



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO 576 OF 2012

WINFRED NYAWIRA MAINA.....PLAINTIFF

Versus

PETERSON ONYIEGO GICHANADEFENDANT

RULING

Two Applications: Payment by Instalments and Sale of Property

[1] I have before me the two applications: A Motion dated 17th February 2015 and another dated 27th February, 2015. The former application is made by the Plaintiff and the latter by the Defendant. The first application is seeking for two significant orders; 1) an order that the attached property herein, namely L.R. NO 209/10949 be sold by public auction; and 2) the court gives directions on the advertisement, time, terms and conditions of sale thereof. The second application is seeking for; 1) stay of execution of preliminary decree pending hearing and determination of the application; and 2) payment in instalments of the decretal sum herein. The parties filed affidavits in support and opposition of the respective applications.

[2] These applications are two sides of the same coin. But I will determine the application for stay of execution and to pay in instalments only for reasons which will become apparent in a short while. The application dated 27th February, 2015 is under the cover of certificate of urgency and should be determined on the basis of priority.

Stay of execution

[3] The Defendant attempted to withdraw the prayer for stay of execution in his application through the oral submissions by counsel. But Mr Ng'eno was simply attempting to justify his argument that this application should be heard by the Deputy Registrar under order 49 of the Civil Procedure Rules. Because, even after the oral intimation to court of the withdrawal of the request for stay of execution, Mr Ng'eno nonetheless insisted and argued that stay of execution should be granted. One is lost whether the request for withdrawn of the prayer for stay of execution was really a serious commitment to the law or was just made to sustain Mr Ng'eno's argument that the DR should hear the application. Parties as well as their counsels are under a statutory obligation under the overriding objective to be forthright with the Court in their submissions and also to assist the court to resolve disputes expeditiously. The submission by Mr Ng'eno runs contra to that obligation, except, I do not attach to it as much weight as would entitle the court to castigate him. Nevertheless, the issue of stay has been urged and placed before the court for determination;

the court has jurisdiction on the application and I will so determine it.

Stay of execution

[4] An application for stay of execution was made earlier before this court and it was determined by the Court on 29th January 2015. It cannot be re-litigated. Notably also, the property in issue, i.e. L.R 209/10949 is already attached under a prohibitory order which was issued by the Court on 10th September, 2014 and was registered against the title thereof. What is remaining is only the settling of terms of sale. There is no danger of sale before terms are settled by the DR. Therefore, the request for stay of execution is not available or merited. It is hereby dismissed.

Payment in instalments

[5] I now move to the other limb, i.e. on payment by instalments. The Defendant has proposed to pay the sum due in the following manner:

- a) *A sum of Kshs. 700,000 on 26th February 2015*
- b) *A sum of Kshs. 2,000,000 on or before 20th March 2015*
- c) *A sum of Kshs. 1,500,000 on or before 30th April 2015*
- d) *A sum of Kshs. 1,500,000 on or before 30th May 2015, and*
- e) *A sum of Kshs. 1,600,000 on or before 30th June 2015*

[6] The Defendant submitted that he has already paid a sum of Kshs. 700,000 to the Plaintiff. The Plaintiff did not deny that fact. I presume by the time of this ruling, the Defendant has already paid the sum of Kshs. 2,000,000. His major reasons for the applying are that: 1) he is unable to liquidate the decretal sum at once, but he is able, ready and willing to pay in instalments as proposed; 2) execution will only increase costs; 3) that orders sought are in the interest of justice for all the parties. He has also revisited the fact that he has filed an appeal and so the attached property which is valued at over Kshs. 100,000,000 should not be sold on this decree. He also told the court that the Plaintiff is holding the title document to the attached property and so no prejudice will be suffered if his request to pay in instalment is granted. He made further submissions, that he is expecting some payment through his company called Westlife from the Ministry of Transport which he intends to utilize in paying the decree herein in full.

[7] The Plaintiff has objected to the proposed payment by instalment. She insists that the application is just but another attempt to postpone payment of the decree. She accused the Defendant of indolence and unwillingness to pay. She also stated that she has waited for too long to realize her decree and that application to postpone or for payment in instalments should be declined.

Legal threshold

[8] I have considered all the submissions by parties and the judicial authorities filed. I take the following view of the matter. Under Order 21 Rule 12 (1) and (2) of the Civil Procedure Rules, the Court may:-

“...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.”

Therefore, the power to order payment by instalments of the decretal amount is purely a matter of discretion by the Court. Except, the exercise of discretion is circumscribed; sufficient cause must be shown and the indulgence to pay by instalments may be on such terms that the Court thinks fit. The onus of establishing sufficient cause rests on the Applicant. See the case of **JABALI ALIDINA v LENTURA ALIDINA [1961] EA 565 at page 566** that:-

“All commentators on the Civil Procedure Code agree that the court’s 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 Applicant to show that he is entitled to indulgence under this rule.

It is for the Applicant to show “sufficient reason” for indulgence being shown to him, and this court is immediately faced with difficulty in this respect, as the learned magistrate has not stated what reasons put forward by the Applicant he considered sufficient to justify the exercise of the court’s discretion in the Applicant’s favour.”

It is, therefore, on being convinced by the Applicant that there is sufficient cause to permit payment by instalments that the Court should think about other conditions to attach to the order for payment by instalments of the decretal sum. Those terms or conditions include payment of interest, the attachment of the property of the judgment debtor or the taking of security from him, or otherwise. And the list is not exhaustive. What amounts to sufficient cause will, however, depend on the peculiar circumstances of each case.

[9] One aspect of this case is instrumental and a good start-point; the Defendant has, in the Supporting Affidavit and the submissions in Court made a commitment; that he is ready, able and willing to liquidate the decretal sum except not at once but in instalments. Secondly; that he is ready and willing to comply with any terms as to payment of interest, security or attachment of property as the Court may deem fit. But, I have a quarrel with two submissions by the Defendant especially, the promises he has made based on expected pay to Westlife Construction Company Limited; and repayment of friendly loans he has advanced to other individuals. The first argument is not apt for an application of this nature and especially when it is made by an individual person without resolution of the Company. There are ample reasons for this holding, and in particular, the now too familiar law that a company is separate from those who compose it. See the celebrated legal innovation in the case of **Salmon vs. Salmon**. The said company is not the decree-debtor herein, the Defendant is. The debt is not the company’s; it is the Defendants. The second argument is more startling because he cannot base payment of a decree of the court on repayment by friends of loans he has advanced them. I do not think the disclosure assists his application; it only depicts him as a person of means to pay off the decree at once. But that said; should I indulge him?

[10] The Plaintiff has insisted on payment at once of the entire decretal sum. Should I accept the proposed amount of instalments by the Applicant or go by the insistence of the Plaintiff that payment be at once or the Court orders payment on reasonable terms altogether? In strict sense, the Court is not bound by the proposals made by the Defendant or the insistence of the Plaintiff. It is guided by the law although proposals by parties are critical in determining an application to pay by instalments. Of great significance in application of this nature, the following matters are important; 1) the circumstances of the case; 2) the conduct of the parties; 3) the willingness and *bona fides* of the Applicant to pay a fair proportion of the debt; and of course, 4) that the application is made without undue delay. In this case, much time has passed by since the preliminary decree was passed and it has not been paid in full. The earlier application for stay found that the Defendant was tinctured with tendencies of prolonging this case. In that light, the Plaintiff would be within her rights to insist on payment at once of the entire decretal sum. But, she accepted the first instalment, although that does not compromise her right to payment of the decree at once. I note also that the Defendant had proposed to pay a sum of Kshs. 2,000,000 on or before 20th March, 2015, which has passed already. I expect him to have paid the said sum on the date proposed if indeed he is serious with his request. Taking into account the entire circumstances of this case, I will order the Defendant to pay the sum Kshs. 2,000,000 immediately

if he has not paid already. The balance thereof shall be paid within 45 days of today. In default, execution will proceed. Under the law, the court postpones or orders payment in instalments of the decree 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. The property of the Defendant, i.e. L.R 209/10949 is already attached in accordance with the law. The court issued a prohibitory order on 10th September 2014 and was registered against the title L.R. NO 209/10949. The said property of the judgment-debtor is, therefore, in law properly attached. What is remaining is for the Deputy Registrar to settle terms of sale of the property. And in that respect, I remit the application dated 17th February 2015 to the DR to settle terms of sale of the attached property after hearing the parties on 8th of May, 2015, but of course, only in the event the judgment-debtor does not abide by the orders issued herein. Meanwhile, for purposes of this application, the said property L.R 209/10949 shall remain attached as the Defendant makes payment in accordance with this order. It is so ordered.

Dated, signed and delivered in Court at Nairobi this 23rd day of March 2015

F. GIKONYO

JUDGE