



REPUBLIC OF KENYA

HIGH COURT OF AT NAIROBI (MILIMANI LAW COURTS)

Civil Case 1311 of 1999

DECEMBER HOTELS LTD.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD.....DEFENDANT

RULING

By virtue of an Electricity Supply Contract No. 0180740-01 entered by and between the Plaintiff and the defendant, the Defendant agreed to and did supply electricity to the Plaintiff. On 14th April 1999 the Defendant issued a bill to the Plaintiff claiming a sum of Shs.1,765,222.60 allegedly from previous billings over unspecified period and threatened to disconnect electricity supply to the Plaintiff. The Plaintiff filed this suit seeking the following orders:-

- (a) A declaration that the Plaintiff had fully paid to the Defendant for all the electricity consumed upon the Defendant's supply of the same to the Plaintiff.
- (b) An injunction restraining the Defendant by itself, or its employees or servants or agents from disconnecting electricity supply to the Plaintiff pursuant to the supply contract.
- (c) The Defendant be ordered to furnish the Plaintiff with proper bills by excluding any alleged consumption for the period on or before 8th March 1999.
- (d) Costs of the suit and interest.

The Defendant upon being served with summons filed a defence denying the Plaintiff's claim and filed a counter-claim claiming a sum of Shs.1,776,222.60. Thereafter the parties initiated negotiations for out of court settlement and on 22nd November 2006 they recorded the following consent order.

“By consent –

- (1) Plaintiff's claim against the Defendant be and is hereby marked as withdrawn.
- (2) Let there be judgment for the Defendant against the Plaintiff in the sum of Shs.1,776,222.60 as prayed in the counter-claim together with interest thereon calculated at the rate of 6% per annum from 9th October 2001 until payment in full. The

Defendant is entitled to the costs of the counter-claim.

The same to be agreed upon failure of which the same be taxed.

On 8th February 2007 the Plaintiff filed this application by way of a Chamber Summons under Order XX Rule 11 (2) and Rule 20 of the Civil procedure Rules and section 3A of the Civil procedure Act for orders that the Plaintiff Judgment-debtor be allowed to effect payment of the decretal sum by monthly instalment of Shs.50,000/= and that costs be costs in the cause.

The application is based on the grounds that the debt the subject matter of the suit herein and of which judgment has been entered against the Plaintiff was incurred before the present directors took over the management of the Plaintiff/Judgment-debtor company that the Plaintiff/Judgment-debtor is currently experiencing a difficult financial period and therefore unable to effect payment of the decretal sum in lump sum.

The Plaintiff/Judgment-debtor is ready and willing to effect payment of the same by monthly instalments of Shs.50,000/= and that it would be fair and in the interest of justice if the Plaintiff/Judgment-debtor were allowed to effect payment of the decretal sum by monthly instalments.

The application is also supported by an affidavit sworn by Lucy Kariuki on 31st January 2007 in which she avers on similar facts as those contained in the grounds. The application is opposed by the Respondent who has filed a replying affidavit sworn by Awuor Owiti on 9th May 2007. Miss Njoroge learned counsel for the Applicant submitted that the business was run down by the previous management and that judgment was entered by consent on 22nd November 2006. She further submitted that if the application to effect payment of the decretal sum by monthly instalments of Shs.50,000/= is allowed it will enable the Plaintiff to sustain her business and be able to repay the debt. Miss Kimotho learned counsel for the Respondent opposed the application on the ground that allowing the Applicant to effect the payment of the decretal sum by monthly instalments of Shs.50,000/= is allowed it will take the Respondent 4 years to recover the debt and she further submitted and proposed that a monthly instalments of Sh.100,000/= would be acceptable.

This application is brought under O.XX Rule 11 (2) which provides:-

“2’ After passing of 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 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 court has discretion to order payment by instalments but that discretion to order payment of the decretal amount in instalments is one which must be exercised in a judicial and not an arbitrary manner.

It is for the Defendant to show **“sufficient reason”** for indulgence being shown to him. The powers given to the court should be exercised with due consideration for the interest of the creditor as well as those of the debtor.

Miss. Kimotho referred the court to the case of **ALIDINA VS. ALIDINA 1961 EA 565** at page 566 where the court considered the matters which should be considered by a court in deciding whether or not **“sufficient cause”** exists.

These are:

- (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.

If these tests are applied to the Applicant, it will be seen that he does make a good impression. Judgment was entered by consent and he has proposed to liquidate the decretal amount by instalment and the Respondents is agreeable only if the monthly instalments are increased to Shs.100,000/=.

I allow the Plaintiff's application and order that it be allowed to effect the decretal amount by monthly instalments of Sh.60,000/= with effect from 1st August 2007 until payment in full. There will be the usual default clause and the Respondent retains the right to apply for the instalments to be revised. The Respondent will have the costs of this application.

Dated and delivered at Nairobi this 13th day of July 2007.

J.L.A. OSIEMO

JUDGE