



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 11 OF 2016

AHMED OMAR SWADANPLAINTIFF

-VERSUS-

FREDRICK NDAMBUKI MUTISYA.....DEFENDANT

RULING

1. By the Notice of Motion dated 22nd July 2020, Fredrick Ndambuki Mutisya (*the Defendant/Applicant*) prays for an order to be allowed to liquidate the Judgment sum through monthly instalments of Kshs.50,000/- per month until his financial situation improves.

2. The application which is supported by an affidavit sworn by the Defendant is premised on the grounds:

(i) That this Court pronounced Judgment against the Defendant/Judgment debtor on 13th May, 2020 awarding the sum of Kshs.1,357,000/- to the Plaintiff/Respondent;

(ii) That the Plaintiff/Judgment Creditor has on 12th June, 2020 issued a notice of intention to execute but the Defendant is not financially capable of satisfying the Judgment sum in a lump sum due to financial constraints;

(iii) That the Defendant has children in various educational institutions who require fees and this hinders him from satisfying the Judgment amount at once;

(iv) That the Defendant is a retiree who now relies on subsistence farming which can ill afford to pay for the school fees, upkeep for the family and liquidate the Judgment sum;

(v) That due to the current economic quagmire brought about by the lockdown announced by the Government due to the Covid-19 pandemic, the Defendant has been rendered immobile and cannot engage in any meaningful economic activities;

(vi) That the Defendant is currently ailing and under constant medication a situation which exacerbates his financial woes; and

(vii) That if the Plaintiff is allowed to execute the Judgment by selling the suit land it shall amount to this Court giving justice to the Defendant by one hand and taking it away by another.

3. Ahmed Omar Swadan (*the Plaintiff/Respondent*) is opposed to the application. In his Replying Affidavit sworn on 11th September, 2020 and filed herein on 22nd September 2020, the Plaintiff avers that the Defendant/Judgment debtor had initially indicated to the Court that he was ready to refund the sum of Kshs.1,000,000/-.

4. The Plaintiff further avers that the sum of Kshs.1,000,000/- was given to the Defendant in cash and it will be a travesty of justice and an insult if the same is refunded in instalments of Kshs.50,000/- which would mean taking over 40 months before the decretal sum and costs are settled in full.

5. The plaintiff further avers that the Defendant is not a pauper as he would like the Court to believe given that the Defendant owns the suit property whose worth is Kshs.4 million. The Plaintiff thus urges the Court to let execution proceed through the sale of the said parcel of land and/or a portion thereof to satisfy the Judgment debt.

6. I have carefully perused and considered the Defendant's application as well as the response thereto by the Plaintiff. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

7. The Defendant/Judgment debtor herein prays for an order to be allowed to liquidate the Judgment sum through monthly instalments of Kshs.50,000/- per month until his financial situation improves. Essentially the Defendant asserts that he is a retiree and that he has children who are still in school. It is also his case that he has been ailing and that he cannot therefore afford to pay school fees, the upkeep for his family and at the same time liquidate the Judgment sum.

8. The application before me is expressed to be brought under **Sections 3A and 6 3(e) of the Civil Procedure Act** and under **Order 22 Rule 22 of the Civil Procedure Rules**. There was however no substantive application for stay of execution before me at this stage to warrant the invocation of the said **Order 22 Rule 22 of the Rules**. Having considered the substance of the application, I think **Order 21 Rule 12 (2) of the Civil Procedure Rules** should have been the appropriate provision. The said order provides thus:

“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 be made by instalments 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.”

9. The provisions of **Order 21 Rule 12(2)** grant the Court a wide discretion as to whether payment of the amount decreed will be postponed or settled by way of instalments. This discretion must however like any other discretion granted to the Court be exercised in a Judicious manner and not arbitrarily or on a mere whimsical basis.

10. Considering the exercise of such discretion in **Keshavji Jethabai & Bros Limited -vs- Saleh Abdulla (1959) EA 260**, the Court of Appeal observed that:

(a) Whilst the creditors rights must be considered, each case must be considered on its own merits and discretion exercised accordingly;

(b) The mere inability of a debtor to pay in full at once is not a sufficient reason for the exercise of the discretion.

(c) The debtor should be required to show his bona fides by arranging prompt payment of a fair proportion; and

(d) 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.

11. Addressing itself to a similar scenario in **Rajabah Alidina -vs- Remtulla Alidina & Another (1961) EA 565**, the Court set out the conditions to be considered as follows:

(a) The circumstances under which the debt was contracted;

(b) The conduct of the debtor;

(c) His financial position; and

(d) His bona fides in offering to pay a fair proposition of the debt at once.

12. Guided by the above legal principles and conditions, it was clear to me that a Judgment creditor is entitled to payment of the decretal amount which amount he should receive promptly to, as it were, reap the fruits of his Judgment. It was also clear to me that while the Judgment debtor might genuinely be in a difficult position in paying the decretal sum at once, he was required in such an instance to show his *bona fides* by demonstrating that he was serious in his commitment to pay but for the handicap that he was presently facing.

13. In the matter before me, all that the Defendant/Judgment debtor says is that the amount he is supposed to pay is enormous given that he is a retiree. He avers that he has children in school and medical bills to pay and that, given the global Covid-19 pandemic, he has been rendered immobile and cannot engage in any meaningful economic activities.

14. In my view, for the Court to allow payment by installments, the Judgment debtor ought to lay bare his financial position for scrutiny by the court. While the Judgment debtor herein states that he is a retiree from the private sector living on a pension, he does not state the amount of pension that he is entitled to. While he states that he has children in school, a perusal of the documents annexed would suggest that there are no such children in school. For instance one of the children is said to have been admitted to the Kenya Medical Training College on 17th March, 2015 for a duration which the admission letter puts at 2 years. That time had certainly expired as at 22nd July, 2020 when the debtor made this application.

15. It was not in dispute that the debtor is the registered proprietor of the suit property being Plot No. Kilifi/Madzimbani/26. In his own testimony at the trial herein, the Judgment debtor purported that he had intended to sell the same property to the Plaintiff/Judgment creditor at the sum of Kshs.72,000,000/-. Whether that was the sale price or Kshs.4 Million as stated by the Plaintiff, it was evident to me that the debtor was seized of property a portion of which could be disposed off to settle the decretal sum. His proposal if accepted would condemn the Plaintiff to wait for more than 40 months before receiving the decretal sum in full.

16. Arising from the foregoing, I did not think that the Defendant had demonstrated any *bona fides* or any level of commitment to pay the debt as to warrant the discretion of this court to be exercised in his favour.

17. The upshot is that I find no merit in the Motion dated 22nd July, 2020. The same is dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 10TH DAY OF FEBRUARY, 2022 VIA MICROSOFT TEAMS.

In the presence of:

No appearance for the Applicant

No appearance for the Respondent

Court assistant - Kendi

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J. O. OLOLA

JUDGE