



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

IN THE ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

CIVIL CASE NO. 22 OF 2019

ALISON ODERA MKANGULA.....3RD DEFENDANT/APPLICANT

BENARD ABSALOM SANYA.....4TH DEFENDANT

MARION PAULYNE DOME.....5TH DEFENDANT

VERSUS

ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF/RESPONDENT

RULING

1. In its judgment in this matter dated 29th April 2020, this court allowed the plaintiff's application dated 1st November 2019. It struck out the 3rd defendant's defence and entered judgment on admission against Alison Odera Mkangula, the 3rd defendant in the matter, for the sum of Kshs. 5,746,500/= as well as the costs of the application. The 3rd defendant had admitted liability on his own behalf and on behalf of the 4th and 5th defendants.
2. The 3rd defendant, has now filed the application dated 5th May 2020 in which he seeks stay of execution of the judgment on admission entered against him. He also asks the court to allow him to satisfy the amount owed in quarterly instalments of Kshs. 300,000 (Kenya Shillings Three Hundred Thousand). He also asks the court to restrain the plaintiff/respondent from levying execution against him.
3. The application is supported by an affidavit sworn by the applicant in which he notes that judgment on admission was entered against him for the sum of Kshs 5,746,500 in the ruling of this court dated 29th April, 2020. He avers that he is now faced with an extremely difficult obligation to pay the whole amount. He is unable to pay the whole amount in a lump sum even though he is willing to do so as he has been having cash flow problems due to loss of employment. He is however willing to pay the amount in instalments of Kenya Shillings Three Hundred Thousand (Kshs. 300,000) until the amount is paid in full. He states that he has demonstrated good faith having previously paid Kenya Shillings Six Hundred and Fifty Thousand (Kshs 650,000/-). He had also expressed his willingness to settle the matter amicably as he would not be able to pay the amount in a lump sum.
4. He avers that it is in the interests of justice that there be a stay of execution to enable an amicable resolution and give room for alternative dispute resolution on the matter in view of the fact that the court has powers to order payment by instalment or postponement of payment. Should the court not grant the orders he seeks, he stands to suffer irreparable harm and loss in the event the plaintiff proceeds with execution without giving credit for payments already made.
5. In his submissions, the applicant argues that the application arises from his apprehension that the respondent will proceed to levy execution against him for defaulting in paying the decretal sum. He states that he faces an extremely onerous obligation to pay the whole amount in a lump sum, but he has difficulties doing so due to his loss of employment and the prevailing Corvid-19 pandemic that has affected his cash flow. He states that he is however, still willing and committed to paying the whole amount in instalments of Kshs. 300,000. He has demonstrated *bona fides* by payment of a fair proportion of the amount as he has already paid Kshs. 650,000 by himself and through the 5th defendant. He further states that if a stay of execution is not issued, the respondent will proceed to levy execution without regard to the payments that he has already made.
6. The applicant submits that the court has the jurisdiction to issue the orders sought. He relies on the provisions of Order 21 Rule 12 of the Civil Procedure Act which empowers the court, on the application of the judgment debtor and with or without the consent of the decree holder, for sufficient cause, to postpone the payment of the decretal sum or allow for it to be paid by instalments.

7. The applicant further submits that he is entitled to the orders that he seeks. He argues that he has shown his good faith by payment of a fair proportion of the amount due. He is willing to make the payment of the whole decretal sum by instalments of Kshs 300,000 until the decretal sum is paid fully, and granting this prayer will not occasion any prejudice to the respondent in its effort to recover the amount in question. The applicant relies on the case of **Keshavji Jethabhai & Bros Ltd v Saleh Abdulla (1959) E.A. 260** as was cited in the case of **James Kariuki Nganga T/A Ndarugu Merchants v Joseph Ngae Njuguna & Another [2004] eKLR** in which it was held that an application seeking orders like the ones sought in this application should:

“ordinarily be required to show his bona fides by arranging prompt payment of a fair proportion of the debt..... and that Each case has to be decided on its own merits, the predominating factor being, of course, the bona fides of debtor.”

8. The applicant further relies on the case of **Jabali Alidina v Lentura Alidina (1961) EA 565** to submit that in determining whether to allow payment of a decretal sum in instalments, the court should consider 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. It is his submission that he has shown good conduct and has fully co-operated and initiated an out of court settlement in order to resolve this matter. He has also started making payments towards settling the decretal sum and is willing to continue doing so.

9. The applicant submits that his financial position is in jeopardy as he is no longer in gainful employment, a situation that has been worsened by the tough economic times being experienced due to the Corvid-19 pandemic, which he asks the court to take judicial notice of.

10. Reliance is also placed on Freight Forwarders Ltd v Elsek & Elsek (K) Ltd (2012) eKLR with regard to what should be considered ‘sufficient cause’ to warrant the grant of orders sought to pay a decretal sum in instalments. He sets out these reasons as being the inability to pay in lump sum, ability to pay in reasonable monthly instalments, and the fact that the application is made in utmost good faith, all of which he submits he has met and is therefore entitled to the orders that he seeks.

The Response

11. The respondent opposes the application and has filed an affidavit in reply sworn on 18th May 2020 by Maleya Omondi, an investigator with the respondent. Mr. Omondi avers that the respondent had filed the civil suit to recover from the defendants the sum of Kshs. 11, 493,000/= which funds were fraudulently drawn from Chebororwa Agricultural Training Centre. The applicant was the Sub-County Accountant- Marakwet West and a mandatory signatory of the subject account from which the funds were embezzled. He had signed all the cheques amounting to Kshs. 11, 493,000/= which were drawn in favour of the Principal, Chebororwa ATC, and various business entities as itemized under paragraph 7 of the plaint dated 27th August 2019. The applicant was therefore a key player in the embezzlement of the funds from Chebororwa ATC and does not therefore deserve the liberty to repay the funds embezzled at his convenience.

12. Mr. Omondi further avers that the funds were embezzled from Chebororwa ATC between 23rd February 2017 and 19th May 2017, about three (3) years ago. He notes that the respondent had demanded payment of the money from the applicant by letter dated 17th May 2019. The applicant had by his letter dated 12th June 2019 admitted liability, expressed willingness to pay a sum of Kshs. 5,746,500/=, and requested for a grace period of 60 days to enable him raise the said amount. Despite being allowed the said period, he had failed to honour his pledge, forcing the respondent to file this suit. It is Omondi’s averment therefore that the applicant has had all the time he required, about three years since the funds were embezzled from Chebororwa ATC, but has failed to repay and now seeks to employ further delaying tactics. Omondi asks the court to note that the funds at issue are not loans or debts arising from a contractual obligation but public funds embezzled from a public institution. Accordingly, the applicant does not deserve any leniency that would allow him to honour the judgment at his convenience.

13. Mr. Omondi avers further, on the advice of the respondent’s Counsel on record, that an application for payment of a decretal sum under Order 21 Rule 12 of the Civil Procedure Rules presupposes that the decretal sum is founded on an underlying contractual obligation. In the present case, the applicant illegally embezzled the said decretal sums and he cannot therefore benefit from the said provisions for payment of the decretal sum through instalments.

14. The respondent notes that the applicant proposes to repay the decretal amount in quarterly instalments of Kshs. 300,000/=, which translates to Kshs. 100,000/= per month. This, Omondi avers, indicates that the applicant intends to repay the sum of Kshs. 5,746,500/= in a period of about four years and nine months. It is his averment that this period is unreasonable given the fact that the amount at issue was embezzled from public accounts. To allow the present application, he avers, is to allow the applicant to benefit from his own fraudulent scheme.

15. In its submissions, the respondent notes that the onus remains on the applicant to prove that there exist sufficient reasons for granting the orders that he seeks. It relies on the case of **Rajabali Alidina –vs- Remtulla Alidina & Another (1961) EA 565** which was followed in **Diamond Star General Trading LLC. –Vs- Ambrose D.O. Rachier T/A Rachier & Amollo Advocates (2018)eKLR** with regard to the onus placed on the applicant. It submits that he must prove, first, his financial position and demonstrate why he cannot liquidate the whole decretal sum in one lump sum.

16. The respondent submits further that aside from mentioning that he has lost his employment, the applicant has not tendered evidence to prove his financial position or to show that he has been terminated from employment and the reasons for termination. He has also not shown that he has made any arrangements to source for funds from any financial institution or from sale of his properties to honour the judgment, and has not demonstrated how he will pay the instalments proposed. It therefore submits that the applicant has not proved that he has any financial difficulties in settling the decretal sum in a single payment, and he has failed to discharge the onus to prove his financial position or his financial difficulties.

17. The respondent further submits that while hardship to a debtor might, in some circumstances, be taken into consideration on an application for payment by instalments, this is not sufficient reason to allow an application of this nature. Reliance for this submission is

placed on the case of **Keshavji Jethabhai & Bros. Ltd –vs- Saleh Abdulla** (supra).

18. The respondent further submits that an application of this nature requires the exercise of the court’s discretion, which must be exercised judiciously. It is its position that it should only be granted where there are circumstances that justify the exercise of discretion in favour of the applicant. Support for this submission is placed on **Keshavji Jethabhai & Bros. Ltd –vs- Saleh Abdulla** (supra) and **KTK v- Baringo County Government 20170 eKLR**.

19. The respondent further argues that in order to exercise discretion in favour of the applicant, the court must consider the circumstances under which the contractual obligation to settle the decree arose as was held in **Keshavji Jethabhai & Bros. Ltd –vs- Saleh Abdulla** (supra). It submits that Order 21 Rule 12 (1) of the CPC presupposes that an application for payment on instalments has to be founded on an underlying contractual obligation. It notes that in this case, the applicant incurred the liability out of an illegality, the embezzlement of public funds. Its position therefore is that there is no good reason to consider the application since the debt was not pegged on a contract, a credit facility or an ordinary debt.

20. The respondent emphasizes that the funds in question were public funds intended to be utilized for the public good and were from Chebororwa Agricultural Training Centre. The applicant was the Sub-County Accountant – Marakwet West, a mandatory signatory to the account, who breached his statutory duty to protect public funds and fraudulently participated in its embezzlement. He had signed all the cheques drawing funds from the institution, and his role in the embezzlement was significant and disentitles him any leniency from the court.

21. The respondent submits that the applicant, who had admitted liability on behalf of three business names used to draw the funds from the accounts of Chebororwa ATC, must have foreseen that he would be required to repay the money as soon as the plaintiff began investigations into the matter. He should therefore have made arrangements for the payment. Accordingly, in its view, all these factors do not provide favourable circumstances to justify the grant of the orders that the applicant seeks.

22. The respondent submits that the *bona fides* of the applicant, an important factor in determining whether or not to grant the application, can be evaluated from his conduct. In this regard, it submits that the court should consider whether he has made a prompt payment of a fair proportion of the decretal sum, whether the proposal suggested is reasonable in the circumstances, and whether it will take unreasonably long to liquidate the decretal sum and thereby prejudice the judgment creditor.

23. The respondent notes that the applicant has not made a prompt substantial payment or a fair proportion of the decretal sum. He has made two instalments of Kshs. 50,000/ on 26th June 2019 and Kshs. 450,000/= on 7th August 2019. The 5th defendant, on whose behalf the applicant admitted liability, made a single payment of Kshs. 150,000/= on 10th June 2019. No other payment has been made since, despite the fact that in his admission letter dated 12th June 2019, the applicant had requested for only 60 days to clear the admitted sum. It notes that the applicant has not made a single payment since the entry of judgment, and the amount paid to date represents less than 10% of the decretal sum.

24. The respondent further reiterates that the amount at issue was embezzled between 23rd February 2017 and 19th May 2017, which is three (3) years ago. It further reiterates that allowing the liquidation of the amount as proposed by the applicant would mean that it would take a further four years and about nine months for the repayment of the amount. In its view, it would be unfair and unconscionable, a mockery of justice and of the fight against corruption, that public funds which were intended for a public purpose should be repaid after seven (7) years. It submits that a fair and proportionate payment of the decretal sum, in these circumstances, would require that the applicant makes an upfront payment of a substantial sum and liquidates the balance within a reasonably short period of time. It is the respondent’s view, however, that the applicant has not provided sufficient reasons to warrant the grant of the orders that he seeks, and it prays that the application be dismissed with costs.

Analysis and Determination

25. I have considered the pleadings and submissions of the parties, as well as the authorities that they have relied on. The applicant seeks to be allowed to repay the decretal sum in this matter, being Kshs. 5,746,500/=, in quarterly instalments of Kshs 300,000. From the calculations done by the respondent, this would translate to payment of Kshs 100,000 per month, and result in payment over a period in excess of four years.

26. Under Order 21 Rule 12 of the Civil Procedure Act, it is provided that:

12. (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. (Emphasis added)

27. Both parties have referred the court to the case of **Keshavji Jethabhai & Bros Ltd v Saleh Abdulla** (supra) and what the court should consider in determining whether to allow payment of a decretal amount by instalments. The applicant cites the words from that decision cited in the ruling of the court dated 24th November 2004 in the case of **James Kariuki Nganga T/A Ndarugu Merchants v Joseph Ngae Njuguna & another [2004] eKLR** in which it was observed:

“...the mere fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reason.....; ordinarily he should be required to show his bona fides by arranging prompt payment of a fair proportion of the debt..... Each case has to be decided on its own merits, the predominating factor being, of course, the bona fides of debtor.”

28. The respondent makes two observations in its submissions which are indisputable. First, the funds in contention in this matter are not the subject of a contract between the applicant and the respondent. They are stolen public funds. They were embezzled from a public entity, the

Chebororwa Agricultural Training Centre. The applicant was a public servant, the Sub-County Accountant- Marakwet West. He was a mandatory signatory to the public account from which the funds were embezzled. The embezzlement could not have taken place without his connivance and active participation in the theft.

29. The second observation is that the funds at issue were embezzled in 2017. The applicant now wishes to repay the funds in instalments of Kshs 300,000 per quarter, so that he completes repayment in close to five years from now. He did not borrow the funds. He and his associates embezzled the funds three years ago. They now wish to repay in about five years from now.

30. The applicant has argued that he has demonstrated good faith in that he has repaid, prior to the filing of this suit, some Kshs 650,000. That this should be taken into consideration in determining whether he has shown good faith, and should therefore lead to the exercise of the court's discretion in his favour.

31. The court has somewhat mixed feelings about the applicant in this matter. One admires his effrontery in asserting that he has demonstrated good faith in paying back about 5% of funds that he facilitated embezzlement of from public coffers, and in offering to pay back a portion thereof in five years. On the other hand, it has to be recognized that he did show some level of 'integrity'- the 'integrity' of a criminal who saves the court's time by entering into a plea bargain in a criminal matter- in accepting liability for the theft of the public funds, and undertaking to pay the amount that, one supposes, he and the defendants for whom he accepted liability, the 4th and 5th defendant, benefitted from.

32. That, however, does not entitle him to the exercise of discretion in his favour under Order 21 Rule 12. It is not, in my view, a provision in law that should be extended to persons who steal from the public. One cannot embezzle public funds then seek to convert the funds into some kind of 'contract sum' that can be repaid in instalments.

33. However, for his attempt to rediscover integrity, to accept that he took funds that did not belong to him, the court shall exercise its discretion and allow him to repay the decretal amount in instalment. The court notes that the applicant had, in June 2019, requested the respondent to grant him 60 days within which to repay the amount he had admitted liability in respect of. He has had more than a year to meet his commitment. While he has submitted that the Covid 19 pandemic has affected his financial position, the court takes judicial notice that measures such as lockdown and social distancing recommended by the Ministry of Health for avoiding the spread of Covid 19 only came into effect in mid-March 2020. The applicant had sufficient time between June 2019 and March 2020 to plan how he was going to repay the public funds.

34. Accordingly, much as he hardly merits this consideration, the court directs that the applicant shall repay the decretal amount, less the amount paid prior to filing suit, together with the costs of the suit and interest on the decretal amount, in three equal instalments payable at the end of June, August and October 2020. In default of any one instalment, the respondent shall be at liberty to execute.

35. The applicant shall also bear the costs of this application.

Dated Delivered and Signed at Nairobi this 17th day of June 2020

MUMBI NGUGI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Order 21 rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court.

MUMBI NGUGI

JUDGE