



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 603 OF 2015**

**ASTRAZENECA UK LTD.....PLAINTIFF/RESPONDENT**

**VERSUS**

**MACNAUGHTON.....DEFENDANT/APPLICANT**

**RULING**

[1] The Notice of Motion dated **2 February 2016** was filed by the Defendant/Applicant and is expressed to have been brought pursuant to **Order 21 Rule 12** and **Order 50 Rule 1** of the **Civil Procedure Rules, 2010**. It seeks for orders that:

- (1) **Judgment be entered for the Plaintiff against the Defendant as prayed in the Plaintiff.**
- (2) **That the Defendant be allowed to liquidate the Plaintiff's claim by monthly instalments of USD 50,000 with effect from the date of judgment for a period of 6 months.**
- (3) **That thereafter, there be a review of the instalments as is reasonable and on the direction of the Court.**
- (4) **That costs of the application be in the suit.**

[2] The grounds set out in the Notice of Motion in support of the application are that the Defendant does not dispute the Plaintiff's claim, but that due to financial constraints, it is unable to liquidate the amount due in lump sum, hence the application to pay by instalments of **USD 50,000**. The application is supported by the two affidavits sworn on **2 February 2016** and **21 March 2016**, respectively, by **Miriam McKnight** in which she deponed that the debt herein was contracted in the normal course of business due to the fact that the Plaintiff had overstocked the market by appointing three other distributors, thereby resulting in delay in the movement of stock. It was further deponed that the Defendant had demonstrated good faith towards the Plaintiff by offering to pay in various monthly instalments, but that the offers were turned down by the Plaintiff.

[3] The application was conceded to by the Plaintiff/Respondent to the extent that it seeks for the entry of judgment on admission against the Defendant for the sum claimed of **USD 2,382,988.07**; but was otherwise opposed by the Plaintiff/Respondent on the basis of the Replying Affidavit sworn by **Adam Lambart** on **24 February 2015**. It is the Plaintiff/Respondent's contention that the Defendant's proposal to pay the claim in instalments of **USD 50,000** is unreasonable, and that any order to that effect would not

only be unfair but also prejudicial as it would take more than five years for the Plaintiff to recover the fruits of its judgment.

**[4]** A perusal of the pleadings filed reveals that pursuant to a Distribution Agreement dated **1 January 2015**, the Plaintiff appointed the Defendant to distribute its pharmaceutical products in Kenya. The arrangement between the parties was that the Defendant would place an order for the goods and thereupon the Plaintiff would then prepare and deliver the goods vide a Delivery Note. Upon the invoices being raised, the Defendant would pay the applicable purchase price for all the products delivered, at any rate not later than **180 days** from the end of the calendar month in which the invoice was issued.

**[5]** It is the Plaintiff's case that as at **3 December 2015** when this suit was filed, the Defendant was indebted to it in the sum of **USD 2,382,988.07**, which sum was admitted in full by the Defendant vide the Statement of Admission filed herein on **2 February 2016** under **Order 13 Rule 1 of the Civil Procedure Rules, 2010**. In the premises, judgment is hereby entered in the Plaintiff's favour against the Defendant on admission for:

**[a] The principal sum of USD 2,382,988.07;**

**[b] Interest on [a] above at 2% per annum above the LIBOR rate calculated on a daily basis from the respective due dates of the invoices until payment in full;**

**[c] Costs of this suit;**

**[d] Interest on [c] above at court rates from the date of filing suit until payment in full.**

**[6]** The court has the discretion under **Order 21 Rule 12(1) of the Civil Procedure Rules** to allow the Defendant to pay the sum aforesaid by instalments. That provision states thus:

**"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 instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable."**

**[7]** The question to be determined herein therefore is whether sufficient reasons have been given for the court to allow the Defendant to pay the sum claimed by instalments of **USD 50,000** as proposed. In this regard the Plaintiff drew the court's attention to the following authorities for the proposition that the debtor must not only show sufficient reason for the indulgence but also his bona fides by arranging to pay a fair proportion of the debt:

**[i] A. Rajabali Alidina vs Remtulla Alidina & Another [1961] EA 565.**

**[ii] Maasai Kenya Ltd vs Hardware & Steel Centre Ltd & Another [2013] eKLR**

**[iii] Woodroffe & Amir Ali's Civil Procedure in British India, 2nd Edition, p. 869**

**[iv] Zlatko Rostocil vs James Samuel Kinyanjui [2013] eKLR**

**[v] Hildegard Ndalut vs Lelkina Dairies Limited & Another [2005] eKLR**

**[vi] Keshavji Jethabhai & Bros Limited vs Saleh Abdula [1959] EA 260**

**[8]** In the supporting and further affidavits filed by the Defendant/Applicant, the reason given for the indulgence sought is that the Defendant is currently experiencing financial difficulties which have been contributed to in part by the Plaintiff in overstocking the market, thereby reducing the Defendant's market share. In addition thereto, the Defendant contended that it has demonstrated good will by paying **USD 200,000** at the rate of **USD 50,000** per month with effect from February 2016 when the application was

filed. On its part, the Defendant relied on the following authorities:

**[i] Singh Gitau Advocates vs City Finance Bank Ltd [2013 eKLR;**

**[ii] Lavington Security Limited vs Nairobi City Water & Sewerage Co. Ltd [2014] eKLR;**

**[iii] Keshavji Jethabhai Bros Ltd vs Saleh Abdulla [1959] EA 260;**

**[iv] Freight Forwarders Ltd vs Elsek & Elsek (K) Ltd [2012] eKLR;**

**[v] Y.A. Shretta vs Leishure Lodges Limited [2015] eKLR.**

**[9]** From the totality of the authorities cited, it is common ground that, as a general rule, a judgment creditor is entitled to the immediate payment of the decretal sum; and that while the judgment debtor might genuinely be in a difficult position in paying the debt at once, the court must be convinced that there is sufficient reason for allowing payment by instalments. It is also common ground that to determine what amounts to sufficient reason, consideration should be given to:

**[a] The circumstances under which the debt was contracted**

**[b] The conduct of the debtor**

**[c] His financial position**

**[d] His bona fides in offering to pay a fair proportion of the debt at once.**

**[10]** I have considered the circumstances under which the debt was contracted as shown herein above. It is apparent that the parties have had a long relationship since 2000, and that the subject contract was only but a renewal of this longstanding relationship. This is evident in the schedule set out in paragraph 8 of the Plaintiff, which lists invoices from **March 2014** as being part of the documents relied on in support of the claim. Indeed, in paragraph 8, the Plaintiff averred that:

**"...between March 2000 and June 2015, the Plaintiff supplied various products to the Defendant in respect of which the Defendant has failed, neglected and/or refused to pay the Plaintiff..."**

**[11]** The foregoing thus indicate that the Defendant was otherwise a good distributor and that it honored the terms of their arrangements for the period leading up to 2014. The Defendant's contention that the Plaintiff increased its distributorship, thereby limiting its market share, appears to be uncontroverted, for there is nothing in the Plaintiff's Replying Affidavit to indicate otherwise. Additionally, the Defendant deponed that it made some supplies to South Sudan for which payment was still outstanding. The Court is therefore satisfied that a sufficient reasons have been advanced by the Defendant to justify the orders sought, there being nothing by way of conduct on the part of the Defendant that would be considered reprehensible.

**[12]** I however note that nothing was availed by way of evidence to demonstrate the Defendant's current financial position and/or difficulties. It was simply averred in **paragraph 5** of the Supporting Affidavit that the Defendant has other creditors, but no details or particulars thereof were given, nor is there any indication in terms of income vis-a-vis outflows that would have helped place the instant debt in perspective. Moreover, there is no indication that the Defendant ever paid a fair proportion of the debt before commencing the unilateral payment of the proposed instalments of **USD 50,000** from February 2016 to date.

**[13]** The foregoing notwithstanding, in the final analysis, each case must be determined on the basis of its peculiar facts. Indeed this is what the Court determined in **Keshavji Jethabhai & Bros Ltd vs Saleh Abdulla [1959] EA 260** when it stated as follows:

**"Whilst the courts must be zealous of the creditor's rights, they must consider each case on its merits and exercise the discretion accordingly... Hardship to a debtor might in some circumstances be taken into consideration on an application for payment by instalments; it is a question in each case whether some indulgence can fairly be given to the debtor without unreasonably prejudicing the creditor."**

**[14]** In the instant matter I have taken into consideration the uncontroverted averment by the Defendant that the Plaintiff had overstocked the market thereby reducing the Defendant's market share, as well as the contention by the Defendant that it is ought a huge amount of money by a sister company operating in South Sudan. In addition, consider it a sign of good faith that the Defendant has been consistent in the payment of the proposed instalments and that thus far a sum of USD 200,000 has been paid. In the same vein, there is no denying that the Plaintiff's concern that at the proposed rate of **USD 50,000** it would take over **5 years** for the Plaintiff to realize the fruits of its judgment is valid, in view of the amount claimed. I note, too, the averment at paragraph 5 of the Replying Affidavit that at some point in time, the Defendant had offered to pay and did pay part of the sum due in instalments of **USD 100,000** prior to the filing of the suit. On their part, Counsel for the Plaintiff proposed that if the court were to allow instalment payment, then four equal instalments would be acceptable.

**[15]** Thus looking at the entirety of the facts presented herein, the Court is satisfied that whereas sufficient cause has been shown to warrant payment by instalments, the amount proposed is on the lower side. Accordingly, I would allow the Defendant's application but order that the instalment payments be in the sum of **USD 100,000** for **6 months**.

The matter to be mentioned thereafter for review and further orders. costs of the application will go to the Plaintiff.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20th DAY OF MAY 2016**

**OLGA SEWE**

**JUDGE**