

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 106 of 2003

NJERI ONYANGOPLAINTIFF

VERSUS

PATRICK MUSIMBA.....DEFENDANT

RULING

This is an application by the defendant for stay of execution and payment of the decretal amount by reduced installments of KShs.20,000.00 instead of KShs.50,000.00 ordered by Mutungi J on 27.5.2005. The application is expressed to be brought under the provisions of Order XLIV Rule 1 of the Civil Procedure Rules Section 3A of the Civil Procedure Act and all other enabling provisions of the Law.

The application is based primarily on the reasons that he is not in arrears of the installments ordered by Mutungi J and that he is now unable to continue paying KShs.50,000.00 as ordered. The application is supported by an affidavit sworn by the defendant in which it is deponed that one of his businesses was placed under receivership thereby drastically reducing his income. His surviving business has not picked up sufficiently to generate income. It is also deponed that he owes M/S Daima Bank Limited KShs.12,900,364.75 with interest payment of which sum he is negotiating. Because of those circumstances, the defendant deponed that he is unable to pay the decretal amount in the installments ordered by Mutungi J.

The application is opposed and the plaintiff has filed a replying affidavit. The plaintiff contends that the application was designed to pre-empt the Notice To Show Cause which had been listed for hearing on 10.5.07 and was therefore brought in bad faith. It is also her further contention that the defendant has been in default of the order to pay by installments and no new circumstances have arisen to warrant the review sought. In her view it would take an inordinately long period to settle the decretal amount if the installments sought are allowed.

I have considered the application and the affidavits filed by both sides. I have also considered the rival submissions of the counsels appearing. Under Order XX Rule II (2) the Court has a discretion to postpone payment of the decretal amount or order payment of the same by installments. That is the discretion my colleague Hon. Mutungi J exercised on 27.5.2005. So what does the defendant say has happened to warrant the review sought. He says one of his businesses has been placed under receivership by M/s Fidelity Commercial Bank Limited. No material has been placed before the court to support that averment. He also says that he owes M/S Daima Bank KShs.12,900,364.75 and a judgment for that sum together with interest was entered against him on 1.7.2003. Again, no documentary evidence has been furnished to the court to support the position. In any event even if such a judgment was indeed entered against the defendant on the date alleged, it was a liability that the defendant was aware of when he lodged his earlier application to be allowed to pay by installments on 27.4.2004. Yet the defendant did not mention the liability before Mutungi J in the said application.

In view of the above, I find and hold that the defendant has not satisfied any of the conditions for the grant of a review under Order XLIV Rule 1 of the Civil Procedure Rules. The sum due is in excess of KShs.4,000,000.00. The installments ordered by Mutungi J of KShs.50,000.00 per month will still keep the plaintiff out of her money for a long time. I must in the circumstances refuse the application for review of the installments.

With regard to the prayer for stay of execution, I am inclined to allow the same in view of the fact that

the defendant has paid KShs.1,220,000.00 as at 4/4/07. The defendant shall therefore continue payment of the decretal amount together with interest as ordered by my Brothers Mutungi J and Ochieng J.

So save for the order of stay of execution, this application is declined. The defendant shall pay the plaintiff's costs of this application.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JUNE, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mungai for the plaintiff.

F. AZANGALALA

JUDGE

11/6/07