



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

(CORAM: A.K. NDUNG'U J.)

ELECTION PETITION NO. 1 OF 2017

JEREMIAH NYANGWARA MATOKE.....PETITIONER/APPLICANT

VERSUS

INDEPENDENT ELECTROL AND BOUNDARIES COMMISSION.....1ST RESPONDENT

THE RETURNING OFFICER.....2ND RESPONDENT

ALFAH MIRUKA ONDIEKI.....3RD RESPONDENT

AND

FLORENCE NYANGWARA.....1ST OBJECTOR/ APPLICANT

SUNRISE PRODUCE KENYA LIMITED.....2ND OBJECTOR/APPLICANT

RULING

1. The application for determination is a Notice of Motion dated 10th September 2020 and amended on 22nd September 2020. The orders sought in the application are as follows:

a. Spent

b. That this court be pleased to issue a temporary order staying execution of the judgment or decree of this court dated 17th October 2019 and the petitioner be allowed to liquidate the decree by monthly installments be provided for (sic); and/ or

In the alternative this honorable court do grant leave to the applicant to liquidate the decretal sum by monthly installments of Kshs. 100,000/= till payment in full or till further orders of this honorable court;

c. That this court be pleased to issue a temporary order staying execution of the judgment and/or decree of this court dated 17th October 2019 pending the hearing and determination of this application;

d. That costs of this application be provided for.

2. The application has been brought pursuant to **Order 22 Rule 22**, **Order 42 Rule (6) (10) (2)** and **Order 51 Rule 1** of the **Civil Procedure Rules** and **Section 1 (A) (B) and 3A** of the **Civil Procedure Act**. It is based on the grounds set out in the body of the application and the applicant's affidavit which was sworn on 22nd September 2020.

3. The applicant avers that before venturing in politics, he was a civil servant. He took an early retirement to join politics and spent his retirement benefits to purchase land. He also obtained a loan from Co-operative Bank to build a house on the plot to generate an income for his upkeep. Unfortunately, the building collapsed during construction erasing his entire investment and the loan he had taken. He claims that he has renegotiated with the bank which has agreed to re-finance him to put up a building on the plot.

4. The applicant informs the court that he intends to use part of the loan to repay the decretal sum of Kshs. 3,700,000/= in a lump sum and settle the balance in monthly installments of Kshs. 100,000/=. He states that at the moment, he has no source of income apart from his pension which he uses to sustain himself and his children. He is of the view that no loss or damage will be occasioned to the respondent who is the current Member of Parliament for Bomachoge Chache Constituency if the application is allowed.

5. The 3rd respondent is opposed to the application. He swore an affidavit on 8th October 2020 contending that the application was only calculated to deny him the fruits of his judgment. He states that since the Certificate of Taxation was issued, the applicant has made no move to settle the balance of the decretal sum and it is clear that he is unwilling to settle the amount which stood at Kshs. 4,477,000/= inclusive of interest. He avers that the proclamation notices show that the respondent has a lot of property and no cogent reason has been given for his failure to pay the decretal sum.

6. The proposal for settlement of the decretal amount by way of monthly installments of Kshs. 100,000/= is rejected by the respondent who states that such a mode of payment would not be prompt, fair and cost effective administration of justice as it would take over 4 years for the entire amount to be paid.

7. The respondent's counsel opted to rely on the replying affidavit sworn on 8th October 2020 as his arguments against the application while the applicant's learned counsel filed written submissions in support of the application.

8. The application for payment of the decretal sum in installments is made pursuant to **Order 21 Rule 12(2)** of the **Civil Procedure Rules** which provides:

12(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.

9. The applicant relied on the case of **Freight Forwarders Ltd v Elsek & Elsek (K) LTD Civil Case 56 of 2012 [2012] eKLR** where the court cited with approval the cases of **Keshavji Jethabhai & Bros Ltd vs Saleh Abdulla [1959] EA (J) 260** and **A. Rajabali Alidina vs Rehmatulla Alidina & Anor [1961] EA 565** on the conditions to be met for the court to allow an application for payment of the decretal sum in installments.

10. In **Keshavji Jethabhai & Bros Ltd vs Saleh Abdulla [1959] EA (J) 260** the court held: that

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.

11. In **A. Rajabali Alidina vs Rehmatulla Alidina & Anor [1961] EA 565** it was held:

the court can consider the circumstances in which the debt was incurred; the conduct of the debtor; his financial position; and his bona fides.

12. The decree against the applicant in this case arose from the dismissal of his Election Petition with costs to the respondents. The applicant and the 3rd respondent agreed at a sum of Kshs. 4,200,000/= in costs. They also agreed that the sum of Kshs. 500,000/= which had been deposited in court as security would be released to the 3rd respondent to offset part of the costs. A decree was entered to that effect on 2nd April 2019.

13. The applicant claims that he is not in a good financial position to clear the decretal sum in a lump sum as he is a pensioner getting a sum of Kshs. 38,983/= a month. He also claims that a building he was constructing using his retirement benefits and a loan from Co-operative Bank collapsed; erasing his investment and his expectations of an income for his upkeep.

14. The applicant's counsel submits that the applicant has demonstrated his hardship in raising a lump sum to service the debt. He also argues that the applicant has shown good faith by willingly surrendering the security of Kshs. 500,000/= to the respondent. He submits that the applicant has no other source of income since his financial position was gravely affected by the collapse of his building which he had invested heavily in.

15. The foregoing authorities hold that the mere inability of a debtor to pay in full at once is not sufficient reason to grant an application to settle the decretal amount in installments. In this case, I am not persuaded that the applicant has been acting in good faith. From when the decree was passed on 2nd April 2019, the respondent has not made any payments towards the settlement of the amount which stood at Kshs. 3,700,000 at the time. The decretal sum continues to accrue interest by the day.

16. The applicant claims that he will pay a part of the debt by redirecting a loan he has been negotiating with his bank to refinance the reconstruction of his building. That proposition is not only fraudulent but is also vague and unsupported and has not been explicitly sought in

the instant application. It is not clear what amount the applicant intends to pay as a lump sum and when. His proposal to pay a sum of KShs. 100,000/= is just as uncertain as the respondent is not forthright on how he plans to raise the installments given his track record and his claim that his sole income is a pension.

17. In the circumstances, the 3rd respondent worry that he may not enjoy the fruits of his judgment, if the application is granted is warranted. If the application is allowed as it is, this matter will, at the very least, take 3 years to be finalized. That would go against the overriding principles which call for expeditious and timely disposal of suits. I therefore reject the applicant's proposal.

18. For the reasons already given, the application amended on 22nd September 2020 is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Kisii this 16th day of December, 2020.

A. K. NDUNG'U

JUDGE