



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 273 OF 2012**

**MAASAI KENYA LIMITED ..... PLAINTIFF**

**VERSUS**

**HARDWARE & STEEL CENTRE LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MANSUKH PARBAT PATEL ..... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. The Application before this Court is brought by the Defendants and is dated 27th February 2013. It seeks the stay of execution of the partial Judgement and consequential Orders issued by this Court arising out of a Ruling delivered by Court on 23rd January 2013. The Application is brought upon the following grounds:

**“a. The Applicants stand to suffer irreparable damage and substantial loss if this Honourable Court declines to grant a stay of execution as the Respondent will proceed to execute against it for the sum of Kshs.2,316,730.**

**b. The Applicants do not intend to Appeal against the Ruling delivered in this matter on 23<sup>rd</sup> January, 23<sup>rd</sup> January 2013.**

**c. The Applicants are willing and able to pay the decretal sum of Kshs.2,316,730 and only seek to be granted leave to liquidate the same by way of twenty three (23) equal monthly installments of Kshs.100,000 each, plus a final installment of Kshs.16,730 until payment in full commencing 31<sup>st</sup> March 2013 and on the last day of every successive month.**

**d. This Application has been filed without undue delay.**

**e. It is in the interest of justice and fairness that this Application be allowed and decided expeditiously”.**

2. The Application is supported by the Affidavit of the second Defendant sworn on 27<sup>th</sup> February 2013. Apart from reiterating the Grounds in support of the Defendants’ Application, the deponent admitted, as per paragraph 11 of the Defence, that the Plaintiff was owed Shs. 2,316,730/- only. The deponent indicated that he was willing and able to pay that sum but sought leave to liquidate the same by 23 equal monthly instalments of Kenya shillings 100,000/-plus a final instalment of

Kenya shillings 16,730/-. Such would commence on 31<sup>st</sup> March 2013 and the instalments would be paid on the last day of each month. The deponent then went on to reiterate the Defendant's arrangement with the Plaintiff as to the ordering and paying for cement relevant to the First Defendant's business. Such matters were raised before this Court prior to its Ruling delivered on 23rd January 2013. Mr. Patel maintained that he had made diligent efforts to settle the amount and had paid Shs. 2 million arising from the sale of his own property at Thika plus a further amount of Shs. 494,290/-by cheque. He admitted the balance outstanding as above. He deponed to the fact that his overdraft facility with the Defendants' bankers had been stopped and that he was currently servicing a huge loan of approximate Kenya Shs. 3 million. He then reiterated his proposal to pay the decretal amount herein by instalments as above. He concluded his Supporting Affidavit by stating that he sought a further mention of this matter in 6 months' time to assess the payment status.

3. The Application is opposed and Mr. Meghji Varsani, a director of the Plaintiff Company's swore a Replying Affidavit on 14 March 2013. He noted that the Defendants had admitted owing a sum of Shs. 2,316,730/-only. The deponent observed that despite such an admission, made almost a year ago, the Defendants had never made any attempt or offer to pay. He pointed out that even after the Ruling of this Court delivered (as above) on 23rd January 2013, there had been no offer made to pay the sum as admitted. The deponent also noted that the Defendants had admitted delivery and receipt of the cement from the Plaintiff. He was of the opinion that the Defendants took cement from the Plaintiff issuing cheques that they knew full well would not be paid. As regards the proposal as to payment by way of instalments put forward by Mr. Patel in his Supporting Affidavit to the Application, Mr. Varsani regarded the same as extremely unfair to the business of the Plaintiff. The Defendants had already enjoyed two years without effecting payment and for the Court to extend the period for another two years was unjust. He maintained that the Plaintiff also had rights as regards its Judgement obtained against the Defendants. On 11th April 2013, Mr. Varsani swore a Supplementary Affidavit which was filed in Court, together with the Plaintiff's written submissions on 16th April 2013. That Supplementary Affidavit was filed without the leave of this Court having been granted and, accordingly, this Court cannot pay heed to its contents.
4. The Defendants' Submissions were filed herein on 5th April 2013. After setting out a brief background of the facts as regards the supply of cement as between the Plaintiff and the first Defendant, the Defendant noted the admitted balance of monies owed by it of Shs. 2,316,730/-. The Defendants set out the provisions as to payment of the decretal sum by way of instalments as per **Order 21 Rule 12 (2)** of the *Civil Procedure Rules, 2010* which provides as follows:

**“After passing of any such decree, the Court may on the application of the judgement-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 judgement debtor or the taking of security from him, or otherwise as it thinks fit”.**

The Defendants had demonstrated the circumstances surrounding the reasons why the debt was owed. In its opinion, the act of the Plaintiff in reneging upon the agreement reached with the Defendants was significantly responsible for the Defendant's financial woes. They requested the Court to review their account statements with their bank annexed to the Supporting Affidavit which they maintained were hugely significant insofar as they illustrated the Defendants' financial status. It asked the Court to find that the proposed instalments for payment of the decretal sum were reasonable in the circumstances. The Defendants concluded their submissions by stating that if their Application was not allowed, there would be a serious and apparent risk that the Plaintiff would execute the Decree herein to the detriment and loss of the Defendants who were willing and able to satisfy the Decree of the Court but only sought to do so by way of reasonable instalments.

5. The Plaintiff's written submissions opened by outlining the uncontested facts in relation to this matter. It then set out what it considered to be the issues in dispute as follows:

**“a. Whether the application as filed is competent.**

**b. Whether facts deponed to in the Defendants affidavit in support of their Application, paragraphs 2 a) to c), 10, 11, 12, and 13 have been properly brought to the attention of the court and the probative weight of the same.**

**c. Whether the Defendants settlement proposition is reasonable in the circumstances.**

**d. Who bears the cost of this application”.**

The Plaintiff noted that the Defendants’ Application had detailed in the heading thereof, that it was brought under the provisions of **Order 46 Rules 1, 2 and 3** of the *Civil Procedure Rules, 2010*. This was as regards a submission to arbitration. The Court noted that before Court on 23<sup>rd</sup> of April 2013, Mr. Mabira, learned counsel for the Defendants, admitted that the heading was in error and that there was no intention to seek that this matter be referred to arbitration. As regards the proposal by the Defendants that the decretal sum be paid by way of instalments, the Plaintiff referred the Court to the 2 cases of **Commercial Bank Ltd v Saabah Baraka Bakery HCCC No. 113 of 1994 (unreported)** and **Katibi v Barclays Bank of Kenya & 2 Ors (2006) eKLR**.

6. Both of those cases dealt with procedural amendments and the Rulings therein were delivered by the 2 Judges concerned, before the Civil Procedure Rules, 2010 came into effect. This Court has taken note of the provisions of Order 51 rule 10 of the Rules which reads:

**“10 (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.**

**(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”**

It seems therefore that the Plaintiff’s objection in this connection is inapplicable to the circumstances of this case.

7. The provisions of **Order 21 Rule 12 (2)** of the *Civil Procedure Rules, 2010* give this court a wide discretion as to whether payment of the amount decreed be postponed or settled by way of instalments. The Defendants in putting forward their Application to pay the decretal amount by instalments seem to have forgotten 2 things:

a. The Ruling of this Court delivered on 23 January 2013 although entering judgement for the Plaintiff on admission in the amount of Shs. 2,316,730/-also directed that the question of the amount of interest claimed in the Plaint as well as the refund of bank charges on unpaid cheques will have to be dealt with in the trial of this matter in due course. To my mind therefore, the Defendants may have more to pay than just the partial amount of Shs. 2,316,730/-so far entered against them in the Judgement of this Court, providing the Plaintiff can prove its claim in respect of these two unresolved/undetermined items.

b. The Partial Judgement herein was entered as against both Defendants whereas the instalment proposals would only seem to come from the first Defendant company in relation to its business. There is no mention of any payment being made to the Plaintiff by the second Defendant.

8. The cardinal rule on the exercise of discretion as regards payment of the decretal sum by instalments, like any other, must be exercised in a judicial and not an arbitrary manner. In the case of **A. Rajabali Alidina v Remtulla Alidina & Anor. (1961) EA 565, Law JA** (as he then was) detailed that:

**“All commentators on the Civil Procedure Code agree that the court’s discretion to order payment of the decretal amount in instalments is one which must be exercised**

**in a judicial and not an arbitrary manner. The onus is on the defendant to show that he is entitled to indulgence under this rule.”**

As regards what constitutes “for any sufficient reason” as detailed in Order 21 rule 12, Law JA referred to a passage in **Woodroffe & Amir Ali’s Civil Procedure in British India, 2nd Edition, P. 869** and quoted as to what constitutes sufficient reason as follows:

**“These are:**

- a. **the circumstances under which the debt was contracted**
  - (b) **the conduct of the debtor**
  - (c) **his financial position**
  - (d) **his *bona fides* in offering to pay a fair proportion of the debt at once.”**

9. In the case of **Hildegard Ndalut v Lelkina Dairies Ltd & Anor. (2005) eKLR, Dulu Ag.J.** (as he then was) considered the matter as follows:

**“Both parties have referred to the case of Keshavji Jethabhai & Bothers Limited –vs- Saleh Abdulla [1959] EA 260, which is a case from a High Court of Tanganyika. That case followed the principles laid down in the Indian case of Sawatram Ramprasad –vs- Imperial Bank of India (1933) AIR Nag. 33 – that a defendant should be required to show his bona fides by arranging fair payment of the proportion of the debt – in persuading the court to allow payment by way of instalments. This, in my view, is the proper test to apply in granting orders for payment of a decretal amount by way of instalments. A judgement creditor is entitled to payment of the decretal amount, which he should receive promptly to reap the fruits of the judgement. The judgement creditor 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”.**

10. Based on the above principles, I must now consider the Defendants’ Application for payment by instalments. The second Defendant has deponed to the fact that the first Defendant’s finances are not in good shape and from the Imperial Bank statements annexed to his Supporting Affidavit, it appears that as at the end of January 2013, the first Defendant was indebted to the Imperial Bank in relation to its account in the amount of Shs. 1,798,637/03. The trading movement on the account does not seem to vary much in terms of its balance from month-to-month. It seems unlikely therefore that the first Defendant is going to be able to do a lot towards paying off the Judgement sum. Similarly, I note from paragraph 18 of the Affidavit in support of the Application that Mr. Patel had to sell off his personal property at Thika to raise Shs. 2 million towards the payment of the debt. It seems that the second Defendant may have difficulty in coming up with the admitted Judgement sum himself. However, I must weigh up that position against the interests of the Plaintiff who, it appears, also has trading constraints. If I allow the Defendants to pay by monthly instalments over the period of 24 months, such would amount to undue hardship for the Plaintiff.

11. In my view therefore and to be fair to both parties, I grant the application of the Defendants to pay by instalments by the order that they shall pay the balance of the Judgement sum by monthly instalments of Shs. 200,000/-until payment in full commencing on 30<sup>th</sup> June 2013 and on the last day of each successive month. In default of any one instalment, execution to issue. I make no order as to costs.

**DATED and delivered at Nairobi this 28<sup>th</sup> day of June, 2013.**

**J. B. HAVELOCK**

**JUDGE**