



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 510 OF 2013

LAVINGTON SECURITY LIMITED.....RESPONDENT

Versus

NAIROBI CITY WATER & SEWERAGE CO. LTD..... APPLICANT

RULING

Payment by instalments

[1] The Applicant has applied to be allowed to pay the decretal sum herein by monthly instalments of Kshs. 2,600,000.00 every month beginning 30th January, 2014 until payment in full. The relevant law is **Order 21 Rule 12 (1) and (2)** of the Civil Procedure Rules which provides that:-

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 installments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.**
2. **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 installments 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.”**

[2] The Applicant is also asking for stay of execution of the decree herein. The application was supported by the affidavit of Edward Rubiro.

Brief background

[3] On being served with the plaint, the Applicant appearance on 20th December 2013 and a statement of admission under Order 13 Rule 1 of the Civil Procedure Rules on 21st January 2014 admitting that it owes the respondent a sum of Kshs. 24,203,139.22/= as claimed in the plaint. Then on 19th March, 2014, Judgment on admission was entered for the Respondent and against the Applicant in the sum of Kshs. 24,203,139.22/= plus costs. At the same time, the court directed that parties should agree on the mode of liquidating the decretal amount. Thereafter, parties engaged into some negotiations on interest and the proposed payment by instalments of the

decretal sum but no concrete agreement was fastened. The Applicant proposed to pay by monthly instalments of Kshs. 2,000,000 until payment in full but the Respondent insisted on payment of the decretal sum by four equal installments of Kshs. 4,722,784.74/=, hence, this application.

APPLICANT'S SUBMISIONS

[4] The Applicant filed submissions to reinforce its requests for payment by instalments of the decretal sum as well as a stay of execution of the decree. The Applicant laid much emphasis on an extract from Justice Lesiit's ruling which cited *Jabali Alidina Vs Lentura Alidina (1961) EA 565* on the salient matters which the Court should consider, i.e. 1) Circumstances under which the debt was contracted; 2) The conduct of the debtor; 3) His financial position; and 4) His bona fides in offering to pay a fair proportion of the debt. According to the Applicant, it admitted the claim by filing a statement of admission and proposed to liquidate the decretal amount by paying monthly instalments of Kshs. 2,000,000.00. The Respondent refused to hold a meeting which was aimed at resolving the issue of instalment in amicable manner. Instead, the Respondent insisted that the Applicant liquidates the said amount in two monthly installments. And, the Respondent is now suggesting payment in four monthly installments of Kshs.4,77,784.74/=. Since admission of facts, the Applicant has paid a total of Kshs. 10,720,000.56 leaving a balance of Kshs. 13,483,138.66 which it proposes to pay in the next 6 instalments. By proposing that the Applicant Liquidate the decretal amount in four (4) monthly instalments the Respondent has in effect allowed the application save for the amount to be paid out. What needs to be considered also is that, before the Applicant spends any money, it has to adhere to the constitutional provisions espoused in Article 201 and adhere to the strict provisions of spending of public money under the Public Finance Management Act. No. 18 of 2012.

[5] The Applicant submitted further that, due to the new Constitution the Applicant has been directed to limit its area of operation within the County of Nairobi because the majority shareholder of the Applicant is the County council of Nairobi. Towards that end the Applicant has embarked on installing bulk water meters in the boundaries with the neighboring Counties to enable it monitor and charge for water services in accordance to usage. The exercise is inevitable and must be done in line with the supreme law of the country, as such; the Applicant is in a difficult financial position to liquidate the decretal amount in four (4) monthly installments as proposed by the respondent. As a show of good faith and in accordance with the statement of Admission, the Applicant has been able to liquidate the decretal amount by paying Kshs.2,600,000/-. This is a positive trait of the conduct of the Applicant and is more than willing to continue paying the amount aforesaid until payment in full. See the case of **J.M MATHENGE T/A BUILECON ASSOCIATES v KENYA TEA DEVELOPMENT AGENCY LTD (2009) eKLR** Lesiit J (supra) referred to the case of *Jabali Alidina Vs Lentura Alidina (1961) E.A 565* in which the court set out matters that a court will consider in deciding whether there exist sufficient cause to warrant the court exercise its discretion to order payment of the decretal amount by installments. The court allowed the debtor to pay the decretal amount in installment for among other reasons the hardship by the debtor to access its market through its imports of tea to Pakistan and Afghanistan occasioned by civil strife. The hardship herein arises from the constitutional requirement to restrain water services by the Applicant within the County council of Nairobi. In addition to the above, in **FREIGHT FORWARDERS LTD v ELSEK & ELSEK (K) LTD (2012) eKLR**, Mwongo J narrowed the principles as regards to what amounts to 'sufficient cause' to include the following;

- i. **The debtor is unable to pay in lump sum**
- ii. **The debtor can pay by reasonable monthly instalments**
- iii. **The application is made in utmost good faith.**

In the above decision, the court allowed the Debtor to pay the decretal sum in instalments. Also in **MEDOL GROUP LTD v ADRIAN COMPANY LTD & ANOTHER (2012) eKLR**, the Applicant had shown bona fides by paying 1 million shillings in the course of its application. The court was persuaded there existed sufficient cause to order payment by instalment of the decretal amount.

[6] The Applicant was of the view that all the foregoing show that the Applicant has met conditions to warrant an order by court for payment of the decretal sum by instalment. The Applicant has demonstrated bona fide by paying the Respondent Kshs. 10,720,000.56 of the decretal sum. The Applicant's spending is regulated under the Public Finance Management Act, 2012. It can only spend money allocated to it. A stay of execution should also issue as sufficient cause has been shown. See the case of **JOSEPH MAKARIOS VS BENARDICCATO ESALAMBO & ANOTHER (2014) eKLR, Dulu J** referred to in the case of **SAVINGS & LOAN (K) LTD v ODONGO (1987) KLR 294** where the court of appeal stated that the court has inherent jurisdiction to grant stay of execution orders. The remaining balance of the decretal sum is Kshs. 13,483,138.66 and the same will be settled in the next 6 months as per the Applicant/Applicant's proposal.

Respondent opposed the application

[7] The Respondent opposed the application and cited the case of **KESHVAJI JETHABHAI & BROS LIMITED v SALEH ABDULLA [1959] EA 260** which it says has laid down the principles that should guide exercise of discretion in this matter which are:-

- a. whilst 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 exercise of the discretion
- c. the debtor should be required to show his bona fides by arranging prompt payment of a fair proportion
- 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.

[8] The Respondent submitted that the Applicant has not met the above mentioned principles. Firstly the Applicant has not provided to this court **sufficient cause** to warrant it the indulgence of the court. The Respondent has merely averred that it is not in a financial position to pay a lump sum of the decretal sum because it is currently undergoing installation of bulk water meters to its surrounding neighbours. The Respondent has not placed before this court any evidence to demonstrate its inability to pay for example financial statements /audited accounts to show its financial standing. Secondly, on the conduct of the Applicant negates any indulgence being extended to it because whereas, it proposed to pay monthly instalment of Kshs. 2,600,000/=, it has only paid Kshs. 5,312,000.28/= which consists of payments for the months of January, February and part of March. No payments have been made since the month of March which leaves the outstanding amount of Kshs. 18,891,138.94/=. Thus, the debtor has not shown his *bona fides* as it has not paid or made arrangements for **prompt payment of a fair proportion**. Nevertheless, the Respondent is willing to accept payment of the balance by four equal installments of Kshs. 4,722,784.74/-. Thirdly, the debt arose out of services rendered to the Applicant by the respondent from 1st July to 30th September 2013, almost a year ago. Fourthly, by allowing the Applicant to pay the decretal sum in installments the respondent will suffer prejudice. Due to the dishonoured invoices the respondent was forced to service the contract between itself and the Applicant and incurred collateral debts. These debts continue to accrue interest and therefore the respondent will suffer great prejudice at the expense of the Applicant. In the premises, the orders sought by the Applicant are not merited.

[9] On the request for stay, the Respondent relied on **Order 22 Rule 22(1) & (3)** of the Civil Procedure Rules as well as the case of **HALAI & ANOR v THORNTON & TURPIN (1963) LTD [1990] KLR** where the Court of Appeal held as follows:

“The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the Applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the Applicant must furnish security. The application must of

course be made without unreasonable delay.”

The Respondent, then, submitted that the Applicant has not demonstrated any sufficient cause to warrant the orders of stay. It has merely pointed out that it would be ‘unjust if the execution process is commenced when in fact it is willing and committed to liquidate the entire decretal amount.’ Moreover the Applicant has not stated what loss if any it would suffer if the orders sought are not granted. On the other hand an order for stay would be detrimental to the respondent as it has incurred collateral debts to service the contract between itself and the Applicant, which debts continue to accrue interest. In light of the above, the request for stay of execution should be dismissed with costs.

[10] According to the Respondent, the case of **J.M. MATHENGE T/A BUILECON ASSOCIATES v KENYA TEA DEVELOPMENT AGENCY LIMITED [2009] eKLR** can be distinguished from the present facts because in that matter the court found that the Applicant gave three grounds which were sufficient cause for the indulgence sought from the court in its application. Further the Applicant offered to pay any lump sum amount the court may order for the court to allow the payment by installment. The Applicant left the matter to the discretion of the court which the court found the Applicant’s conduct as fair. In the present case the Applicant has offered to make installments of Kshs. 2,600,000/= to settle a debt of Kshs. 24,203,139.22/= which is not a ‘fair proportion’. A sum of Kshs. 4,722,784.74/= is the fair proportion.

[11] The other case of **MEDOL GROUP LIMITED v ADRIAN COMPANY LIMITED & ANOTHER [2012] eKLR** is also distinguishable from the present facts because the parties in the former case had agreed on the mode of payment by installments before commencement of the suit. In the premises, it is our humble submissions that the application dated 8th April 2014 lacks merit and accordingly should be dismissed with costs.

COURT’S RENDITION

[12] Under Order 21 Rule 12 (1) and (2) of the Civil Procedure Rules, the Court may ‘*...for sufficient cause shown order that the payment of the amount decreed be postponed or be made by installments 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.*’ Therefore, the power to order payment by instalments of the decretal amount is purely a matter of discretion by the Court. Except, the exercise of discretion is circumscribed; sufficient cause must be shown and the indulgence to pay by instalments may be on such terms that the Court thinks fit. The onus of establishing sufficient cause rests on the Applicant. See the case of **JABALI ALIDINA v LENTURA ALIDINA [1961] EA 565 at page 566** that:-

“All commentators on the Civil Procedure Code agree that the court’s discretion to order payment of the decretal amount in installments is one which must be exercised in a judicial and not an arbitrary manner. The onus is on the Applicant to show that he is entitled to indulgence under this rule.

It is for the Applicant to show “sufficient reason” for indulgence being shown to him, and this court is immediately faced with difficulty in this respect, as the learned magistrate has not stated what reasons put forward by the Applicant he considered sufficient to justify the exercise of the court’s discretion in the Applicant’s favour.”

It is, therefore, on the Court being convinced by the Applicant that there is sufficient cause to permit payment by instalments that the Court should think about other conditions to attach to the order for payment by instalments of the decretal sum. Those terms or conditions include payment of interest, the attachment of the property of the judgment debtor or the taking of security from him, or otherwise. And the list is not exhaustive. What amounts to sufficient cause will, however, depend on the peculiar circumstances of each case. There is an aspect of this case which is an instrumental start-point; the Respondent, in its Replying affidavit and the submissions in Court is

not really opposed to payment by instalments of the balance of the decretal sum herein; has proposed and is willing to accept instalments in four equal and successive monthly batches. Therefore, what remains in contention is the amount of the instalments. Accordingly, I will proceed on that basis.

[13] Should I accept one or other of the proposed amount of instalments by parties or should the Court order a separate amount of instalment altogether? In strict sense, the Court is not bound by the proposals made by the parties although such proposals are critical in determining an application to pay by instalments. Of great significance in application of this nature are; the circumstances of the case; the conduct of the parties; the willingness and bona fides of the Applicant to pay a fair proportion of the debt; and of course, that the application is made without undue delay. The conduct of the parties, especially the Defendant stretches back from the performance of the contract, after default, on commencement of and during the entire proceedings. No doubt the Applicant defaulted and that sowed this suit but it did not deny the debt; it admitted it formally and judgment was accordingly entered on that admission. There, the conduct of the Applicant becomes an important factor to consider. It was positive. And, luckily, the question the parties have agreed on one thing: that decretal sum will be paid in instalments. The only question I need to ask myself is; it's the Applicant's willingness to pay a sum of Kshs. 2,600,000 a fair proportion of the debt?

[14] This is a Court of justice and should do justice to all; not to only one of the parties. The Respondent says it will be prejudiced unless the balance of the decretal sum is settled in four equal monthly instalments because it has been servicing the contract since the default by the Applicant, and that has made it incur other collateral expenses. The Applicant proposes to pay it in six instalments. Whereas I laud the conduct of the Applicant in the first part of this ruling, it has a blemish; at least from the record, it has not been paying on a regular monthly basis. If it had done that from January 2014, by this month of September, 2014 it would have paid a minimum of Kshs. 18,000,000 going by the initial proposal of Kshs. 2,000,000 and a minimum of Kshs. 23,400,000 using the proposal of Kshs. 2,600,000. The Applicant has had the advantage of time and also kept money belonging to the Respondent thus depriving the Respondent of the money. In view of this conduct of the Applicant, allowing it to pay in six monthly instalments will not be fair to the Respondent who has shown magnanimity in conceding to payment by instalments of its decretal sum. Therefore, I am inclined to go by the proposal made by the Respondent. And I order that the balance of the decretal sum herein shall be paid in four equal instalments starting from 30th October, 2014 and thereafter at the end of each succeeding month until payment in full. It is so ordered. The Applicant has sufficient time to navigate through the requirements of the Public Finance Management Act and pay up on the due dates. Having allowed payment by instalments, I should be clear that execution will only issue in the event of default by the Applicant on any one instalment on its due date, and that settles the question of stay of execution.

Dated, signed and delivered in open Court at Nairobi this 22nd day of October, 2014

F. GIKONYO

JUDGE

In the presence of:

Alex court clerk

Ranja for M/s Kinyua for plaintiff/Respondent

Githui for defendant/applicant