



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CIVIL CASE NO. 132 OF 2014**

**MULTIPOINT INTERNATIONAL LIMITED.....PLAINTIFF**

**VERSUS**

**TURBOR HIGHWAY ELDORET LIMITED.....DEFENDANT**

**R U L I N G**

1 The defendant TRBOR HIGWAY ELDORET LIMITED has filed a Notice of Motion dated 19<sup>th</sup> January 2015 seeking two prayers as follows:

(a) That judgment be entered in favour of the plaintiff and against the defendant herein on admission by the defendant for sum of USD 106,381.05 and Ksh 14,850; and

(b) That the defendant be allowed to pay the liquidated claim by installments of Ksh 400,000 per month till payment in full.

2 The plaintiff MUTIPOINT INTERNATIONAL LIMITED does not oppose the first prayer but does oppose the second prayer.

3 The defendant through its director AMIT AGGARWAL deponed in the affidavit in support of the application that its failure to pay the plaintiff for goods supplied was occasioned by harsh economic environment where by the defendant has been incurring losses. To demonstrate this defendant annexed to the affidavit its management accounts for the period January to July 2010 and August to September 2014. Defendant deponed that it has experienced economic hardship which had led to its inability to pay its debts. That if the prayer to pay the plaintiff's debt by installments is not allowed, the defendant would be financially crippled.

3 Defendant's learned counsel in submissions relied on the case **FREIGHT FORWARDERS LTD V-S ELSEK & ELSEK (K) LTD (2012) e KLR** Where Justice R.M. Mwongo considered a similar applications I have before me and referred to other authorities thus:

*- Keshavji Jethabhai & Bros Ltd vs Saleh Adbulla ( 1959) EA (J) 260 which held: that*

*- Whilst creditors rights must be considered, each case must be considered on its own merits and discretion*

*exercised accordingly.*

*- the mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of the discretion.*

*- the debtor should be required to show his bone fides by arranging prompt payment of a fair proportion.*

*- hardship of the debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.*

*A Rajabali Alidina vs Rehmatulla Adlidina & anor ( 1961) EA 565 which held*

- *The court can consider the circumstances in which the debt was incurred; the conduct of the debtor; his financial position; and his bona fides.*

4 The second prayer in the defendant's application is opposed by the plaintiff on the ground that mere hardship was not a basis to allow the defendant to pay the debt by installments. On this the plaintiff relied on the discussion in the case A. RAJABALI ALADINA –V- REMTULA ALADINA and ANOTHER (1961) E.A. 565 and KESHAVJI JETHABHAI & BROHTERS LTD v-V SALEH ABDULLA ( 1959) E.A. 260.

5 Plaintiff also faulted the defendant's management account saying that they did not show the current financial position of the defendant company. Plaintiffs' counsel submitted that the court cannot rely on financial statements that were prepared four months before the present application was made.

### ANALYSIS

6 The defendant's application is brought under Order 21 Rule (2) (1) of the civil Procedure Rules, which provides:

***12. (1) Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by installment, with or without interest, not withstanding anything contained in the contract under which the money is payable.***

7 I have considered the parties rival arguments. The rule under which the application is brought gives the court discretion, on the application showing sufficient reason, to order the judgment amount to be paid by installment.

8 I have looked at the defendant's management accounts. Those accounts reflect defendant's liabilities as follows:

Bank overdraft Ksh 270,391,505.93

Tax provision Ksh 62,513,226.10

Trade and other payables Ksh 107,892,143.38

The accounts also show that for the period that ended 30<sup>th</sup> September 2014 suffered a loss of Ksh 43,450,586.68. it becomes clear when one looks at those figures that the defendant is not exaggerating it economic well being.

9 I have considered the plaintiff's submission that mere hardship is not a consideration of whether one can be a debt by installment. As much as that is correct I am however of the view that each case must be looked at with a view to its perculia facts. The defendant is not refusing to pay the debt but rather it is the one that sought judgment be entered against it. It then now requests that it be allowed to settle the amount by installment. It would have assisted the court if the plaintiff had indicated what amounts of installments would be acceptable to it. However it did not and the matter was left for the court to decide I do find that sufficient cause is shown by the

defendant why the judgment amount can be paid by installments but with a proviso that the installment amount be reviewed.

### **OTHER ISSUE**

10 Parties disputed whether the plaintiff was entitled to rely on letter written under the title of “without prejudice”.

11 The legal position is that without prejudice correspondence is intended to encourage negotiations out of court for settlement of disputes. The rule of without prejudice negotiations is intended to exclude all negotiation genuinely aimed at reaching a settlement, either in writing or oral. The learned author Alan Taylor in the book ‘Principles of Evidence’ quoting the case **RUSH & TOMPKINS LTD –V- GREATER LONDON COUNCIL (1989)** stated;

*“...it is worth stressing that if the negotiations lead to agreement, and enforceable contract is established. If one party then wishes to deny or resile from what has been agreed, the communications can be relied upon to prove the contract and its terms, because in such a situation, the question is whether there has been a concluded agreement, and it would be impossible to decide it without looking at the correspondence.”*

12 In this case no agreement was reached and the plaintiff therefore was not entitled to rely on without prejudice correspondence.

### **CONCLUSION**

13 In the end I grant the following orders:

**(a) Judgment is hereby entered in favour of the plaintiff for USD \$106,381.05 and Ksh 14,850 plus costs and interest.**

**(b) The defendant shall pay the decretal sum by first making down payment of Ksh 1,750,000 representing the installments from January to July 2015.**

**(c) The plaintiff shall thereafter at the end of August 2015 and at the end of each subsequent months up to 31<sup>st</sup> January 2016 pay to the defendant Ksh 500,000 per month.**

**(d) The parties shall fix the matter for mention in the month of February 2016 with a view to upgrading the monthly installments payable by the defendant. If parties shall not agree the amount of upgrading the installments the court will be at liberty to upgrade that amount. Until such an upgrade is either agreed or ordered by the court defendant nonetheless shall continue to pay the plaintiff Ksh 500,000 per month until such upgrade.**

**(e) In default of anyone payment execution shall issue.**

Dated and delivered at Mombasa this 24<sup>th</sup> day of August 2015

**MARY KASANGO**

**JUDGE**

24.8.2015

Coram

Before Justice Mary Kasango

C/Assistant –

For: Plaintiff:

For Defendant:

Court

The judgment is delivered in their presence/absence in open court.

**MARY KASANGO**

**JUDGE**