



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 231 OF 2012

COMMERCIAL BANK OF AFRICA LIMITED..... PLAINTIFF

VERSUS

DAVID NJAU NDUATI..... DEFENDANT

RULING

INTRODUCTION

1. The Defendant's Notice of Motion application dated and filed on 2nd May 2014 was brought pursuant to the provisions of Section (sic) 159 of the Constitution of Kenya, Order 21 Rule 12, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya and all enabling provisions of the law. It sought the following orders:-
 1. **THAT the Defendant/Applicant be granted leave to liquidate the decretal sum in monthly installments by tender of a monthly sum of Kshs 500,000/= till full and final payment.**
 2. **THAT the Plaintiff/Respondent be restrained from levying execution or committing the Defendant/Applicant to civil jail for as long as the Defendant pays the proposed monthly installments.**
 3. **THAT the cost of this Application be in the cause.**

THE DEFENDANT'S CASE

2. The application was supported by the Defendant's Affidavit that was sworn on 2nd May 2014 and the Further Affidavit by Rahab Wanjiku Nduati that was sworn on 23rd September 2014 and filed 5th September 2014. His written submissions were dated 17th November 2014 and filed on 19th September 2014.
3. The Defendant sought leave of the court to liquidate the sum of Kshs 13,465,392.20 being the decretal sum of Kshs 8,461,911.76 together with interest at the rate of twenty six (26%) per cent per annum and court collection charges, by effecting monthly payments in the sum of Kshs 500,000/= till full and final payment. He also wanted the Plaintiff restrained from levying execution or committing him to civil jail for as long as he paid the proposed monthly instalments.
4. He contended that his only source of income was a monthly salary ranging between Kshs 800,000/= and Kshs 1,000,000/=. He stated that he did not have the resources to pay the entire

- decretal sum at once due to current financial difficulties. He said that his efforts to raise the entire decretal amount at once to enable him clear the same had been futile.
5. He averred that the Plaintiff would not suffer any prejudice if the present application was allowed but that instead, he would be subjected to irreparable loss, damage and harm as the Plaintiff has applied for his arrest and committal to civil jail.
 6. He pointed out that he had made his application in good faith and that it was in the interest of justice that the orders he had sought be granted to avert gross miscarriage of justice to him.

THE PLAINTIFF 'S CASE

7. On the 4th September 2014, Ronald Mworira, Head Remedial Management Unit of the Plaintiff swore a Replying Affidavit on behalf of the Plaintiff herein. It was filed on 5th September 2014. The Plaintiff's Written Submissions were dated and filed on 27th November 2014.
8. The Plaintiff averred that it advanced the Defendant personal and car loans in the sums of Kshs 2,000,000/= and Kshs 3,100,000/= respectively. However, the Defendant had not made any payment since 2009. It added that the Defendant had been accorded adequate time to effect payments when it was granted a stay of execution of thirty (30) days which was later extended for another forty five (45) days and additional time to dispose of one of his properties to settle the decretal amount herein.
9. It stated that it applied for a Notice to Show Cause against the Defendant as he had not fulfilled his promises in spite of his large salary and upmarket house and car. It therefore sought that the Defendant's application be dismissed with costs to it.

LEGAL ANALYSIS

10. The Defendant relied on the provisions of Order 21 Rule 12 (2) of the Civil Procedure Rules, 2010 that give the court discretion to allow payment of 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 application of the judgment-Debtor and with the consent of the decree holder or without the consent of the decree holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by installments on such terms.”

11. He referred the court to numerous decisions wherein courts have allowed judgment-debtors to liquidate decretal sums in installments. In the case of **Gas Link Limited vs Haven D. Mandarian t/a Everest Enterprises (2014) eKLR**, Ogola J had held as follows:-

“I am alive to the fact that in determining the current application, this court should ensure that the Decree holder is not barred from enjoying the fruits of its judgment. Under Order 21 Rule 12 of the Civil Procedure Rules, this court has the discretion to allow the payment of the decretal sum by way of installments where the Judgment Debtor has shown sufficient cause for such payment.” (sic).... As I have earlier noted, justice requires that the Plaintiff is not delayed from enjoying the fruits of his Judgment. On the other hand, the process of execution by way of committal to civil jail should be the last option. In that case, I am inclined to grant the Defendant the opportunity to pay the decretal sum in the following terms...”

12. In the case of **Lavington Security Limited vs Nairobi City Water & Sewerage Company Limited [2014] eKLR**, Gikonyo J had stated thus:-

“...of great significance in application (sic) of this nature are; the circumstances of the case; the conduct of the parties; the willingness and bona fides of the applicant to pay a fair proportion of the debt; and of course, that the application is made without undue delay...”

13. He also placed reliance on the cases of **Freight Forwarders Limited vs Elsek & Elsek (K) Limited (2012) eKLR** and **Singh Gitau Advocates vs City Finance Bank Limited (2013)**

- eKLR** where the common thread was that the court could allow settlement of decretal sum by way of installments if a debtor was unable to pay in lump sum, if the application was made in good faith and the monthly repayments were reasonable.
14. On its part, the Plaintiff submitted that the Defendant had not demonstrated sufficient cause why he should be allowed to pay the decretal sum in instalments as had been set out in the cases he had relied upon.
 15. It contended that there was a very large variation of the range of income that was given by the Defendant that suggested a lack of sincerity on his part. It pointed out that the Defendant had also not disclosed his contract and pay-slips.
 16. The Plaintiff was categorical that the Defendant was not deserving of the orders sought in the application herein for the reason that he had not made any payment since March 2009. It was its argument that he was attempting to delay the court process as he filed his application nine (9) months after judgment and three (3) days before the hearing of Notice to Show Cause that was scheduled to come for hearing on 5th May 2014.
 17. The only pertinent issue that was therefore for determination by this court was whether or not the Defendant should be granted leave to settle the decretal sum by way of monthly installments in the sum of Kshs 500,000/=.
 18. It was correct as the Plaintiff had submitted that under Order 21 Rule 12 (1) of the Civil Procedure Rules, 2010, an application for payment by instalments could only be made at the time of passing the decree. The decree herein was passed on 31st July 2013 which was nine (9) months before the Defendant filed his application as a result of which the said provision had no relevance to his application.
 19. Parties appeared to be in agreement that from the provisions of Order 21 Rule 12 (2) of the Civil Procedure Rules, 2010, an application for paying by instalments after the passing of the decree could only be made with the consent of the decree-holder and without the consent of the decree-holder, for sufficient cause shown.
 20. There did not appear to have been any attempts to execute the decree that was given on 31st July 2013 until the Notice to Show Cause was served upon the Defendant on 29th April 2014. There was, however, a host of communication exchanged between the parties' advocates evidencing the indulgence that was granted to the Defendant by the Plaintiff and their point of departure.
 21. In a letter dated 3rd June 2014 annexed to the Further Affidavit of Rahab Wanjiku Nduati and marked Exhibit "RWN 2", the Defendant's advocates indicated that they had been put in funds in the sum of Kshs 5,000,000/= which they indicated was to be in full and final settlement of the matter. This was in variance to the sum of Kshs 8,461,911.75 together with interest that the Plaintiff had demanded in its advocates' letter dated 30th May 2014 that was marked Exhibit "RWN 1" annexed in the said Further Affidavit.
 22. Evidently, the Defendant could not purport to dictate the amount he was to pay in full and final settlement of the decretal sum particularly after a decree had been issued herein. Unless set aside or the decretal sum was reduced by consent of the Plaintiff, which was not the case herein, the Defendant was obligated to settle the decree as drawn in full.
 23. Be that as it may, the Defendant was emphatic that he could not pay the decretal sum in lump sum. While the Plaintiff contended that the Defendant had a large salary, drove an expensive car, lived in an affluent area of town, had not provided a pay slip and that he had not made payments for about five and a half (5 ½) years, the court was hesitant to find that the Defendant had filed the present application in bad faith despite having failed to adhere to his promises of effecting payments. Indeed, a sum of Kshs 13, 465,392.20 is a colossal sum to pay at once irrespective of a person's status in society.
 24. The court had due regard to the Defendant's assertions that he was able and willing to pay the monthly sum of Kshs 500,000/= until and final payment of the decretal sum without any failure whatsoever. As the duty of the court is to do justice to all parties, the court was of the view that committing the Defendant to civil jail when he had confirmed that he was ready and willing to liquidate the decretal sum by instalments would be punitive. Indeed, in Exhibit "RWN 2", it was clear that the Defendant's advocates had been put in funds in the sum of Kshs 5,000,000/=, a fact that he emphasised in its Written Submissions.
 25. Having had due regard to the pleadings, affidavit evidence, the written submissions and case law

in support of the parties' cases, the court was thus in agreement with the holdings of other courts that committing a judgment debtor to civil jail ought to be used as a last resort as it is a draconian measure. Committal to civil jail should never be used as a tool to exert pressure on a judgment debtor to pay a debt.

26. It was therefore the view of the court that this was a suitable case for it to exercise its discretion in favour of the Defendant to allow him to pay the decretal amount by way of installments to avoid the draconian measure of him being committed to civil jail by the court as had been proposed by the Plaintiff.

27. Having said so, as an *obiter*, the court expects that the *in duplum* rule shall be strictly observed. The court deemed it necessary to mention the same in view of the fact that the Plaintiff had advanced the Defendant a sum of Kshs 2,000,000/= and Kshs 3,100,000/= in respect of the personal and car loans while the Notice to Show Cause given on 20th March 2014 showed that the decretal sum was for a sum of Kshs 13,465,329.20.

DISPOSITION

28. For the foregoing reasons, the Defendant's Notice of Motion dated and filed on 2nd May 2014 is hereby allowed in the followed terms:-

- a. **THAT the Defendant shall pay to the Plaintiff a lump sum of Kshs 5,000,000/= within the next thirty (30) days from the date of this Ruling i.e by 22nd May 2015.**
- b. **THAT the Defendant be and is hereby granted leave to liquidate the balance of the decretal sum after the payment of the sum of Kshs 5,000,000/= hereinabove, in monthly instalments of Kshs 500,000/= with effect from 22nd June 2015 and thereafter on the 22nd day of every subsequent month until payment in full.**
- c. **THAT in default of any one (1) instalment, execution to issue forthwith.**
- d. **THAT there shall be no order as to costs.**

29. It is so ordered.

DATED and DELIVERED at NAIROBI this 22nd day of April 2015

J. KAMAU

JUDGE