

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL 28 OF 2003**

DR. ALI WARIO APPELLANT

VERSUS

DR. JOHN NGO'NDU RESPONDENT

RULING

The judgment in this appeal was delivered on 27th July 2005 whereby the appellant succeeded to have the lower court judgment in favour of the respondent set aside. The respondent by a decree of the lower court in CMCC Meru No. 567 of 1994 of 24th April 2003 obtained judgment for Kshs. 200,000/= being an award in general damages for defamation. The appellant was awarded costs of the appeal. The Deputy Registrar of this court taxed the appeal costs at Kshs. 176,063/= on 5th May 2008 in favour of the appellant. The respondent filed a reference against those costs. The ruling of that reference was delivered by this court on 25th September 2009 whereby the court ruled that the appellant's costs be taxed at Kshs. 144,480/=. The respondent filed a Chamber Summons dated 5th October 2009 which is the subject of this ruling. That application is brought under order XX Rule 11 of the Civil Procedure Rules. By that application, the respondent seeks to be allowed to liquidate the tax costs by monthly instalment of Kshs. 10,000/=. In support of that application the respondent stated that he has a private practice as a doctor in Meru. That his practice was affected by the appellant's defamation which led to its closure from the year 2004 up to the year 2008 December. The respondent stated that he earns between Kshs. 25,000/= to Kshs. 30,000/= which amount he said he uses for up keep of his family and for payment of bills. He said that he had no other business and consequently, he was unable to raise the whole amount of the taxed costs. He finally stated that there was still a pending case between him and the appellant being HCC No. 164 of 2000. The appellant's learned counsel Mr. Nyamu Nyaga relied on the replying affidavit of the appellant and on the maxim of equity to oppose the application. In the replying affidavit the appellant denied that the respondent has been defamed as alleged. Further, that the proposal of the respondent to pay costs by monthly instalment of Kshs. 10,000/= would translate to the respondent taking 15 months to settle those costs. The appellant deponed that the respondent is known to him and that he is financially endowed with enormous financial base which he could use to pay the taxed costs. Order XX Rule 11 which the respondent relied upon is in the following terms:-

“11 (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 be postponed or be made by instalments on such terms as to the 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.”

As can be seen from that Rule, the court has discretion on whether or not to order payment by instalments. The respondent had a burden to prove that he deserves to have the court exercise that discretion in his favour. The respondent in his affidavit in support of his application merely remarked of his inability to pay the costs. He alleged that his income was between Kshs. 25,000/= and Kshs. 30,000/=. The respondent did not attach any bank account or any other account of his practice to prove how much he earns. The bare statement in his affidavit of how much he earns does not suffice for Rule 11. The amount of money he makes was the only basis upon which the respondent sought to pay the taxed costs by instalment. Having failed to prove his earnings, the application cannot succeed and is dismissed. I also find that the respondent in making the present application did not do so in good faith. This is because even though the court ruled on the 25th September 2009 on how much costs he was to pay the appellant, to date the respondent has not made one single payment of the amount offered by instalments. In the end, the Chamber Summons dated 5th October 2009 is found to have no merit and is hereby dismissed with costs being awarded to the appellant.

Dated and delivered at Meru this 26th day of July 2010.

MARY KASANGO
JUDGE