



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 583 OF 2001

SAMUEL MATHERI GITHENGU.....PLAINTIFF/RESPONDENT

-VERSUS-

LAWRENCE MWAURA.....DEFENDANT/APPLICANT

RULING

1. This ruling seeks to determine a Notice of Motion dated 20th November, 2017 filed by the Defendant under the provisions of section 3A of the Civil Procedure Act and Order 22 Rule (22) (1) of the Civil Procedure Rules seeking orders that;

1. ...spent

2. ...spent

3. The decree be reviewed to correct an error on the interest charged.

4. That the Defendant be granted orders to pay the decretal amount by way of monthly installments of Kshs. 50,000/= until payment in full.

5. The costs of this application be costs in the cause.

2. In support of the Application, the Applicant relies on the grounds on the face of the application as well as on his Supporting and Further Affidavits. The Applicant contends that the suit accident vehicle had been insured with United Insurance Company Limited which went under, by the time the appeal was concluded in the year 2011 and that he is therefore unable to raise the entire decretal amount of Kshs. 2,486,995/= in one installment due to hard economic times, that the decree and warrants issued on 13th February, 2017 indicate interest as Kshs. 1,517,006 with an erroneous increment of Kshs. 112,055.90 and that the applicant has so far managed to pay Kshs. 350,000/= of the decretal amount. He further deponed that the matter has taken long due to an appeal by the plaintiff which was concluded in the year 2011.

3. The application was opposed by the Respondent who filed Grounds of Opposition and a Replying Affidavit sworn by JOHN NJONGORO dated 8th February, 2018. It is deponed that the reliefs sought by the Defendant are equitable in nature and can only be granted upon consideration of the entire facts attendant to this matter. The Plaintiff deponed that judgment was delivered on 1st July, 2002 and since then, the Defendant never made any payment until 20th September, 2016 when he made the 1st payment of Kshs.100,000/-, 14 years down the line. The Plaintiff also depones that with regard to the interest, he raised the issue with the High court civil registry and was assured that the interest was calculated correctly as reflected in the decree issued on 26th July, 2016. That the decree relied on by the Defendant dated 13th February, 2017 is not authentic as it is not certified. That the issue of interest was not challenged by the Defendant in the proclamation served upon him on 22nd February, 2017. The Plaintiff has annexed a bundle of several letters showing how he has been consistently pleading with the Defendant for payment of the decretal sum and the first payment of Kshs.100, 000 was made after 14 years of continuous pleas. It is deponed that the defendant is a person of means with rental houses in Kimbo, Ruiru sub-county and that he served as a Member of County Assembly for 5 years and his salary and allowances would have been enough to settle the decree.

4. The application was canvassed by way of written submissions. The Defendant filed his submissions dated 10th April, 2018. He submitted that he is a businessman and his transport business has been adversely affected by hard economic times and that he was unable to defend his seat as a Member of County Assembly, Ting'ang'a ward and that the campaigns almost bankrupted his family. The Defendant submitted that this Court has the powers to make an order on installments and cited the case of **Commercial Bank Of Africa Ltd v David Njau Nduati [2015] eKLR** and **Lavington Security Limited v Nairobi City Water & Sewerage Co. Ltd [2014] eKLR** where the court stated that, "... 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..."

5. The Defendant also relied on **Freight Forwarders Kenya Limited v Elsek & Elsek (K) Limited & another [2015] eKLR** where the court allowed payment of decretal sum in installments.
6. On the review of the decree, it was submitted that the Defendant's Advocates neither approved the decree as drawn nor raised the issue of interest. The Defendant relied on the provisions of Order 45 Rule 1 and stated that there is no doubt that the orders sought in his application are premised under that order and the omission in stating that provision was not fatal.
7. The Plaintiff on the other hand filed submissions dated 18th April, 2018. He submitted that the Defendant filed his further Affidavit and submissions out of the time stipulated in the consent orders and without the leave of the court. The defendant therefore, submitted that the same should be struck out but nevertheless he submitted that the Defendant did not place any evidence to show that the suit accident vehicle had been in fact insured by United Insurance Company Limited. It was also submitted that the Defendant did not establish sufficient reasons to show that he is entitled to the orders sought, that he did not make payments even after the appeal was concluded on 16th March, 2011 as there was nothing to stop him from paying the sums awarded. It is further submitted that the Defendant has treated the issue of making payments with contempt, being a man of means, having been an MCA and owning rental houses, a fact which he did not deny. It was also submitted that the application was not made without unreasonable delay and that the proposal to make monthly payments of Kshs. 50,000/= cannot be said to be reasonable.
8. On the issue of interest, it was submitted that the Defendant did not file the application for review without undue delay as required as he was given every opportunity to raise any issue but he did not and further that interest continues to accrue. It is also submitted that the Defendant has not shown how the said interest was overstated with the amount of Kshs. 122,055.93 as alleged.
9. I have considered the application, the Affidavits on record and the rival arguments advanced in the submissions. During the submissions, the Respondent contended that the Applicant's Further Affidavit and Submissions were filed out of time and therefore the same ought to be struck out. Whereas I concur with the Respondent that the said documents were filed outside the time agreed upon by the parties, I find that the Respondent will not suffer any prejudice if the court admits them out of time. The same are admitted.
10. There are two issues for determination in this application. The first issue being whether the Applicant should be allowed to pay the decretal sum in monthly installments of Kshs. 50,000/= and the second issue is whether the prayer for review of the decree is merited.
11. On the first issue, the applicant has submitted that he is financially constrained as his transport business is not doing well and that he lost his seat as a Member of County Assembly and therefore he has urged the court to allow him to pay the decretal sum in monthly installments of Kshs. 50,000/=. Though the Court has discretion to order payment in installments, the said discretion ought to be exercised judiciously and in line with the well-established principles that the court should consider when dealing with an application like this one, which are; 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 (see **Lavington Security Limited v Nairobi City Water & Sewerage Co. Ltd [2014] eKLR**)
12. The conduct of the Applicant in this case has been wanting. The judgment in question was delivered in the year 2002 but the Applicant made the first installment of Kshs. 100,000, 14 years down the line and 4 years after the Appeal was concluded in the year 2011. There was nothing barring the Applicant from paying the decretal sum after the judgment was delivered in the year 2002 since the appeal lodged was not against the general damages but was on special damages. On record, are several letters written by the Respondent to the applicant pleading to be paid the decretal sum. In fact, the respondent, in those letters, even offered to accept payment in installment but the Applicant did not take that advantage. All that long, the Respondent had the option of executing the decree but chose to engage the Applicant first. The Applicant does not appear serious in paying the decretal sum and it seems that he rushed to this court after the Respondent decided to execute the decree.
13. It is the Respondent's submission that the proposal by the applicant to be paying Kshs. 50,000/= per month is not reasonable as it will take over 3 years to pay the decretal sum. It has also been submitted that the Applicant is a man of means. The Applicant did not deny the allegation by the respondent that he has rental houses in Kimbo. In his own admission, the Applicant stated that he is a business man running transport business. Since the Applicant has been having sources of income all along, had he been serious in paying the decretal sum, he would have by now, cleared a substantial amount of it. The decretal sum is Kshs. 2,486,995/= and since judgment was delivered the Applicant claims to have paid Kshs. 350,000/= only.
14. In cases where a court finds that the conduct of the Defendant in settling decretal sum has been sluggish, the court can either decline an application to pay in installments or in the alternative can set the terms of installments. In the case of **Lavington Security Limited (Supra) Justice Gikonyo** held that, *"The Applicant has had the advantage of time and also kept money belonging to the Respondent thus depriving the Respondent of the money. In view of this conduct of the Applicant, allowing it to pay in six monthly installments will not be fair to the Respondent who has shown magnanimity in conceding to payment by installments of its decretal sum. Therefore, I am inclined to go by the proposal made by the Respondent. And I order that the balance of the decretal sum herein shall be paid in four equal installments..."*
15. Similarly, in this case, I find that the Applicant has had the advantage of time but slept on it. Nonetheless, this is a Court of justice and should do justice to all. The Respondent says he will be prejudiced unless the balance of the decretal sum is settled in full whereas the Applicant requests to pay in monthly installments of Kshs. 50,000/=. In striking a balance between the two and considering that this is a long outstanding matter, I will order the Applicant to pay a lumpsum of Kshs. 1,000,000/= within 60 days from the date of this ruling. Thereafter, the balance to be paid in monthly installments of Kshs. 100,000/= from the first month after the lumpsum has been paid. Such installment amounts to be on the 10th day of every month until payment in full. Failure to abide by these orders the Respondent will be at liberty to execute.
16. The second issue for determination is whether the orders for review of the decree are merited. It is contended by the Applicant, that the decree and warrants issued on 13th February, 2017 indicate interest as Kshs. 1,517,006 with an erroneous increment of Kshs. 112,055.90. Order 45, governs application for review and provides that where there is discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or where there was a

mistake or error apparent on the face of the record; or where there were other sufficient reasons; and the application must have been made without undue delay. I have considered the arguments of both parties on this issue. The applicant has not shown how the said calculation is erroneous. However, in the interest of justice, I hereby order that the file be remitted to the Deputy Registrar in-charge of Civil Division to re-calculate the accrued interest.

Dated, Signed and Delivered at Nairobi this 21st Day of June 2018.

.....

L. NJUGUNA

JUDGE

In the Presence of

..... *For the Plaintiff*

..... *For the Defendant*