



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1159 of 2000

**J.V. HONGO T/A HONGO & ASSOCIATES.....PLAINTIFF/DECREE
HOLDER**

VERSUS

JOEL E.D. NYASEME

**T/A JOEL E.D. NYASEME AND ASSOCIATES.....DEFENDANTS/JUDGMENT
DEBTOR**

RULING

This is an application expressed to be brought under the provisions of Order XXI Rule 22, Section 3A of the Civil Procedure Act and all enabling provisions of the Law. Prayers 1 and 2 are spent. This ruling is therefore in respect of prayers 3, 4, 5 and 6 of the Chamber Summons dated 28th November 2003. The Defendant is the Applicant and seeks the following orders:

- (3) That the Prohibitory Order and the Inhibition registered against NAIROBI/BLOCK 90/221 be raised lifted or discharged.
- (4) That the judgment debtor be allowed to liquidate the balance of the decretal amount in installments.
- (5) That the Applicant be allowed to sell NAIROBI CLOCK 90/221/and utilize part of the proceeds to pay another deposit of Kshs 400,000/=.

The application is made on the following main grounds:

- (a) That the Applicant has a buyer for the said property and therefore will be able to honour his proposal.
- (b) That if the Prohibitory Order is not lifted the Applicant cannot be able to meet his proposal
- (c) That there are various projects which the Applicant is undertaking and is optimistic that given the

opportunity he will be able to pay the decretal sum by installments.

The Applicant has filed a supporting affidavit and in it depones that in addition to other debts he has 2 children in the United States who depend on him. He further depones that his debtors have delayed to pay him and that given the opportunity to sell the said property he will endeavour to honour Court orders that may be issued.

The application is opposed and the Plaintiff has filed a replying affidavit in which he has given a detailed account of this case and prays that the Defendant is undeserving of the orders sought.

The application was canvassed before me on 23rd November, 2004 by Mr. Ojienda Learned Counsel for the applicant and Mr. Amolo Learned Counsel for the Respondent. Mr. Openda recited the facts in the supporting affidavit and urged me to allow the application.

Mr. Amolo vehemently opposed the application and he too recited the facts in the replying affidavit and emphasized that on the material before the Court the Applicant was undeserving of the prayers sought. He said so mainly in the light of the cause of action, the antecedent behaviour of the applicant and the delay in bringing the application. He urged me to dismiss this application with costs.

I have now considered the application; the affidavits, the annexures and the submissions of counsels appearing. Having done so I take the following view of the matter. The cause of action arose from payment of fees by M/S Victoria Commercial Bank Ltd to the Applicant for services rendered by the Plaintiff way back in the year 1995. The Applicant failed to remit the fees to the Plaintiff/Respondent; hence this suit. I have perused the judgment of my brother Osiemo J. delivered on 25th June 2002 in which he observed that in cross examination; the Applicant said that he had made proposals of how to liquidate the decretal amount through his lawyers but he did not know why the suit proceeded to hearing. If this was true why make the present application?

The supporting affidavit of the Applicant has interesting revelations. At paragraph 6 of the said affidavit the Applicant depones that he had instructed his advocate to offer a proposal for payment of the decretal sum by a deposit of Kshs 400,000/= at once and thereafter Kshs 200,000/= monthly with effect from the end of January 2004. A simple calculation shows that if these payments had been made the Applicant would have paid about Kshs 2,400,000/= by now.

At paragraph 10 of the said affidavit the Applicant depones that he had received an offer to sell the property in question and the letter of offer annexed to the said affidavit shows that the price offered was kshs 2,200,000/=. Yet the Applicant proposes to pay to the Respondent Kshs 400,000/= from the proposed sale and then seeks to be allowed to pay the balance by installments of Kshs 200,000/= presumably from other sources. No single payment from these other sources has been made to the Respondent since.

The Applicant seeks the indulgence of the Court. Under Order XX Rule 11 (2) the Court has a discretion to postpone payment of the decretal amount or order payment of the same by installments. This discretion is however not unfettered. The Applicant must show sufficient cause. This requirement in my view is not the only requirement to be fulfilled. The Court will also take into account the conduct and bona fides of the applicant. I entirely agree with the submission of Counsel for the Respondent that the applicant has not shown sufficient cause for the Court's discretion to be exercised in his favour. His conduct as shown above has not been entirely without blame. He is unworthy of any indulgence by the Court.

In the result the judgment debtors application dated 28th November, 2003 is refused. It is hereby dismissed with costs.

Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JANUARY, 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-