



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 495 OF 2011

GAS LINK LIMITED ::: PLAINTIFF

-VERSUS-

HAREN D. MANDAVIA

T/A EVEREST ENTERPRISES ::: DEFENDANT

R U L I N G

1. The application before this Court is the Notice of Motion dated **6th March 2014** and filed in Court on even date. It is expressed to be taken out under **Order 22 rule 34** as well as **Sections 1A, 1B and 3A** of the **Civil Procedure Act**.
2. The application seeks for orders that the Honourable Court be pleased to allow the Defendant to settle the balance of the decretal sum by instalments of kshs. 400,000/= instant and Kshs. 600,000/= within 30 days and the balance thereafter until payment in full by monthly instalments of kshs. 100,000/=. It is also the Defendant's prayer that the Court be pleased to order the Plaintiff to release to the Defendant the title for Kajiado/Kitengela 24432 held by them as security for the purpose of sale to settle the decretal sum.
3. The application is based on the grounds stated in the application and is supported by the affidavit of HAREN KUMAR MANDAVIA sworn on 6th March 2014.
4. The Plaintiff herein obtained a decree against the Defendant in the sum of Kshs. 3,906,401/=. The Judgment was entered on 8th December 2011 while the Decree was issued on 12th March 2012. It is the Defendant's position that he has made part payment of the decretal sum, leaving a balance of Kshs. 3,575,351/=. The Defendant avers that his bank accounts held at Development Bank and Eco Bank were frozen on 1st November 2012 vide the Court Orders issued in HCC 691 of 2012, which Order still subsists. He further avers that the freezing orders adversely affected his business which halted for a long time and in the process he defaulted in meeting his obligations as mutually agreed. These are the brief circumstances leading to the current application.
5. It is the Defendant's contention that on or about 22nd May 2012 the Plaintiff had instructed Auctioneers to execute against him which they did by proclaiming his household goods and attaching the same on 10th September 2012. It is the Defendant's assertion that the Plaintiff has never disclosed the outcome of the auction and for how much the goods were sold to enable them account for the same in the outstanding decretal amount.
6. It is also the Defendant's assertion that he has tried to request the Plaintiff to release the title to Kajiado/Kitengela/24432 which he had deposited with them as security. It is the Defendant's contention that he cannot sell the said land without the original title. He avers that selling the land

- will enable him pay the Plaintiff the decretal amount.
7. The application is opposed. The Plaintiff filed a Replying Affidavit sworn by the Managing Director, ADAN MOHAMMED ABDULLAH on 17th March 2014. The Managing Director confirmed that the Plaintiff attached the Defendant's goods but that the same were never sold. He avers that the Defendant had made an application on 28th June 2012 to be allowed to pay the decretal sum by monthly instalments. The Court granted an interim stay of execution which order was served upon the auctioneers and therefore they did not proceed with execution.
 8. It is the deponent's assertion that the parties herein had entered into a consent on 26th July 2012 to allow the Defendant to pay by instalments. The terms of the consent are as stated in paragraph 8 of the deponent's Replying Affidavit. The Defendant was to pay equal instalments of Kshs. 300,000/= on 10th August 2012, 10th September 2012 and 10th October 2102 respectively. The sum of Kshs. 258, 711 was to be paid on or before 10th November 2012. Thereafter monthly equal instalments of Kshs. 250,000/= commencing on or before 10th December 2102 until payment in full. The consent was adopted as an order of the Court.
 9. It is the deponent's contention that the Defendant failed to comply with the consent and did not pay a single instalment. Subsequently, the Plaintiff proceeded with execution. On 11th September 2012, the Plaintiff was informed by the Auctioneers that the Defendant had removed his goods to avoid attachment. The Auctioneers therefore advised the Plaintiff to change the mode of execution.
 10. It is further the deponent's assertion that on 9th October 2013, the Defendant delivered to the Plaintiff's Advocates 3 post-dated cheques. He avers that he is aware that the Defendant's accounts held at Eco Bank and Development Bank were frozen pursuant to the Court Order of 1st November 2012. However, according to the deponent, the Defendant should have started making payments in August 2012 as per the consent of 26th July 2012 before the accounts were frozen. It is also his position that the Defendant having delivered post dated cheques from Standard Chartered Bank meant that he had other accounts that were not frozen.
 11. It is the Plaintiff's case that the Defendant has been delaying the process of execution through various applications such as the current one. It is averred for the Plaintiff that the Defendant has previously failed to pay the instalments as per the Court Orders and there is no guarantee that he will do so in the current application.
 12. With regard to the title for Kajiado/Kitengela/24432, it is averred for the Plaintiff that the Defendant has been called upon several times to come and collect the same together with the transfer documents but he has refused.
 13. In reply, the Defendant filed a Further affidavit sworn by himself on 23rd April 2014. The Defendant avers that he was unable to comply with the Consent because he could not sell the land he intended to sell in Kisumu because of a dispute over the same with the Government. He further avers that the Standard Chartered Account was opened on August 2013.
 14. In the said Affidavit, the Defendant stated the various cheques issued by his advocates to the Plaintiff's Advocates which the Plaintiff has declined to accept as part payment of the decretal amount. The Defendant also states that his Advocates have now been given the title to Kajiado/Kitengela/24432 together with all the transfer documents.

ANALYSIS

15. I have considered the application, the affidavits on record as well as the written submissions by both parties. The main issue for determination is whether the Defendant is deserving of the orders prayed for in his application.
16. It is the Defendant's main case that his accounts were frozen and therefore this crippled him from meeting his obligations of paying the decretal amount. On the other hand it is the Plaintiff's position that the Defendant should have paid three equal instalments of Kshs. 300,000/= before his accounts were frozen on 1st November 2012. Indeed as per the Consent of 26th July 2012, the Defendant was to pay equal instalments of Kshs. 300,000/= on 10th August 2012, 10th September 2012 and 10th October 2102 respectively. This was before his accounts were frozen. He defaulted

on the same and there is no legitimate reason as to why he did not make a single payment of any of the instalments.

17. The Defendant argues that his plans were also hampered by the fact that he could not sell his land in Kisumu. The consent was adopted as the orders of this Court and it was up to the Defendant to comply with the same. The Defendant cannot claim that he had to sell the land to comply with the orders. The sale of land can take days, months or even years. Therefore, it was only prudent of the Defendant to put his house in order and ensure the instalments were paid in time.
18. It is also the Defendant's case that they have paid a substantial sum of the decretal sum being Kshs. 881,000/=. This figure comprises of Kshs. 236,000 which was paid before the decree was issued and it is therefore my view that the same should not be factored in. That leaves us with Kshs. 645,000/=. Whichever the case, the amount paid by the Defendant so far is not a fair proportion of the decretal sum which amounts to Kshs. 3,906,401/=.
19. 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 instalments where the Judgment Debtor has shown sufficient cause for such payment.
20. The applicant herein has now made proposals towards the settling of the decretal amount based on his current circumstances. The Defendant seeks to settle the balance of the decretal sum by instalments of kshs. 400,000/= instant and Kshs. 600,000/= within 30 days and the balance thereafter until payment in full by monthly instalments of kshs. 100,000/=. The Defendant's Advocate has forwarded a cheque of Kshs. 400,000 to the Plaintiff's Advocates which is evident from the Court record.
21. The Plaintiff is opposed to the above proposals on the basis that the Defendant has had the habit of defaulting on his instalments and that the Defendant is delaying the execution process of the decree herein. I take note that the decree herein was issued on 12th March 2012. The Defendant is yet to pay the said decretal amount in full two years later. Indeed, this is delaying the Plaintiff's right to enjoy the fruits of its Judgment. It is not in dispute that the Defendant's accounts were frozen and it cannot be ignored that his financial position became constrained in one way or another. Though the Plaintiff has shown that the Defendant could be having another account, there is no evidence of the financial position of that account.
22. 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:-
 - a. ***The Defendant to pay an initial instalment of Kshs. 1,500,000 within 30 (thirty) days from the date of this ruling.***
 - b. ***The balance to be paid in monthly instalments of Kshs. 150,000/= until payment in full.***
 - c. ***Failure by the Defendant to comply with the above orders, execution to issue as appropriate.***
 - d. ***The Defendant shall bear the costs of this application.***

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 31ST DAY OF JULY 201

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Omuko for Plaintiff

Moriasi for Defendant

Teresia – Court Clerk