



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 156 OF 2011**

**SONIA KWAMBOKA RASUGU ..... PETITIONER**

**VERSUS**

**SANDALWOOD HOTEL & RESORT LIMITED**

**T/A PARADISE BEACH RESORT .....1<sup>ST</sup> RESPONDENT**

**LEON MURRITHI NDUBAI .....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By an application dated 5<sup>th</sup> May 2014, the applicants/respondents sought the following orders:
  - i. *That this application be heard ex parte in the first instance and as a matter of urgency on the ground, inter alia, that the entire object of this application and of the intended appeal will be defeated and rendered nugatory if the Plaintiff/Respondent should proceed to with the execution of the Decree issued from the judgment by this Honourable Court on 26 of July 2013.*
  - ii. *That this honourable court do order a stay of execution of the Judgment and Decree made by this Honourable Court on the 26<sup>th</sup> of July 2013, by the petitioner whether by herself, representatives, employees, agents, servants or other person acting on her behalf or claiming through it, pending the hearing and determination of this application.*
  - iii. *That this Honourable Court do order a stay of execution of the Judgment and Decree made by this Honourable Court on the 26<sup>th</sup> of July 2013 pending the hearing and determination of the Defendant/Applicant's intended appeal.*
  - iv. *That the costs of this applicant be provided for.*
2. The grounds on which the application was based were, among others, that the applicants intended to appeal against the judgment of the Court dated 26<sup>th</sup> July 2013 in which the respondent/petitioner was awarded the sum of Ksh 1,000,000 together with costs, execution for which, in the amount of Kshs 1,225,151/-, had precipitated the application. The respondents contended that their appeal had high chances of success and if the orders were not given, their appeal would be rendered nugatory.

3. When the matter came up before the Court (Majanja J) on 8<sup>th</sup> May 2014, the applicants indicated their intentions to pay the decretal amount by way of instalments, the first instalment of Ksh200,000/- to be paid immediately and thereafter by monthly instalments of Ksh50,000/- until payment in full. The Court then ordered the applicants to pay Kshs200,000/- to the decree holder/petitioner forthwith and thereafter file an affidavit of means to enable the court consider their application to pay by instalments.
4. In the affidavit of means sworn on 8<sup>th</sup> July 2014 by the 2<sup>nd</sup> applicant, Mr Leon Murithi Ndubai, the 2<sup>nd</sup> respondent and a Director of the 1<sup>st</sup> respondent, it is deposed on behalf of the applicants that the applicants had paid a total of Kshs Ksh200,000 to the petitioner. He averred that as a Director, he earned a total sum of Ksh150,000/- plus a commission depending on the admission of clients into the hotel. He claimed that since the delivery of the judgment in the matter, Paradise Beach Resort, where the incident took place, had closed down and been taken over by other investors. He claimed further that the 1<sup>st</sup> respondent had only one medium size hotel at Kitengela within Kajiado County which is now the only source of income. Because of the terrorist attacks that the country had faced, its clientele had gone down, tremendously affecting the 1<sup>st</sup> respondent's income.
5. He avers further that he had to meet his monthly mortgage commitment of Kshs100,000 per month, pay for each of his two school going children school fees of Ksh150,000 per term, and meet other household expenses with the assistance of his wife, also an employee of the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent therefore averred that he could only afford to pay Ksh100,000 by 10<sup>th</sup> July 2014 and thereafter monthly installments of Kenya shillings fifty thousand (Ksh50,000) on the 15<sup>th</sup> day of each subsequent month until payment of the decretal amount in full.
6. In her affidavit in response to the applicants' affidavit of means, the respondent/petitioner, Ms Sonia Kwamboka Rasugu, observes that the 2<sup>nd</sup> respondent has not availed any evidence to support the averments in his affidavit of means. She avers further that he has failed to disclose to the Court that he is also the Chief Executive Officer of Indo Africa Finance Company Limited, a Nairobi based micro finance institution established in 1984 under the Hire Purchase Act of 1984 which has been in operation for the last 24 years. She has annexed to her affidavit a print out of information in support of her averments which she states she obtained from the said Company's website on 11<sup>th</sup> July 2014.
7. She contends further that the 2<sup>nd</sup> applicant is known to be a billionaire with various business interests and properties. She also relies on information obtained from the media with regard to the financial situation of the 2<sup>nd</sup> respondent. She contends therefore that the applicants have not established sufficient cause to warrant the grant of orders to pay the decretal sum by way of instalments.
8. The Court directed the parties to file written submissions on the application dated 5<sup>th</sup> May 2014 as this was the only application pending before the Court. The respondent/petitioner did file submissions but the applicants/respondents did not.
9. In this ruling therefore, I will address myself to two issues. First, whether there should be stay of execution pending appeal and secondly, whether the respondents should be allowed to pay the decretal sum, which as at 8<sup>th</sup> May 2014 stood at Kshs 1,225,151, by instalments.
10. From the proceedings before the Court on 8<sup>th</sup> May 2014, it appears that the applicants, though they did not state so expressly, had abandoned the application for stay pending appeal. Their Counsel, Dr Khaminwa, informed that Court that the applicants were praying to be allowed to pay the decretal sum by instalments. In any event, the applicants have not placed before the Court any material on the basis of which it could rule on their application for stay of execution.
11. As submitted by the petitioner in her written submissions, the application for stay was made

almost a year after judgment, even though the applicants/respondents had participated in the hearing of the matter and were fully aware of the judgment. There was therefore unreasonable delay in filing it. It has also not been shown what loss the applicants will suffer if a stay is not granted, nor has it been demonstrated that the appeal will be rendered nugatory.

12. With regard to the application made orally before the Court on 8<sup>th</sup> May 2014 and pursuant to which the affidavit of means was filed, the Court makes two observations. First, from the record, apart from the payment of Ksh200,000 made pursuant to the orders of 8<sup>th</sup> May 2014, there appears to have been no further payment made by the applicants.
13. The Court notes from the record that on 9<sup>th</sup> December 2014 Counsel for the respondent/petitioner indicated that Dr Khaminwa for the applicants/respondents had informed her that two cheques of Kshs100,000/- each were ready and were to be delivered to the petitioner's Advocates' offices later that day. It appears, however, that they had not been forwarded to the petitioner. For a period of about 8 months therefore, no attempt has been made by the applicants to show good faith by making monthly payments towards the decretal sum.
14. In any event, is the proposal to pay by instalments merited? The evidence before the Court indicates that it is not. The applicants have alleged that business is bad and that the income of the 1<sup>st</sup> respondent has been adversely affected by terrorism, but they have not controverted the petitioner's averments with regard to the 2<sup>nd</sup> respondent's means. Further, the 2<sup>nd</sup> respondent's affidavit is inherently lacking in veracity. If his income is indeed Kshs 150,000 per month, it is difficult to see how he pays a mortgage of Kshs 100,000 and school fees of Kshs 150,000 each per term for two children. In addition, as observed by the respondent/petitioner, no evidence has been adduced to support the allegations in the said affidavit.
15. The Court takes the view that the proposal by the applicants to pay the decretal sum by instalments of Ksh50,000 is not merited and would work great injustice to the respondent/petitioner. It would result in liquidation of the decretal sum over a period of 20 or more months.
16. In the circumstances, and doing the best I can to balance the interests of the parties, I direct that the applicants/judgment debtors do pay to the respondent/decreed holder, within **Fourteen (14) days** hereof, the sum of **Kenya Shillings Four Hundred Thousand (Kshs 400,000)**, being approximately the amount that would have been paid to date had the applicants paid the decretal sum by instalments of Kshs 50,000 per month since July 2014. The balance of the decretal sum together with interest thereon shall be paid in instalments of **Kenya Shillings Two Hundred Thousand (Ksh200,000/-)** per month until payment in full. In default, execution to issue.

17. It is so ordered

**Dated, Delivered and Signed at Nairobi this 18<sup>th</sup> day of March 2015**

**MUMBI NGUGI**

**JUDGE**

**Mr. Odour instructed by the firm of Nungo, Oduor & Waigwa for the petitioner**

**Dr. Khaminwa instructed by the firm of Khaminwa & Khaminwa Advocates for respondent**