



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

MISC CIV APPLI 439 OF 2003

RUSTAM HIRAI ADVOCATEAPPLICANT/RESPONDENT

VERSUS

DANIEL FRANCIS EIFFEE.....1ST RESPONDENT/APPLICANT

SUMIA MOHAMED KHALIL.....2ND RESPONDENT/APPLICANT

RULING

The application before the court is dated 4.10.07. The applicants Daniel Francis Eiffee and Sumia Mohamed Khalil seek a stay of execution of a decree arising from the taxation of an advocate's bill of costs as between the Advocate and themselves as his clients. The applicants also seek an order of this court that they settle the decretal sum amounting to Kshs.391,795/- as of 1.10.2007, by monthly instalments of Ksh.50000/- with effect from 30.10.2007. Finally the applicants also seek that the court orders the release of a motor vehicle Registration Number KAN 250V together with the household goods attached by Marchet Auctioneers on behalf of the decree holder/respondent herein.

The background facts as far as this court understood them are that the decree holder, Mr. Ruslam Hira, advocate, represented the applicants herein in Nairobi High Court Civil suit No. 2037 of 1994 in which they were the plaintiffs. They lost the case to the defendants therein on issues and facts, which the applicants thereafter felt should have been within the legal knowledge of the decree holder who should have then advised the applicants not to file the case. This apparently left a bitter taste in the mouth of the applicants against the decree holder.

In the meantime the decree holder filed his advocate-client bill of costs in court and it was taxed inter partes on 7.7.2004. A sum of Ksh.256,732/- was allowed and certificate of taxation dated 1.9.2004 was issued. This sum together with interest thereon was adopted as a judgment of court through a relevant application dated 24.3.2005, on 15.1.2007. A draft order sent to the judgment debtor's advocate for approval with or without amendment had not been returned to the decree-holder. The result was that the decree-holder had the Order sealed without amendment.

It is further in the record that costs for adopting the taxed costs into executable judgment were also taxed on 6.3.2007 and added to the judgment already entered for the decree holder. The result was that the final sum with interest, due to the decree holder grew to Ksh.386,431/65, in respect of which sum the decree holder applied for execution by the attachment of judgment debtor's movable properties on 23.8.2007. A proclamation was served upon the judgment-debtor on 21.9.2007 showing that a motor vehicle registration No. KAN 250V and other properties were attached.

It was the above attachment that prompted this application which effectively seeks release of all the attached property to the judgment-debtors and an order allowing them to pay by monthly instalments of Ksh.50,000/- with effect from 30.10.2007. The judgment debtor also seeks a stay of execution of the decree and all orders issued herein consequent and subsequent to the execution.

In the supporting affidavit the judgment debtor depones that he was not served with the proclamation since the same was by the Decree holder's admission served on one Crispin Kodi. He denies further that he was aware of the judgment and the resulting decree since he was away in Southern Sudan, until he was lately made aware of it by his advocates. The judgment debtor further complains that there was no proclamation served before attachment was made. He fears that the properties attached and taken away may be undersold unless they are released to him. He claims that the decree-holder does not stand to suffer any prejudice if the orders sought are granted.

The decree-holder opposes this application. He depones that while service of the proclamation was made upon one Crispin Kodi, the judgment Debtor has not denied that the latter was found at his premises and served. He argued that the said Kodi was not made to swear any affidavit to deny service or that he did not deliver the proclamation documents to the Judgment debtor.

Further, the decree holder observes that the applicant/Judgment debtor lives and works in Sudan and that, therefore it will be impossible to succeed in execution if the attached goods are released to him. Also that Judgment Debtor failed to reveal his monthly income or his earthly properties which would serve as a security or assurance that he will honour any payments by instalments.

The decree holder further deponed that the judgment debtor was aware of taxed fees since 26.5.2003 when the Bill was served upon his advocates. That the application to execute the resulting decree was to the knowledge of the Judgment Debtor's advocates since 13.12.2006 after being seriously contested. That no step was taken by the decree-holder without the same being contested and that therefore the argument that the judgment debtor was not aware did not arise. That in any case the decree holder wrote again on 9.3.2004 seeking settlement or face execution.

The decree holder further argued that the judgment debtor/applicant was always unwilling to settle on the ground of bitterness by him on the basis that he lost the case in which the decree holder represented him. For that reason, he fights to avoid paying the fees due to the latter, it was claimed.

I have carefully considered the application before me. One thing that is clear is that this court will not be drawn into the fighting field between the parties. Whether or not the decree holder failed to properly and without negligence, represent his clients the judgment debtor is an issue, which is not before the court. The judgment debtor, in my view has an obligation to settle his indebtedness to the Decree-holder on a properly arrived at decree of this court. He has applied to settle it by instalments of Ksh.50000/- per month. He prays that the attached property be returned to the judgment debtor if the court grants payment by installment.

I do not accordingly understand why the judgment debtor would seek a stay besides the orders of court's indulgence abovementioned.

The main issue is whether the court has power to grant the judgment debtor's prayer to settle by instalments.

Order 20 rule 11 of the Civil Procedure Rules states thus:-

“Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.”

It is my view that such jurisdiction of the court extends to any time the discretion is brought before the court for exercising of it. In other words the power of court to indulge the judgment debtor to settle by instalment, can be exercised at any time it is brought before the court as an issue. In the present case the issue has been brought before the court through this application. The court in my view, has power to exercise it provided that the applicant/judgment debtor proves sufficient reason.

What is “*sufficient reason*” then? In my view “*sufficient reason*” would require that the power and discretion of the court to decide whether or not it should allow the judgment debtor to pay by instalment, should be exercised with due consideration for the interest of the creditor as well as those of the judgment debtor. In Woodroffe and Amir Ali’s Civil Procedure in British India (2nd edition at page 86a) the writer gives the following facts as the ones to be taken into account when deciding “*Sufficient reason*”

- a) The circumstances under which the debt was contracted,
- b) The conduct of the judgment-debtor,
- c) The judgment-debtor’s financial position, and
- d) The judgment-debtors bona-fides in offering to pay a fair proportion of the debt at once.

In my view the above factors are supposed to be brought to the attention of the court by the judgment-debtor with a view to convince the court to exercise its power and discretion in his favour. As put in **ALIDINA v ALIDINA** (1961) E.A., 565 at 566:-

“It is for the defendant to show “*sufficient reason*” for indulgence being shown to him...”

and immediately earlier on the same page

“All commentators on the Civil Procedure Code agree that the court’s discretion to order payment of the decretal amount in instalments is one which must be exercised in a judicial and not an arbitrary manner. The onus is on the defendant to show that he is entitled to indulgence under this rule”

How do I apply the above principles to the facts of this case?

I have carefully considered the facts deponed and argued in this case by both sides. Clearly there is animosity between the parties herein. The Judgment debtor has always felt that the decree holder did not give his best professional services as his advocate when he filed and conducted judgment debtor’s case which the latter lost with the attendant loses. The facts that I accept are that he was not, after losing the case, willing to meet the decree-holders fees. The judgment debtor openly expressed this, even during the hearing of this application.

Nevertheless, the judgment debtor in my view, should not have expected to settle the score by refusing to settle the fees due to the decree-holder. If he felt so strongly about it, as he expressed before me, he should have sought recourse by filing a case for professional negligence.

Secondly, once the decree-holders fees were adopted as a judgment of this court and became liable to be executed as any other decree, the applicant/judgment-debtor should have expected execution to follow. It is not denied that the sum due lay in existence with full knowledge of the same by the judgment debtors advocates since 2004. It cannot, therefore be easily believable that judgment debtor’s advocate failed to inform his client of the position. In any case the advocate’s knowledge would in this case be imputed to his client.

Touching on the conduct of the Judgment debtor, this court made the conclusion that for the reason earlier given, the judgment-debtor has never been willing to settle the decree-holder's fees. That also explains why probably, the decree-holder had to go all the way to execution to recover the sum due. This raises the question as whether the offer to settle by monthly instalments of Ksh.50,000/- is genuine and bona fides and whether the applicant intends to honour it to the end.

If the past conduct is anything to go by, this court finds it difficult to believe that the applicant will honour his proposal if accepted. Indeed, the applicant did not as well make an offer of payment of a fair proportion of the debt due. Nor did he reveal his financial ability to pay month after month for about eight months which it will take to settle the sum due.

In exercising this discretion, it is necessary to take into account the interest of both the judgment debtor who is seeking indulgence and the decree-holder who stands to lose the opportunity to recover what has become his right and therefore his property. The applicant deponed that he presently conducts business or works for an employer in Sudan where he resides. What would happen if he disappears to Sudan with the attached motor vehicle and other properties if released to him and refuses to honour the monthly instalment payment? He will be out of jurisdiction, and this court will do nothing, especially since he did not offer any security to which the decree-holder could turn to.

I have anxiously considered this case. I am perturbed that the judgment debtor revealed very little by which this can exercise its power and discretion in his favour under Order 20 rule II aforementioned. His past attitude about settling the amount which happens to be an advocate's fees for services rendered, does not also help the applicant. Nor does his attitude in fighting out every step to recover the amount taken by the decree-holder.

Doing the best I can under the circumstances before me, I will allow the applicant to settle the sum due by reduced instalment after he pays a fair proportion of the debt due.

ORDERS

1. The applicant/judgment debtor to settle the sum due of Kshs.391,795/- by immediately paying to the decree-holder a sum of Kshs.150,000/- on or before 30.11.2007.
2. The balance which will be Ksh.241,795/- with interest thereof to be settled, by three equal instalments of Ksh.81000/- on 30.01.2008, 28.02.2009 and 30.3.2009.
3. That on payment of the sum of Kshs.150,000/- on 30.11.2007, the applicant shall also at the same time, settle the auctioneer's fees which shall nevertheless be agreed upon or taxed by the Deputy Registrar on or before 30.11.2007.
4. That the auctioneer shall forthwith release to the judgment-debtor/applicant, the motor vehicle registration No. KAN 250V, together with every item attached and being in the custody of the auctioneer, on payment of the said sum of Ksh.150,000/- plus the auctioneer's fees as agreed on or taxed.
5. In default of any of the above conditions being complied with as stated on the part of the judgment-debtor to be complied, the decree holder to proceed with execution.
6. Costs of this application to the decree-holder, to be agreed upon or taxed.

Dated and delivered at Nairobi this 7th day of November 2007.

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D A ONYANCHA

JUDGE