



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 56 of 2012

FREIGHT FORWARDERS LTD.....PLAINTIFF

VERSUS

ELSEK & ELSEK (K) LTD.....DEFENDANT

RULING

1. The matter before the court is the Respondent's Notice of Motion seeking stay of execution against the *ex parte* judgment granted to the Plaintiff. The judgment debtor admits the decretal amount of Kshs. 8, 665,944/= and merely seeks time to pay the said amount in instalments.

2. The motion is brought under Order 21 Rule 12, Sub rule 2 provides as follows:

“(2) After passing of any such decree, the court may on the application of the judgment 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 by postponed or be made by instalments, on such terms as into payment of interest, the attachment of the property of the judgment debtor or the taking of security from him, or otherwise, as it thinks fit.”

3. Since the judgment creditor opposes the application the court's role is to satisfy itself that the debtor does merit, for “**sufficient cause**”, an order for payment by instalments. The Applicants grounds in regard to sufficient cause are that: It is unable to pay in lumpsum; that it can pay by reasonable monthly instalments; and that the application is made in utmost good faith.

4. In his supporting affidavit, Osman Erdine Elsek, Director of Applicants says that the Plaintiff rushed to court whilst the parties were still negotiating; that they are faced with temporary cash flow problems; that they can pay a lumpsum deposit of Kshs. 800,000/= and monthly instalments of Kshs. 600,000/=

5. In their submissions, the Applicant Judgment debtor points out that they did not oppose the suit, they sought to negotiate with Plaintiff, all factors demonstrating their *bona fides*. They also provided two bank statements; First with Diamond Trust Bank for March, 2012, showing a debit balance of Kshs. 14,172,760.50 in the name of Elsek & Elsek Construction Limited, whose name; it was pointed out by Plaintiff, was not that of the Defendant. Second, an account with Bank of Africa in Defendant's name, for 9th-16th April, 2012, showing a debit balance of Kshs. 56, 995, 555.80.

6. In their opposition, the Judgment Creditor highlights the following legal principles, which must be shown before the court exercises its discretion to grant the order sought. The authorities stated were:

- **Keshavji Jethabhai & Bros Ltd vs Saleh Abdulla** [1959] EA (J) 260 which held: that

- whilst creditors rights must be considered, each case must be considered on its own merits and discretion exercised accordingly
- the mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of the discretion
- the debtor should be required to show his *bona fides* by arranging prompt payment of a fair proportion
- 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.

A Rajabali Alidina vs Rehmatulla Alidina & Anor [1961] EA 565 which held:

– the court can consider the circumstances in which the debt was incurred; the conduct of the debtor; his financial position; and his *bona fides*.

7. Applying these principles, I observe as follows: When this application came before me on 11th July, 2012, I had allowed the Defendant to pay an amount of Kshs. 2, 600,000/= at its request, to the Judgment Creditor. They were unable to comply with their own requested, amount, without explaining why. I had also ordered that the Debtor pay a further Kshs. 600,000 on or before 20th August, 2012. The Debtor failed to comply with this also.

8. On the bank statements, it was pointed out by counsel for the Judgment Creditor that one of them was not for the Debtor company so I have to disregard it for the purposes of this application. The other statement was for a period of only 9th to 15th April 2012. It does not show th Debtor's financial position over a period. Further, their income generating capacity is wholly unknown.

9. Overall, I am not satisfied that the debtor has shown me sufficient cause to order payment by the instalments they propose. The previously agreed instalments were not honoured. Even by the time of the hearing of this application, the Debtor had not demonstrated good faith and paid any amount whatsoever, since April, 2012 when the application first came up.

10. Doing the best I can to consider the rights of both parties, I will allow the Debtor to pay the decretal amount within a period of twelve (12) months in four (4) equal consecutive instalments. The first instalment to be paid on or before 20th January, 2013. Other instalments to be paid on 20th days of every third month, thereafter namely, April, July and October. In default of payment of any instalment execution to issue.

The costs herein are in favour of the Judgment creditor.

Dated, signed and delivered this 19th day of December, 2012.

R.M. MWONGO
JUDGE

Read in open court

Coram:

Judge: R.M. Mwongo

Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d)