



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL SUIT NO. E147 OF 2020 (OS)**

**IN THE MATTER OF THE**

**FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT**

**AND IN THE MATTER OF ENFORCEMENT OF JUDGMENT DELIVERED ON 11<sup>TH</sup> MARCH 2020 IN THE HIGH COURT OF ENGLAND AND WALES, COMMERCIAL COURT, QUEENS BENCH DIVISION IN CLAIM NO. CL-2019-000762**

**BETWEEN**

**AMRA LEASING LIMITED.....APPLICANT/JUDGMENT CREDITOR**

**AND**

**DAC AVIATION (EA) LIMITED..... 1<sup>ST</sup>RESPONDENT/JUDGMENT DEBTOR**

**DAC INTERNATIONAL AVIATION**

**LIMITED..... 2<sup>ND</sup> RESPONDENT/JUDGMENT DEBTOR**

**EMMANUEL ANASSIS .....3<sup>RD</sup> RESPONDENT/JUDGMENT DEBTOR**

**RULING NO. 2**

**Introduction**

1. The application before the court is filed by the respondents (“the Judgment debtors”) following the recognition of the Judgment delivered on 11<sup>th</sup> March 2020 in the High Court of Justice of England and Wales, Queens Bench Division, in Claim CL-2019-000762 for GB£8,992,980.25. By a ruling delivered on 29<sup>th</sup> May 2020, this court allowed the Originating Summons thereby recognizing the judgment and granting leave for the said judgment to be executed as a decree of this court.

**The Application**

2. The Judgment debtors have filed an application dated 9<sup>th</sup> July 2020 seeking the following orders:-

*a. Spent*

*b. Pending the hearing of this application inter-parties and/or further orders of the court there be a stay of execution of the judgment registered by this court on 29<sup>th</sup> May 2020 recognizing and registering the judgment delivered on 11<sup>th</sup> March 2020 by the High Court of Justice of England and Wales, Commercial Court, Queens Bench Division in Claim No. CL-2019-000762 for GB£8,992,980.25.*

*c. The payment of the sum of GB£8,992,980.25 be postponed for a period of nine (9) months from the date of the order herein*

*d. Without prejudice to any adjustment that may be made in relation to the judgment registered herein, the respondents be allowed to make payment of the sum of GB£8,992,980.25 as follows;*

*1. By monthly installments of US\$50,000 to be paid for a period of six (6) months beginning April 2021 to October 2021.*

*2. Thereafter, by monthly instalments of US\$100,000 for a period of twelve (12) months from November 2021 and November 2022.*

*3. With effect from January 2023, by quarterly instalments of US\$325,000 per quarter until the debt is paid or otherwise compromised.*

*e. There be cessation of the accrual of interest on the judgment amount of GB£8,992,980.25 with effect from the date of this application.*

*f. The Honourable Court be pleased to issue any other order as may seem just and fair in the circumstances of this case.*

*g. The costs of this application be provided for.*

3. The application is supported by the affidavit of Jane Potapova sworn on 9<sup>th</sup> July 2020. In essence the Judgment debtors are apprehensive that the Judgment Creditor will take steps to execute the decree. They contend that GB£8,992,980.25 is a colossal sum and if the decree is executed, it will cause them serious and irreparable harm, including liquidation. In the deposition, the Judgment debtor gave an outline of the 1<sup>st</sup> respondent's business and financial status to justify the orders sought.

4. The Judgment debtors stated that the 1<sup>st</sup> respondent ("DAC Aviation") has been providing humanitarian air charter services for two decades in conflict areas including Sudan, South Sudan and Somalia and that their business is capital intensive and any minor disruption in the revenue stream has far reaching consequences on its bottom line. They stated that DAC Aviation's contract with Tullow Oil, its largest revenue generator, was terminated in 2015 after the fall in oil prices in late 2014 leading to a decrease in revenue from approximately USD 1 million per month to USD 200,000 per month. It also lost about 20% of its expected income following decline in the Euro from its contract with the European Commission which was its second largest revenue generating contract. The Judgment Debtor explained that DAC Aviation also entered into a heavy maintenance cycle that required 40% of its fleet to be put into c-checks leading to a decline in revenue and increase in costs. The Judgment debtors exhibited the DAC Aviation annual reports and financial statements as at 31<sup>st</sup> December 2018, which showed that it made losses of Kshs. 357,310,000/-.

5. The Judgment debtors also explained that DAC Aviation is heavily indebted and all its assets charged to Kenya Commercial Bank ("KCB"). The facilities obtained from KCB were restructured and enhanced in July 2019 leaving it indebted on account of US\$1 million overdraft, a term loan IV facility of US\$1,900,000.00 and a term loan V facility of US\$ 1,700,000.00 for working capital requirements bringing the outstanding liabilities to US\$6,975,000.00 and KES 6,067,000.00. These facilities were secured by a Debenture, a Legal Charge over LR No. 12310 and a Corporate Guarantee and Indemnity by the 2<sup>nd</sup> respondent.

6. The Judgment debtors also explained that when Claim No. CL-2019-000762 in the High Court of Justice of England and Wales was served on them, they failed to file their defence as they could not agree on fees with their legal representative Bird and Bird LLP due to financial difficulties.

7. Since DAC Aviation is involved in aviation business, the Judgment debtors claimed that the COVID-19 pandemic has negatively affected their business following air travel bans between February and March 2020. This affected several contracts; a contract with World Food Programme ("WFP") Somalia for a Cessna Caravan valued at approximately US\$75,000 per month was cancelled, a contract with WFP South Sudan for a C295H valued at approximately US\$960,000 was not renewed, a contract with Nile Drilling South Sudan valued at approximately US\$500,000 per month was suspended while flights under a contract with UNDPKO – South Sudan were reduced and only performed when authorized by the Government of South Sudan.

8. The Judgment debtor's further contended that DAC Aviation's business of servicing aircraft has been affected by its customers delaying payments and that it is owed approximately US\$200,000.00 in outstanding invoices. Its own financial position has also worsened causing it to fall into arrears with respect to its payroll. Its employees, lessors and other creditors have granted it moratoria and payment deferrals to allow it to survive. It has also requested for a moratorium from its financiers including KCB.

9. The Judgment debtors submit that they are not in a financial position to offer immediate payment in settlement of the judgment debt and that if it is to be recovered at once, DAC Aviation will go into liquidation and this will permanently and irretrievably disable the Judgment debtors with no hope of recovery.

### **The Response**

10. The Judgment creditor opposed the application through the replying affidavit of Paul Clark, its Lease Manager, sworn on 28<sup>th</sup> July 2020. He deposed that parties' commercial relationship dated back to 2013 and that during that time, the Judgment debtors brought up issues of alleged financial hardship. In his view, these appeared exaggerated and were designed to persuade the Judgment creditor to forego any demands for payment but any flexibility granted was rewarded by the Judgment debtors paying other creditors first.

11. The Judgment creditor submitted that Judgment debtors have failed to articulate the measures they have put in place during the period they seek to postpone payment of the judgment debt. It doubted their bona fides as well as the feasibility of the proposed payment plan and asserted that prior to commencement of Claim CL-2019-000762, it had attempted to reach out to them for an amicable settlement but its

efforts were ignored. DAC Aviation elected to persuade the Judgment creditor to suspend demand for payment while giving preference to other creditors.

12. The Judgment creditor submitted that the annual reports and financial statements provided by DAC Aviation in support of the application were misleading, incorrect and selective and an attempt to avoid paying the debt. The Judgment Creditor pointed out that only audited reports for 2016 were produced while the financial statements for 2017, 2018 and 2019 were unaudited thus giving an incomplete picture of its position.

13. In response to the Judgment debtor's proposal, the Judgment creditor submitted that it was not supported by any empirical evidence to demonstrate that it was feasible or achievable. It complained that the Judgment debtors have only highlighted financial difficulties but have not set out any measures that they propose to ameliorate those difficulties in order to settle the judgment debt. It further notes that nothing was said or proposed by the 2<sup>nd</sup> and 3<sup>rd</sup> Judgment debtors who also have an obligation to settle the judgment debt. As regards the COVID-19 pandemic, it submitted that the liability has been outstanding for several years and that the pandemic is only an excuse to avoid liability.

14. On the whole, the Judgment creditor avers that the respondents have failed to prove the existence of the contracts with third parties and evidence of moratoria and other indulgence from third parties. It is submitted that the Judgment debtors have failed to demonstrate that they would be able to implement the proposed payment plan and the plan makes no allowance for the amount of time elapsed during which the obligations have remained unperformed and the significant amount of time and resources to pursue payment of the sums due to it from the Judgment debtors.

### The Rejoinder

15. In her further affidavit sworn on 7<sup>th</sup> August 2020, Jane Potapova denied the Judgment creditors allegations. She stated that DAC Aviation was not in a position to set out measures it has put in place to mobilise resources due to uncertainty caused by the COVID-19 pandemic but it was trying to secure new business contracts and it has pending contracts from WFP and United Nations Department of Peacekeeping whose decisions are expected in September 2020.

16. MsPotapova explained that due to DAC Aviation's financial difficulties most leases signed from 2017 onwards were secured by the revenue generated by each asset and in that regard Lockbox accounts were set up which allowed the owners of the assets to control the release of funds generated from those assets. She further deposed that it had to enter into those arrangements to secure new assets in order to keep the business operational hence it was not correct to assert that it favoured other creditors.

17. The Judgment debtors denied that the application was filed to delay or permanently frustrate the applicant as alleged. They reiterated the 1<sup>st</sup> Judgment Creditors commitment to liquidate the judgment debt but for the COVID-19 pandemic.

### Determination

18. The substance of the application before the court is for postponement of the payment of the judgment debt and for the Judgment debtors to settle the judgment debt by instalments. The application is grounded on **Order 21 rule 12** of the **Civil Procedure Rules** which provides as follows:

*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.*

*(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.*

19. These aforesaid provisions give the court a wide discretion as to whether payment of the amount decreed will be postponed or settled by way of installments. This discretion must be exercised in a judicial and not an arbitrary manner. Several cases have been cited by the parties to delineate the contours of this discretion. I would be content to cite several authorities including **Keshvaji Jethabhai & Bros Limited V Saleh Abdulla [1959] EA 260**, **Hildegard Ndalut v Lelkina Dairies Ltd & Another [2005] eKLR** and **Freight Forwarders Ltd v Elsek & Elsek (K) Ltd MSA HCCC No. 56 of 2012 [2012] eKLR**. In the latter case, Mwongo J., distilled the principles applicable. While creditors rights must be considered, each case ought to be decided on its own merits bearing in mind the circumstances in which the debt was incurred, the conduct of the debtor, his financial position and bonafides. The inability of a debtor to pay the full debt at once is not sufficient reason for exercise of the discretion. The debtor should be required to show bona fides by arranging prompt payment of a fair proportion of the debt and while hardship may be a factor, it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.

20. The fact that DAC Aviation is facing financial constraints is quite evident. This is against a background of the COVID-19 global pandemic, a matter of common notoriety, which has negatively affected businesses the world over. It is understandable, more so, for companies in the aviation businesses as local and international flights were suspended for several countries to curb the spread of the Corona virus.

21. DAC Aviation has requested for postponement of 9 months. By its own admission it has entered into moratoria with some its creditors but this is not supported by material evidence of the agreements. It is thus difficult for the court to gauge the nature and extent of its exposure and therefore to determine what is available to liquidate the judgment debt. There is however public evidence that some creditors have already expressed the intention to commence the process of liquidation. In light of all this the financial position of DAC Aviation in 9

months' time is not clear.

22. As the authorities show the judgment debtor might genuinely be in a difficult position in paying the decretal amount at once but it must show seriousness in paying the amount. In my view, I am not impressed by the material before me supporting postponement of payment of the judgment debt for a period of 9 months. The request of postponement, must be supported by a tangible and achievable plan as the Creditor is requested to forebear executing for a considerable period of time taking into account it has not been paid even prior to the time the suit was filed in England.

23. In view of what I have stated, I am prepared to order payment by instalments taking into account the liability of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Although they are equally liable to settle the debt, they have said nothing of their capacity and ability to make payments. They are fully liable and must contribute as the Judgment creditor is entitled to proceed with execution against them.

24. The order I intend to make balances the interests of all the parties, by allowing DAC Aviation to continue as going concern and repay its debts to the Judgment. Having allowed the Judgment debtors to pay the debt by instalments, the inconvenience by suffered by the Judgment Creditor will be ameliorated by the accrual of interest over the period which it is rightly entitled to. The interest payable is its compensation for the indulgence granted to the Judgment Debtors. I also believe a short period of time would enable DAC Aviation arrange its affairs accordingly.

25. For the reasons I have set out above, I allow the Notice of Motion dated 9<sup>th</sup> July 2020 on the following terms:

*a. The Respondents/Judgment Debtors be and are hereby allowed to make payment of the sum of GBE8,992,980.25 as follows;*

*1. By monthly installments of US\$50,000 to be paid for a period of six (6) months commencing 1<sup>st</sup> November 2020 to April 2020. Every subsequent instalment shall be paid on the 5<sup>th</sup> day of the month.*

*2. Thereafter, by monthly instalments of US\$100,000 for a period of twelve (12) months whereupon the entire debt shall become due and owing.*

*3. In the event of any default in payment of the instalments of the due date, the entire debt shall become due and owing and the Decree holder shall be at liberty to proceed with execution.*

*b. The costs of this application shall be borne by the Judgment Debtors.*

**DATED and DELIVERED at NAIROBI this 24<sup>th</sup> day of AUGUST, 2020.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr. M. Onyango

MrKuyo instructed by Coulson Harney LLP for the applicant/Judgment creditor

MrOndieki instructed by Hamilton, Harrison and Mathews for the respondent/Judgment debtors.