

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc Appli 632 of 2008

MASORE NYANG'AU & CO.

ADVOCATES APPLICANT

VERSUS

KIARIE KAMERE & CO. ADVOCATES.....RESPONDENT

R U L I N G

Before me is an application by the Respondent made pursuant to the **provisions of Order XX1 Rule 1 and Order XX Rule 11 of the Civil Procedure Rules**. The respondent seeks two orders from the court; firstly, that he be granted temporary stay of execution of the decree here in pending the hearing and determination of the application and secondly, that the court be pleased to order that the defendant pays the decretal sum by monthly installments of KShs.50,000/= until the payment in full of the said amount due and owing from him to the applicant. The grounds in support of the application are on the face of the application. The respondent states that he is an advocate of humble means and is therefore unable to pay the decretal sum in one lump sum. The defendant pleads to be allowed to pay the decretal sum in the proposed monthly installments. He stated that if execution is levied against him, he would be rendered destitute since the operations of his law firm would be drastically affected. The respondent stated that the court should favourably consider his application in view of the fact that he was a victim of circumstances. The application is supported by the annexed affidavit of Joakim Kiarie Kamere, the respondent.

The application is vehemently opposed by the applicant. The applicant filed grounds in opposition to the application and a replying affidavit in further opposition to the application. In the grounds of opposition, the applicant stated that the application was incompetent since the prayers sought therein could not be granted under the rules that the application is sought. The applicant complained that there had been inordinate delay in the making of the application. The applicant contends that the application was incompetent in the manner in which it had described the parties to the application. He observed that the application was neither drawn nor signed by the advocate on record. The applicant was of the view that the application was supported by an affidavit that contained falsehoods.

In the replying affidavit, Leo Masore Nyang'au, the proprietor of Masore Nyang'au & Company Advocates swore that the application was unmerited since the respondent was a man of means who had filed the application in order to frustrate him from being paid his fees. He deponed that the respondent had opted to pay his legal fees instead of allowing his erstwhile clients to pay the same upon the said clients offering to settle the same on his behalf. He swore that the respondent had been paid the said legal fees by his clients but had refused to transmit the same to him. He deponed that the respondent failed to disclose his properties or his bank statements in support of his assertion that he was a man of humble means who could not be able to pay the decretal sum in one lump sum. He was of the view that the respondent had filed the application with the ulterior motive of coercing him into sharing part of the legal fees due to him on account of the work that he had undertaken. He deponed that the application was made in bad faith since the respondent made no effort to pay the decretal amount even after the applicant had attempted to execute for the same. He urged the court to disallow the application.

At the hearing of the application, I heard the rival submissions made by Mr. K'Ouna for the respondent and by Mr. Nyang'au for the applicant. I have carefully considered the said submissions. I

have also read the pleadings filed by the parties in support of their respective opposing positions. Certain facts are not in dispute in this application. It is not disputed that the respondent owes the applicant the sum of KShs.1,555,787/=. The said sum is the applicant's taxed costs. Indeed, the said applicant's costs were taxed by consent of the applicant and the respondent. The respondent made an application to the court to be allowed to pay the said decretal sum by monthly installments of KShs.50,000/= until payment in full. The respondent explained that he was a man of humble means and was therefore not able to pay the said decretal sum in one lump sum. The applicant gave history of how the respondent thwarted his effort to obtain the said legal fees that are due to him. The applicant was of the view that the application had been made by the respondent purposely to frustrate him from enjoying the fruits of his judgment.

I considered the grounds placed before the court by the respondent in support of his assertion that he was a person of humble means. What is interesting is that the applicant failed to annex any document to support his claim that he was a man of humble means. He failed to annex any bank statements in support of his contention that he is unable to pay the decretal sum in one lump sum. **Order XX Rule 11(1)** of the **Civil Procedure Rules** grants this court discretion to order the payment of the decretal sum to be postponed or to be paid by installments. There is however a caveat: such an applicant must establish sufficient reasons in order for the court to invoke its jurisdiction in his favour.

In the present application, other than asserting that he was a man of humble means, the respondent placed no evidence before the court to support his claim that he was a person who is unable to settle the decretal sum in one lump sum. It is interesting that the respondent refused to allow the applicant to execute against his former clients for the said decretal sum. The respondent on his own volition undertook to settle the amount due to the applicant. On evaluation of the facts of this application, I am inclined to believe the submission made by the applicant that the respondent had indeed been paid the said legal fees by his former clients. It is evident that the application to pay the decretal sum by monthly installments of KShs.50,000/= was made in jest. It was not a serious proposal since if the court was to allow the application, the respondent would take more than three years to settle the said decretal sum, not taking into consideration the interest and costs that would have accrued by the time.

However, considering the economic circumstances that currently exists in the country, I will reluctantly grant the respondent's application to pay the decretal sum by the following installments:

- (i) The respondent shall pay the applicant the sum of KShs.500,000/= within fourteen (14) days of today's date.
- (ii) Thereafter, the respondent shall pay to the applicant the sum of KShs.200,000/= on each month beginning 5th December 2008 until the payment in full of the decretal sum, interest and costs.
- (iii) In default of the payment of any one installment due, the applicant shall be at liberty to execute without further reference to this court.
- (iv) Stay of execution of the decree herein is granted pending the payment of the decretal sum by the respondent in the installments decreed by this court.
- (v) The applicant shall have the costs of this application.

DATED at NAIROBI this 5th day of NOVEMBER, 2008.

L. KIMARU

JUDGE