



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS &
TAX DIVISION)**

CIVIL SUIT 689 OF 2010

AFRICAN BANKING CORPORATION LIMITED PLAINTIFF

VERSUS

FLORENCE WANGARI WANGAI DEFENDANT

RULING

By a Plaint dated 11th October, 2010, the Plaintiff claimed against the Defendant for a sum of Kshs.3,388,488/40 together with interest thereon at 10% per annum from 12th October, 2010 until payment in full. Judgment in default was entered on 28th February, 2011. On 16th November, 2011, the Defendant took out a Motion on Notice for orders that she be allowed to liquidate the decretal sum by way of monthly instalments of Kshs.50,000/- until payment in full and the waiver of interest. That is the application under consideration.

The application was supported by the Affidavit of the applicant dated 16th November, 2011 and a Further Affidavit sworn on 7th May, 2012. The Applicant contended that she had used all her savings to purchase the prime mover the subject of the debt, that she had been paying a sum of Kshs.185,209/- per month but the motor vehicle was involved in an accident in March, 2007 barely two (2) months after the purchase thereof. That as a result of the accident and loss, the motor vehicle was resold by the Plaintiff, that she had paid about Kshs.4 million and she is unable to repay the decretal sum of Kshs.3,688,639/72 and she proposed that she be allowed to liquidate the decretal sum by the monthly installments of Kshs.50,000/-.

The Plaintiff filed a Replying Affidavit sworn by Mr. Steve Luseno on 26th March, 2012. He swore that the Plaintiff had carried out investigations on the Defendant and produced an undated Investigations Report produced as "SL". The Report stated that the Applicant operated two Boutiques at the Re-insurance Plaza known as Beauty Parlour and Beauty Boutique, respectively with attachable assets exceeding Kshs.3.9 million, that her residence at Golf Course House No. 584 had items worth approximately Kshs.500,000/-, that she owned a saloon at Golf Course Estate, that she owned motor vehicles KAH 079W, KAV 098 X, KAW 458V and KAO 929R. The Report stated that the Applicant is capable of repaying the decretal sum within three (3) years. The Affidavit further affirmed that the Applicant was a person of means, that the Plaintiff was not averse to settlement by instalments provided the instalments should not rewrite the agreement, between the parties, that the proposed instalments were too little and would stretch to 80 months. The Plaintiff urged that the application be refused.

In her Further Affidavit, the Applicant denied the contents of an investigations report produced by the Plaintiff, she denied that she was a person of means. She denied that she is an owner of Beauty Boutique at Re-insurance Plaza as the same was owned by Norkan Investments Ltd, that she no longer lives in Golf Course II House No. 584 although she had lived there till March, 2011, she denied owning a Boutique at Golf Course II Estate, that a saloon she was operating thereat had since closed down, she denied owning

the motor vehicles registration Nos. KAH 079W or KAV 098X; that the latter motor vehicle had been sold by DFC Bank in November, 2011, that a Scania KAP 929R had been written off in an accident in 2009, that motor vehicle KAW 458V was charged to K-Rep for Kshs.4,200,814/- which is being serviced by the income from the said KAW 458 V. She urged that the application be allowed.

I have considered the application, the Affidavits on record and the submissions of Counsel. An order for payment of a decretal sum is a discretionary order. The court's discretion is perfectly free. However, like in all discretions the same must be exercised judiciously.

My view is, an applicant who wishes a court to exercise its discretion and order payment of a decretal sum by way of installments must be very candid with the court. Such an applicant must present to the court sufficient material to show that he/she is a person of no means, that whatever income she/he has is lawfully committed elsewhere. He/she must disclose to the court all his/her means and explain to the court why the proposed instalments are the best option available. Accordingly, the burden is on the applicant to prove/show that he/she deserves the order sought.

In the case before me, the Applicant did not at all present any material whatsoever on which the court could exercise its discretion. In the Supporting Affidavit, the Applicant only addressed the court about the events before the filing of the suit. She never at all addressed the issue of her current well being. It is only after the Plaintiff produced an investigations report about her and her perceived assets that she came out to explain about the ownership of Beauty Boutique at Re-Insurance Plaza, motor vehicle registration numbers KAP 929R ZC Trailer Zc 8910 and KAW 458V Zc 5422.

She however remained silent about her association with the boutique known as Beauty Parlour at Re-Insurance Plaza. She also did not clarify her relationship with Norkan Investment Ltd which she asserted was the owner of Beauty Boutique that was helping her meet her monthly instalments. In her Supporting Affidavit of 16th November, 2011, she had indicated in paragraph 10 that she was one of the directors in a Boutique at Re-Insurance. She needed to come out clearly what income she was getting through this company.

In my view, an applicant under Order 21 Rule 12 must not only deny allegations leveled against him or her on the perceived properties owned by him or her, but he/she must also volunteer information laying the basis for the installment he/she would like the court to order. In this case, the Applicant has failed to do so. One would have expected her to explain how she intends to raise the Kshs.50,000/- per month and exhibit her bank account(s), if any, but she has failed to do so. I would consider Kshs.50,000/- which have been proposed to be so little as it will take a very long time to settle the decretal sum. The Plaintiff is a successful party who needs to recoup the same as soon as possible yet the Applicant states she will be unable to service repayment. Applying the provisions of Section 1A of the Civil Procedure Act, the interests of both parties must be weighed. The Court of Appeal in the case of **E. Muiru Kamau and Another –vs- National Bank of Kenya Ltd (2009) e KLR**, observed as under:-

“The Courts including this court in interpreting the Civil Procedure Act or the Appellate jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principle aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on equal footing.” (Emphasis supplied)

Accordingly, weighing the interests of both parties on the scales of justice, I note that the Plaintiff is not averse to a repayment by instalments only that such installments should be reasonable. In the investigations report relied on by the Plaintiff it is indicated that the Applicant can comfortably repay the decretal sum in three (3) years time. I am alive to the fact that there is an element of interest of 10% per annum flat rate on the decretal sum. I am also alive to the Applicant's liabilities to other banks as shown in the Affidavits. Doing the best I can in the circumstances, I am of the view that installments of Kshs.150,000/- per month would be just in the circumstances.

Accordingly, I allow the application and direct that the decretal sum be liquidated by a monthly sum of Kshs.150,000/- from the 31st day of July, 2012 and on the last day of each subsequent month until payment in full. In default of any one installment on its due date, the entire sum shall become due and payable and the Plaintiff shall be at liberty to execute for the same. I will award the Plaintiff the costs of the application.

Orders accordingly.

DATED and delivered at Nairobi this 29th day of June, 2012.

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A. MABEYA

JUDGE