



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

Civil Suit 439 of 2005

**TREADSETTERS TYRES LIMITED.....
.....PLAINTIFF**

VERSUS

**UNISTAR AUTOPARTS LIMITED.....
.....DEFENDANT**

R U L I N G

The parties on 12th January 2006 entered into a consent whereby judgement was entered in favour of the plaintiff for shs 2, 409, 270 and whereby the defendant was to pay the decretal amount by monthly instalments of kshs 500, 000 with effect of 15th January 2006, and thereafter on the 15th day of each subsequent months until payment in full.

The defendant made payment of the first instalment and thereafter defaulted. As a consequence of that default the plaintiff put in motion the execution process and has attached two vehicles belonging to the defendant.

The defendant has now moved this court by a Notice of Motion brought under Order XXI Rule 22 (1) and (2) seeking an order: -

“That the defendant do liquidate the decretal sum by payment of equal monthly instalments of kshs 100,000/-.”

The defendant’s application is based on two grounds.

The first is that the defendant has experienced financial difficulties in payment of the agreed amount. This ground was attacked by the plaintiff on the basis that the defendant failed to attach financial statements to prove such hardship.

The second ground was that the attachment of defendant’s assets was irregularly effected. The defendant argued that the plaintiff did not proclaim before attachment of goods. To this the plaintiff responded by annexing the proclamation dated 24th May 2006, to the replying affidavit. The defendant again argued that the decree, hereof, was issued before taxation. That decree captured the consent judgment of the parties.

The defendant submitted finally that the court should exercise its discretion and reduce the amount payable by instalments by the defendant, to kshs 100, 000/-.

Plaintiff submitted that the defendant's application is fatally defective, incompetent and bad in law because it had been brought under the wrong provision of the law. The plaintiff said that the application should have been moved under Order 20 Rule 11 since it was seeking for an order for payment by instalment. Additionally the plaintiff submitted that the defendant had failed to show sufficient reason why the court should order the payment of the decretal amount, by monthly instalments. In that regard plaintiff relied on the cases:

- RAJABALI – V – REMTULLA ADIDINA & ANOTHER [1961] E.A. 565, and
- KESHAVJI JETHABAHAI & BROS LTD – V – SALEH ABDULLA

I have considered the arguments made before me. I do agree with the plaintiff that the defendant ought to have placed his financial statements before court to prove that it is under going financial difficulties. On the alleged irregularities on the process of execution I find that there is no basis for the same. The decree represented the consent, which was entered into between the parties. That consent provided for judgment to be entered in favour of the plaintiff for kshs 2, 409, 270/- plus interest and costs to be agreed or taxed. Those costs were subsequently agreed and I find that it is after they were agreed that execution was started. The averments that the defendants goods were proclaimed on 24th May 2006 was not countermanded by the defendant and must therefore be accepted as true. The said proclamation goes to disprove the allegation by the defendant.

I am however of the view that above all the most important consideration is whether the defendant can obtain an order to review the instalments agreed. In other words can the court over look the consent of the parties. The answer is to be found in a court of appeal decision of MUNYIRI – NDUNGUYA [1985] KLR 370. The holding there was:

“The remedy that was open to the parties was to set aside the consent order either by review or by the bringing of a fresh suit as a court can only interfere with a consent judgement in such circumstances as would afford a good ground for varying or rescinding a contract between parties.”

The defendant has not laid a basis for interfering with the consent judgement entered into between the parties. The defendant has not shown there was misrepresentation by the plaintiff or any other ground that would justify to interfere with a contract.

The court finds that the application cannot on that ground be granted. The fact however that an application is brought under the wrong rules is not reason enough to disallow an application, that is, so long as there is no prejudice suffered by the opposite side.

The order of the court is that the Notice of Motion dated 20th June 2006 is hereby dismissed with costs to the plaintiff.

Orders accordingly.

MARY KASANGO

JUDGE

Dated and delivered this 28th June 2006.

MARY KASANGO

JUDGE