



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 7 of 2015

IN THE MATTER OF THE ESTATE OF MUHAMBI GOGO MWANGALA

KHAMISI ANTHONY TSANJE.....APPLICANT/RESPONDENT

VERSUS

TABU MUHAMBI GOGO

HAWERISA MUHAMBI GOGO

BIBI MKANYI MAKALA

MEDI MUHAMBI GOGO

KHAMISI KOMBO GOGO

GOGO MWANGALA GOGO

NELSON GOGO MWANGALARESPONDENTS/APPLICANTS

RULING

1. The Application before me dated 29.9.17 arises from a taxation ruling of 25.8.17 (the Ruling) on a party and party bill of costs dated 1.12.16. The Respondent **Khamisi Anthony Tsanje had filed a citation against Tabu Muhambi Gogo, Hawerisa Muhambi Gogo, Bibi Mkanyi Makala, Medi Muhambi Gogo, Khamisi Kombo Gogo, Gogo Mwangala Gogo and Nelson Gogo Mwangala**, (the Applicants) who are the children of Muhambi Gogo Mwangala (deceased). After the Respondent closed his case, the Applicants gave instructions to their advocates to file a petition for a grant of representation. The matter was thus settled and costs were awarded to the Respondent. Following disagreement on costs payable, the Respondent filed the aforesaid bill of costs. In the Ruling, the costs were **taxed at Kshs. 113,918/= (the amount due)**. The Applicants now seek stay of execution of the Ruling and all consequential orders. They also seek that they be granted leave to pay the amount due in monthly instalments of Kshs. 5,000/= as they are unable to pay the same at once due to financial constraints. .

2. The Applicant opposed the Application by a preliminary objection filed on 6.6.18. The grounds are that:

i) the Application has been filed in the wrong Court.

ii) The Applicants have not satisfied the conditions of Order 42 Rule (6)(2) of the Civil Procedure Rules, 2010 (the Rules).

3. Parties filed their written submissions in support of their respective positions. The Court has considered the material on record and makes findings on the issues in dispute. On whether the Court has jurisdiction to entertain the Application, the Respondent urged that the Ruling was delivered by the Resident Magistrate. As such, the Application ought to have been filed in that Court. For the Applicants, it was submitted that this Court has unfettered jurisdiction to entertain the Application under Order 21 Rule 12(1) (2) of the Rules. To the Applicants. This is the right Court in which to seek orders of stay and payment of the amount due in instalments.

4. Order 21 Rule 12(1) (2) of the Rules provides:

(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.

5. Costs in this matter were awarded to the Respondent by this Court. The Magistrate's role as the taxing master was to determine whether the costs in the bill of costs were in tandem with what is allowed by law. This was done and the costs were taxed at the amount due of KShs. 113,918/=. This being the Court that awarded costs is the correct Court in which to file an application for stay of the taxation and for paying the taxed costs in instalments. I do find that by dint of Order 21 Rule 12 of the Rules, this Court is clothed with the jurisdiction to entertain the Application. The Applicants need only satisfy the Court that they have sufficient cause to warrant the grant of the orders sought.

6. On the issue of non-compliance with Order 42 Rule (6)(2) of the Rules, it was submitted for the Respondent that the Applicants failed to comply with the same. It was contended that no substantial loss would be suffered by the Applicants. The Respondents have failed to provide security for the due performance of the order which is binding on them. In response, the Applicants sought refuge in Article 159(2)(d). They further argued that the preliminary objection does not meet the threshold required for a preliminary objection.

7. Order 42 Rule (6)(2) of the Rules provides:

6. Stay in case of appeal

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

8. It is clear from the foregoing that stay is contemplated pending appeal. By analogy, in the case of taxation of costs, Order 42 Rule (6) would be applicable where a reference has been filed and a party seeks stay pending determination of the reference to a judge. In the present case, the Applicants have not filed a reference and have in fact stated that they do not intend to challenge the taxation of costs. In the premises therefore, my view is that Order 42 of the Rules is not applicable herein. This ground of the preliminary objection therefore fails.

9. Under Order 21 Rule 12 (1) (2) the Court has the discretion, for sufficient cause shown, to order that payment of any amount decreed be postponed or made by instalments. The rules provide:

(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.

10. While appealing to the Court's indulgence, the Applicants must show sufficient cause. I follow the holding in Lavington Security Limited v Nairobi City Water and Sewerage Co. Ltd [2014] eKLR where Gikonyo, J. stated:

Under Order 21 Rule 12 (1) and (2) of the Civil Procedure Rules, the Court may "...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." Therefore, 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. The onus of establishing sufficient cause rests on the Applicant. See the case of JABALI ALIDINA v LENTURA ALIDINA [1961] EA 565 at page 566 that:-

"All commentators on the Civil Procedure Code agree that the court's discretion to order payment of the decretal amount in installments is one which must be exercised in a judicial and not an arbitrary manner. The onus is on the Applicant to show that he is entitled to indulgence under this rule.

It is for the Applicant to show "sufficient reason" for indulgence being shown to him, and this court is immediately faced with difficulty in this respect, as the learned magistrate has not stated what reasons put forward by the Applicant he

considered sufficient to justify the exercise of the court's discretion in the Applicant's favour."

11. In the instant case, the Applicants state that they not financially able to pay the amount due in one go. The Respondent has not contested this claim. In the circumstances, I have no reason to doubt the Applicants' inability to pay the amount due at once. I am therefore inclined to exercise my discretion in their favour.

12. While considering whether to allow the proposal by the Applicants, I again follow Gikonyo, J in Lavington Security Limited (supra) where had this to say:

Should I accept one or other of the proposed amount of instalments by parties or should the Court order a separate amount of instalment altogether? In strict sense, the Court is not bound by the proposals made by the parties although such proposals are critical in determining an application to pay by instalments. Of great significance in application of this nature are; the circumstances of the case; the conduct of the parties; the willingness and bona fides of the Applicant to pay a fair proportion of the debt; and of course, that the application is made without undue delay.

13. The Court notes that the Applicants have stated that they do not wish to appeal the Ruling. They have expressed a willingness to pay the amount due but in monthly instalments of Kshs. 5,000/=. They state that they are unable to pay the amount due at once as they are not financially stable. The Court further notes that the amount due though not disputed has remained unpaid since 25.8.17 when the Ruling was delivered. The monthly instalments of Kshs. 5,000/= proposed by the Applicants to liquidate the amount due is inordinately low. It will take about 22 months to clear the same. This is in my view unreasonable. This being a Court of justice, the interests of all the parties must be weighed and the Court must justice to all.

14. In the result, I make the following orders:

- i) The Preliminary Objection lacks merit and is hereby dismissed.
- ii) The Applicants shall pay the sum of Kshs. 113,918/= in 5 equal monthly instalments on or before the 5th day of each month with effect from 5.5.19 until payment in full.
- iii) In default on any one instalment, the Respondent shall be at liberty to execute for the sum outstanding as at the date of default.
- iv) Given the delay in settling the amount due, I do award costs of this Application to the Respondent.

DATED, SIGNED and DELIVERED in MOMBASA this 26th day of April 2019

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant/Respondent**

..... **for the Respondents/Applicants**

..... **Court Assistant**