



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 282 OF 2016**

**THURAYA TELECOMMUNICATIONS COMPANY.....PLAINTIFF/RESPONDENT**

***VERSUS***

**INDIGO TELECOMLIMITED.....DEFENDANT/APPLICANT**

**RULING**

1. Indigo Telecom Limited (The Defendant) admits owing Thuraya Telecommunications Company (the Plaintiff) a sum of USD 522,050.48 and asks the Court to allow it to liquidate this debt by monthly installments of USD 14,000 which amount may be reviewed as directed by Court. That application is embodied in the Notice of Motion dated 26<sup>th</sup> September 2016.

2. Although the Defendant filed a Statement of Admission on 27<sup>th</sup> September 2016 conceding to a debt of USD 522,650.48 there was already an Exparte Judgement entered on 16<sup>th</sup> September 2016 against it for USD 525,221.47. As that Exparte Judgement has not been set aside, the Court will be determining whether to allow the Defendant plea to pay the Entire Judgement amount by way of installments.

3. Order 21 Rule 12 provides:-

“12. (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 installments, with or without interest, not withstanding 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 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”.

4. The statement made by Law J. (as he then was) 55 years ago in A. Rajabali Alidina vs. Remtulla Alidin & another [1961] EA 565 on Applications to postpone payment of a Decretal Amount or to pay by installments is as true now as it was then. The Judge, observed,

“All commentators on the Civil Procedure Code agree that the Courts discretion to order payment of the decretal amount in installments is one which must be exercised in a Judicial and not an arbitrary manner. The onus is on the Defendant to show that he is entitled to indulgence under this

rule”.

5. Explicit in the provisions of order 21 Rule 12 is that the Applicant must demonstrate that there is sufficient cause to order the postponement or payment by installments. In interrogating whether sufficient cause has been demonstrated, a Court will consider,

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

This list may not be exhaustive.

6. How the debt was incurred is not agreed by the parties. The Defendant says it was contracted in the normal course of Business.

7. The Business was that the Plaintiff had appointed the Defendant as a Service Provider under an arrangement in which the Defendant was granted the Plaintiff’s mobile satellite Network to sell and/or distribute to Kenyan end users directly for a fee. The arrangement contemplated that the Defendant would bill the end users, who would make a payment directly to the Defendant. The Defendant would then remit the payment to the Plaintiff after deducting its commission.

8. In an affidavit sworn on 6<sup>th</sup> February 2017 by Olive Atieno Otieno on behalf of the Plaintiff, it is explained that the contract between the Plaintiff and the Defendant obliged the Defendant to remit payment to the Plaintiff within 30 days of the Date of Bill regardless of whether or not the Defendant had received payment from the end users/subscribers.

9. The Plaintiff asserts that the failure of the Defendant to make the remissions was driven by fraud and avarice and cannot therefore be a failure in the normal course of business.

10. Given this rival positions and the scanty evidence available to Court, the Court cannot, with certitude, say that the debt was fraudulently incurred by the Defendant. What is clear, nonetheless, is that it was a debt incurred within a Business Contract entered by the parties.

11. In respect to conduct of the Defendant, it can be said that its admission of the debt very early in the proceedings is an indication that it does not intend to obstruct or delay the resolution of this matter much further or an acknowledgement that the end of the road to this dispute is not imminent. That said the Defendant started to incur the debt in 2012, about 4 years prior to filing of the suit. This considerable length of time will have to be taken into account.

12. Although the Defendant states that it has been making some payments even as it seeks the Courts indulgence, the Plaintiff asserts that they are in respect to current Bills. Again, the scanty evidence available does not help the Court resolve the issue one way or other. And because it is the Defendant who bears the onus of demonstrating sufficient cause, the inadequacy of evidence does not help its cause.

13. However, even in the midst of the opposition, the Plaintiff makes a concession in paragraph 23 of the Affidavit of Olive Atieno Otieno and states,

“That in light of the age and magnitude of the debt, the Plaintiff is willing to accept 50% of the entire outstanding amount as a first lump sum payment and the remaining balance to be paid within one year”.

14. In view of this concession the Court shall allow the Defendant’s plea to pay by installments but not in

a manner that will oppress the Plaintiff. The proposal put on the table by Defendant will stretch the repayment to over 3 years and this is certainly unreasonable, more so because the debt became due as early as 2012. The Court will make an order that ensures payment is completed in the next 18 months.

15. Although the Plaintiff was keen to receive a lump sum, the Defendant maintains that it is unable to make one now. However, pending before another Court is a claim by the Defendant against IEBC for Kshs.39,364,272 (Milimani Commercial Civil Case NO.391 of 2015, **INDIGO TELECOM LTD VS. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION**). If the Defendant were to succeed in the claim then this would yield an amount that could substantially pay off the Plaintiff's debt. In fairness to the Plaintiff this Court should be able to review its order in the event of an outcome that is favourable to the Defendant therein.

16. These are my Orders:-

- a. The Court allows the Defendant to pay the sum of US 525,221.47 in monthly installments of USD 29,178.00 with effect from 1<sup>st</sup> June 2017 and thereafter on or before the 5<sup>th</sup> day of each succeeding month.
- b. In the event of default of any one payment, the entire balance shall become due and payable at once and execution to issue.
- c. The Plaintiff is at liberty to apply for review of the above Orders.
- d. Each party shall bear its own costs on the Application of 26<sup>th</sup> September 2016.

**Dated, Signed and Delivered in Court at Nairobi this 26<sup>th</sup> day of April, 2017.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Gachugi for Plaintiff/Respondent

Katonye for Defendant

Alex - Court Clerk