



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

Civil Case 73 of 2004

DALBIT PETROLEUM LIMITED.....PLAINTIFF

VERSUS

MARTIN GACHERU.....DEFENDANT

RULING

The Chamber Summons herein, dated 7/12/04, under order 20 rule 1192) and 20, Order 21 rule 22 of the Civil Procedure Rules, Section 3A of Cap. 21, Laws of Kenya

s the following orders:

- a) Already spent
- b) The Defendant be allowed to liquidate the decretal sum of K.Shs.3,302,300/- by way of monthly instalments with a provision for review of the sum payable as follows:
 - i) K.Shs.50,000/- per month from 15/12/04 and each consecutive month upto and including 15/5/05.
 - ii) K.Shs.200,000/- per month from 15/6/05 and each consecutive month until 15/12/05
 - iii) From 15/12/05 to be reviewed upwards.
- (d) Costs to be provided for.

The application is on the grounds, *inter alia*, by consent judgment was entered for the Plaintiff and against the Defendant for K.Shs.3,203,000/- the Defendant is incapable of settling the decretal amount at once due to unforeseen financial constraints; the Defendant is and has always been willing to liquidate the sum agreed upon in instalments; the Plaintiff has rejected the Defendant's offer.

The application is supported by Martin Mwangi Gacheru's Affidavit.

In opposition the Respondent aver, *inter alia*, that: the applicant is not keen to liquidate the debt at once as he has other assets; that the proposed instalments would take too long to clear the debt which is detrimental to the Plaintiff's business; there was no agreement that the Plaintiffs and Defendants contractual obligations would be pegged on the conduct of other third parties; the applicant's life style is luxurious and should not maintain such lifestyle at the expense of the Respondents.

After very careful consideration of the pleadings herein, and consideration of the submissions of the counsels for both sides, I have reached the following findings and conclusions; Order 20 rule 11(2) of the Civil Procedure Rules under which the application is brought provides as under:

“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 instalments 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 Decree-holder has not consented to the settlement of the sum by way of instalments, if anything, if the Respondents case that the judgement-debtor/applicant just lacks the commitment to clear the sum, even at once.

The Applicant does not dispute the sum claimed, nor indeed the interest charged. His claim of incapacity to pay the decretal sum at once, is not altogether anything to inspire a smile, and by and large fails to meet what the Respondent –Decree holder calls both faith and want of commitment to pay.

I largely buy the sentiments by the decree-holder. This is on the following grounds:

Looking at what I may, for lack of better term, statement of affairs of the judgment-debtor/applicant, there is no evidence that he is taking any steps to pursue his own debtors from whom he can recover sufficient funds to clear the claim by the Plaintiff. It is a very poor excuse for a debtor to tell his creditor that “I cant pay you now because I have other creditors whom I must also pay.”

The Plaintiff – decree holder is in all honesty a third party/stranger to whatever other creditors he owes any money.

Secondly, my examination of the applicant’s statement of affairs shows that the applicant lives far beyond the expected standard of lifestyle of any debtor. Serious debtors go even to the extent of relocating their kids from expensive to moderate or average schools. The applicant wants to maintain his pre-debtor standard of life. That is his choice, but not at the expense of his Creditor – Decree holder.

I have noted that at the proposed instalment rates, it will take years to settle the sum owed to the Decree holder. The same has been outstanding for quite a while now.

Taking everything into account, I have concluded, and hold as follows:

1. I grant prayer No. C in the application subject to the following terms;

The decretal sum of K.Shs.3,302,300/- be paid as per the following monthly instalments.

(a) K.Shs.75,000/- per month starting on 15/12/04, and thereafter every 15th day of subsequent months up to 15/5/2005.

(b) K.Shs.250,000/- per month from 15/6/2005 and every 15th day of every subsequent month up to 15th December, 2005.

(c) K.Shs.225,383/70 per month from 15th January 2006 up to 15th June, 2006.

2. The above sum, that is K.Shs.3,302,300/- to be paid with interest at the court rates effective from 15/12/04 till payment in full.

3. I make no orders as to the costs of this application.

Finally, while exercising my discretion, this discretion, as per the forementioned order and rule, is not unfettered. It is subject to sufficient cause being shown. I have also taken into account that the decree-holder is also a business entity, entitled to at least a return of its costs of investment, even if not that much profit margin.

DATED and delivered in Nairobi, this 21st Day of March, 2007.

O.K. MUTUNGI

JUDGE