filed in response to the notice to show cause and which I have seen.

21. A copy of his pay slip for the month of July, 2019 annexed to his replying affidavit places the net salary of the applicant at Kshs.184,211.65/. The applicant had also annexed a copy of the lease agreement dated 1st November, 2018 to show that he pays a monthly sum of Kshs.41,500/ towards house rent.

22. However, the applicant did not avail any credible evidence to show that his daughter is indeed a student at the Strathmore University or to show that he has other school-going children.

23. In my view, the applicant has not demonstrated by way of credible evidence that he has any specific financial commitments/constraints that would impede his ability to meet his obligations pursuant to the decree.

24. Furthermore, it is apparent from his conduct that the applicant has not demonstrated good faith in the past by not showing any efforts made at paying even part of the decretal amount, keeping in mind the fact that judgment was delivered in 2017. In this way, I concur with the sentiments raised by the respondent that he has suffered prejudice since he has not been able to realize the fruits of his judgment.

25. I also considered the applicant's proposal to settle a portion of the decretal sum on the one hand, and considered the duration of time it would take for the applicant to clear the remaining balance using the proposed monthly instalments. While it may be true that the applicant's proposal of paying monthly sums of Kshs.150,000/ may take a number of years to clear the decretal sum, it is also important to note that the decretal sum is quite a colossal amount which the applicant may not be able to pay in full at one go given his current earnings shown in the pay slip provided. I also find the proposed instalments to be reasonable in this instance in comparison to the sum proposed by the respondent which I find to be on the higher side.

26. Having taken the above factors into account and stated my views on the same, I am ultimately required to balance the interest of the parties and to exercise my discretion fairly.

27. On the subject to do with the accrual of interest, I find that the applicant did not bring any credible evidence to warrant a review of the same. The mere fact that the decretal sum is substantial in nature does not in itself automatically result in the accrual of interest to be discontinued. As earlier noted, the applicant herein has not shown that he is completely unable to meet his decretal obligations. I am therefore unable to grant this request.

28. The upshot is that the Motion is allowed in terms of prayer (iv) and the following orders are consequently made:

- a) The applicant shall pay the sum of Kshs.3,000,000/ to the respondent within 90 days from today.**
- b) The applicant shall thereafter pay to the respondent monthly instalments of Kshs.150,000/ on or before the 5th of every month beginning the month of October, 2020 until payment in full.**
- c) In the event that the applicant defaults in the payment of any single instalment, the respondent shall be at liberty to execute the decree for the recovery of the outstanding decretal amount.**
- d) In the circumstances of this application, a fair order on costs is that each party bears his own costs.**

Dated, Signed and Delivered at Nairobi this 25th day of June, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendant/Applicant