

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

AT NAIROBI

CIVIL CASE NO. 513 OF 2012

A Z SHAH T/A FASHION SPOTPLAINITFF

VERSUS

JANMOHAMED INVESTMENT LTD .. DEFENDANT

RULING

By an application dated 27th April, 2017 the defendant/ applicant sought two substantive orders. There was a prayer for stay of execution of the court's decree dated 3rd December, 2015 and another for leave to liquidate the decree by monthly instalments of Kshs. 100,000/= until payment in full.

The application is premised on Order 21 Rule 12, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules. The applicant has also cited Section 3A of the Civil Procedure Act. The grounds are set out on the face of the application and there is a supporting affidavit sworn by Karim Janmohamed one of the Directors of the defendant/ applicant.

The decree in favour of the plaintiff/respondent is in the sum of Kshs. 1,518,362.10. The application is opposed and there are grounds of opposition filed on behalf of the plaintiff. The thrust of the applicant's case is that it is undergoing genuine financial constraints and any negotiations to reach an amicable settlement have completely failed leading to a threat of execution.

The application is said to have been made in good faith and the applicant is ready to comply with any orders imposed by the court. The applicant has all along been ready to settle the decretal sum and through reasonable instalments of Kshs. 100,000/=. On the other hand, the plaintiff states that the application is frivolous, incompetent, misconceived and devoid of any merit. If anything, it is tantamount to abuse of court process. It is also stated that the grounds advanced are not sufficient for granting the orders of stay of execution.

Several authorities have been cited. In the case of **Zlatko Rostocil Vs. James Samuel Kinyanjui [2013] e KLR** the court citing other cases in relation to similar applications stated that, the primary consideration for postponing payment of a decree by instalments is for the judgment debtor to demonstrate *bona fides* by payment of a fair proportion of the date.

The orders sought are discretionary but at the same time, the court has to consider and appreciate that the plaintiff holds a judgment in his favour against the defendant. The amount of the decree is substantial and a lot of time has gone by since the issuance of the decree.

The defendant applicant has made some payments to the plaintiff which were accepted without prejudice. At some point there was a prayer that the deponent of the supporting affidavit be summoned for cross-examination; this however was not pursued.

I have considered the positions of both parties, the obtaining facts and circumstances. I am persuaded that justice must look at both sides but the proposal advanced by the defendant applicant is too low. I find and hold that there shall be a stay of execution provided that the defendant applicant enhances the proposed monthly instalments to Ksh. 300,000/= with effect from 30th September, 2017.

In default of any instalment thereafter, execution shall follow. Each party shall bear their own costs of this application.

Dated, signed and delivered at Nairobi this 27th Day of July, 2017

A. MBOGHOLI MSAGHA

JUDGE