REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 244 OF 2001

ANDREW KURIA NJUGUNA T/A ONGATET ENTERPRISESARIUKI MUNGAI.....PLAINTIFF

VERSUS

ROSE WAMBUI KURIA.....DEFENDANT

RULING

By his Notice of Motion dated 5th April June 2012, brought under the provisions of Order 22 rule 22(1), Order 51 rule 1 of the Civil Procedure Rules, Sections 1A, 3 and 3A of the Civil Procedure Act and all enabling provisions of the law, the applicant, who is the defendant in this suit is seeking the following orders:

1. **That this application be certified urgent and be heard Ex-parte in the first instance.**

2. **That this Honourable court be pleased to order stay of execution of the judgement of this Honourable court pronounced on the 24th of April 2009 pending inter-parte hearing and final determination of this Application.**

3. **That this Honourable court be pleased to Order Stay of Execution of the judgment of this Honourable court pronounced on the 24th of April 2009 pending any further orders of the court.**

4. **That the Applicant be allowed to continue to pay the costs and interest on the decretal amount due to the Plaintiff/respondent by way of instalments.**

5. **That costs of this application be provided for.**

It is important to state that the current Order 22 rule 22(1) is formally Order 21 rule 25(1) of the Civil Procedure Rules and it provides as follows:

"The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto".

In **Joseph Njuguna Muniu vs. Medicino Giovanni Civil Appeal No. 216 of 1997** the Court of Appeal

held:

"Order 21 rule 22 can only be invoked if the decree has been sent for execution to a court other than the court by which the decree was passed; then the executing court may grant a temporary stay of execution of such a decree for a reasonable time to enable the judgement debtor to apply to the court which passed the decree or to any court having appellate jurisdiction in respect of that decree or the execution thereof for an order of stay of execution. Where the executing court is going to be the same as the one which passed the decree, Order 22 rule 22 would have no application. Of course the court which has passed the decree may stay it, if the circumstances warrant, in the exercise of the inherent powers".

In the application before me what is sought is stay of execution of the judgement of this court pronounced on 24th April 2009 hence the above provision is inapplicable. With respect to payment by instalment it is Order 21 rule 12 that applies. That provision clearly has not been invoked. Whereas under Order 51 rule 10 no objection is to be made and no application is to be refused merely by reason of a failure to state the provision under which an application is brought, the same even in cases where the party in default succeeds. This is in recognition that Rules of procedure are aimed at safeguarding the rules of natural justice and equality of hearing and that it would make no sense to have express rules of procedure, which are not enforced and enforced with consistency.

Nevertheless, the application is supported by an affidavit sworn by **Rose Wambui Kuria**, the applicant herein on 4th April 2012. According to the deponent, on 24th April 2009, judgement was entered ordering her to pay the respondent Kshs. 1,150,000/- with interests at 12% per annum from 8th December 1995 as well as the costs taxed in the sum of Kshs. 156,178.00. According to her she has since paid the full decretal amount due to the respondent as confirmed in the warrant of attachment taken out by the respondent. The same was according to the deponent, settled by way of monthly instalments of Kshs. 50,000.00. It is further deposed that she has been diligently paying the outstanding costs and interests by way of an agreed instalment in the said sum of Kshs 50,000.00 which payments the respondent's advocates have acknowledged. Out of the blue, it is contended, the respondent's advocates have now taken out warrants of attachment for recovery of Kshs. 1,704,980.00 which sum is required to be paid in lumpsum if the attachment of the applicant's property is to be avoided. Attempts to convince the respondent's advocates to cap the accruing interests have not been fruitful, it is further deposed. According to the deponent, the colossal sum involved coupled with the fact of her unemployment as well as the harsh economic times, it is in the interest of justice that there be a stay and the respondent should not be allowed to renege on his word without a reasonable cause. According to the applicant, no prejudice will be suffered by the grant of the orders sought herein and in any case she is wiling ready and willing to abide by any directions of the court.

The application was opposed by way of a replying affidavit sworn by **Andrew Kuria Njuguna**, the respondent herein on 25th April 2012. In it, it is deposed that the cause of action arose from Kshs. 1,150,000/- paid by him in cash to the applicant towards an agreement for purchase of land in 1995 which the applicant failed to complete. Following the said action of the applicant, it is deposed that the respondent pursued refund of the same for 5 years but in vain as a result of which he was forced to file this suit in 2001. After 8 years wait judgement was entered in his favour on 24th January 2009 and no appeal was preferred. An application seeking stay of execution pending an appeal was dismissed on 1st February 2010 and on 12th February 2010 the applicant filed an application seeking to be allowed to settle the decretal sum by monthly instalment of Kshs. 50,000.00. On 18th March 2010 a consent was entered into between the respective parties for payment of Kshs. 100,000.00 forthwith and thereafter Kshs. 50,000.00 per month till payment in full and in default execution was to ensue. This consent, in the respondent's view was only in respect of the decretal amounts but excluded the costs of the suit and interests. Subsequently the respondent's costs were taxed in the sum of Kshs. 156,178.00 and the respondent, on humanitarian grounds allowed the applicant's request to settle the costs as well by way of the instalment of Kshs. 50,000.00. However, it is deposed that the correspondence relied upon by the applicant did not encompass interests and on 19th December 2011, the applicant's advocates proposed to negotiate the mode of payment of the said interest. To the deponent, this was an indication that there was

no prior agreement with respect to payment of interest. However, he was not keen in such an arrangement despite the fact that he had instructed his advocates way back on the 14th September 2011 to accept payments of costs by similar instalments. Despite this, it was not, according to the deponent, until 12th March 2012 that the applicants made the 1st instalment of Kshs. 50,000.00 on costs. Due to the erratic payments, the respondent instructed his advocates to proceed with the execution and the warrants were hence applied for as a last resort following the failure by the applicant to settle the costs in full while no effort has been made to settle the interests. Taking into account the fact that the suit is now 11 years old, the applicant's proposal to settle the sum of Kshs. 1,974,723.28 by monthly instalment of Kshs. 50,000.00 is unreasonable, since it will take another three or more years to clear. According to the deponent, his advocate proposed that the outstanding sum be settled by payment of a lumpsum of Kshs. 500,000.00 followed by a monthly instalment of Kshs. 100,000.00 to ensure that the sum is paid within a year. According to the respondent the proposed payment of Kshs. 50,000.00 per month will take too long and will make it more expensive for him as he continues to retain an advocate. As the aforesaid proposal has not been responded to, the applicant's seriousness is doubtful and she has defaulted in remission of instalments for the months of January and February. It is further deposed no sufficient material has been furnished to enable the court consider the applicant's application favourably and to make matters worse the applicant has not even made an offer to provide security for due performance as a demonstration of her being mindful of the respondent's interest. The deponent believes that this application is simply meant to enable the applicant hold on to the respondent's money as long as possible and pay the same at her own convenience. According to him, therefore, the orders sought are not deserved and the application ought to be dismissed with costs.

In her written submissions the applicant submit that an agreement was arrived at between the parties for payment of Kshs. 100,000.00 forthwith and thereafter Kshs. 50,000.00 per month with respect to the decretal amounts only, which according to her were faithfully paid, the parties were free to agree on the modes of settling the costs which they agreed on by way of monthly instalment of Kshs 50,000.00. Relying on **Timothy Kamau vs. Mariashoni Forest Housing Co-operative & 2 Others [2004] eKLR and Central London Trust Limited vs. High Trees House Limited [1946] 1 KB 130**, it is submitted that the respondent is estopped from going back on his word. On the default in payments for January and February 2012 it is contended that since there were ongoing negotiations, the applicant had to hold on in those months awaiting the outcome of negotiations until 12th March 2012 but the same has been paid and acknowledged. Since the earlier agreement was for payment of Kshs. 50,000.00 per month and the applicant's financial position has not changed, it is submitted that it would be unfair to adopt a different mode of payment. It is further submitted that taking into account the fact that the sum in issue herein is more than the amount that was involved when instalments were agreed to be paid by monthly instalments of Kshs. 50,000.00 to disallow the application will occasion substantial injustice to the applicant. Relying on **Mpaka Road Development Ltd vs. Bharat Rach alias Sailesh Rach & Another [2005] eKLR**, it is submitted that the applicant has demonstrated the difficulty she would find herself in, if payment is made at this stage. It is further submitted that the applicant has satisfied the requirements of Order 42 rule 6(2) of the Civil Procedure Rules which require that the application be made without unreasonable delay. It is further submitted that the applicant has indicated that she is ready and willing to abide by any directions of the court in further fulfilment of the provisions of the said rule.

On his part, the respondent submits that at the time of the making of this application the decretal amounts and part of the costs had been settled leaving part of the costs and interests which stood at Kshs. 1,974,723.28 as at 14th September 2011 and which interest continues ton accrue. It is further submitted that the applicant has continuously defaulted in remitting payments as agreed forcing the respondent to apply for the warrants. Since the applicant has disobeyed the orders of 18th March 2010, she is the author of her own misfortune. Since the application was made after the respondent had obtained the warrants, it is submitted it is an afterthought and the applicant has not shown any sufficient cause as required under Order 22 rule 22(21). Taking into account that it has been 17 years since the respondent lost his money, it shows that the respondent has been patient, which patience the applicant continues to abuse. Order 42 rule 9(2), it is submitted, only applies to stay of execution pending appeal. Citing **Bethuel Muiruri Benjamin vs. Development Bank of Kenya**, it is submitted that the applicant's grounds are not satisfactory to warrant a grant of stay of execution. As the applicant has indicated her willingness to provide security, it

is submitted this is an indication that she is able to settle the amounts due to the respondent but chooses not to. Without evidence of the applicant's means of livelihood, it is submitted it is not enough to simply state that she is unemployed since formal employment is not the only source of income. Relying on **Shah vs. Mbogo [1967] EA 116**, it is submitted that the applicant is using this application to delay justice for the respondent evidenced by the suspension of payment of any instalments as soon as she obtained the interim orders herein. Allowing the application, it reiterated, will permit the applicant to drag the settlement of the suit for another three years. In the respondent's view, the application is scandalous, vexatious and an abuse of the process of the court. In the event that the Court is inclined to grant the application, it is submitted, following in the footsteps of **Halai & Another vs. Thornton & Turpin (1963) Ltd [1990] KLR 365** and **Dr. Daniel Chebutuk Rotich vs. Morgan Kimaset Chebutuk**, the applicant should be ordered to provide security.

Having considered the foregoing this is the view I form of the matter.

It is true that the application before the court is not an application under Order 42 rule 6 under which the Court is empowered to grant a stay of execution pending appeal. In fact the limb of the application dealing with stay is subjected to the grant of further orders. Accordingly, the conditions prescribed under Order 41 rule 6 do not apply to the present application.

The principles guiding the grant of an application for settlement of decretal sum by instalments are now well documented. However, before delving into the application, a distinction must be made between a decretal sum and the principal sum. A decretal sum arises after a decree has been issued. It is the total sum due under a decree and in my view it encompasses the principal sum, the costs as well as interests. The proviso to Order 27 rule 10(2) for example provides:

Provided always that the Public Trustee may pay out of the decretal amount such costs as the plaintiff infant or person of unsound mind may have incurred in the institution and conduct of the cause or matter in which the decree shall have been issued.

For guidance one needs to look at form 1 Appendix C of the former Civil Procedure Rules which is applicable by virtue of Sections 22 and 24 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya. That form categorically enumerates what constitute a decree as

(1) Principal

(2) Interest

(3) Court fees

(4) Other disbursements

(5) Party and Party Costs

It is clear then that decretal amount includes costs.

That said, in **Keshavji Jethabhai & Bros Limited vs. Saleh Abdullah [1959] EA 260** the Court stated:

"Defaults if due to the recession (if such it can be called) might be no fault of the debtors and in some circumstances might have been properly taken into consideration by the court in favour of the debtor when consideration was given to an application for instalments; hardship is a factor which has been recognised by superior courts. It is a question in each case whether some indulgence can fairly be given to the debtor without unreasonably prejudicing the creditor, who can be granted compensation by way of interest on the amount at any time outstanding. There are some instances in which debts are contracted without any specific agreement as to the time of payment, and when it is shown that dealings have been conducted on this footing and no injury is done to the creditor by ordering payment by instalments, the court may be well entrusted with discretion to arrange the

payment of a debt by instalments, but when a contract is distinctly made for payment on a date certain for purpose of enabling the creditor to obtain punctual payment, the circumstances that the payment is secured by an hypothecation of property ought not deprive him of that right. If the reason assigned amounts to nothing more than an inability to pay that is not sufficient reason why execution should not at once proceed…The length of time for repayment is a consideration and where the rate of instalments which had been ordered would have taken some ten years to pay off the appeal court directed the sale of the property hypothecated. If the debtor is hopelessly embarrassed in his circumstances, there is little use in attempting to save him from the consequences of his own improvidence or misfortunes…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 ordinarily he should be required to show his *bona fides* by arranging prompt payment of a fair proportion of the debt although this is not a condition precedent for the exercise of the discretion of granting instalments. Each case has to be decided on its own merits, the predominant factor being the *bona fides* of the debtor…Another consideration would be the ability of the debtor to pay substantial instalments so that the repayment of the decretal sum would not be unreasonably delayed… The existence of sufficient reason 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 instalments should be directed where the defendant shows his *bona fides* by offering to anything like a fair proportion of his debt at once...Because a person has been doing big business it does not follow that he should be able to pay his debts, which might well be proportionately larger".

Likewise in A Rajabali Alidina vs. Remtulla Alidina & Another [1961] EA 565 Law, J (as he then was)expressed himself as follows.

"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 and the onus is on the defendant to show that he is entitled to indulgence under this rule...It is for the defendant to show "sufficient reason" for indulgence being shown to him, and the court is immediately faced with a difficulty in this respect as the learned resident magistrate has not stated what reasons put forward by the defendant he considered sufficient to justify the exercise of the court's discretion in the defendant's favour...Powers given to the court should be exercised with a due consideration for the interests of the creditor as well as those of the debtor and the matters to be taken into consideration by the Court in an application for payment by instalment are:

(i) the circumstances in which the debt was contracted,

(ii) the conduct of the debtor,

(iii) his financial position,

(iv) his *bona fides* in offering to pay a fair portion of the debt at once.

If these tests are applied to the respondent, it will be seen that he does not make a good impression. From the examination, he must have been on the verge of bankruptcy when he ordered for the goods from the appellant. Although he has been paid for the goods which he bought from the appellant and re-sold, he did not pass on a single cent of his money to the appellant. When asked for the money by the appellant, the respondent offered him twenty percent in full settlement. This casts some light on the respondent's *bona fides.* He had apparently enough money to be able to offer to pay twenty percent of his debt in full settlement, but he did not make any payment when his offer was refused. Another indication of the respondent's lack of *bona fides* can be found in the fact that when the respondent consented to judgement, his advocate offered to pay the debt by monthly instalments but when the matter came before another magistrate this offer was reduced without explanation... Although the amount of instalments and the period for their repayment is a matter for the discretion of the court, which discretion is to be exercised within bounds, if the result of the decree is that it would take the plaintiff more than seven years to recover the amount due to him, it

constitutes a virtual denial of the decree holder's rights".

In this case, the circumstances under which the debt was accrued was a breach of an agreement for sale of land. That was in 1995 which is more that 16 years ago. The applicant took the respondent through the trial process until judgement was entered against her 14 years later in 2009, 5 years ago. Since then the respondent is yet to realise the full fruits of the said judgement. How has the applicant conducted herself since then? According to the applicant she has faithfully adhered to the arrangement between the parties herein with respect to payment by instalment. She, however admits that she did not pay the instalment for the months of February and March 2012 on due dates. Her reason for this is that there were ongoing negotiations. The negotiations in question, if I understand the parties well, were initiated by the applicant. To say that she was using the negotiations, initiated by herself, in order not to remit the instalments is with respect callous. With respect to her financial position, the applicant contends that she is unemployed and these are harsh economic times. Whereas one cannot dispute the fact that these are harsh times economically, justice must look at both parties and it must be taken into account that the respondent has been waiting for the settlement of this matter for the last 16 years. On the other hand the Court appreciates that the respondent must have appreciated the applicant's precarious financial position for it to have acceded to the payment of part of the decretal sum by instalments. With respect to the applicant's *bona fides*, there is no offer made by the applicant to pay a fair portion of the debt at once. Despite the respondent having offered some accommodation, the applicant does not seem to have seriously pursued that offer. Instead the applicant has decided to seek refuge in the courts. Courts, it has been said time and again cannot be converted into a haven of refuge for people who do not want to pay their debts.

Having said that and being cognisant of the fact that the respondent must have appreciated the applicant's financial dilemma when he allowed her to settle the earlier amounts by way of instalments and as there is no evidence that the applicant's financial position has since improved I have decided to exercise my discretion in a manner that will ensure justice is done to both parties. Accordingly, it is hereby ordered that there will be a stay of execution against the applicant on condition that the applicant will forthwith remit the unpaid instalments todate as per the earlier arrangements. Subject to the foregoing, leave is granted to the applicant to settle the outstanding decretal amount by a deposit of Kshs. 200,000.00 within 7 days and thereafter by way of equal monthly instalments at the rate of Kshs 100,000.00 with effect from the last day of August 2012 and on the last day of each subsequent month till payment in full. In default of any one instalment on due date, the total outstanding sum to be due and payable and the respondent be at liberty to execute for the same. The costs of this application shall be borne by the applicant.

Ruling read, signed and delivered in Court this 19th day of July 2012.

G.V. ODUNGA
JUDGE

In the presence of:

Mr Oyunge for Applicant

Miss Rotich for Mugo for Respondent