



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**SUCCESSION CASE NO. 430 OF 2008**

**WILLY WAMBUA MWEKI. .... OBJECTOR/APPLICANT**

**VERSUS**

**GRACE NGINA KIOKO**

**TITUS KYANIA KIOKO.....PETITIONERS/RESPONDENTS**

**RULING**

**The Application**

The Objector is seeking orders that this Court stays the execution of the decretal sum of Ksh 151,330/= awarded to the Petitioners in a ruling made on 23/11/2015, and that the judgment debtor herein be allowed to defray the decretal sum by way of monthly installments of Ksh 10,000/=. The grounds for the application which are in his Notice of Motion and supporting affidavit dated 23rd March 2016, are that the Objector was not made aware of the ruling by this Court made on 23/11/2015, and neither was he notified of the taxation, or served with a notice to show cause before the proposed execution of the decree by the Petitioners. Further, that he only came to learn of the same upon being served with the notice of proclamation of the intended auction of his property.

The Objector stated that he is ready and willing to defray the decretal sum, however being a retired civil servant he is financially unable to pay the whole decretal sum at once, and therefore prays to be allowed to pay monthly installments of Ksh 10,000/= towards settlement of the same

The Objector's learned counsel, Andrew Makundi & Company Advocates filed submissions dated 1<sup>st</sup> July 2016 wherein he relied on Order 22 Rule 22(2) of the Civil Procedure Rules for the position that a Court which issued the execution may order the restitution of property seized or the discharge of a person pending the results of an application. Reliance was also placed on Order 21 rule 12(1) of the Civil Procedure Rules for the position that where a decree is for the payment of money, the Court may for 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.

Further, that Order 21 rule 12(2) Civil Procedure Rules 2010 states that the Court may on the application of the judgment debtor, 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.

It is also the Objector's submission that the Petitioners have not demonstrated any substantial loss they are likely to suffer if the order of stay of execution is not granted. Furthermore, that he is ready and willing to defray the decretal sum by way of monthly installments of Ksh 10,000/= per month, and has

demonstrated sufficient cause for the Court to exercise its discretionary powers in this respect.

### **The Response**

The Petitioners opposed the Objector's application in a replying affidavit sworn by the 1st Petitioner on 24<sup>th</sup> March 2016, wherein he averred that he personally knows the Objector who is a man of means as he owns several parcels of land which he can sell to pay the decretal sum; has recently constructed a commercial plot at Mitaboni Market; carries out extensive farming by cultivating maize, beans, and fruits; is a coffee farmer and also has a large herd of cattle he keeps at Ndovoini in Lukenya.

Therefore, that the Objector is capable of paying the decretal amount at once and the application is merely a delaying tactic. Further, that the proposal to pay by monthly instalments of Kenya Shillings 10,000/= is not acceptable or reasonable, as it will take one and a half years to pay the decretal amount of Kenya Shillings 151,330/=.

The Petitioners' learned counsel, Mr. Sila submitted at the hearing held on 25<sup>th</sup> May 2016 that he would wholly rely on the replying affidavit.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions filed. The issue for determination is whether this Court can order payment of the decretal sum of Ksh 151,330/= awarded to the Petitioners in instalments, and if so on what terms and conditions. The law on payment of a decretal sum in instalments is found in Order 21 Rule 12 of the Civil Procedure Rules which provides as follows:

**“ (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.”**

The exercise of discretion by this Court as regards payment of the decretal sum by installments should be exercised in a judicial and not an arbitrary manner, as was espoused in the case of **A. Rajabali Alidina vs. Remtulla Alidina & Another**, [1961] EA 565, wherein Law J. held as follows:

**“The court's discretion to order payment of the decretal amount in instalments is one which must be exercised in a judicial and not an arbitrary manner and the onus is on the defendant to show that he is entitled to indulgence under this rule...It is for the defendant to show “sufficient reason” for indulgence being shown to him, and the court is immediately faced with a difficulty in this respect as the learned resident magistrate has not stated what reasons put forward by the defendant he considered sufficient to justify the exercise of the court's discretion in the defendant's favour...Powers given to the court should be exercised with a due consideration for the interests of the creditor as well as those of the debtor and the matters to be taken into consideration by the Court in an application for payment by instalment are:**

- (i) the circumstances in which the debt was contracted,**
- (ii) the conduct of the debtor,**
- (iii) his financial position,**

**(iv) his *bona fides* in offering to pay a fair portion of the debt at once. “**

The primary consideration for allowing payment of a decree by instalments therefore is for the judgment debtor to demonstrate *bona fides* by payment of a fair proportion of the debt, and there must be a genuine and reasonable cause why the decree cannot be met immediately in full. In Keshavji Jethabhai & Bros Limited vs. Saleh Abdullah, [1959] EA 260 the Court further stated as follows:

**“The mere fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reason for granting instalments 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 instalments. 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 instalments 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 instalments should be directed where the defendant shows his *bona fides* by offering to anything like a fair proportion of his debt at once...”.**

In the instant application, the Objector has not made any payment of the decretal sum ever since the certificate of costs was issued on 22<sup>nd</sup> February 2016, and has not offered to make any down payment of the decretal sum of Ksh 151,330/=. In addition the offer to pay Kshs 10,000/= per month until payment in full will result in the payment of the decretal sum over a period of over 15 months. The Objector in addition did not dispute the Petitioners’ averments that he is a man of means who is able to liquidate the decretal sum.

Considering that the judgment against the Objector was entered almost two years ago and no attempts at payment of the decretal sum have been made by the Objector, and further that it would take about two more years to liquidate the decretal sum if his proposal is accepted, I find the Objector’s offer unreasonable and lacking in *bona fides*.

The Objector’s Notice of Motion dated 23<sup>rd</sup> March 2016 is therefore accordingly allowed only to the extent of the following orders:

1. There shall be a stay of execution of Judgment herein subject to the following conditions:
  - a) The Objector shall settle the decretal sum by first making a down payment to the Petitioners of Ksh 100,000/= by 31<sup>st</sup> March 2017.
  - b) The Objector shall thereafter pay monthly installments of Ksh.15,000/= to the Petitioners with effect from 1<sup>st</sup> May 2017 and on the last day of each subsequent month till payment in full.
  - c) In default of payment of any one instalment on the due date, the total outstanding sum to be due and payable, and the Petitioners be at liberty to execute for the same.
  - d) The Objector shall bear the costs of the Notice of Motion dated 23<sup>rd</sup> March 2016 .

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 30<sup>th</sup> day of January 2017.

**P. NYAMWEYA**

**JUDGE**