



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 1757 of 2001

ZLATKO ROSTOCIL PLAINTIFF

- VERSUS -

JAMES SAMUEL KINYANJUI.....DEFENDANT

RULING

1. This is the defendant's notice of motion dated 23rd August 2013. The defendant craves leave to pay the decretal sum in installments of Kshs 200,000 per month. He also prays that warrants of arrest for committal to civil jail be stayed. The application is expressed to be brought under section 3A of the Civil Procedure Act and Order 22 of the Civil Procedure Rules 2010. The motion is predicated on averments contained in a deposition sworn by the judgment debtor.

2. The gist of the motion is that the decretal sum of Kshs 25,821,374.50 is a substantial sum. The applicant avers that he has already paid Kshs 10,500,000 to the decree holder. He remains committed to paying the debt in full but can only afford the installments of Kshs 200,000 per month. He claims to be old and sickly and that he is making arrangements to sell of some properties and to enforce a separate decree in HCCC 655 of 2009 to settle the present debt.

3. The motion is contested. There is filed a replying affidavit sworn on 17th October 2012 by the plaintiff's legal counsel. In a nutshell, the plaintiff submits that the defendant has not shown sufficient cause to postpone payment of the decree, that his *bona fides* are doubtful because he has the means to pay but has not made any payment since March 2012, that the proposed installments are too low, and that it is only fair and just to allow the decree holder to enjoy the fruits of his judgment.

4. I have heard the rival submissions. This court has discretion to postpone payment of a decree. But that discretion is tethered by a number of caveats: The applicant must show sufficient cause and must demonstrate *bona fides* by arranging payment of a fair proportion of the decree. The starting point is Order 21 rule 12 (2) 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 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”.

5. The test to be applied is well settled by precedent. In Keshavji Jethabai & Brothers Limited Vs Saleh Abdulla [1959] E.A. 266 the East African Court of Appeal cited with approval the decision in Sawatram Ramprasad Vs Imperial Bank of India (1933) AIR Nag. 330. The primary consideration for postponing payment of a decree by installments is for the judgment debtor to demonstrate *bona fides* by payment of a fair proportion of the debt. I agree with the remarks of my learned brother George Dulu J, in Hildegard Ndalut Vs Lelkina Dairies Limited and another Eldoret, High Court case 138 of 2004 [2005] e KLR where he delivered himself thus:

“This, in my view, is the proper test to apply in granting orders for payment of a decretal amount by way of instalments. A judgment creditor is entitled to payment of the decretal amount, which he should receive promptly to reap the fruits of the judgment. The judgment debtor might genuinely be in a difficult position in paying the decretal amount at once. However, he has to show seriousness in paying the amount. In that event he should show his bona fides by arranging fair payment proposals to liquidate the amount”.

6. Closely allied with that is the requirement to show sufficient cause. There must be a genuine and reasonable cause why the decree cannot be met immediately in full. If the judgment debtor is feigning impecuniosity or offers unreasonable installment proposals, he will not merit an order for postponement of payment of the decree. Merely being hard pressed is not enough. There is a persuasive passage in Mahomed Akbar Khan Vs Kasturchand Daga cited with approval in Keshavji Jethabhai case (Supra):

“It is laid down that the mere fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reason for granting instalments and that ordinarily he should be required to show his bona fides by arranging prompt payment of a fair proportion of the debt. We are in respectful agreement with this interpretation of the law but find great difficulty in construing the last observations in the ruling in the way desired by the counsel for the plaintiff, i.e. that prompt payment of a fair proportion of the debt is a condition precedent for the exercise of the discretion of granting instalments. Each case has to be decided on its own merits, the predominating factor being of course the bona fides of debtor”.

7. In Keshavji Jethabhai case (Supra) at page 263, the court adopted a definition of *sufficient cause* found in Woodroffe and Ameer Ali on Civil Procedure Code 2nd Edition 869:

“Sufficient reason – The existence of this will depend upon the facts of the particular case. The court will consider the circumstances under which the debt was contracted, the conduct of the debtor, his financial position, and so forth, and installments should be directed where the defendant shows his bona fides by offering to pay anything like a fair proportion of his debt at once”.

8. Applying those principles of law to the facts here, I find as follows. The judgment debtor does not dispute the decree. He is 75 years old. He states he has every reason to meet the decree but not by a lumpsum payment. It is common ground that the decretal sum was in the region of Kshs 25,821,374.50. It is a substantial sum. Since his release from civil jail, he has paid Kshs 10,500,000. He has paid some installments of Kshs 200,000 per month. The decree holder concedes that the balance is now about Kshs 15,421,374.50. I do not doubt that the applicant last paid Kshs 200,000 in March 2012. I have also little doubt that payments have been at the peril of incarceration in civil jail. But having paid Kshs 10,500,000 I cannot say that the applicant has not shown *bona fides*. The applicant deposes in the affidavit that he might clear the debt quickly if he succeeds to sell a property in Kiambu or enforce a decree dated 29th January 2010 in his favour arising out of Nairobi Misc case 655 of 2009. The installments proposed may seem low in relation to the outstanding debt but they seem reasonable. The decree holder has not presented cogent evidence to show the applicant can pay higher installments. Between 20th July 2010 and 23rd March 2012, that has been the installment rate paid towards the decree. I see no good reason for the decree holder to hit the applicant in the teeth when he is down. In the end, I find that the applicant has demonstrated sufficient reason and *bona fides* for an order to postpone payment of the decree by payment

of installments of Kshs 200,000 per month. I will however backdate the effective payment date to 30th April 2012 when the applicant should have paid a further installment.

9. Under Order 22 rule 22, the court again has discretion to order a stay of execution. The decree holder has employed the means of arrest and committal to enforce the decree. Granted what I said earlier, it is not the most appropriate means where a judgment debtor is of advanced age or ailing, and is not absconding or disposing of his assets to defeat the decree. The judgment debtor has demonstrated good faith by paying Kshs 10,500,000 towards the decree. I have made a suitable order to liquidate the balance. I will in the interests of justice and the overriding objective of the court stay the issue of warrants of arrest and committal of the defendant to civil jail. It would be to turn logic onto its head to expect the judgment debtor to service the judgment debt on the one hand and to hold the sword of Damocles over his head by threat of incarceration to civil jail. But if the judgment debtor does not meet the installment payments on their due date, the decree holder shall be at liberty to execute the decree.

10. For all the above reasons, I order as follows;

- a) **THAT** leave be and is hereby granted to the defendant/judgment debtor to postpone payment of the decree by paying monthly installments of Kshs 200,000/- with effect from 30th April 2012 till full payment.
- b) **THAT** in default of payment of any one such installment on its due date, the plaintiff/decree holder shall be at liberty to execute for the balance of the decretal sum then due.
- c) **THAT** I grant the defendant/decree holder stay of issue and execution of warrants of arrest and committal to civil jail.
- d) **THAT** I grant the plaintiff/decree holder costs of this motion in any event.

It is so ordered.

DATED and DELIVERED at NAIROBI this 25th day of April 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. P. Kiranga for Mr. Michuki for the Plaintiff/Decree holder

No appearance for the Defendant/Judgment debtor

Mr. Collins Odhiambo Court Clerk.