



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wanjiru & another (As Legal Representatives of Arthur Nyanjui Gichui) v Gitau  
(Land Case 103 of 2012) [2022] KEELC 2402 (KLR) (23 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2402 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
LAND CASE 103 OF 2012  
FM NJOROGE, J  
MAY 23, 2022**

**BETWEEN**

**JOYCE WANJIRU ..... 1<sup>ST</sup> PLAINTIFF**

**SERAH WAMBUI NYAJUI ..... 2<sup>ND</sup> PLAINTIFF**

**AS LEGAL REPRESENTATIVES OF ARTHUR NYANJUI GICHUI**

**AND**

**JOSEPH CHEGE GITAU ..... DEFENDANT**

**RULING**

1. The Plaintiffs vide the application dated 24/3/2022 and filed the same date seeks the following orders:
  1. Spent.
  2. That this Honourable Court be pleased to grant a stay of proceedings herein pending inter partes hearing and determination of the instant application.
  3. That this Honourable Court be pleased to grant stay of proceedings herein pending the Hearing and determination of the appeal being Nakuru Court of Appeal Civil Appeal No. 3 of 2021.
  4. That this Honourable Court be pleased to allow the plaintiffs/appellants/applicants to pay Kshs. 50,000/- on a monthly basis to the court of offsetting the taxed costs as a security for costs in the existing appeal.
  5. That costs of this application be provided for.
2. The respondent filed a replying affidavit dated 30/3/2022 in which he averred that the application for stay of execution is res judicata a similar application dated 15/10/2020 having been filed, heard and determined; that in the decision given the applicant was given a conditional stay of execution pending



the hearing of the appeal to the Court of Appeal; that the stay granted was conditional upon the applicants depositing in court the taxed party and party costs within 21 days of their taxation; that that party and party costs were duly taxed on 19/5/2021 and the certificate of costs duly issued and that the applicants failed to pay the taxed costs into court within the requisite period and consequently the stay application stood dismissed.

3. I have perused the court file record and I have found that the applicant filed an application dated 15/10/2020 on 21/10/2020 seeking orders of stay of execution of the judgment and decree in the instant suit pending the hearing and determination of an intended appeal against the court's final decision in this matter delivered on 24<sup>th</sup> September 2020. The issues raised by that motion were adjudicated in a ruling delivered by this court on 28/1/2021 granting conditional stay in that the applicants were to deposit the taxed costs in court within 21 days of the taxation failing which the motion would stand dismissed.
4. From the record it appears therefore that the instant application is res judicata with regard to prayer no 2 that seeks a stay of execution for that was dealt with by this court earlier as stated herein before.
5. As regards the prayer that the applicants be allowed to defray the taxed costs by payment of instalments of Ksh 50,000/= per month, there was no such prayer in the application dated 15/10/2020 and therefore it may in this court's opinion be addressed in the instant application. In my view, it is a fresh issue.
6. I do not see any contents of the replying affidavit that specifically oppose the request for payment by instalments. The court has discretion to order settlement of a decree by instalments where circumstances permit.
7. The court in the case of *Diamond Star General Trading LLC v Ambrose D O Rachier carrying on business as Rachier & Amollo Advocates* [2018] eKLR relied on Order 21 Rule 12(2) of the *Civil Procedure Rules* to exercise its discretion to allow the Applicant to pay the decretal sum in instalments and cited with approval the case of *Keshvaji Jethabhai & Bros Limited V Saleh Abdulla* [1959] EA 260 which laid down the principles that should guide the court in exercising its discretion as follows:
  - 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 Court in the case of *Abdisalan Abdi Ali Ismail v Guhart Abdi Ali & 2 others* [2019] eKLR cited with approval the case of *A. Rajabali Alidina v Remtulla Alidina & Anor.* (1961) EA 565 where the court stated as follows:

“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 defendant to show that he is entitled to indulgence under this rule.”



9. The court went further to state as follows:
17. The Court further went ahead and attempted to define what constitute sufficient reasons, which included the circumstances, under which the debt was contracted, the conduct of the debtor, his financial position, and his bona fides in offering to pay a fair proportion of the debt at once.
10. In the case of *Hildegard Ndalut v Lelkina Dairies Ltd & Anor* [2005] eKLR the court held 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 installments. 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 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”.
11. I have considered the fact that the respondent has not opposed the application for payment by instalment but I subscribe to the school of thought espoused by *Keshvaji Jethabhai & Bros* (supra) and *Hildegard Ndalut* (supra) to the effect that the rights of both the judgment creditor and the judgment debtor must be balanced in each case. I have perused the record and noted that this is a dispute that the current plaintiffs inherited from the patriarch in their family when he passed on, and they have to contend with an appeal against the decision of this court in the court of appeal and the attendant costs. I think this is a deserving case in which the order of payment by instalments sought may be granted. However, in keeping with the principles espoused in the cited case law and in order that the judgment debtors demonstrate that they are serious about paying the sum due in term of costs, they should pay a lumpsum that will substantially reduce the total sum owing before they embark on any instalments that this court may order. I find that a lumpsum of Ksh 100,000/= paid within 30 days of the date of this ruling will be adequate for the purpose.
12. Consequently, I order as follows:
- i. Prayer no 3 of the application dated 24/3/2022 is dismissed.
  - ii. Prayer no 4 in the application dated 24/3/2022 is granted subject to a lumpsum down payment of the sum of Ksh 100,000/= within 30 days of this order.
  - iii. The applicants shall defray the rest of the taxed costs by way of instalments of not less than Ksh 50,000/= each calendar month before the 30<sup>th</sup> day of each month with effect from 1/7/2022 and in default execution of any pending balance may issue at the discretion of the decree holder.
  - iv. The costs of this application shall be borne by the applicants.
- It is so ordered.

**DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 23<sup>RD</sup> DAY OF MAY, 2022.**



**MWANGI NJOROGE**  
**JUDGE, ELC, NAKURU**

