



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
MISCELLANEOUS CASE NO. 1 Of 2017

KTK ADVOCATES.....ADVOCATE/RESPONDENTS

VERSUS

BARINGO COUNTY GOVERNMENT.....APPLICANT

RULING

1. This is a Notice of Motion dated 28th September 2018 brought under sections 1A, 1B, 3 and 3A of the Civil Procedure Act and order 51 of the Civil Procedure Rule and all enabling provisions of the law, and filed in court on 1st October 2018. Through this application, **Baringo County Government**, the Applicant, has asked this court to allow it to settle the decretal sum in quarterly instalments of Kshs 3 million to be paid within three years. The motion is grounded on the facts that appear on its face as well as depositions in the affidavit of **Francis Komen** sworn on the same day.
2. The grounds in support of the motion are that the Applicant has a budgetary constraint and that since the decretal sum was to be accommodated in the previous financial year, no allocation was made for it; that budgetary allocations must be approved by the county assembly; that the Applicant's approved legal services budget is only about 5 million which cannot fully settle the decree now standing at over Kshs33 million; that the Applicant had made effort to settle part of the decree by paying Kshs.4 million and that the Applicant is desirous of settling the decretal sum but by instalment. It is contended that unless the orders sought are granted, the Applicant stands to suffer prejudice and irreparability.
3. According to the affidavit of **Francis Komen**, the respondent's advocate/client Bill of costs was taxed at Ksh17,570,907 and a certificate of taxation issued to that effect. He deposed that subsequent to taxation, the Respondent filed an application for adoption of the certificate of taxation as a judgment of the court which was allowed on 2nd November 2017 and a decree issued thereafter. He deposed that the Applicant then filed an application for review or settling aside of the orders of 2nd November 2017 but it was dismissed on 15th January 2018;
4. **Mr Komen** further deposed that the Respondent filed a JR application for mandamus to compel the Applicant to settle the decree which was also allowed; that in July 2016, the Applicant paid part of the decree in the sum of Ksh 4 million and is currently indebted to the Respondent to the tune of slightly over Kshs13.5 million. According to **Mr. Komen**, in July 2018, the Respondent demanded settlement of the decree with a threat to execute in default which led to the filing of the present application. He therefore stated that unless the court intervenes, the Applicant will suffer irreparably because it will not be able to settle the decree due to budgetary constraints.
5. The respondents filed a replying affidavit by **Donald Kipkorir**, sworn on 16th October 2018 and filed in court on 17th October 2018 opposing the application. He deposed that their advocate/ client Bill of costs was taxed after Ksh4 million had been paid and the taxing officer took into account the deposit while taxing the Bill of costs.
6. **Mr Kipkorir** further deposed that after taxation and adoption of the certificate of taxation as a judgment of the court, the Applicant filed applications on 15th June, 2017, 3rd July 2017 and 13th December 2017 in the suit; that the Applicant has filed other applications in JR No 687 of 2017, seeking to set aside the taxation and settle the issue of deposit paid but all applications were dismissed hence the issue of fee deposit is *res judicata*.
7. Regarding the contention that the Respondent cannot pay due to budgetary constraints, **Mr Kipkorir** deposed that the Respondent received sufficient funds in the 2018/19 budget hence the issue of budgetary constraint has no basis and, therefore, the application lacks merit.
8. During the hearing of the application, **Mr Ogolla** argued the motion and prayed for grant of the orders. Learned counsel submitted that the Applicant deserves the orders to allow it settle the decree by instalments due to budgetary constraints. He contended that out of the taxed costs, the Applicant had paid Kshs 4 million leaving a balance of about Ksh13 million outstanding.

9. To justify grant of the application, learned counsel contended that the amount is to be drawn from the annual budget and that in the 2018/2019 only Kshs, 5.7 million was allocated to cover legal fees. He submitted that the Applicant is willing to pay Ksh3 million quarterly for three years contending that the money can only be paid on approval during the budget process. He was of the view, that since the money comes from the legal services vote and services had already been offered, the respondent will not be prejudiced if the application is granted.

10. **Mr Kipkorir** opposed the application submitting that the law applicable in relation to advocates' fees is the Advocate's Remuneration Order which provides for taxation, reference, judgment and enforcement of the judgment. He contended that they do not provide for stay of execution or payment by instalment. He also argued that there is no law providing for stay of payment of advocates' fees or payment by instalments.

11. **Mr Kipkorir** submitted that the Bill of costs was taxed on 19th June 2017 and that the issue of Ksh4 million was not part of the taxed costs. He argued that the issue has been raised countless times but has been dismissed by courts every so often.

12. On the argument that the money has not been budgeted for, **Mr Kipkorir** contended that settlement of a judgment is not dependent on budgetary allocations. He argued that the Respondent has a judgment and allowing the application would mean no advocate would execute against a county government. He urged that the application be disallowed.

13. I have considered this application, the response and submissions by counsel for the parties. I have also considered the authorities relied on. The issue before court is not, in my view, how much amount is due to the Respondent but whether the court should allow the Applicant to settle the decree by instalments. I say so because although counsel for the Applicant tried to introduce the issue of the deposit paid to be taken into account in relation to the outstanding decretal sum, that is not an issue for this court, at least not where the matter has reached, Such an issue was to be settled before the taxing officer and if it was not settled to the Applicant's satisfaction, there should have been a reference in terms of Section 11 of the Advocates Act to enable the court dealing with the reference settle it and thereafter file an appeal if not satisfied. Whether that was done or not, is not for this court to determine at this stage.

14. Having said that, I now turn to consider the real issue in this application, namely; whether or not to grant the application for payment of the decretal sum by instalment. There is no doubt that there is a judgment and decree arising from the court's adoption of the certificate of costs arising from the taxation of the advocate/client Bill of costs. Being a judgment of the court from which a decree has been extracted, it is no longer legal fees.

15. The Applicant has asked that it be allowed to settle the decretal sum by quarterly instalments for three years. As it is, the matter is no longer a dispute as regards the existence of a lawful decree. **Mr Ogolla**, learned counsel for the Applicant, argued that the Applicant's budgetary allocation for legal fees is only about Ksh5 millions which is not enough to settle the outstanding decree hence the reason why the court should allow their application. It should be understood that a judgment or decree whether or not arising from taxation of a Bill of costs is not legal fees. It is a debt that the judgment debtor has an obligation to pay.

16. Whether or not to allow a party to settle a decree by instalment, is a matter of exercise of discretion. And the court must be satisfied that the Applicant deserves exercise of that discretion. Order 21 Rule 12 of the Civil Procedure Rules (2010), grants the court power to allow a judgment debtor pay decretal sum by instalments. The rule provides that;

“(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.”

17. It is clear from the above rules that although the court may allow settlement of a decree by instalment, that is at the discretion of the court and as usual it must be exercised judicially and only in circumstances that justify exercise of the discretion.

18. In the case of ***Keshval Jethabhai & Brothers Ltd v Saleh Abdul*** [1959]EA 260, the court stated the principles that should apply in considering such an application, namely; each case must be considered on its own merit; mere inability to pay in full at once is not sufficient reason for exercising the discretion; the debtor should show *bona fides* by arranging prompt payment and that though hardship may be a factor, the court has to consider whether indulgence should be given to the debtor without prejudice to the decree holder. The above decision shows clearly that it is for the judgment debtor to show sufficient cause and justify indulgence.

19. In ***Hildegard Ndelut v Letkina Dairies Ltd & Another***[2005]eKLR it was stated that ***“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 debtor 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)***

20. In ***Mahomed Akbar Khan Vs Kasturchand Daga*** cited in ***Keshavji Jethabhai & Brothers Ltd v Saleh Abdul*** (Supra), the court held that *the mere fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reason for granting leave to pay by instalments. Ordinarily he should be required to show his bona fides by arranging prompt payment of a fair proportion of the debt, although prompt payment of a fair proportion of the debt is not a condition precedent for the exercise of the discretion of granting instalments. Each case has to be decided on its own merits, the predominant factor being of course the bona fides of the judgment debtor.*

21. Where there is a submission that an Applicant has sufficient reason for allowing an application for payment by instalments, *the court has*

to consider the circumstances said to exist in order to determine whether or not to grant the application. The court will also consider other factors such as the conduct of the judgment debtor and its financial position. More importantly, in my view, the court should be persuaded to allow payment by installments where the judgment debtor shows willingness to pay.

22. In that regard, any decision on whether a court should allow a party to settle a decree by instalment is really an issue of discretion to be exercised judicially. It is up to the Applicant to show to the satisfaction of the court that in the circumstances of his case such a request is deserved. This is because; a successful litigant who has a decree acquires a property right which is to be protected by courts. The court will not order a judgment debtor to pay by instalment without making a case for it.

23. Applying the above principles to this application, it is clear to me that the Applicant who has come seeking the court's discretion, must show that the discretion is deserved because and that grant of the application will not cause prejudice to the respondent.

24. The facts of this application shows that after the advocate/client bill of costs was taxed, a decree was extracted in November 2017. The Applicant attempted to set it aside a couple of times without success as can be deciphered from the pleadings of both sides. It was after the dismissal of the applications that the Applicant moved this court for leave to pay by instalments.

25. The Applicant has stated in its affidavit that it is willing to pay the decretal sum by instalment. Although the decree was extracted in November 2017, the Applicant has not paid any money towards liquidating the decree, more than one year later. This cannot be a sign of **bona fides**. **Bona fides** means acting in good faith and sincerity. The Applicant has argued that it can only pay the amount from the legal fee budgetary allocation. However, as I have pointed elsewhere in this ruling, this is a debt and not legal fees. The Applicant has not shown that it has made arrangements to liquidate the decree or the effort it is making to that end to enable the court exercise its discretion in its favour.

26. It is my considered view, that the Applicant has not shown **bonafides** in this matter. This is so because although the decree was extracted in November 2017, there has not been any attempt to make payment towards its settlement or that it has made provision for payment despite stating that it is willing to pay. More over, the Applicant has stated that as a sign of good faith it has paid Kshs. 4 million towards liquidation of the decree. It is worth noting that the amount was paid in 2016 before the bill was taxed and the decree extracted. That cannot be a sign of good faith. It is not **bona fides** on the part of the Applicant to use it to justify exercise of the court's discretion.

27. Although the Applicant is a county government and it relies on budgetary allocations ,that is not in itself a ground for allowing the application. The court must be satisfied that the Applicant has shown **bona fides** in its effort to settle the indebtedness to deserve the discretion.

28. Taking into account the circumstances of this case, I am not satisfied that the Applicant has satisfied the court that it deserves exercise of discretion in its favour. Consequently, the application dated 28th September 2018 is declined and dismissed with costs.

Dated, Signed and Delivered at Nairobi this 18th Day of December 2018

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