



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 78 OF 2012

EQUATORIAL COMMERCIAL BANK LTD.....PLAINTIFF

VERSUS

DANSON BUYA MUNGATANA.....DEFENDANT

RULING

1. The primary consideration for a court in considering an application to postpone the payment of a decretal sum is whether the applicant/judgment-debtor has shown bona fides by payment of a fair proportion of the debt in advances. That however must be founded on a demonstrated difficulty to pay the debt at once.

2. These principles are to this court founded on the not so difficult to legal reality that a decree is a property and it is indeed a strong thing to keep a citizen away from his property unless for very good cause shown.

3. In this matter, judgment was entered for the plaintiff on the 18/4/2016 by a ruling of that date by which the court held that the parties had negotiated and come to conclusion that the defendant owed to the plaintiff the sum of Kshs.6,031,597. The Court found that the judgment debtor had admitted the debt but what became sticky was the question of costs. Even mode of payment proposed by the defendant at Kshs.100,000 was accepted by the plaintiff.

4. It is noticeable from the file that the proposal or offer to pay by instalments was made in the month of May 2015 yet by the time judgment was entered one year later not a single instalment had been made. That history is important to determine the *bona fides* of the judgment debtor.

5. However before I proceed to the *bonafides*, what is the basis of the application by the judgment debtor dated 26/5/2016 and seeking payment by instalments? The answer to that question can be found at paragraphs 5, 6 & 7 of the affidavit in support in what the judgment debtor depones:-

5. THAT I am ready and willing to settle the award herein, however I am sincerely unable to settle the same fully immediately and therefore seeking from this court, in the interest of fairness and justice, to be allowed to settle the same in equal monthly installments of Kshs.100,000/= until payment in full.

6. THAT I know the Plaintiff Bank mean business and my at any time commence execution and instruct Auctioneers with the sole aim of attaching my assets to recover the full decretal sum to great detriment upon myself.

7. THAT I have always been desirous to settle the claim herein and considered the terms of the proposed consent letter dated 15th May 2015, at monthly installment of Kshs.100,000/=, save that the issue of costs had never been fully agreed with the Plaintiff. (Annexed hereto marked and produced as Exhibit “DMM 1” is a true copy of a letter dated 15th May 2015 and attached unsigned consent.)

The same facts are reiterated in the further affidavit filed on 7/10/2016 with an addition that as at 13/9/2016 the judgement debt stood at Kshs.7,248,236/60.

6. The application to pay by instalment is opposed by the decree holder who asserts that the applicant has not met the prerequisites of grant of the order sought and that the judgment debtor is merely abusing the court process.

7. In order for the court to exercise its discretion in a matter of this nature, the court would look at the circumstances under which the debt was incurred, the conduct of the debtor since the debt was incurred, the financial position of the debtor, if known among other factors.

8. I hold the view that the onus of proof will always rest upon the shoulder of a judgment debtor to show that his financial position is such that he is unable to pay. To discharge that duty, one has to come forth and say what his average monthly income is, his expenses for such a period and his surplus he intends to commit for the payment of the debt. It is not enough for the judgment debtor to merely make a statement that he is unable to pay anything more than what he is offering to pay. That would be tantamount to saying that a judgment debtor is given the liberty to pay the debt at his own time and on own terms.

9. In *Kashavji Jethabhai Brothers Ltd vs Saleh Abdalla [1959] EA 266*, the East Africa Court of Appeal set the test to be applied by the courts in the following words:-

“.....the mere fact that the judgement debtor is hard

pressed or is unable to pay in full at once is not sufficient reason for granting instalment and that ordinarily he should be required to show his bona fides by arranging a payment of the fair proportion of the debt”

10. In this case, I find no reason or proof that the judgment debtor is not able to pay at once nor that the most he can pay is Kshs.100,000 per month.

11. The other consideration to be taken into account is the reasonableness of the proposal. In this case, in the words the judgment debtor himself, at paragraph 3 of the further affidavit the decree was Kshs.7,248,236.60 way back in September 2016. As entered, the judgment attracts interests at court rates of 14%pa. That in my approximation works at about 82,000 per month. It might as well be outstanding in the sum of over 7,500,000 as at today. Even if there was no be no further application of further interest it would take a period of some 75 months, more than 6 years to settle. With application of interest, the payment of 100,000 may just go toward servicing the interest. To that extent that proposal cannot pass the test of being made bona fides nor can it be deemed reasonable.

12. The judgment debtor is a public figure and known as a legal practitioner and national political leader. I hold the view that he has not been candid in this matter with facts regarding his finances. The result is that I find the application unmerited, lacking in bona fides and it thus cannot succeed but must fail and is hereby dismissed.

13. I award the costs thereto the Respondent judgment/debtor.

Dated at Mombasa this 28th day of February 2017.

P.J.O. OTIENO

JUDGE