



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERCIAL AND TAX DIVISION

MISC. CIVIL APPLICATION NO. 451 OF 2015

DIAMOND STAR GENERAL

TRADING L.L.C.....PLAINTIFF/RESPONDENT

VERSUS

AMBROSE D.O. RACHIER

Carrying on business as

RACHIER & AMOLLO ADVOCATES.....DEFENDANT/APPLICANT

RULING

1. This Ruling relates to a Notice of Motion Application dated 3rd April 2017, brought under the provisions of Sections 1A, IB and 3A of the Civil Procedure Act (Cap 21) Laws of Kenya, Order 21 Rule 12 and Order 52 Rule 7 of the Civil Procedure Rules, 2010 and all other enabling provisions of the Law.

2. The Applicant is seeking for orders:-

i. That the Honourable Court be pleased to order stay of execution of the judgment of the Court issued herein on 15th March 2017, pending the hearing and determination of this Application;

ii. That the Honourable Court be pleased to give leave to the Defendant/Applicant to liquidate the judgment sum awarded to the Plaintiff herein, being Kshs 80,000,000 plus interest from the date of filing the suit to payment in full and the costs of the suit, in monthly installments of Kshs 1,600,000, to be paid from the date of the order until final settlement;

iii. That the Honourable Court be pleased to restrain the Plaintiff/Respondent from levying execution herein for as long as the Defendant/Applicant pays the proposed monthly installments;

iv. That the Honourable Court be pleased to issue any other order as may seem just;

v. That the costs of this Application be provided for.

3. The Application is based on the grounds on the face of it and an Affidavit dated 3rd April 2017, sworn by the Applicant. He avers that sometime in the year 2013, Friends That Care Holding Limited (herein "the client"), being a client he had previously acted for, approached him and requested him to give an assurance to its prospective lender, being the Plaintiff (herein the "Respondent"), to the effect that the client would pay back all the money it was borrowing.

4. That at time the client requested him to give the assurance, the two parties had already negotiated a loan agreement on terms known to them and the Respondent apparently required that assurance from him to disburse the money. He was not therefore conducting any matter or transaction for the said client and never intended to give a professional undertaking but only gave assurance to enable the client obtain the loan, albeit now clearly a careless undertaking.

5. Unfortunately, the client neglected to repay the loan amount being a total sum of Kshs 80,000,000, leading the Respondent to institute the

suit herein against him in a personal capacity, claiming enforcement of the professional undertaking.

6. On 15th March 2017, the Honourable Court delivered a judgment and held that he had given the Respondent a professional undertaking for payment of the total sum of Kshs. 80,000,000 and that he should honour it by paying all that amount of money. The Honourable Court also ordered that he should pay the Respondent interest on the amount claimed from the date of filing the suit till payment thereof in full plus costs of the suit.

7. Consequently, he is now faced with the extremely difficult obligation to pay all that money, which is quite enormous, and is at extreme pains to find ways of paying it as he never received the money or any part thereof from the client such as to enable him to pay up, now that he has to pay it from his own pocket.

8. He avers that given the magnitude of this obligation, even though he is willing to pay as ordered by the Court, he is unable to pay all that money as a lump sum, although keen to start diminishing the amount by paying monthly installments of Kshs 1,600,000.

9. Further that, he has instituted a suit against the client to recover the monies and if he obtains the compensation before full settlement of the judgment sum herein, he will pay off the remaining sum in a lump sum as he has tried various ways to push the client to pay back the money but all efforts have been unsuccessful. The failure by the client to repay the loan thereof is beyond control and he is thus constrained to ask the Honourable Court to allow him to pay the judgment sum in installments of Kshs 1,600,000 which amount is a reasonable sum forthwith.

10. Finally, the Applicant states that he made the Application in good faith. He resides in Nairobi within the Republic of Kenya where he has established his family and career spanning over a period of more than thirty (30) years, therefore he poses no threat whatsoever of absconding this obligation to pay. He prayed that in the interest of justice and fairness, the Honourable Court allow him to pay the judgment sum in requested installments.

11. The Application was opposed vide grounds of opposition dated 7th April 2017 and filed by the Respondent on 10th April 2017. The grounds are as follows:

(i) *The Court has no jurisdiction to grant an order of stay of execution;*

(ii) *The Applicant has not demonstrated good faith in dealing with this matter and is therefore underserving of the Court's indulgence;*

(iii) *The Applicant ought to have paid a substantial portion of the decretal sum first as a show of good faith;*

(iv) *The proposal to pay the sum of Kshs 1,600,000 to settle the decretal sum is unreasonable. It will take over 50 months or about 4 years to settle the decretal sum;*

(v) *The professional undertaking which is the subject of this suit was given in June and July 2013. Payment was to be made by 31st October 2013. The proposal to pay in monthly installments of Kshs 1,600,000 will keep the Plaintiff/Respondent out of its money for a long time;*

(vi) *The Applicant has not established sufficient cause for the grant of the orders sought.*

12. The Parties agreed to dispose of the Application by filing submissions. Whereby the Applicant filed submissions on 6th November 2017, in which he basically reiterated the grounds and/or averments in the Affidavit in support of the Application. That since he did not intent to give a professional undertaking in the strict sense, he did not obtain any form of security or indemnifications from the client to enable him meet their obligation in case of failure as is the practice in giving professional undertakings.

13. However, he acknowledges that once judgment is made, such as herein, it follows that payment should be made so that the Plaintiff can receive its award, as the conventional principle goes *"the Decree Holder should enjoy the fruits of his judgment"* and therefore, payment is the most important issue at this stage which the Defendant acknowledges.

14. However he further reiterated that the money in question is extremely a lot to be paid by an individual. That he is acting in good faith, and is exercising due diligence by rushing to the Honourable Court immediately after the decision was made to express his willingness to pay forthwith and to propose a payment plan so that the Respondent is not denied and does not experience delay in enjoying the fruits of its judgment.

15. The Applicant relied on the provisions of Order 21 Rule 12 of Civil Procedure Rules, 2010 which empowers the Court to order that monies due and pursuant to the judgment of the Court, be paid in installments where sufficient reason is given. He prayed that the Court exercises its power under these provisions as the Respondent will be seeking to extract a decree for purposes of execution.

16. The Applicant referred the Court to the principles laid in the cases of; *Keshavji Jethabhai & Bros. Limited vs Saleh Abdullah (1959) EA 260* and *A.Rajabali Alidina vs Remtulla Alidina & Another (1961) EA 565* that guide the discretion of the Court to order payment by installments. He argued that the key factor is to recognize and consider the circumstances of each case be determined in light of its surrounding facts.

17. Further reference was made to the case of; *Sawatram Ramprasad vs Imperial Bank of India* where the Court held that, the prompt

payment of a fair proportion of the debt is not a condition precedent for the exercise of the discretion of granting payment by installments.

18. Finally, the Applicant reiterated that, the sum of Kshs 1,600,000 million every month is quite a lot for him to pay, as he is an individual who relies on the practice of law for his daily earnings and he supposed to single handedly pay the decretal sum to a Multinational Company. Even then, he is paying back a loan which he never took, and the proposed sum is fair proposal and favourable to the Respondent.

19. That if he is permitted to settle the Judgment debt in the proposed terms, he will be able to organize himself in advance of every month and in turn the Respondent will recover all its monies within a period of at most four (4) years if he will not have obtained payment from the client before the end of 4 years.

20. However the Respondent filed response submissions stating that, it took the Applicant nineteen (19) days to file the Application which amounts to undue delay. The delay is not explained. The Applicant has not also mentioned leave alone furnished security for the payment of the decretal sum which is a condition for the grant of an order of stay of execution. Reference was made to the provisions of Order 21 Rule 12(1) of Civil Procedure Rules 2010, which provides the factors the Court will consider in determining whether a debtor has shown sufficient reasons.

21. Further reliance was placed on the case of; Rajabali Alidina vs Remtulla Alidina & Another (1961) EA 565. The conditions to be considered were stated as:-

- a) *The circumstances under which the debt was contracted;*
- b) *The conduct of the debtor;*
- c) *His financial position;*
- d) *His bona fides in offering to pay a fair proportion of the debt at once.*

22. The Respondent further submitted that the conduct of the Applicant in insisting that he had not issued an undertaking when it was clear that he did, ought to be taken into account as a factor that will militate against the Court exercising its discretion in his favour.

23. It was argued that it is more than 5 months since judgment was entered and not a penny has been paid which is indicative of bad faith and the Court ought not to assist a litigant who disregards its orders. It was further submitted that the Applicant has not alleged that he is not in a position to settle the decretal sum and has not disclosed his financial position to enable the Court assess whether or not he is in a position to pay the decretal sum. He only states that the decretal sum is colossal and that he will struggle to pay it.

24. Reliance was placed on the case of; Keshavji Jethabhai & Bros. Limited vs Saleh Abdullah (1959) EA 260, where the Court of Appeal held that;

“ 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...”

25. The Respondent further argued that, there is no evidence to support the allegations that the Applicant has filed a suit to recover the money from his client or the various efforts to push for payment of the money by client. That it is not the obligation of the Respondent to wait for the Applicant to collect the money from his clients.

26. Further, the Applicant has not showed any good faith in a bid to settle the debt. He has not made any substantial down payment to liquidate a large part of the debt to enable him comfortably pay the balance in installments. The Court ought not to exercise its discretion in his favour in the circumstances. The proposal to pay the sum of Kshs. 1,600,000 to settle the decretal sum is unreasonable, as it will take over 50 months or about 4 years to settle the decretal sum.

27. Finally, the Respondent submitted that the prayer seeking to restrain it from levying execution is premature as it is based on the presumption that the Defendant's Application to pay the decretal sum will be allowed and also premature as there is no danger of execution at present as the costs due to the Plaintiff are yet to be taxed and neither has the Respondent applied for execution before taxation. Thus the Applicant's apprehension lacks basis.

28. The parties agreed to and filed written submissions to dispose of the Application. I have considered the same in this ruling. From the averments and the contents of the said Affidavits, I find the following issues require determination:-

- (i) *Whether the Applicant has met the threshold for grant of an order for stay of execution and/or the payment in installments;*
- (ii) *Whether the Court should grant the orders sought.*

29. The procedural provisions of Order 42 Rule 6 of Civil Procedure Rules lays down the conditions upon which a stay of execution order will be granted that as follows:-

- (i) *The Applicant will suffer substantial loss unless an order of stay of execution is granted;*

(ii) *The Application has been made without unreasonable delay; and*

(iii) *Security for the due performance of such decree or order has been given by the Applicant.*

30. In relation to these provisions, I find that grant of an order for stay of execution is a discretionary power of the Court which must be exercised judicially, and not capriciously and whimsically. It must be based on sufficient or reasonable cause or explanation. In the exercise of this power, the Court will also take into account inter alia, the special circumstances of the case and its unique requirement (*see Butt vs Rent Restriction Tribunal (1982) KLR and Shah vs Mbogo (1967) EA 470*).

31. Based on the provisions of order 42 Rule 6 of the Civil Procedure Rules, I shall now deal with the issue as to whether this Application was filed without undue delay. I note from the Court record that the Judgment in this matter was delivered on 15th March 2017. The Application was filed on 3rd April 2017. This is a period of about 18 days. The Respondent argued that there was undue delay in filing the Application. The Applicant did not address this issue in his submissions. However taking into account the circumstances of this case, I find that the delay of eighteen (18) days is not unreasonable and/or undue delay.

32. I shall now deal with the issue of substantial loss. In the case of; *Kenya Shell Ltd vs Kibiru & Another (1986) eKLR*, the Court of Appeal held that:

“substantial loss is in various forms, it is the cornerstone of both jurisdictions for granting stay. This is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondent should be kept out of their money”.

33. In the case of; *James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR*, the Court held that:-

“...no doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss, under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the Appeal.”

34. Finally in the case of; *Sewankambo Dickson vs Ziwa Abby HCT-00-CC MA 0178 of 2005*, the Court held that:-

“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal...”

35. The Applicant again did not make any submissions on this issue or on any of the three (3) prerequisite for grant of stay for the execution under Order 42 Rule of the Civil Procedure Rules. However the Respondent submitted on the same. It was argued that the Applicant has not proved any of the three (3) conditions; and that it is not enough for the Applicant to merely state that he is likely to suffer substantial loss, if stay is not granted. The Applicant is bound to place before the Court such material and information that will help the Court assess the risk he will suffer moneywise.

36. In the same vein, the Respondent argued that, the Applicant has not offered any security at all as required under Order 42 Rule 6 of the Civil Procedure Rules. Again this issue was not addressed by the Applicant. I have however looked at the provisions under which this Application was filed, and I find that the Applicant does not expressly invoke the provisions of Order 42 Rule 6 of the Civil Procedure Rules. As such, the Provisions of Order 42 Rule 6 of the Civil Procedure Rules are unavailable for consideration. Even then, the Applicant at prayer two (2) of the Application, seeks for stay of execution of the Judgment delivered herein on 15th March 2017 **“pending the hearing the hearing and determination of this Application.”** It therefore follows that this particular prayer is spent, and neither is the Applicant seeking for stay of execution pending Appeal. Therefore all the arguments and/or submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules will rest where it has fallen.

37. I shall now move to the provisions of Order 21 Rule 12 of the Civil Procedure Rules which provides as follows:

“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”.

38. These provisions of **Order 21 Rule 12 (2)** of the *Civil Procedure Rules, 2010*, therefore give the court a wide discretion as to whether payment of the amount decreed will be postponed or settled by way of installments. However this discretion must be exercised in a judicial and not an arbitrary manner.

39. The case of *Keshvaji Jethabhai & Bros Limited V Saleh Abdulla [1959] EA 260* lays down the principles that should guide the Court in the exercise of discretion in such matter and states 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.

40. It is also trite law that in seeking for orders as herein however, the onus is on the defendant to show that he has sufficient cause and is entitled to indulgence under this rule (see A. Rajabali Alidina v Remtulla Alidina & Another (supra)). The question that arises is: what constitutes sufficient cause under Order 21 Rule 2(2) of the Civil Procedure Rules?

41. In the text book by Woodroffe & Amir Ali's on Civil Procedure in British India, 2nd Edition, P it is stated that sufficient reason or cause will be based on the circumstances referred to herein as stated in the case of Rajabali Alidina (supra).

42. In the case of; Hildegard Ndalut v Lelkina Dairies Ltd & Anor. (2005) eKLR, the Court observed that:

“Both parties have referred to the case of Keshavji Jethabhai & Bothers Limited –vs- Saleh Abdulla [1959] EA 260, which is a case from a High Court of Tanganyika. That case followed the principles laid down in the Indian case of Sawatram Ramprasad –vs- Imperial Bank of India (1933) AIR Nag. 33 – that a defendant should be required to show his bona fides by arranging fair payment of the proportion of the debt – in persuading the court to allow payment by way of installments. This, in my view, is the proper test to apply in granting orders for payment of a decretal amount by way of installments. A judgment creditor is entitled to payment of the decretal amount, which he should receive promptly to reap the fruits of the judgment. The judgment creditor might genuinely be in a difficult position in paying the decretal amount at once. However, he has to show seriousness in paying the amount. In that event he should show his bona fides by arranging fair payment proposals to liquidate the amount”. (emphasis mine).

43. Finally in the case of; Keshavji Jethabhai & Bros Limited vs. Saleh Abdullah [1959] EA 260 which was relied on by both parties. The Court stated as follows:

“Defaults if due to the recession (if such it can be called) might be no fault of the debtors and in some circumstances might have been properly taken into consideration by the court in favour of the debtor when consideration was given to an application for installments; hardship is a factor which has been recognized by superior courts. It is a question in each case whether some indulgence can fairly be given to the debtor without unreasonably prejudicing the creditor, who can be granted compensation by way of interest on the amount at any time outstanding. There are some instances in which debts are contracted without any specific agreement as to the time of payment, and when it is shown that dealings have been conducted on this footing and no injury is done to the creditor by ordering payment by installments, the court may be well entrusted with discretion to arrange the payment of a debt by installments, but when a contract is distinctly made for payment on a date certain for purpose of enabling the creditor to obtain punctual payment, the circumstances that the payment is secured by an hypothecation of property ought not deprive him of that right. If the reason assigned amounts to nothing more than an inability to pay that is not sufficient reason why execution should not at once proceed...The length of time for repayment is a consideration and where the rate of installments which had been ordered would have taken some ten years to pay off the appeal court directed the sale of the property hypothecated. If the debtor is hopelessly embarrassed in his circumstances, there is little use in attempting to save him from the consequences of his own improvidence or misfortunes...The mere fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reason for granting installments and ordinarily he should be required to show his bona fides by arranging prompt payment of a fair proportion of the debt although this is not a condition precedent for the exercise of the discretion of granting installments. Each case has to be decided on its own merits, the predominant factor being the bona fides of the debtor.

Another consideration would be the ability of the debtor to pay substantial installments so that the repayment of the decretal sum would not be unreasonably delayed... The existence of sufficient reason will depend upon the facts of the particular case. The court will consider the circumstances under which the debt was contracted, the conduct of the debtor, his financial position, and so forth, and installments should be directed where the defendant shows his bona fides by offering to anything like a fair proportion of his debt at once...Because a person has been doing big business it does not follow that he should be able to pay his debts, which might well be proportionately larger”. (emphasis mine).

44. Guided by the legal principles in the above case, I have considered the circumstances of this case and the written authorities cited and referred to above, and I find that basically all that the Applicant states is that the amount he is supposed to pay is enormous, and that he did not incur the debt under normal circumstances, as it arose out of an otherwise what he refers to as, “clearly a careless undertaking”. He avers that, he is unable to pay all that lump sum money and he is at extreme pains to find ways of paying it. That he has tried through various ways in vain to have his previous client pay, the debt although he has instituted a suit for recovery of the money from the client.

45. The Respondent on the other hand, submitted that, the Applicant has not shown that he is not in a financial position to pay the debt and has not shown good faith in a bid to settle the debt. That his continuous denial that he gave a professional undertaking is in bad faith and should be considered. Finally, the Respondent argues that the proposed payments of 1,600,000 will keep it out of its money for a long time.

46. I have considered these rival arguments and I find that first and foremost, it is a fact that the liability to pay the decretal sum herein arose out of a professional undertaking as herein stated and therefore the debt is not secured as stated by the Applicant. It is not primary but secondary liability. Secondly, in my considered opinion and by all means and standards, the amount herein of Kshs 80,000,000 is substantial. Thirdly, I take into account the fact that the Applicant is ready and willing to pay the amount sought save for but not pay in one full lump sum.

47. However, the Applicant other than alleging inability to pay, has not demonstrated his financial position to enable the Court ascertain the reasonable amount that he can pay. It is trite law that unless there are good, sufficient and adequate reasons, a judgment debtor should be allowed to enjoy the fruits of the judgment. Therefore as much as the Court will consider circumstances under which this debt was incurred,

the Court will also have to consider the right of the judgment creditor to prompt payment.

48. I note that in this particular case, the letter of professional undertaking given by the Applicant is dated 14th June 2013. The payment should have been made on the same on or before 31st October 2013, and therefore, it has been a period of over four (4) years since the debt became due. The suit was filed in the year 2015, another three years ago, bringing the period to about 7 years. Subsequently as aforesaid, the judgment that placed the liability on the Applicant was rendered on 15th March 2017. A period of a year ago. If the Court were to allow payment by the proposed installments, it will take about four (4) years. This will actually bring the total period taken to pay the debt to twelve (12) years. This by all means will not be just and fair to the Respondent. Unfortunately, the Respondent did not make any proposals as what they would be ready to accept as reasonable payment installments and for what period. However, based on the above factors, it will be in the interest of justice to balance the rights of the parties by allowing the Applicant to make payments by installments but upon payment of reasonable amounts that will enable the Respondent enjoy the fruits of the Judgment.

49. It is against this background and in the interest of justice, I make the following orders:

- a) The Applicant will pay an initial lump sum of Kenya Shillings Ten Million (Kshs 10,000,000) within a period of 30 days from the date of this order; (on or before 12th April 2018);
- b) Upon payment of the said sum under (a) above, the Applicant will then pay a sum of Kshs Five Million (5,000,000) per month with effect from the last day of the following month (that is on or before the last day of May 2018) and continue paying the said sum of Kenya Shillings Five Million (Kshs 5,000,000) on the last day of each subsequent month for a period of Five (5) months (June, July, August, September and October 2018);
- c) Then the Applicant will liquidate the remaining sums of: the principal sum, interest and costs in equal monthly payment installments of Kenya Shillings Two Million Five Hundred Thousand (Kshs 2,500,000) on the last date of each subsequent month with effect from end of November 2018 until payment in full;
- d) That interest will continue to accrue on any unpaid sum until payment of the principal, interest and costs is made in full.
- e) In default of payment of any single installments, in accordance with the orders herein above given, the decree holder will be entitled to execute forthwith for payment of the outstanding total decretal sum.
- f) A stay of execution is thus granted on the terms set above under (a to e);
- g) The costs of this Application will be borne by the Applicant.

50. Those then are the orders of the Court.

Dated, delivered and signed in open court this 12th day of March 2018

G.L. NZIOKA

JUDGE

In the presence of:

No appearance for the Plaintiff/Respondent

Mr. Ongoro holding brief for Mr. Arua for the Defendant/Applicant

Langat.....Court Assistant