



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 189 OF 2010

BENSON MBUVI KATHENGE PLAINTIFF

VERSUS

NELSON MUTAI T/A KANDIE MUTAI MUDEIZI & CO.

ADVOCATES DEFENDANT

RULING

1. By the **Notice of Motion** dated and filed herein on 18th December 2015, the Defendant/Applicant prays for an order lifting the warrants of arrest issued against him on 3rd December 2015 and a further Order that the applicant be given the leave to liquidate the outstanding sum by monthly instalments of Kshs.50,000/= until payment in full.

2. The background to the application in that on 3rd December 2015 a warrant of arrest was issue by this court against the Defendant/Applicant for failure to pay the decretal sum herein amounting to Shs.4,534,834.60. The Applicant now fears that he can be arrested at any time since the arrest warrants are out. The Applicant states that he is willing to pay the decree but that he is currently not enjoying good financial health in his practice as an advocate, and now pleads to be allowed to liquidate the decretal sum by monthly instalment of Shs.50,000/=. To that end the Applicant is willing to deposit Shs.200,000/=.

3. The application is opposed by the Plaintiff/Decree Holder vide Replying Affidavit filed herein on 8th January 2016. Specifically the Respondent states that stay of execution herein cannot issue since the same prayer is not open for the determination by this court since it is alleged that this matter has been dealt with previously in this court and even in the court of Appeal. The Respondent also submitted that prayer for payments by instant is not well grounded, and that the decretal sum of over Shs.4,5000,000/= if paid by instalment of Shs.50,000/= per month will take over 8 years to pay, and given that the judgment debt has been over due for 6 years, it will take the judgment Creditor 14 years to realise the fruits of the judgment.

4. Parties filed submissions which I have considered. In my view, there are only two issues for determination,

a) Whether the warrants issued on 3rd December 2015 can be lifted.

b) Whether the court can allow the applicant to liquidate the debt by instalment.

5. WHETHER WARRANTS CAN BE LIFTED

On this issue the Respondent/Decree holder submitted that stay of execution had previously been denied by this court and even by the court of Appeal, and that the matter is now resjudicate. That maybe so. There is no record on file to show whether that issue had been considered either in this court or in the court of Appeal save what the Respondent states in the Replying Affidavit. However, even if that were true, the application before the court is not for stay of execution. Rather it is for lifting the warrant of arrest issued on 3rd December 2015. To my mind, issuance of warrants of arrest is just one of the several ways of executing a decree. This application does not seek to stay any execution. But it seeks that that particular mode of execution be lifted, in a tacit acknowledgment that other modes of execution can be resorted to. Indeed, that is the reason why in the next prayer the applicant seeks leave to satisfy the decree by monthly instalment of Shs.50,000/=. So, in answer to issue number one herein, this court finds that it can exercise its discretion to lift the said warrants. I therefore exercise by discretion under Order 22 of the Civil Procedure Rules and hereby lift the said warrants.

6. WHETHER TO ALLOW PAYMENTS BY INSTALMENTS

Although **Order 21 rule 12 (2)** give this court a wide discretion as to whether payment of the decree amount is to be postponed or settled by way of installments, it has been held that the cardinal rule on the exercise of their discretion must be exercised judiciously. The onus is on the applicant to show that he is entitled to this indulgence under this rule. For this court to grant the Applicant the prayers sought, it has been held^[1] that it should look at:

i. The circumstances under which this debt was contracted.

ii. The conduct of the debtor.

iii. His financial position.

iv. His bona fides in offering to pay a fair portion at once

The circumstances under which the applicant got into the present debt are not pleaded in his application but are in any event present in the court proceedings. This court is not able to say more on this issue. However, as for the conduct of the Debtor, this court notes that the judgment in this case was entered in the year 2010 when the debt was a meager Two Million, Nine Hundred and Fifty Thousand together with cost and interest. From that date to date, six years later, the Applicant has only paid to the Respondent Kenya Shillings One Hundred and Twenty Thousand (Kshs.120,000/-), and the interest continues to accrue. It can therefore be concluded that the applicant's conduct is of a person who is not willing to pay the decretal amount. It should also be noted that this application was presented to court on the 18th of December 2015, three days after an attempted arrest of the Applicant pursuant to the Warrants of Arrest issued by this court on the 3rd December 2015 .

7. On the Applicant's financial position, it is on record that the applicant was directed to pay a lump sum amount before further directions were given on the proposed installments. The applicant failed to honour the directive given hence the issue of the warrants of arrest. Further, it is worth noting that the Applicant has only presented to this court the same documents that he presented during the hearing of the Notice to Show Cause why execution should not issue. These same documents are in respect to periods between November 2013 and April 2014. The Applicant has further averred that he is a practicing advocate and as such he is in business. This then calls into question the Applicant's bona fides in offering to pay a fair portion at once.

8. In the case of **Hildegard Ndalut v Lelkina Dairies Limited and Another**[2005] eKLR it was held that a defendant should be required to show his bonafides in arranging fair payment of the portion of the debt in persuading the court to allow payment by way of installment. It was further held that the judgment

debtor might genuinely be in a difficult position in paying the decretal amount at once. However, he has to show seriousness in paying the amount. In that event, he should show his bona fides by arranging fair payment proposals to liquidate the amount. This is the proper test for granting orders for payment of installments. The Applicant herein has not offered to pay a fair portion at once in order to persuade this court to grant the prayers sought. He only offers to pay Kshs.200,000/= against a decree of more than Kshs.4,500,000/-. This amount is too little and demonstrates the Applicant's unseriousness in paying the decretal amount.

9. From the above, it is clear that the Applicant is not serious with his proposal to satisfy the decree herein. However, it is now good law that one should not be sent to Civil jail for failure to pay a debt, and that every debtor should as far as possible be given opportunity to pay the debt while they retain their freedom. Where a Judgement Debtor is willing to pay the debt, a court should not rush him into a Civil Jail. The provisions of Article 11 of the International Convention on Civil and Political Rights (I.C.P.P.R.) provides that:

“no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation”.

10. However, for a just cause, a person shall be sent to Civil Jail where the court believes that the debtor is not making proper and affordable effort to settle a debt, and civil jail still remains the option open for obstinate debtors to satisfy a decree. The constitutional freedom of not taking somebody's liberty arbitrarily does not apply where there has been a proper, open legal process. That means that where the court has assessed that a debtor is obstinately avoiding to pay a debt, civil jail remains the only open and legitimate redress.

11. In the light of the foregoing this court is prepared to give the Applicant a reasonable chance to satisfy the decree by instalment. In that regard, I make the following orders;

- a) The warrant of arrest issued against the Judgement/ Debtor/Applicant herein on 3rd December 2015 are hereby lifted.
- b) The Judgement/Debtor/Applicant is herewith allowed to liquidate the decree as follows;
 - (i) Make a lumpsum deposit of Shs.700,000/= to the Judgment Creditor by 30th April 2016.
 - (ii) Make a monthly payment by instalment to the Judgement Debtor of Shs.100,000/= with effect from 1st June 2016.
 - (iii) If there is any failure of compliance with above orders the said warrants of arrest issued on 3rd December 2015 shall automatically be reinstated.
 - (iv) Costs of this application shall be for the Judgement Creditor/Respondent.

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI THIS 24TH DAY OF MARCH 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

M/s Mwinzi for Plaintiff

Mr. Khesiani hb Kabuya for Defendant

Teresia – Court Clerk