



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 604 OF 2012

AYMAN HIJJAWI.....PLAINTIFF

-VERSUS-

ANWAR HUSSEIN.....DEFENDANT

R U L I N G

I N T R O D U C T I O N

1. The application before the court is a **Notice of Motion** dated **5th June 2014** and filed in court on 6th November 2014 by the Defendant under Order 21 Rule 12 (2) of the Civil Procedure Rules.

2. The application seek for orders that:-

1. The payment of the decretal amount herein be made by monthly installments of USD 3,500 before 30th November 2014.

2. That costs of this application be in the cause.

3. The application is premised on the grounds that the Defendant is currently financially constrained and if compelled to liquidate the full decretal amount it may lead to the Defendant's bankruptcy, and that in the meantime the Defendant can only afford USD 3,500 per month. The application is supported by the affidavit of the Applicant dated **5th November 2014** and his further affidavit dated 27th February 2015.

4. The application is opposed. The Plaintiff filed Grounds of Opposition on 8th December 2014 and stated that the Defendant has not established any financial hardship that would prevent him from settling the decretal amount. No affidavit of means has been filed. Previous promises to repay the Plaintiff the sums claimed herein have not been honoured since 2008. If the Defendant's proposal to liquidate the sum of USD 100,000 by monthly instalments of US\$ 3,500 is granted, it will take a period of over two and half years to settle the decretal sum. This will cause the Plaintiff more hardship since the debt herein accrued in 2008. The Plaintiff stated that no payment have been made as a down payment, or even on account of the first instalment. While the grant of the orders sought is discretionary, the Plaintiff submitted that no good grounds have been set out to warrant the exercise the exercise of the court's discretion in the Defendant's favour in the circumstances of this case and that the application is vexatious, made in bad faith and should be dismissed with costs to the Plaintiff.

THE APPLICANT'S CASE

5. The Plaintiff also filed a replying affidavit sworn on 4th December 2014 in opposition to the application.

6. With the leave of the court, parties filed written submissions to the application.

7. The Applicant submitted that he is cash trapped currently and is in the process of disposing some 15 half acre properties in Nairobi owned by a company called Albright Holdings Limited in which the Applicant has shares. Before the completion of the sale the Applicant submitted that he will not have money to satisfy the decree. Vide his further affidavit the Applicant attached his bank statements with Diamond Trout Bank and with Gulf Africa Bank, showing balances amounting to KShs.195,000/-. He denied the allegation by the Respondent that he earns a salary of USD 10,000 from Rapid Communications Limited, a company

in which he owns shares.

THE RESPONDENT'S CASE

8. On his part the Respondent annexed particulars of the companies in which he alleged that the Applicant has interest and should be in a position to pay the decree in a single installment. The Respondent further stated that the Court should consider the conduct of the Defendant throughout the history of this claim and find that he does not merit the exercise of this Court's discretion. The Respondent states that he believes that the Defendant wishes to take advantage of the Court process to delay for as long as possible his liability to pay the money he owes the Plaintiff. There have been several promises to pay on the grounds that the Defendant was about to complete certain transactions. There is no indication as to what became of those transactions. The Plaintiff found it ironical that the Defendant is once again talking of disposing of property whose value is alleged to be over Kshs one billion, yet proposes to liquidate the decretal sum of slightly over USD 100,000 herein by a paltry instalment of USD 3,500 per month. The Plaintiff averred that the Defendant is a majority shareholder, a director and the Chief Executive Officer in a company known as **Rapid Communications Limited**. The Plaintiff believes that the Defendant earns remuneration as Chief Executive Officer of **Rapid Communications Limited** which has a very good business turnover. However the Defendant has concealed the fact of his employment and has failed to disclose what he earns by way of remuneration and emoluments in that Company and by way of dividends as a shareholder. The Plaintiff states that he is aware that the Defendant's monthly salary in the company in 2012 was USD 10,000 which has no doubt gone up over the years, and that the Defendant is a man of means.

9. I have carefully considered the application by the Defendant to pay the decretal sum herein by installments. The only issue to determine is whether judgement/debtor qualifies for such an order under Order 21 Rule 12 (2) of the Civil Procedure Rules, which states:-

“After passing of any such decree, the court may on the application of the Judgement Debtor . . . order that the payment of the amount decreed be postponed or be made by installments on such terms . . . as it thinks fit.”

10. The above rule requires that there be sufficient cause before such order for payment by the installment may be issued. It is upon an Applicant for such orders to show sufficient cause. The Applicant herein has attached bank statements from two banks showing one of his accounts to be showing debit entries while the other account shows credit balance of Kshs.195,000/-, hardly enough to pay a decretal sum standing at over USD 100,000. However, the annexure of the two bank statements does not of itself show the money worth of the Applicant. Bank statements accounts normally oscillate from credit to debit at any one time in the month but that alone has no relevance to a person's financial liquidity. The Plaintiff/Creditor has annexed documents which show that indeed the debtor has interests in other entities from which he could be earning monthly salary which is speculated to be in the region of USD 10,000. This has been denied by the Debtor. I am therefore left with no dependable records from which this court can deduce the financial worth of the Debtor, except the Debtor's admission that if he is able to sell his properties in Kileleshwa, Nairobi, he could be in a position to pay the decretal sum. From the correspondences of pages 51 to 54 of Mr. Ayman Hijjani's replying affidavit, I have noted that even before the hearing of this suit, the debtor had made several promises to pay the money then due by installment, and had at one time accepted five months installment. I have also seen from the said correspondences that the debtor was very open to the Plaintiff about his predicament in relation to the debt. On several occasions he asked the Plaintiff to trust him to repay the debt. Equally, I have noted that the process of selling the properties to satisfy the decree could take a while, and may not be the basis upon which an order can be issued by this court.

11. Purely in the exercise of this court's discretion, and being guided by the correspondences between the parties herein and the need to give the Debtor a little breathing space to re-organize his finances, this court allows the application herein on the following terms:-

a. The decretal sum herein shall be liquidated by the Debtor in six (6) equal installments with effect from 1st June 2015. .

b. The costs of this application shall be for the Plaintiff/Judgment Creditor.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 15TH DAY OF MAY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Mirigu holding brief for M/s Kinaru for the Plaintiff

Mr. Kosgei holding brief for Waigwa for the Defendant

Teresia – Court Clerk