



CIVIL PRACTICE AND PROCEDURE

Ø **Application for payment of decretal amount by instalments**

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CASE NO. 100 OF 1996

ISAAC MWINGIRWA & 9 OTHERS.....PLAINTIFFS

VERSUS

M'BIRITHIA GITHONGO & 2 OTHERS.....DEFENDANTS

RULING

The plaintiffs sued the defendants in this case seeking for orders that the defendants be ordered to clear and unblock an access road leading to the plaintiff's plots. The plaintiffs' suit was on 22nd January 2009 dismissed for want of prosecution. The plaintiffs were ordered to pay to the defendants costs of the suit. The costs of the defendants were taxed on 18th January 2010 at Kshs. 45,450/=. Before court now, is a Chamber Summons dated 3rd June 2010 brought under Order XX Rule 11 of the Civil Procedure Rules. The application is supported by an affidavit of Isaac Mwingirua the first plaintiff. Isaac does not state that he had authority of his fellow plaintiffs to swear the affidavit in support of that application. Despite his failure to show that authority, he deponed as follows in his affidavit:

3. THAT we have no intentions of appealing or objecting to the taxation of the costs.

4. THAT we are unable to pay the decretal amount in a lump sum as we are poor peasant farmers with no regular incomes and our claim was to only unblock the access road which was to serve the present and future generations.

5. THAT we now pray to be allowed to pay the decretal amount equally by dividing the total amount among the 10 plaintiffs as the defendants have threatened to commit me alone to civil jail even though there are ten plaintiffs "Annexed an marked IMM 1" is a copy of the Notice to show cause why execution should not issue fixed for hearing on the 3/6/2010 seeking to commit me only to civil jail.

The application was opposed by the defendants. In the replying affidavit sworn by the first defendant, it was deponed that the plaintiffs had failed to prove the alleged poverty. It was further deponed that the plaintiffs, contrary to what had been stated in the affidavit of Isaac Mwingirua, were businessmen working at Maua town. For that reason, it was stated that if one of the plaintiffs had execution levied against him in respect of the taxed costs, he could obtain a refund from the other plaintiffs. Order XX Rule 11 (2) of the Civil Procedure Rule provides as follows:-

“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 installments 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.”

An order for the payment of the decretal amount by instalments can be made with the consent of the decree holder and where there is no such consent such an order can be made where there is sufficient cause. In the case **A. Rajabali Alidina vs. Remtulla Alidina & Another** [1961] EA 565 the Court held:-

“A debtor must show sufficient reason for indulgence and the matters to be taken into consideration by the court are the circumstances in which the debt was incurred and the financial position, conduct and bona fide of the debtors.”

The plaintiff in support of the application simply stated that they are poor peasant farmers. There is nothing before court to confirm the same. The least the plaintiffs could have provided is a chief's letter confirming that they are not in gainful employment or business. The plaintiffs' application therefore fails the test required, that is, to show sufficient cause why taxed costs should be paid by instalments. The Chamber Summons dated 3rd June 2010 is dismissed and the costs thereof are awarded to the defendants.

Dated and delivered at Meru this 22nd day of October 2010.

MARY KASANGO

JUDGE