



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 40 OF 2009**

**NALINKUMAR MEGJI SHAH ..... PLAINTIFF**

**V E R S U S**

**MUMIAS SUGAR COMPANY ..... DEFENDANT**

**RULING**

**PRELIMINARY**

1. This Ruling was due to be delivered on 23<sup>rd</sup> April 2015. That date could not be met by me for several reasons. Firstly I was invited to attend a training at the Judicial Training Institute, Nairobi, thereafter I proceeded on my annual leave and on resuming duty I found that my secretary and court assistant were on transfer to other stations. The delay indeed is regretted.

**NOTICE OF MOTION**

2. The Notice of Motion under consideration in this Ruling is dated 3<sup>rd</sup> December 2014. It is brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 and Order 21 Rule 12(2), Order 22 Rules 18 and Order 51 Rule 15 of the Civil Procedure Rules.
3. The Defendant by that application seeks the following orders:

- i) **The warrants of attachment herein dated the 24<sup>th</sup> November 2014 be set aside,**
- ii) **The proclamation of the Defendant's moveable property by Kinyua & Co Auctioneers their agents, servants and/or employees be lifted,**
- iii) **The defendant be allowed to liquidate the decretal sum herein in reasonable instalments.**

**BACKGROUND**

4. The Plaintiff obtained a monetary decree against the defendant in this court and the defendant being aggrieved by the judgment against it filed an appeal. The Mombasa court of Appeal by Civil Appeal No. 21 of 2011 dismissed the Defendants appeal by the judgment of 10<sup>th</sup> February, 2013.

## THE LAW

5. The main prayer of the defendant's notice of Motion was for the court to order the decree to be settled by installment. The power to so order is from Order 21 Rule 12 (2) of the Civil Procedure Rule. That Rule provides:

**After passing of any such decree, the court may on 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 the attachments 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.**

## CASE LAW

6. The Plaintiff provided to the court useful authorities in respect to the prayer for settlement of the decretal sum by installments which I shall refer to. The common thread that comes out of these cases is that the court does have discretion to order the amount in the decree to be settled by instalment. The court in the cases cited below show the conditions which an applicant should meet to enable the court exercise that discretion in their favour.
7. In the case **ABDULRAZAK KHAFFAN & ANOTHER – V – SUPERSONIC TRAVEL & TOURS LTD & ANOTHER [2005] EKL R** the court stated:

**“I have considered the application and the submission of counsel. It is correct to say, indeed, that the court has discretion to allow a judgment debtor to settle a judgment debt by instalments. To that effect, O. XX rule 11 confers upon the court discretion, for sufficient cause shown, to order the payment of the amount decreed to be made by instalments. However, this discretion, like any other, must be exercised in a judicial and not an arbitray manner. In the case of A. RAJABALI ALIDINA v. REMTULLA ALIDINA & ANOTHER [1961] E.A. 565. Law, J., as he then was said at page 566, with reference to O.XX rule 11 (1) that-**

**“All commentators on the Civil procedure Code agree that the court's discretion to order payment of the decretal amount in instalments is one which must be exercised in a judicial and not an arbitray manner. The onus is on the Defendant to show that he is entitled to indulgence under this rule.”**

As for what constitutes “sufficient cause” in the context of rule 11 above, Law J. referred to a passage in **WOODROFFE and AMIR ALIS CIVIL PROCEDURE IN BRITISH INDIA, 2<sup>nd</sup> Edn.** Page “sufficient reason” exists. The learned judge then said – These are:

- a) the circumstances under which the debt was contracted
- b) the conduct of the debtor (c) his financial position
- c) his bona fides in offering to pay a fair proportion of the debt at once.”

8. In the case of **TREAD SETTERS TYRES LIMITED –V- UNISTAR AUTOPARTS LIMITED [2006] eKL R** the court said:

**“I have considered the arguments made before me. I do agree with the Plaintiff that the defendant ought to have placed his financial statements before court to prove that it is undergoing financial difficulties.”**

9. In CALTEX OIL KENYA LTD – V- TOO t/a KERICHO CALTEX SERVICES STATION [2005] eKLR the court stated:-

**“A judgment-Debtor coming to court for indulgence Order 20, Rule 11 (2) of the Rules must first and foremost show absolute good faith and that he is not merely seeking to delay the course of justice. Although the court will no doubt consider the judgment-Debtor’s personal hardship, nevertheless it will be mindful of the fact that the decree-Holder is entitled to realize the fruits of his judgment, notwithstanding that in the eyes of the Judgment-Debtor the decree-holder is rich and does not need the money as badly as the judgment-debtor does.”**

10. The Defendant by its affidavit in support of the application set out the amounts of substantial payments already made to the Plaintiff toward the satisfaction of the decree. I have noted from the warrants dated 24<sup>th</sup> November 2014, that the defendant is still owing the Plaintiff Kshs 35 Million.

11. The Defendant then deponed that it had been unable to make further payments because its plant had been closed for maintenance and was due to reopen on 15<sup>th</sup> December 2014.

12. It is important to note that the application was argued before me on 25.2.2015 and the Learned counsel for the Defendant did not inform the court whether by then the Defendant’s plant had reopened.

13. It was further deponed by the defendant’s Legal officer that:

**“The Defendant, hopes to have sorted out its financial problems by end of January 2015 and will thereafter be able to liquidate the debt in monthly instalments of ksh 5,000,000 with effect to 30<sup>th</sup> January 2015.”**

When the parties presented their Oral submissions before court, on 25.2.2015, the Learned counsel for the Plaintiff submitted from the bar that the Defendant had previously offered to settle the debt by monthly instalments of Kshs 10,000,000 and did not? fulfill that proposal but instead now by the present application the Defendant was offering to settle the debt by payment of instalments of Kshs 5,000,000. Further Plaintiff submitted that even as at 25<sup>th</sup> February 2015 the Defendant paid not made the proposed amount of Kshs 5,000,000.

### **DETERMINATION**

14. I have considered the prayer for payment of the decretal sum by instalments, the affidavit evidence and the submissions from counsel. Having done so I find that the statement that the Defendant is undergoing financial difficulties is not sufficient reason to order postponement of the payment of the decretal sum. This is particularly because the Defendant did not prove to the court that it is indeed undergoing financial difficulties. In my view it was not enough for the defendants to rely on what has been reported in the media about its financial difficulties. Media reports after all are personal assessments of a journalist and the court cannot always lay reliance on it.

15. The Defendant also lacked good faith. It first made an offer to pay to Plaintiff instalments of Kshs 10 Million and before it could pay that amount it made the present application to be allowed to liquidate the decree by monthly instalments of Kshs 5 Million. To cap it all up the Defendant, even by late February 2015 had not began to pay the proposed instalments despite having approached this court by its Notice of Motion, on 4<sup>th</sup> December, 2014.

16. That prayer therefore fails.

### **PRAYER TO SET ASIDE WARRANTS AND TO LIFT PROCLAMATION**

17. The Defendant based those two prayers on the ground that the auctioneers Kinyua & Co Auctioneers executed the warrants of attachment by attaching goods that were in Nairobi. It was submitted that the auctioneer was not licenced to operate in Nairobi. Defendant deponed that it had received oral information that indeed the auctioneer was not so licenced. Defendant relied on section 20(1) of the Auctioneers Act, Cap 526 which provides:

**“The Board shall keep a register, in such form as it may determine, of all licences issued under this Act and shall enter therein in respect of every licence-**

- a) the full names and identity card number of the auctioneer;**
- b) the place of business in respect of which the licence is granted;**
- c) the date of expiry of the licence;**
- d) particulars of any amendment to the licence;**
- e) particulars of any revocation or suspension of the licence;**
- f) any other particulars the board may require to be recorded.”**

18. Defendants Learned Counsel submitted that Defendants deposition, on the issue of Auctioneers Licence, had not been controverted by the Plaintiff as provided under section 112 of the Evidence Act, Cap 80 which provides:

**“In Civil proceedings, when any fact is specially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”**

#### **DETERMINATION**

19. In my view that section does not support the defendant’s contention that the evidential burden to prove that the auctioneer was licensed to operate in Nairobi, had shifted to the Plaintiff. This is because Section 20 (1) of the Auctioneers Act makes that clear. Under that section the Auctioneers Board is obligated to keep a register of the Licensed Auctioneers. There was no information from the Defendant that such a register is kept away from the public. Since Defendants did not so state then they had an obligation to supply a copy of that register to prove their contention if they would have done so they would have met the burden of proof in section 107 of cap 80.

20. It is for the above reason that the prayer to set aside warrants and to Lift proclamation is rejected.

#### **CONCLUSION**

**21. In the end and for the reasons given in this Ruling the defendant’s Notice of Motion dated 3<sup>rd</sup> December 2014 is dismissed with costs to the Plaintiff.**

**DATED and DELIVERED at MOMBASA this 25<sup>TH</sup> day of JUNE, 2015.**

**MARY KASANGO**

**JUDGE**