



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL DIVISION – MILIMANI**

**CIVIL CASE NO. 528 OF 2003**

**ADDAH KISAI WAKESHO.....PLAINTIFF**

**VERSUS**

**STANLEY WAMWANDU MWAWASI.....DEFENDANT**

**RULING**

This is an Application by the Defendant for stay of execution and payment of the decretal amount in instalments of Kshs 50,000/= per month until payment in full. The Application has been brought under the provisions of Order XX Rules 11 and 20 of the Civil Procedure rules and Section 3A of the Civil Procedure Act.

The only reason for the Application for payment by instalments is the Defendant's financial constraints and consequential inability to liquidate the decretal amount by a single payment. The Application is supported by an affidavit sworn by the Defendant in which he has deponed that he is a civil servant and earns a net salary of Kshs 30,944/=. He has also averred that he is a director of Elkay Holdings Limited in which he invested the sums advanced to him by the Plaintiff. He has further deponed that he is the sole breadwinner in his family of seven children five of whom are in school where he pays fees. Because of these family financial commitments, the Defendant has also deponed that he is unable to pay the decretal amount in one instalment.

The Application is opposed, and the Plaintiff has filed a Replying Affidavit and Grounds of Opposition. The Plaintiff has deponed that the decretal amount arose from sums she lent the Defendant which sums she had borrowed from her employer and she is repaying with interest. She has further deponed that in October, 2004, the Defendant was paid Kshs 7,800,000/= following a sale of L.R. No. 209/12255/3.

The Application was canvassed before me on 15th March 2005 by Mr. Saende Learned Counsel for the Defendant and Mr. Kamau Learned Counsel for the Plaintiff. Counsel for the Defendant recited the averments in the supporting affidavit of the Defendant aforesaid and emphasized that the Court has a discretion to allow payment by instalments which discretion should be exercised in favour of the Defendant.

Counsel for the Plaintiff in opposing the Defendant's Application relied upon the Plaintiff's replying affidavit aforesaid. He emphasized that the facts deponed to in this affidavit had not been rebutted. Counsel further referred me to the Defendant's affidavit sworn on 4th December, 2003 in response to the Plaintiff's application to strike out the Defendant's defence. In that affidavit the Defendant had admitted owning other property which he had not disclosed in this Application. In Counsel's view, the Defendant is guilty of material non-disclosure and is not disserving of the exercise of the Court's discretion in his favour. Reliance was placed upon two decisions in A. RAJABALI ALIDINA -V- REMTULLA ALIDINA AND ANOTHER (1961) E.A. 565 and KESHAVJI JETHABHAI & BROS. LTD -V- SALEH ABDULLA(1959) E.A. 260 for the proposition that mere hardship of a debtor is per se not sufficient reason to allow payment by instalments and further that circumstances in which the debt was incurred and the debtors *bona fides* are to be considered.

I have now considered the rival submissions. I have further considered the entire record of this case.

Having done so I take the following view of the matter.

Under Order XX Rule 11 (2) I have a discretion to order payment of the decretal amount by instalments. This discretion in my view is not absolute. The Defendant or judgment debtor must show sufficient cause. The Court of Appeal in the case of A. RAJABALI ALIDINA –V- REMTULLA and ANOTHER (supra) held that the Court in deciding on instalments should consider *inter alia* the circumstances in which the debt was incurred and the financial position and *bona fides* of the debtor.

The uncontroverted facts in this case are that the Plaintiff lent money to the Defendant which money the Defendant invested in his venture. It is also not in dispute that the Defendant on 7th October, 2004 was paid Kshs 6,550,000/= being balance of purchase price of L.R. No.209/12255/3 which premises he had sold for Kshs 7,800,000/=. There is also the clear averment by the Defendant in his affidavit sworn on 4th December, 2003 that the Defendant owns houses at Yaya and along State House Road which he admitted are valued far beyond “the contractual amount.”

The Defendant’s financial position was sufficiently strong enough for him to only ask for 30 days stay of execution at the time of recording the consent judgment on 5th November, 2004. In this Application the Defendant has not explained the income he derives from Elkay Holdings Limited where he is a director. He has said nothing about the sale of L.R. No.209/12255/3. He has had the Plaintiff’s money since July 2002 which money the Plaintiffs borrowed at an interest. The circumstances of this case are such that I must refuse to grant the prayers sought in the Application dated 8th December, 2004 which Application is hereby dismissed in its entirety with costs.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF APRIL 2005.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-