REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS) Civil Case 463 of 2007

DR. JOHN KARUNGAI NYAMU.....1ST PLAINTIFF
ELIZABETH WANGUI KARUNGAI .....2ND PLAINTIFF

VERSUS

MUU & ASSOCIATES ADVOCATES ..... DEFENDANTS

R U L I N G

This application is brought by a Chamber Summons dated 17th November, 2009, and taken out under Section 3A of the Civil Procedure Act; Order XX Rule 11 and Order XXI Rule 22 of the Civil Procedure Rules and all the other enabling provisions of the law.

The main prayer that the application seeks is that the mode of payment of the amount of Kshs.2 million ordered by the court be varied and the applicant be allowed to pay the said sum due to the plaintiffs by installments by paying the sum of Kshs.200,000/= to the plaintiffs forthwith; Kshs.30,000/= monthly for the months of November and December, 2009, and January, 2010; the balance of Kshs.1,710,000/= be liquidated in monthly installments of Kshs.50,000/= commencing from February, 2010.

The application is supported by the annexed affidavit of Francis Ndungo Muu, the applicant, and is based on the grounds that:-

(a) The amount of Kshs.2 million payable by the defendant is quite substantial and the court should take judicial notice of the harsh economic times that Kenyans are living in.

(b) The surety's sole source of income is employment and his monthly net pay is Kshs.105,915/80 until January, 2010.

(c) He is a family man who has to maintain his family and yet contend with the satisfaction of the security guarantee issued to the plaintiffs.

(d) The surety is not a party to this suit and came in to stand security for the defendant, and a father should not be unduly punished or financially ruined for merely exercising parental mercy over his son.

(e) The unique circumstances of this case and the totality of its circumstances warrant the grant of the orders sought for payment by installments.

The application is opposed by the replying affidavit of Elizabeth Wangui Karungai, the 2nd plaintiff, sworn on 16th October, 2009.

At the hearing of the application, Mr. Kimani appeared for the guarantor while Mr. Wanjohi appeared for the plaintiffs. Each Counsel submitted at length and after considering the pleadings and submissions of Counsel, I note from the decided cases that Order XX Rule 11 upon which application is made confers upon the court a discretion, for sufficient cause shown, to order the payment of the amount decreed to be made by installments. However, this discretion must be exercised in a judicial and not in an arbitrary manner, and it is upon the defendant to show that he is entitled to be indulged under this Rule. Suffice it to refer to A. RAJABHAI ALIDINA v. REMTULLA

ALIDINA & ANOR. [1961] EA, 565, in which, with reference to Order XXI Rule 11, Law, J., as he then was, said at page 566;

> *"... the court's discretion to order payment of the decretal amount in installments is one which must be exercised in a judicial and not an arbitrary manner. The onus is on the defendant to show that he is entitled to indulgence under this rule."*

From the decided authorities, the principles which should be considered by a court in determining whether or not sufficient reason exists are:-

(a) *The circumstances under which the debt was contracted.*

(b) *The conduct of the debtor.*

(c) *His financial position, and*

(d) *His bona fides in offering to pay a fair proportion of the debt at once.*

The applicant in this matter is not the judgment debtor. Instead, the judgment debtor is his son, and the applicant only guaranteed to discharge his son's indebtedness. However, in my view, having undertaken to discharge that indebtedness, he thereby stepped into his son's shoes, and the considerations which would have applied to his son now apply to him.

The circumstances which led the applicant to this unfortunate situation are clearly set out in his deed of guarantee dated 30th September, 2009. In brief, by a court order made on 12.3.08, the applicant's son, hereinafter referred to as "the defendant", was ordered to deposit in court the sum of Kshs.3,158,670/= within seven days from the date thereof. He defaulted in depositing the said sum for which default he was cited for contempt of court and convicted of the same, whereupon he was sentenced to serve three months in civil jail by an order made on 29.9.2008. He was arrested on 29.9.09 in execution of the order for committal to civil jail and on being brought before the court, the execution of the said order was stayed on some four conditions:-

1) *That the defendant purges his contempt by payment into court of the sum of Kshs.100,000/=.*
2) *That the defendant pays to the plaintiffs the amount of Kshs.2 million within 30 days from 20.09.09.*
3) *The Guarantor executes a deed of guarantee guaranteeing payment by the defendant of Kshs.2 million to the plaintiffs as ordered.*
4) *In default of payment of the said sum of Kshs.2 million to the plaintiff within 30 days, the plaintiffs be at liberty to execute both against the defendant and the guarantor.*

In consideration of the court staying execution of the committal order made on 29.09.2008, against the defendant, the guarantor applicant, by a deed-

> *"...binds himself to this Honourable Court and unconditionally and irrevocably guarantees to the plaintiffs the payment by the defendant of the sum of Kshs.2 million within 30 days from 29.09.09, and if the defendant makes default of payment the applicant herein would pay the said amount forthwith."*

Apparently, the defendant did not pay the Kshs.2 million within 30 days and it became incumbent upon the applicant to pay the said sum forthwith. Instead of doing so, the applicant filed this application on 17th November, 2009, seeking from the court, as it were, a variation of the terms of the guarantee. Taking into account the principles to be considered in allowing payments by installments, the conduct of the applicant in this matter leaves some question marks in my mind. The applicant is a doctor who, no doubt, is a very well educated person. On 30/09/09, he bound himself to this court and the plaintiffs to pay the amount of Kshs.2 million forthwith if his son did not do so within 30 days from that date. It cannot, by any stretch of imagination, be claimed that he did not know what he was getting himself into. It does not

reflect very nicely for a person of his standing to come to court in less than a month to seek a change in the terms of his own undertaking.

Secondly, the applicant depicts his financial position as so bad that he can ill afford to honour this undertaking. According to him, whereas his net salary is some Kshs.105,915/80, his monthly domestic expenditure stands at Kshs.145,000/=. How is he able to finance the domestic monthly expenditure of Kshs.145,000/= from a salary of Kshs.105,915/80? This suggests that he has some other sources of income from which he finanances the deficit. If that be so, then he is not being forthright with the court. He is also ready, from paragraph 14 of his supporting affidavit, to sell one of the family cars in order to offset the deficits, but at the same time he doesn't seem to mind the issue of his liability. In ground 4 of his application, he states:-

"*A father should not be unduly punished or financially ruined for merely exercising parental mercy on his son …"*

While I agree with that sentiment, it poses some more challenges to the court. Is it the court that is punishing the applicant? If not, who is punishing him? He brought himself to court without being summoned by anybody. And who is ruining him? The applicant voluntarily guaranteed that if his son did not pay his debt, the applicant would himself pay it out forthwith, and when he is called upon to honour that undertaking, he resorts to alleging that he is being ruined and punished. He offered an undertaking which was accepted by the court, and his conduct suggests that like he wants to withdraw with one hand what he offered with the other. Such conduct can hardly endear him to any law enforcement agency.

Finally, the applicant has not demonstrated any bona fides in offering to pay a fair proportion of the debt at once. A payment of Kshs.200,000/= out of Kshs.2 million is only 10% which is not fair proportion.

For the above reasons, I find that the applicant has not demonstrated sufficient cause to be allowed to pay by installments the amount of money which he guaranteed to pay forthwith if his son defaulted in paying it. His application has no merit and accordingly fails. It is hereby dismissed with costs.

DATED and DELIVERED at NAIROBI this 26th day of March, 2010.

L. NJAGI
JUDGE