



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

Civil Suit 405 of 2011

MEDOL GROUP LIMITED.....PLAINTIFF

VS

ADRIAN COMPANY LIMITEDS1ST DEFENDANT

BERNARD WANJAI NOROGE.....2ND DEFENDANT

RULING

1. Before me is a Notice of Motion application dated 27th April 2012 brought by the Defendant/Applicants under Order 21 Rule 12(2) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The application seeks orders that the Defendant be allowed to pay the decretal amount herein of Kshs. 8,500,000/- in installments of Kshs. 1,000,000/- as a first installment and thereafter monthly installments of Kshs. 500,000/- until payment in full.
2. The application is based on grounds set out in the face of the motion and is further supported by the affidavit of Bernard WachaiNjoroge the 2nd Defendant and Managing Director of the 1st Defendant sworn on 27th April 2012.
3. The Defendants' case is that the 1st Defendant does not have the liquidity to pay the decretal sum of Kshs. 8,500,000/- in lump sum and should be allowed to settle the same in installments. They claim that the circumstances giving rise to the debt meet the threshold for payment by installments. They further aver that the Plaintiff would not be prejudiced if the orders sought are allowed as this was the mode of payment subsisting before suit was filed. They further claim that the company has 126 employees on permanent and casual basis and cannot absorb the full decretal sum in view of the weak bank balances *vis a vis* the 1st Defendant's payment obligations.
4. To show bona fides on their part, the Defendants paid an installment of Kshs. 1 Million in the course of hearing of the present application.
5. In response, the Plaintiff opposes the application through a replying affidavit of Edward Magero, a director of the Plaintiff, essentially on the grounds that the application lacks merit. The Plaintiff claims that the debt arose out of an agreement between the parties entered into over one and a half years ago. The debt had seriously prejudiced the plaintiff's business and the continued withholding of payment would worsen the situation. The demand letters from financial institutions to the 1st Defendant exhibited in the supporting affidavit are for minimal sums of money and do not support the claim of inability to settle the

decretal sum in lump. The invoices exhibited in the supporting affidavit also show that the 1st Defendant is liquid hence the Defendants are not candid about their true financial position. The Defendants had further not exhibited financial statements or audited accounts to prove their true financial standing.

6. Counsel for the Plaintiff further applied orally for garnishee orders to issue pursuant to Order 23 Rule 1 allowing the Plaintiff to garnishee sums owed to the 1st Defendant by Safaricom Limited which he claimed were due. He also indicated that the 1st Defendant had obtained a payment of Kshs. 200 Million and was for that reason able to pay the decretal sum in full.

7. The application to garnishee was fervently opposed by counsel for the Defendants who took the view that the court could not issue the orders without a formal application for garnishee orders.

8. I have carefully considered the application based on the material placed before me as well as the rival oral submissions by counsel for the parties. I am therefore in a position to make my view on the application.

9. Order 21 Rule 12(2) of the Civil Procedure Rules gives this court jurisdiction to order that payment of decretal sum be made in installments with or without the concurrence of the Judgment-Creditor if sufficient cause is shown as to why such payment structure is merited.

10. In the present application before me, the Applicant has urged the court to allow it settle the decretal sum of Kshs. 8,500,000/- essentially for the reason that its financial situation and obligations cannot permit it to settle the said sum in lump.

11. I have perused the annexure to the supporting affidavit of the 2nd Defendant and noted that the 1st Defendant has invoiced Safaricom in numerous invoices of considerable sums of money which if paid would comfortably settle the decretal sum in this matter. However, there is no indication on the invoices of when payment falls due. In that regard, the court is not in a position to verify the true liquidity position on the basis of such invoices. Further the court is unable to establish the total outgoings and other financial obligations of the 1st Defendant that are depended upon such income.

12. I am further aware that the agreement between the parties before commencement of the suit in this matter was that the Plaintiff would advance monies to the 1st Defendant which monies would be payable at a future specified date at a premium. An order for payment in installments would not therefore significantly prejudice the Plaintiff's position as that mode was already agreed upon by the parties.

13. In the circumstances, and in my assessment of the financial strength of the Defendants, I am inclined to exercise my discretion under Order 21 Rule 12(2) to allow the Defendants settle the decretal in monthly installments of Kshs. 1,000,000/- with effect from 1st July 2012. Interest on any unpaid portion of the decretal sum shall accrue at the rate of 18% per annum until payment in full.

14. Meanwhile, the Plaintiff's oral application for garnishee orders is compromised in the above payment terms.

15. In the result, the Notice of Motion dated 27th April 2012 is allowed in the adjusted payment terms of Kshs. 1,000,000/- per month with effect from 1st July 2012 and with interest accruing on the unpaid balances at 18% per annum. In default of any one installment, the Plaintiff shall be at liberty to execute.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7th DAY OF JUNE 2012.

J.M. MUTAVA

JUDGE