



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

**CIVIL CASE NO. 2408 OF 1996**

**RAYSHIAN APPARELS LIMITED..... PLAINTIFF**

**- V E R S U S -**

**P. N. MASHRU TRANSPORTERS LIMITED.....RESPONDENT**

**RULING**

1. Rayshian Apparels Ltd, the plaintiff herein filed a suit against P.N Mashru Transporters Limited, the defendant herein, seeking special damages of USD 158,437.90/-. The suit was heard by Justice J.L.A Osiemo who thereafter delivered a judgement on 17/10/2008 in favour of the plaintiff as against the defendant for the sum of usd158,437.90/- together with interests at court rates and costs of the suit.

2. The defendant being aggrieved, appealed to the court of appeal vide Civil Appeal No.256/2009 P.N Mashru Transporters Limited –vs- Rayshian Apparells Limited. The appeal was heard and delivered on 19/05/16 where the appellants appeal partly succeeded. The decretal sum was reduced to USD319,508/-, that translates to ksh.32,909,324/- with the current dollar rate at 103/-, which amount continues to accrue interest until payment in full.

3. The defendant/judgment debtor/applicant has now taken out a notice of motion dated 23/10/17, in which it sought for the following orders;

***1. That this application be certified urgent, be heard ex parte and service be dispensed with in the 1<sup>st</sup> instance.***

***2. That there be a stay of execution of the decree and all consequential orders against the applicant pending the hearing and determination of the application herewith.***

***3. That this Honourable court be pleased to order that the Judgment debtor/ applicant herein do liquidate the decretal amount in equal monthly instalments of Ksh.1,000,000/- until payment in full.***

***4. That costs of this application be in the cause.***

4. The motion is supported by the affidavit of Francis Mulili. The plaintiff/respondent/decreed holder filed its grounds of opposition to oppose the motion. I have considered the grounds stated on the face of the motion and the facts deposed in the affidavits filed in support and the grounds of opposition against the application.

5. The applicant avers that being largely in the transport industry some time back they were insured by Blue Shield Insurance Company Limited and Concorde Insurance Limited both of which are under

statutory management and it has to pay numerous claims to avert execution.

6. That due to the harsh economic conditions faced by the defendant and with the introduction of the Standard Gauge Railway, the defendant is not in a position to satisfy the decretal sum, which is in the excess of ksh.32,909,324/-, in one full and final settlement. The applicant proposes to liquidate the decretal amount in equal monthly instalments of Kshs.1,000,000/- until payment in full.

7. The plaintiff/respondent/decreed holder on the other hand avers that the application should not be allowed since the defendant is guilty of inordinate delay in filing the same. The court of appeal decision was delivered on 19/May/2016 and the application was filed on 23<sup>rd</sup>/October/2107, a record one and a half years of delay.

8. That it is inconceivable that the defendant would be unable to settle the decretal sum in one payment as a result of financial constraints, yet it is the largest common carrier and transporter in the Republic of Kenya.

9. That this suit having been filed in the year 1996, it has been in court for the last 21 years and the defendant should no longer be allowed to continue frustrating its finalization and litigation must come to an end.

10. The respondent is of the view that the proposal to pay Ksh.1,000,000/- per month by the applicant is inordinately low. It was argued that if that application was allowed, it will take about 34 month to settle the amount due.

11. The provisions of order 21 Rule 12(2) of the Civil Procedure rules 2010, give the court discretion to allow payment of the decretal sum by way of instalments. The same stipulates as follows:

**“after passing of any such decree, the court may on the application of the judgement debtor and with consent of the decree holder for sufficient cause shown, order that the payment of the amount be made by instalments on such terms.”**

12. There are numerous court decisions wherein courts have allowed judgement debtors to liquidate the decretal sums by instalments. The factors to be considered in such applications are:

a. *Nature of the case*

b. *Conduct of the parties*

c. *Willingness and bonafides of the applicant to pay a fair proportion of the debt .*

d. *The application has to be made without undue delay.*

13. The defendant is emphatic that it could not pay the decretal sum in lump sum, and should be granted leave to settle it by instalments. While the plaintiff contends that the applicant is a party of means being the leading transport company in the Republic of Kenya and the proposed ksh.1,000,000/- per month is inordinately low. The judgment having been made on 19/05/2016, this delay is denying the decreed holder the fruits of its judgement. In this spirit, the plaintiff proposes a payment plan of up to a maximum of 6 months.

14. On the issue of time, it is apparent from the record, that the judgement on appeal was delivered on 19.05.2016 while the motion was filed on 23.10.2017. I am satisfied that the motion was not timeously filed but in broad interest of justice I will excuse the delay.

15. The parties are in agreement that the decretal sum be settled in instalments, to bring this litigation to an end. However they are unable to agree on the amount payable per month. I have considered the proposals by both sides but I am unable to agree with either party. I am convinced that a sum of

ksh.3,500,000/- is a fair and reasonable figure that will lead to a quick settlement of the decree.

16. For the foregoing reasons, the defendant's notice of motion dated 23/10/17 is hereby allowed in the following terms;

**i. The defendant be and is hereby granted leave to liquidate the decretal sum by monthly instalments of ksh. 3,500,000/- with effect from 15/1/2018 and thereafter on the 15<sup>th</sup> day of each succeeding month until payment in full.**

**ii. In default of any one instalment, execution to issue forthwith.**

**iii. There will be no orders as to costs.**

**Dated, Signed and Delivered in open court this 20<sup>th</sup> day of December, 2017.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent