



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 322 of 2007

TARPO INDUSTRIES LIMITED.....PLAINTIFF

VERSUS

PICASSO PRODUCTIONS LIMITED.....DEFENDANT

RULING

The defendant filed an application purportedly under the provisions of Order XX Rule 11 (2), Order XXI rule 22 of the Civil Procedure Rules and Sections 3A and 63 (e) of the Civil Procedure Act seeking basically two orders from the court; the defendant sought an order of stay of execution of the decree herein pending the hearing and determination of the application. Its main prayer was for the court to allow it to liquidate the decretal sum in twenty four (24) monthly installments of Kshs.154,000/= with effect from the 30th June, 2008, until payment in full. The grounds in support of the application are on the face of the application. The defendant admits being indebted to the plaintiff to the sum of Kshs.3,688,285/= plus interest. The defendant contends that it is unable to pay the decretal amount at one go due to financial constraints that it was currently experiencing. The defendant was apprehensive that if the plaintiff was allowed to proceed with attachment, its goods of trade would be attached in execution of the decree and thus prejudice the defendant as a going concern. The application is supported by the annexed affidavit of Barrack Gogo, the Managing Director of the defendant company.

The application is opposed. Shafana Rajana, the General Manager of the plaintiff company swore a replying affidavit in opposition to the application. He first disputed the decretal sum as admitted by the defendant. He was of the view that if interest is added to the decretal sum, the amount owed by the defendant would be more than Kshs.3,800,000/=. He deponed that the court should not grant any indulgence to the defendant since the defendant had made no effort to settle the decretal amount since the said debt was incurred. He deponed that the defendant had been dishonest or conducted itself in a manner that would make this court doubt the defendant's capability to fulfill its commitment if the court were to favourably consider the application. He deponed that it would prejudice that plaintiff if the defendant is allowed to liquidate the decretal sum by paying monthly installments for a period of two years yet the plaintiff's claim was on the basis of purchase price for goods supplied at the request of the defendant in a one-off transaction. He took issue with the defendant's assertion that it was currently experiencing financial difficulty, yet when its business was robust, it made no effort to settle the debt owed to the plaintiff. The plaintiff was of the view that the application was made in bad faith and further that if the court were to grant the application by the defendant to pay the decretal sum of installments, it should order the defendant to make reasonable monthly installments, after first paying a substantial lumpsum of the decretal sum owed.

At the hearing of the application, I heard the rival arguments made by Mr. Onyango, on behalf of the defendant and by Mr. Mutua on behalf of the plaintiff. The issue for determination by this court is whether the defendant made a case to enable this court grant the defendant's application to pay the decretal sum in accordance to the proposed installments. Order XX Rule 2 (1) of the Civil Procedure

Rules grants this court discretion to order payment of decretal sums by installments. In particular Order XX Rule 11 (2) of the Civil Procedure Rules provides that: -

“After passing of any such decree, the court may on application of the judgment debtor and with the consent of the decree-holder or without the consent of the decree-holder for sufficient cause order that payment of the amount decreed be postponed or be made by installments on such terms as to payment of interest, the attachment of the property of the judgment debtor or the laying of security from him, or otherwise, as it thinks fit.”

This rule has been given interpretation by our courts. In Shakespeare Investments & Another vs Paul Kipsang Kosgei [2004] e K L R, Waweru J held at page 2 of his ruling at follows: -

“The judgment debtor seeks the indulgence of the court. He must show sufficient reason for the indulgence sought. In this regard, the court will take into consideration the particular circumstances of the case, including the financial position, the conduct and bona fides of the judgment-debtor. See the case of Alidina vs Alidina [1961] E A 565. The judgment debtors bonafides is the most important consideration when the court considers whether some indulgence can be fairly given to the judgment – debtor without unreasonably prejudicing the decree-holder. See also the case of Keshavji Jethabhai & Bros Ltd vs Saleh Abdulla [1959] E A 260.”

In the present application, the defendant pleads with court to allow it to settle the decretal sum by monthly installments of Kshs.154,000/=. The defendant's plea is premised on its assertion that its business has experienced a downturn and therefore it had become difficult for it to settle the decretal sum due at once. The defendant proposes to commence the payment of the decretal sum on 30th June, 2008. Its Managing Director deponed that it is confident that by that time, its business prospects would have improved. The plaintiff on the other hand, does not wish any indulgence to be given to the defendant. The plaintiff is of the view that the defendant is procrastinating and prevaricating from fulfilling its legal obligation to settle the decretal sum due. The plaintiff argued that it would be prejudiced if the defendant's application to pay by installment is allowed on the basis proposed by the defendant.

I have carefully considered the rival positions presented to me by the parties to this application. I have also taken into consideration the particular circumstances of this case. The defendant purchased goods from the plaintiff in December 2006. It paid for the said goods with cheques, which upon presentation, were returned unpaid. The defendant had in effect issued rubber cheques. The cheques bounced. Even after the plaintiff filed the present suit in June, 2007, the defendant made no effort to pay the decretal sum owed. To date, the defendant has made no single payment to the plaintiff. The defendant filed a defence denying that it owned the decretal sum to the plaintiff. The defendant only rushed to court when the plaintiff sought to execute against it. It is therefore evident that the defendant's conduct is not deserving of exercise of discretion in its favour by this court. However, this court has put into consideration that the defendant has now indicated its willingness to settle the decretal sum due. It has pleaded for the court to consider the economic circumstances currently prevailing in the country. This court is not oblivious of the economic circumstances currently prevailing in the country. This court is not unaware of the circumstances alluded to by the defendant. The court is willing to give the defendant indulgence under circumstances that will not prejudice or be unfair to the plaintiff.

I will allow the defendant's application to pay the decretal sum by installments but on the following terms;

(i) *The defendant will pay the plaintiff a lumpsum*

of Kshs.500,000/= on or before the 15th June,

2008.

(ii) *Thereafter, the defendant shall pay the balance of the decretal sum plus any accrued interest by monthly installments of Kshs.250,000/= with effect from the 15th July, 2008, and on*

each 15th of each succeeding month until payment in full of the decretal sum, interest and costs.

(iii) In default of any one payment, the plaintiff shall be at liberty to execute for the entire sum that shall be then outstanding without further reference to the court.

(iv) The plaintiff shall have the costs of this application.

DATED at NAIROBI this 21st May 2008.

L. KIMARU

JUDGE