



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 1 of 2004

CLEARSPAN CONSTRUCTION LIMITED.....APPLICANT/
DEFENDANT

VERSUS

EAST AFRICAN GAS COMPANY
LIMITED.....RESPONDENT/
PLAINTIFF

RULING

1. This is the Defendant/Applicant's Notice of Motion dated 29th August, 2012. The order sought herein is as follows:

“4. That the court be pleased to grant the Applicant leave to pay and settle the amount decreed in this case together with costs and interest by instalments of:

i. An initial payment of Kshs. 10,000,000.00 within seven (7) days of the court's ruling.

ii. Balance in instalments of Kshs.1,000,000.00 per calendar month for eight (8) months.

iii. Pay whatever balance may be outstanding in the ninth (9th) month.

iv. That the court do issue any other or further orders and or directions as it may deem fit and just in the interest of justice.”

The grounds are contained in the application which is supported by the forty six paragraph affidavit of Evans Lagat the Legal Officer of the Defendant, to which was annexed forty eight pages of documents.

2. The application had been filed under urgency, which was allowed at the time of its filing. The application is brought under Order 21 Rule 12 and Sections 3A, 1A, 1B, and Civil Procedure Act Article 159 of the Constitution.

Order 21 Rule 12(2) is the applicable rule in the present circumstances of this case, where a decree has already been passed. That sub-rule entitles the court:

“...for sufficient cause shown, [to] order that the payment of the amount decreed be postponed or 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.” (Underlining mine)

3. The Respondent opposes the application, and has filed a Replying Affidavit deposed by Anthony Dickinson the Plaintiff's Director. Amongst other things the deponent states at paragraph 4 as follows:

“4 That is its Ruling dated and delivered on the 3rd November, 2009, the court rendered itself thus:

'I do hereby grant Prayer 2 of the Notice of Motion dated 17th July, 2009 in the sum of Kshs. 49,914,562 with interest thereon from the date of filing the suit until payments in full at court rates.'

4. At paragraph 6 of the said Affidavit the Respondent points out that the Applicant did, at page 18 of an application dated 13th August, 2011, annex a warrant for execution of the court decree in which the decretal sum was stated to be at Kshs. 101,440,759.50.

5. It is not in dispute that the suit was filed on 7th October, 2004 and that interest is payable on the decretal amount from the date of filing suit at the court rates of 12% per annum. In paragraphs a(1)-(v) of the Applicant's grounds in support of the application it is stated that the decretal amount as at the end of July, 2012 was **“49,914,962.00 (exclusive of interest) and costs of Kshs.1,936,069.00.”**

6. The only issue for determination before me is whether the Applicant has shown that there is **“sufficient cause”** to be allowed to pay by the instalments proposed by it.

7. Whilst the parties in their submissions dwelt on many matters and authorities, all of which I have considered, I will not repeat them here, or offer any detailed analysis thereof for reasons I will shortly state.

8. It is my understanding that the following are the legal principles which must be shown before the court exercises its discretion, or which must be taken into account when the court is deciding whether or not to grant the order sought. They are summarised in the following authorities:

- **Keshavji Jethabhai & Bros Ltd vs Saleh Abdulla** [1959] EA (T) 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 *bona 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 Alidina & 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*.

9. Applying these principles, the first point I note is that the Applicant's proposal only seriously addresses the payment of Kshs.18,000,000.00 over the first eight months, and then proposes payment of the outstanding balance on the ninth month.

10. On basis of a quick mental calculation, the principal decretal amount has been accruing interest, as argued by the Respondent, for the last eight (8) years and three months. Simple annual interest at 12% court rates would be roughly atleast another Kshs. 5,900,000 x 8 years and 3 months, that is, roughly

Kshs. 48,600,000.00. If this is added the decretal sum of Kshs. 49,914,962/- it totals Kshs. **98,604,962/-** If the Applicant paid Kshs. 18,000,000 in the first 8 months as proposed, it would be less than 18.5% of the total payable amount in that period with the intention of paying the balance of over 80% in month nine. The income sources for that amount are not clearly outlined. I therefore do not consider the Respondent's proposal to be a *bona fides* proposal for prompt payment of a fair proportion of the debt.

11. The Applicant also appears to lack seriousness in disclosing its true financial position. It has annexed, as evidence of its financial position, exhibit "E A - a 44" a bank statement for the period 1st July 2002 – 31st December, 2002. All the entries in it show only ledger fee and minimum balance penalty debits and no inflows. This is an old statement for a dead account showing a total credit balance, ten years ago, of Kshs. 5,787.40 It discloses evidence of a company that can hardly be described as solvent, or a going concern or having a cash flow, and demonstrates inability to raise funds.

12. The above fact decries and contradicts the Applicant's statement at paragraphs 5 and 9 of the certificate of urgency where it deposed that:

"5 Execution would cause the Defendant/Applicant irreparable injury, prejudice, loss and damage as its cash flow will be extinguished, its capacity to borrow fundamentally damaged and its credit-worthiness fatally injured."

and

"9... on the inverse the Defendant could be wiped out if it is not allowed to pay the amount by instalments."

13. The Applicant's proposal for payment by instalments therefore appears by and large to be predicated, not on its business enterprise, but on expectations of receipts from third parties. Exhibit 47 to the Applicant's supporting affidavit shows the e-mail communication dated 15th August, 2012 from an Applicant's counsel to the Respondents counsel with the proposal as follows:

"... In anticipation of the meeting, our client requests to settle the amounts in the terms:-

a) Kshs. 10 Million upon agreement

b) Kshs. 1 Million payment per month for eight (8) months

c) Balance on the month (9th) month, upon when the Defendant shall have obtained funds from 3rd parties upon sale of a 3rd party's asset. The balance might become available earlier, and 9 months are asked for a s precaution."

14. On the basis of the above, and given that five months have lapsed since the offer, the minimum lumpsum amount the Applicant should be able to pay immediately under the proposal terms should be Kshs.15 Million. Thereafter, under that scheme Kshs. 4 Million would be payable in the next four months and the balance of Kshs. 85 Million odd payable after the fourth month. Provided that there is more concrete evidence of sale and receipt by the Applicant of proceeds of third party assets, such proposal - somewhat enhanced for fairness to the Respondent - could be ordered by the court. Such evidence is however not available.

15. I have also considered the fact that the Applicants stated own various immovable properties which it claims are valued at over Kshs. 200,000,000/=. No proposal is made regarding those properties, nor is it disclosed whether they are income generating or otherwise. The paucity of information disclosure regarding the Applicant's real and true sources and quantum of income or assets to fulfil the proposed instalment payment, plan does not generate the court's confidence that, if ordered, such plan will in fact be largely fulfilled.

16. For all the foregoing reasons, the court is not satisfied that the Applicant has shown sufficient cause in terms of Order 21 Rule 12 (2) of the Civil Procedure Rules to merit the benefit of the order sought. Accordingly, the application is dismissed with costs.

The parties are directed to attempt an out of court settlement on the mode of payment of the decretal sum for adoption by the court within twenty one (21) days from the date hereof, failing which execution may issue.

Orders accordingly.

Dated, signed and delivered this 15th day of January, 2013

**R.M. MWONGO
JUDGE**

Read in open court

Coram:

Judge: R.M. Mwongo

Court clerk: M. Matano

In Presence of Parties/Representative as follows:

- a).....
- b).....
- c).....
- d).....