



**REPUBLIC OF KENYA**  
**HIGH COURT OF KENYA AT NAIROBI MILIMANI COMMERCIAL**  
**COURTS**

**Civil Suit 149 of 2002, 170 of 2002 & 171 of 2002**

**STEPHEN NDICHU.....**  
**.....PLAINTIFF**

**VERSUS**

**MONTY’S WINES & SPIRITS LIMITED.....DEFENDANT**

**CONSOLIDATED WITH**

**CIVIL CASE NO. 170 OF 2002**

**LORENZO VENTURA.....PLAINTIFF**

**VERSUS**

**MONTY’S WINES & SPIRITS LIMITED.....DEFENDANT**

**CONSOLIDATED WITH**

**CIVIL CASE NO. 171 OF 2002**

**JACKPOT ENTERPRISES LIMITED.....PLAINTIFF**

**VERSUS**

**MONTY’S WINES & SPIRITS LIMITED.....DEFENDANT**

**RULING**

The Applicants are the judgment debtors herein pursuant to the judgment of Hon. Azangalala, J., entered herein in favour of the Plaintiff on 28<sup>th</sup> November, 2007. The Applicants unsuccessfully sought to have the judgment of 28<sup>th</sup> November, 2007 set aside. Having failed to have the court set aside the Judgment, the Applicants moved to the Court of Appeal. In the meantime the Applicants obtained an order of stay pending appeal which was granted on condition that the Applicants deposited with this court within 21 days from date of the order the sum of Kshs.10 million. The Applicants have not deposited the said sum and the time set for the said deposit lapsed on 23<sup>rd</sup> February, 2009. That is the date this application was filed. In the instant application, the Applicants have moved the court under Order III rule 9A and Order XX rule 11 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The prayer sought is as follows:

- 4. HAT this Honourable Court be pleased to allow the Applicant/Judgment-debtor to pay the Decretal Sum by the immediate deposit of the Kshs.500,000/- and thereafter by payment of Kshs.250,000/- per month until payment in full.**
- 5. THAT this Honourable Court be pleased to grant other or further orders as may be appropriate in the circumstances.**

The application is mainly premised on the grounds.

**(iii) The said Order required the Defendant to Deposit Kshs.10,000,000/= with the Court within**

21 days thereof. This period lapses on 23<sup>rd</sup> February, 2009.

**(iv) Due to the untimely demise of one Rupani Rajani, a director of the Defendant Company and the Guarantor to the three Loan Agreements entered into between the Plaintiffs in the consolidated suits and the Defendant, the Defendant Company has been compelled to take up bank overdraft and credit facilities so as to service its working capital requirements and maintain a trading platform so as to generate sufficient profits to settle the loan agreements.**

**(vi) That the Judgment-Creditor's interests and claim would be best served by an installment arrangement as proposed by the Defendant considering that the total value of the Applicant's stocks as assessed by the auctioneers is Kshs.2,718,700/= is far short of the judgment debt, in excess of Kshs.11,000,000/-.**

**(vii) The Applicant is currently heavily indebted to various creditors to the tune of kshs.6,588,921.60/= and owes Prima Bank Limited Kshs.4,395,834.55/= by way of overdraft secured by a debenture over the assets of the Applicant.**

The application is supported by the affidavit sworn by Rajesh Rajani, the director of the Defendant. I have considered the said affidavit and the annexures thereto.

The application is opposed. The Plaintiff/Judgment Creditor/Respondent has sworn a replying affidavit dated 6<sup>th</sup> March, 2009. I have considered the said affidavit together with the annexures thereto.

Ms. Nungo argued the application on behalf of the Applicants. Counsel urged that by reason of a debenture over the Defendant's property in favour of Prime Bank, and by virtue of fact any execution against the Defendant could only yield Kshs.2.5 million, the Defendant's application to pay the decretal sum by installments as proposed should be granted.

Mr. Khamalla argued the application on behalf of the Plaintiff. Counsel strongly opposed the application on grounds first, that the installments suggested by the Defendant were too low and would lead to the Plaintiff waiting over 3 years to obtain the full fruits of his judgment. The second ground urged is that debt allegedly owed to Prime Bank, counsel submitted that documents relied upon were not registered and were therefore a stack of papers. I agree with Mr. Khamalla. Unless a debenture is duly signed and sealed by the parties, and registered as required, it is of no legal effect. The Defendant cannot rely on it to support its allegations that it was indebted to a third party. In any event, the party that can enforce the debenture, and therefore one who can correctly raise the issue is Prime Bank itself.

Mr. Khamalla urged that the Applicant has made a multiplicity of applications, most of whose terms it has failed to meet as set by the court.

I have noted that the Applicants obtained a stay pending appeal on condition it deposited Kshs.10 million with the court. That condition was agreed upon by consent on 2<sup>nd</sup> February, 2009. Subsequently, the parties entered a consent order, when the Defendant failed to meet the terms agreed on 2<sup>nd</sup> February, 2009. The latter order gave temporary reprieve to the Defendants while parties negotiated a settlement. None was however reached. The Applicants then took a date for the prosecution for the instant application.

Mr. Khamalla's complaint is that the Defendant failed to meet the terms of the agreement and yet waited until the last minute to file this application. Counsel urged the court to find that the Defendants/Applicants lacked in bona fide and that the application was not in good faith.

I have considered the application and the submissions by counsel. The court has power under Order XX rule 11 to allow an application for payment of the decretal sum by installments. The Respondent/Decree Holder has not consented to the payment of the decretal sum by installments. In the circumstances, as provided under Order XX rule 11(2), the Court can only grant the application if sufficient cause is shown. The rule provides thus:

***"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."***

The Applicant has alleged that it is indebted to a third party and that the said third party holds a debenture over its assets. The documents annexed as proof of this fact are however not registered and are therefore of no legal effect. The alleged debt is being raised for the first time now. In my view, this issue is an afterthought and could as well have been raised mischievously to defeat the Decree Holder's efforts to realize the fruits of its judgement.

**Having carefully considered the application, I find that no sufficient cause is shown to allow this court exercise its discretion to order payment of the decretal sum by installments. The application is therefore without merit and is dismissed with costs.**

**Dated at Nairobi this 30<sup>th</sup> day of April, 2009.**

LESIIT, J.

JUDGE

***Read, signed and delivered, in the presence of:***

Majanja Holing brief Mr. Nungo for the Applicant

Mr. Khamalla for the Respondents

**LESIIT, J.**

JUDGE