



Mwangi Kengara & Company Advocates v Kibe (Miscellaneous Civil Application E058 of 2021) [2023] KEELC 20054 (KLR) (23 August 2023) (Ruling)

Neutral citation: [2023] KEELC 20054 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION E058 OF 2021**

**JA MOGENI, J
AUGUST 23, 2023**

BETWEEN

MWANGI KENGARA & COMPANY ADVOCATES ADVOCATE

AND

JOEL KAMAU KIBE CLIENT

RULING

1. This court in its ruling dated 13/07/2023 struck out the notice of motion application dated 28/04/2023 which sought to have the order of stay of execution of the judgment and decree of this court made on 13/07/2022 and to extend time for the deposit of the decretal sum as ordered by the court on 8/12/2022.
2. The court in striking out the application found that the preliminary objection dated 23/05/2023 had merit since the matters raised in the application had been deliberated and settled by the same court thus the application contravened the principle of res judicata.
3. Earlier, while granting a stay of execution of the judgment delivered on 13/07/2023 the court had ordered the client/applicant to deposit the full decretal amount in an interest earning account in the joint names of the advocates within 30 days which order was to be automatically vacated at the lapse of the 30 days from 8/12/2022.
4. The applicant filed a notice of motion application dated 24/01/2023 seeking to stay the order of this court dated 8/12/2022 which was dismissed because the order issued had lapsed due to effluxion of time and there was no order to stay through this court's ruling on 20/03/2023. It is worth noting that in this application dated 24/01/2023 the applicant had averred that he was ready to comply with the court order and was willing to deposit in court as security deposit in compliance with the court order and he had even attached copies of the banker's cheques. This application was dismissed the court finding no merit in it.



5. The last application in this matter is the one earlier referred to dated 28/04/2023 and a preliminary objection dated 23/05/2023 where the preliminary objection was upheld and the application dated 28/04/2023 dismissed thus dismissing the order sought for stay of execution of this court's judgment and decree made on 13/07/2022 and the court not extending time within which the deposit of the decretal sum should be made as per the order of 8/12/2022.
6. The client/applicant thereafter filed the instant application under certificate of urgency vide notice of motion dated 10/08/2023 and under the *High Court Vacation Rules* section 10 of the *Judicature Act*, Chapter 8 of the Laws of Kenya, and rule 3(2) of the High Court. Upon which the court certified the notice of motion application urgent to be admitted for hearing during vacation. The notice of motion seeks the following orders:
 - a. Spent
 - b. That pending the hearing and determination of this application, this honorable court be pleased to grant an interim order of stay of the warrants of attachment and sale of the applicant's movable assets including the proclamation of movable assets made pursuant thereon on the 9th August 2023 and any other execution processes.
 - c. That pending the hearing and determination of the intended appeal and the appeal, this honorable court be pleased to grant an interim order of stay of execution of the judgment and decree of the ELC court made on July 13, 2022 in Nairobi ELC Misc Civil Application No. E058 of 2021, Mwangi Kengara & Company-vs- Joel Kibe.
 - d. That the respondent has already procured warrants of attachment of the applicant's movable assets and unless stay is granted, the advocate will proceed with execution, and which would greatly prejudice the applicant and this application.
 - e. That the client/applicant is unable to pay the entire decretal sum immediately due to prevailing economic circumstances and in inaccessible funds to facilitate the same.
 - f. That in view of the foregoing, it is in the interest of justice and fairness that the prayers sought herein are allowed.
 - g. That the urgency in the application is that the advocate/ respondent has already proclaimed the movable assets of the client and unless stay is issued, they will attach and sell the said assets.
7. The application was based on the grounds on the face of it and the supporting affidavit of Joel K. Kibe the client/applicant.
8. The advocate/respondent filed a replying affidavit dated 17/08/2023 sworn by Mercy Nduta Mwangi, the advocate/respondent. She deposed that the application was a travesty of justice which is riddled with mala fides, lacking in substance and is meant to conceal the wealth status of the judgment debtor.
9. She deposed further that the client/applicant bought the property known as LR Number 214/381 situated in Muthaiga in cash for Kshs. 320,000,000. She annexed the sale agreement as MNM-2 as evidence of the alleged purchase.
10. It was her contention that the judgment-debtor presented a banker's cheque of the entire decretal sum when he filed the notice of motion dated 28/04/2023 which according to her was proof that he has adequate funds to satisfy the amounts owed and she attached the supporting affidavit sworn by the judgment debtor where it was stated that he had taken out the banker's cheques for the entire decretal sum marked as MNM-3.



11. She deposed further that the judgment/debtor was a man of immense wealth with and was described as being a tycoon and a billionaire in the Business Daily of 4/2/2016 which she attached and marked as MNM-1. She contends that he is able to pay the whole decretal sum but was determined to frustrate and delay the implementation of the decree.
12. She stated that the judgment debtor had filed an appeal NAI-Court of Appeal Civil Appel No. E362/2023 seeking stay of execution which appeal is pending directions for disposal.
13. She went on and deposed that on or about 3/10/2022 the judgment debtor frustrated the effort to satisfy the Garnishee proceeding by withdrawing funds from Cooperative Bank of Kenya Limited and SBM Bank Kenya and she attached copies of the Replying Affidavit and Bank Statements to support the contention as NMN -5 .
14. She finally concluded by urging the court to dismiss the application because in her view, it lacks merit and is an attempt to obtain orders for stay of execution of the decree dated 13/07/2022. It was her contention that litigation concerning the said decree must come to an end. Therefore, she prays for summary dismissal of the instant application with costs.
15. This matter was certified urgent and the application was admitted to be to be heard during vacation on 22/08/2023

Client/Applicant's Oral Submissions

16. The client/applicant in its submission stated that this court is has powers to grant the orders sought and to even vary the amounts proposed for repayment. Further the role of the court is to ensure dispute resolution. That whereas the client/applicant had made a proposal for payment of the decretal sum in instalments the advocate/respondent has refused to accept this proposal. He submitted that with regard to the appeal filed, there is no law that stated that where one is seeking an appeal that they are then barred from seeking for payment of a decretal sum in instalments. That order 21 rule 12 grants this Honorable Court discretion to grant the prayers sought and that the proposal presented to settle the outstanding amount is fair and reasonable in line with article 159.
17. Further that concerning the ruling on the Garnishee Application he submitted that there was no appeal nor a review of the said order and therefore the issues raised by the respondent should have been raised in the context of an active application. Further that no contradictory statement of accounts has been presented before this court. It was his contention that the basis upon which an extension of time had been sought is because the applicant could not be able to raise the amount decreed.
18. Two issues for determination namely; whether the client/applicant should be allowed to liquidate the decretal amount in monthly instalments and whether the interest should be reviewed. The applicant/applicant in conclusion submitted that he acknowledged obligation to pay the decretal amount but he was not able to pay the whole amount in one instalment due to the hard economic times. That the respondent had rejected its proposal to settle the decretal amount with the first instalment of Kshs. 500,000 and thereafter pay the rest in equal instalments till the end of the year when he will have settled the entire decreed sum. In citing order 21 rule 12 of the [Civil Procedure Rules](#) he submitted that through the said order the court is empowered to order that monies due and pursuant to the judgement of the court be paid in instalments where sufficient reason was given. He prayed that the court allows his client he is not a man of means as described by the advocate/respondent to settle the decretal sum in instalments and therefore allow the application.



Respondent's Submissions

19. The advocate/respondent in her response submitted orally and stated that the applicant had filed an appeal NAI-Civil Application No. E362 of 2023 effectively moving this matter out this Honorable Court. Further that the court of Appeal has already issued directions on how the matter will be disposed of. This being the case any directions that this court may give will not be able to be implemented given the fact that the court of appeal is seized with the matter. Further that the applicant did not file an affidavit of means that shows why he should be allowed to pay in instalments.
20. It was her submissions that this application is a backdoor means to try and obtain a stay. Further that the proclamation issued is lawful. It was her submission of the exhibit MNM-5 which was attached to the Replying Affidavit was testimony that when the decree holder applied for order Nisi on 3/10/2022 the balance in Cooperative Bank was Kshs. 1,341,348 but a withdrawal of Kshs. 950,000 was made. The same applies to the SBM bank which has a balance of Kshs. 1,941,000 and a withdrawal of Kshs. 950,000 was made. She submits that this action was taken to frustrate execution of the court order.
21. On the issue of the banker's cheques, it was her submission that the ruling delivered by this court was made before the banker's cheques were presented to the court. In conclusion she submits that the applicant has substantial wealth and that there is no justification to pay the decretal sum in instalments. Further that any order of this court touching on this matter will meddle with the process of the Court of Appeal.

Analysis and Determination

22. I have perused carefully the applicant's application herein, the affidavits and listened to the oral submissions made by both parties and one issue arise for determination namely; whether this court should allow the client/applicant to pay the decretal amount in instalments.
23. In addressing the first issue, order 21 rule 12 (1) and (2) of the Civil Procedure Rules provides as follows:
-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 installments, 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 installments 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.
24. In view of the above, under order 21 rule 12(2) the court has power and discretion to order payment of the decretal sum in instalments on application by the judgment-debtor with or without the consent of the decree holder. The judgment-debtor however has to show sufficient cause as to why he should be allowed to pay the decretal sum in instalments and/or why the payments should be postponed. Further in my opinion, this court discretion to order payment in instalments and/or on such terms it deems fit must be exercised judiciously having regard to the facts and circumstances of each individual case.
25. In the case of Diamond Star General Trading LLC v Ambrose D O Rachier carrying on business as Rachier & Amollo Advocates [2018] eKLR, G L Nzioka J relied on order 21 rule 12(2) to exercise his discretion to allow the applicant pay the decretal sum in instalments. The Judge cited with approval the case of Kshs. Vaji Jethabhai & Bros Limited V Saleh Abdulla [1959] EA 260 which laid down the principles that should guide the court in exercising its discretion as follows: -



- a. whilst creditors' rights must be considered each case must be considered on its own merits and discretion exercised accordingly;
 - b. the mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of the discretion;
 - c. the debtor should be required to show his bona fides by arranging prompt payment of a fair proportion;
 - d. Hardship of the debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.
26. In the present case, the plaintiff/applicant has not demonstrated any reason for its inability to settle the decretal sum in one lump sum. There is no iota of evidence save the statement that it is was in an environment of tough economic hardship. This statement is relative. One must demonstrate sufficient reason so as to attract the courts discretion. In this regard this court is unable to do so for these observations.
27. Consequently, the prayer on payment by instalments is disallowed. The respondent shall have the costs of this application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF AUGUST 2023.

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MOGENI J

JUDGE

In the presence of:

Ms Mwangi for the Respondent/ Decree Holder

No appearance for Mr Njenga for Client/Applicant

Ms. Caroline Sagina: Court Assistant

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MOGENI J

JUDGE

