



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

MISCELLANEOUS CIVIL APPLICATION 1059 OF 2007

J.M. MATHENGE t/a BUILECON ASSOCIATES.....CLAIMANT/RESPONDENT

VERSUS

KENYA TEA DEVELOPMENT AGENCY LIMITED.....RESPONDENT/APPLICANT

RULING

This is a Chamber Summons application dated 12th May, 2009 expressed to be brought under Order XX rule 11(2) and 20 of the Civil Procedure Rules. It seeks order 3 of the application:

“THAT the Respondent be granted leave by this Honourable Court to pay aforesaid sum of Kshs.16,879,493.08 in installments of Kshs.500,000.00 every month beginning 30th May 2009 and on or before the 30th of each succeeding month until payment in full.

The application is supported by an affidavit sworn by John Omanga, the Company Secretary of the Defendant. The gist of the Affidavit is that the Defendant is unable to pay the decretal sum and seeks the leave of the court to pay the said sum in monthly installments of 500,000/-. The deponent sets out the basis for the application and seeks to demonstrate the reason why the Defendant company is unable to meet the decretal amount. The main ground argued in support of the Defendant’s inability to pay is the fact that its main market for tea export is Pakistan, Afghanistan and Egypt, and that these countries are experiencing civil and economic tension of global notoriety and that the same has negatively impacted on the Defendant’s export market.

The application is opposed. The Plaintiff has filed a replying affidavit in which he has vehemently opposed the application and avers that from all previous proceedings in the matter, both in the High Court and the Court of Appeal, the Applicant always boasted that it was capable of paying any decretal sum at any time. The Applicant has annexed a document to support that allegation. The document is an affidavit sworn by the Head of Legal and Regulatory Affairs of the Defendant, Ms. Rebecca Mbithi, filed in the Court of Appeal as a supporting affidavit. The affidavit sets out the grounds upon which the appeal was filed in the Court of Appeal challenging the decision of the High court in a ruling before it. At paragraphs 13 of that affidavit, it is deposed that the Defendant company is a solid corporation and that it is self sufficient security for the award and decree of the court. I however do note that at paragraph 12(ii) the Defendant company deposes that the amount of the decree is a huge amount which will affect the operations of the Defendant company. The annexed affidavit does not wholly support the averments by the Respondent to the application to the effect that the Defendant company boasted of its ability to pay the decretal sum at any time.

I have considered the submission by both counsel, Mr. Kipkorir for the Defendant/Applicant and Mr.

Mwaniki for the Plaintiff/Respondent. Mr. Kipkorir relied on the supporting affidavit sworn by Ms. Mbithi.

In an application of this nature, an Applicant must show sufficient cause why the application should be granted. Order XX rule 11 of Civil Procedure Rules stipulates:

“11 (1) Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by installments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

(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”

Mr. Kipkorir relied on the case of Jabali Alidina vs Lentura Alidina [1961] EA 565 at page 566:

“All commentators on the Civil Procedure Code agree that 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.

It is for the defendant to show “sufficient reason” for indulgence being shown to him, and this court is immediately faced with a difficulty in this respect, as the learned resident magistrate has not stated what reasons put forward by the defendant he considered sufficient to justify the exercise of the court’s discretion in the defendant’s favour.”

Counsel also relies on the case where the court set out matters that a court will consider in deciding whether sufficient cause has been demonstrated or exists as set out herein below:

“(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.”

Mr. Kipkorir relied on another case of Keshavji Jethabhai & Bros, Limited v. Saleh Abdulla [1956] EA 260 for the proposition that hardship to a debtor might in some circumstances be taken into consideration and that the question for the court to decide is whether some indulgence can fairly be given to the debtor without unreasonably prejudicing the creditor.

I agree with the above proposition and with the *ratio decidendi* relied upon in the two cited cases. The Applicant has relied on three grounds as sufficient cause for the indulgence sought from the court in this application. The first is already stated above which is that the Applicant’s largest markets for tea are Afghanistan, Pakistan and Egypt and that two of these countries are going through a political turmoil which has prejudiced the Defendant’s tea export market.

The other ground argued is that the world is undergoing recession which has affected all sectors of the economy both within and without the country. The third ground urged is that the decretal amount being sought to be executed includes interest on the decretal sum, which has accrued since the arbitral award was filed. Mr. Kipkorir has urged the court to allow the application as the Applicant is willing to pay any lumpsum the court may order and thereafter the installments as proposed in the application.

As stated earlier, the Respondent has opposed the application. In answer to the issue of the accrued interest on the award, Mr. Mwaniki relied on section 26(2) of the Civil procedure Act and submitted that interest is provided for even where the decree is silent, and that the section provides that interest will be deemed to have been ordered even where the decree is silent. Mr. Mwaniki also submitted that the question of interest cannot be a ground for seeking leave to pay the decretal sum by installment. Mr. Mwaniki agreed that the criteria to be used by the court in determining the merits of the application are the ones laid down in the case of **Alidina**, supra. Counsel emphasized the four matters that must be considered by the court in deciding whether sufficient reason to grant the application exists, as set out in the cited case as above.

Mr. Mwaniki has urged the circumstances under which the debt was incurred. Counsel submitted that the debt was incurred as a result of services rendered to the Defendant by the Plaintiff in the year 2002. Regarding the conduct of the debtor, Mr. Mwaniki urged that after the award was given by the Arbitrator and after it was filed in court, and after the Applicant was informed of the said filing it did nothing filed separate suits which were subsequently struck out. Counsel urged that the Defendant eventually proceeded to the Court of Appeal on appeal, which appeal was also dismissed. Mr. Mwaniki urged the court to find that the Applicant's conduct has been very bad.

Regarding the financial condition of the debtor, Mr. Mwaniki urged that the Applicant has not placed before the Court any evidence to demonstrate its inability to pay the decretal amount. Mr. Mwaniki submitted that the Applicant could for instance have filed its latest audited accounts to prove its impecuniousness.

In a brief response to Mr. Mwaniki, Mr. Kipkorir submitted that a party has a right to appeal and that the mere fact the Applicant has gone to the Court of Appeal does not constitute an abuse of the court process. Mr. Kipkorir submitted that the appeal is still pending before the Court of Appeal and that what was dismissed before that court was an application for stay of execution pending the appeal.

I have considered the application and the submission made by counsels and the cases upon which they relied. The court has power under order XX rule 11 to allow an application for payment of the decretal sum in installments. Order XX rule 11(2) provides that the court can either grant the application for payment of the decretal sum by installments if the decree holder consents. In the absence of such a consent, the judgment debtor has to show sufficient cause for indulgence being shown to it as sought in the application.

I have considered the basis upon which the application has been made. The ground urged by the Judgment Debtor is that due to the economic slump in the world, the company is unable to pay the debt at once, and further that its main importers of the tea were Pakistan and Afghanistan, where there has been political and civil strife which has affected its export to these countries. The two grounds argued by the judgment debtor cannot be denied as they are of public notoriety.

In addition to these considerations, the court is required to consider the circumstances under which the debt was contracted, the conduct of the debtor, the financial position of the debtor and his bona fides. I have considered the submissions by Mr. Mwaniki in that regard. I have considered the circumstances under which the debt was contracted. The fact that this debt arises out of services rendered to the judgment debtor by the decree holder, the fact that this services were rendered in 2002, six years ago, the fact that the matter went for arbitration and that an award was made and registered in this court in 2007. All these are relevant facts.

The tenor of the submission by the decree holder seems to be based on suspicion that the judgment debtor is unwilling to settle the debt. This suspicion is informed by the conduct of the debtor in prolonging the matter by filing numerous applications and appeals in this court and in the Court of Appeal. It is not proof of unwillingness to pay a debt to file an appeal against a decision on a money decree as the judgment debtor has sought to do in this case. It is the Applicant's right to file an appeal in the matter however vexing it is to the Respondent. The bona fides of the Applicant can be determined by what it has offered to pay in the application for payment by installment. The Applicant has offered to pay

Kshs.500,000/- every month with effect from 30th May, 2009. The Applicant has also offered that in addition to the installments offered, it is willing to pay any lumpsum the court may order in order for the court to allow the payment by installment in the sums proposed in the application. I think that the Applicant is being fair and since it has not quoted any sum as the initial installment towards the debt, it has left the matter to the discretion of the court to decide. I do not see anything in this application that would prevent the court granting the prayers sought. In exercise of the court's discretion, I will allow the application on the following terms.

- 1. The application dated 12th May, 2009 be and is hereby granted.**
- 2. The Applicant/judgment Debtor do pay the sum of Kshs.10 million as the initial installment towards the decretal sum within 14 days from the date hereof.**
- 3. The Applicant/Judgment Debtor do pay Kshs.500,000/- with effect from 30th June, 2009 and thereafter on or before the 30th of each succeeding month until payment in full.**
- 4. In default of any one of the installments in (2) and (3) above, the Decree holder to be at liberty to execute.**
- 5. The costs of this application be in the cause.**

Dated at Nairobi this 12th day of June, 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Ms. Shalake holding brief Mr. Kipkorir for the Defendant/Applicant

Mr. Mwaniki for the Plaintiff/Respondent

LESIIT, J.

JUDGE