



REPUBLIC OF KENYA

High Court at Mombasa

Miscellaneous Application 295 of 2008

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW
ORDER OF PROHIBITION AND CERTIORARI**

**AND
IN THE MATTER OF: THE NATIONAL ENVIRONMENT TRIBUNAL
TRIBUNAL APPEAL NO. NET 23 OF 2007**

BETWEEN

REPUBLIC APPLICANT

**VERSUS
NATIONAL ENVIRONMENT TRIBUNAL**

EX PARTE SILVERCREST ENTERPRISES LTD RESPONDENT

AND

JOEL LESALE 1ST INTERESTED PARTY

DONATO FONCESA 2ND INTERESTED PARTY

MRS. BETH WAMBUI MUGO 3RD INTERESTED PARTY

JOHN MBUVI 4TH INTERESTED PARTY

MANGA MUGWE 5TH INTERESTED PARTY

EUGENE CHERNEL 6TH INTERESTED PARTY

NICK MUGO 7TH INTERESTED PARTY

**NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY (NEMA) 8TH INTERESTED PARTY**

RULING

(1) By Notice of Motion dated 16th February 2012, the Applicant seeks an order that:

“the Applicant be allowed to satisfy the certificate of costs herein by an initial deposit of Kshs.200,000/= and thereafter by monthly installments of Kshs.100,000/= effective 1st March 2012 until payment in full.”

The application is supported by the affidavit of its director of 16th February 2012 whose central plea is that (see paragraph 4 of thereof):

“That due to the current harsh economic conditions, the Applicant is unable to settle the awarded costs by one lumpsum payment but is able to settle the same by making an immediate payment of Kshs.200,000/= and thereafter monthly installments of Kshs.100,000/= with effect from 1st March 2012 until payment in full.”

(2) The application is opposed by the 1st–7th Interested Party/Respondents who claim principally, as set out in the written submissions by counsel for the said Respondents, that:

“The Applicant has failed to show any cause or justification why the court should indulge it to pay the amount in installments. Apart from a singular averment contained in paragraph 4 of the affidavit of George Atetwe as to the “current harsh environment conditions” there is no evidence whatsoever annexed to the affidavit to persuade the court to indulge the Applicant. The Applicant has not annexed any returns or audited accounts to show that it is suffering from the “harsh climate.” Indeed, with respect, if this argument was to succeed, one would argue that it also applies to the 1st to 7th Interested Parties who due to the “harsh economic climate” need the award by the court enforced.”

Counsel cited the High Court decision in **Wesley Kiptanui Kipkemoi v. Simon Simiyu (2005) eKLR** per Serگون, on the principles for the grant of an order for the payment of decretal amount in installments.

(3) I have considered the submissions by the parties on the matter and I agree with the broad principles set out in the **Wesley Kiptanui Kipkemoi** case, supra, especially as they relate to ordinary debt. The broad principle is that **“a debtor must show sufficient reason for indulgence and the matters to be taken into account by the court are the circumstances in which the debt was incurred and the financial position, conduct and bona fides of the debtor.”** With respect, the principles must vary where the debt or decretal amount relates to a taxation of costs of the suit as in this case because of the effect the costs must have to the principle to access to justice. In considering the level of costs, the Court of Appeal for Eastern Africa in **Premchand Raichand Ltd and Another v. Quarry Services of East Africa Ltd and Others (No. 3) (1972) EA 162**, held that the costs must not be allowed to rise to such a level as to confine access to the courts to the wealthy. This principle reverberates well with that of access to justice which is now constitutionally underpinned by Article 48 of the Constitution of Kenya 2010 in terms that:

“The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

I consider that the mode of payment may have as direct a bearing on the access to the court as the level of costs.

(4) I do not agree with counsel for the 1st–7th Interested Party/Respondents that because the Applicant has merely asserted without proof by any returns or audited accounts that **“the current harsh economic conditions”** have taken toll on the Applicant, the discretion of the court should not be exercised in its favour. While the subjective position of the Applicant may be demonstrated by audited accounts of the Applicant, an objective assessment of the proposed payment schedule is necessary to gauge the reasonableness of the installments. In the absence of detailed financial position of the Applicant, the court may examine the proposed scheme for reasonableness in the circumstance of the case and determine whether or not to grant the prayer for payment by installments, taking into account the justice and fairness of the case.

(5) In making a decision on the application before the court, I have taken into account the following matters:

(a) Despite the lack of audited accounts to support the Applicant's plea that it is unable to pay in one lumpsum the sum of the decretal amount of costs, the same standing at over Kshs.1.3 million, a substantial amount for any company.

(b) The mode of payment, and execution in default of payment by attachment and sale of the Applicant's property as sought by the Respondent, will have a direct bearing upon the principle of access to justice. It may amount in its effect, to a penalty for approaching the courts with undesirable deterrent consequences for the Applicant and other litigants in similar situation.

(c) The proposed payment schedule of Kshs.200,000/= deposit and Kshs.100,000/= monthly installments would have settled the decretal amount, allowing for interest, in about 12 months, which I do not find unreasonable.

(d) The Respondents are entitled to interest at court rates for the period of delayed payment.

(e) The Applicant who sought payment by installment beginning 1st March 2012 is expected to have made arrangement for the payment effective that date and is able at the date of the ruling herein to pay the arrears on the installments in lumpsum.

(6) Accordingly, for the reasons set out in this ruling, I make the following orders on the Notice of Motion of 16th February 2012:

(a) The Applicant shall liquidate the decretal amount herein by installments as follows:

i. By payment of Kshs.200,000/= lumpsum already deposited in court and which may now be released to the 1st-7th Interested Party/Respondents;

ii. By further payment of Kshs.100,000/= per month effective 1st March 2012 making a total of Kshs.1,000,000/= for the period March – December 2012 payable not later than 31st December 2012.

iii. By further payment of Kshs.100,000/= per month beginning 1st January 2013 until payment in full.

(b) The Applicant will pay interest on the decretal amount at court rates.

(c) Costs of the application to the Respondents.

Dated and delivered this 13th day of December 2012.

EDWARD M. MURIITHI
JUDGE

In the presence of:

Mr. Nyabicha for Were for for the Applicant's

No appearance for the Respondents

Mr. Njeru for Shah for for the Interested Parties

Miss Linda Osundwa - Court Clerk