



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA, NAIROBI
COMMERCIAL DIVISION, MILIMANI

Civil Suit 624 of 2004

ABDULRAZAK KHAFAN1ST PLAINTIFF

MERCANTILE & GENERAL ASSURANCE

COMPANY LIMITED2ND PLAINTIFF

VERSUS

SUPERSONIC TRAVEL & TOURS LTD1ST DEFENDANT

GEORGE KARIUKI2ND DEFENDANT

RULING

On 5th May, 2005, this court delivered a ruling in this matter striking out the defence filed herein and entering judgment against the defendants, jointly and severally, as prayed in the plaint. In the plaint, the plaintiffs had prayed for judgment for Kshs.4,578,199/05 and US\$20,837.78 together with interest thereon at court rates from 1st January, 2004 until payment in full; and costs of the suit on an advocate client basis with interest thereon at court rates. The defendants were also condemned with the costs of the application.

The application now before the court is dated 18th May, 2005. It is made by a chamber summons brought under O. XX rule 11 (2) and O. XXI rule 22 of the Civil Procedure Rules; S. 3A of the Civil Procedure Act and all enabling provisions of the law. It seeks from the court the following orders –

- 1. THAT there be a stay of execution herein pending the hearing and determination of this application.**
- 2. THAT this Honourable Court be pleased to order that the judgment debtor/applicants herein do liquidate the decretal amount by monthly instalments of Kshs.60,000/= from 31st May, 2005 and thereafter at Kshs.100,000/= from 30th April, 2005 till payment in full.**
- 3. THAT the costs of this application be provided for.**

The application is supported by the annexed affidavit of GEORGE NGURE KARIUKI and is based on the following grounds –

- (a) THAT judgment has been entered for the plaintiffs against the defendants for Kshs.4,578,199.05 plus an additional US\$20,837.78**

(b) THAT the defendants are facing lean moments financially and they are unable to pay the decretal sum in one lump sum.

(c) THAT it in the interest of justice and only equitable that this Honourable Court allows the defendants to liquidate the decretal sums by monthly instalments.

(d) THAT the defendants are servicing other loans and decretal sums respectively.

(e) THAT the 2nd defendant is apprehensive that if the court fails to order for instalment payments, he might be arrested and committed to civil jail in satisfaction of the decree herein since he does not have the money or the means to clear the decretal sum herein in one lump sum.

The application is opposed by a replying affidavit sworn and filed in court on 10th June, 2005 by SUDHIR S. SATHE, the General Manager of the 2nd plaintiff. At the hearing of the application on 13th July, 2005, Mr. Mwaniki appeared for the applicants while Mr. Karungo appeared for the respondents. In his submissions, Mr. Mwaniki adopted the grounds on the face of the record upon which the application is made, and also the 2nd applicant's affidavit in support of the application. He argued that the applicants had attached copies of their bank statements showing heavy indebtedness. He also submitted that the applicants had shown good faith by making a proposal and paying 3 instalments of Kshs.60,000/= each. The applicants therefore sought the court's indulgence to permit them to pay the judgment debt by the proposed instalments or such other instalments as the court may order. He referred the court to A. RAJABALI ALIDINA v. REMTULLA ALIDINA & ANOTHER [1961] E.A. 565.

In his response, Mr. Karungo for the respondents opposed the application and relied on the affidavit of SUDHIR S. SATHE and the authority cited above, which he said was his authority. He submitted that the debt arose from tickets sold by the applicants who were supposed to hold the money in trust for the respondents. The 2nd applicant had not disclosed that he had other sources of income and therefore his conduct was improper and undeserving of the court's discretion. Counsel also submitted that the applicant's should first pay a lump sum as a mark of their bona fides, and then the balance. At the rate they propose to pay, they will take 10 years which will be a complete negation of the respondents' rights. He finally prayed that the application be dismissed with costs, otherwise the respondents were ready to accept a deposit of Kshs.3million and thereafter monthly instalments of Kshs.500,000/=.

In reply, Mr. Mwaniki submitted that the 2nd applicant was only a guarantor of the 1st defendant and that their inability to settle had been amply demonstrated. The court has a discretion to permit a judgment debtor to settle the judgment debt by instalments, and he thereupon urged the court to allow the application for payment of the decretal sum by such instalments as the court may order.

I have considered the application and the submissions of counsel. It is correct to say, indeed, that the court has a discretion to allow a judgment debtor to settle a judgment debt by instalments. To that effect, O. XX rule 11 confers upon the court discretion, for sufficient cause shown, to order the payment of the amount decreed to be made by instalments. However, this discretion, like any other, must be exercised in a judicial and not an arbitrary manner. In the case of A. RAJABALI ALIDINA v. REMTULLA ALIDINA & ANOTHER [1961] E.A. 565, Law, J., as he then was said at page 566, with reference to O. XX rule 11 (1), that -

"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."

As for what constitutes "sufficient cause" in the context of rule 11 above, Law J. referred to a passage in WOODROFFE and AMIR ALIS CIVIL PROCEDURE IN BRITISH INDIA, 2nd Edn. Page 869, which sets out the matters which should be considered by a court in deciding whether or not "sufficient reason" exists. The learned judge then said – "These are:

(a) the circumstances under which the debt was contracted

(b) the conduct of the debtor (c) his financial position

(d) his bona fides in offering to pay a fair proportion of the debt at once.”

The circumstances under which the debt herein was contracted were a sad affair. By an agreement in writing dated 15th December, 2003, between each IATA member (hereinafter called “the Carrier”) and the 1st Applicant, the Carrier appointed the 1st applicant as its travel agent for the sale of airline tickets in Kenya. The 1st Applicant was authorized to sell air passenger transportation on the services of the carrier and on the services of other air carriers as authorized by the carrier. All monies thereby collected by the 1st Applicant for transportation and ancillary services sold under the agreement were the property of the Carrier and were supposed to be held by the 1st Applicant in trust or on behalf of the Carrier until satisfactorily accounted to for the Carrier and settlement made. In breach of this agreement, the 1st Applicant wrongfully failed or refused to pay to the 1st respondent the decretal sum of Kshs.4,578,199/05 and US\$20,837.78 which is the subject matter of this application. There is nothing redeeming in these circumstances which spell an outright breach of trust. When the respondents filed the suit claiming recovery of the money aforesaid, the 1st applicant denied owing the respondent any such money. This raises a very simple question – what happened to all the money collected by the 1st applicant on behalf of the 1st respondent?

The financial position of both applicants remains obscure. All they have attached in demonstrating that position are statements of their loan accounts, without disclosing their incomes. Whereas such statements depict adequately their respective liabilities, they don’t reveal the true financial standing of the applicants. I can only observe that the financial position of the applicants which the statements reveal is very interesting; but that which they conceal is more important. It is significant that the applicants have not offered to make any down payment of a fair portion of the debt at once. They have only offered to pay Kshs.60,000/= per month from 31st May, 2005 for 11 months, and thereafter to liquidate the balance by paying Kshs.100,000/= per month from 30th April, 2006 until payment in full. If this proposal were to be accepted, it will take about 5 years for the respondents to be repaid their money. Yet, there is no explanation as to why that money was not remitted to the respondents when it was due and payable in the first instance in 2003. While I agree with the 2nd applicant that the cardinal tonet of the courts is to do justice to all the parties, the court cannot be said to have done justice merely by leaning exclusively in favour of the debtor. Even creditors have their rights, and these must be balanced against those of the debtors. The economic times are as harsh on the creditors as they are on the debtors, and if the interests of the creditors are not taken care of, ironically, the creditors would be driven out of business by none others than their own debtors.

Being of the view that the conduct of the applicants in this matter has not been impressive, and that they have not shown sufficient reason for indulgence by the court, the court will accommodate them on the following terms:-

1. The defendants/Applicants will make a downpayment of Kshs.3 million, being a fair proportion of the debt, by 31st August 2005. This sum will be inclusive of the instalments paid by that date.
2. The balance to be paid by 12 equal monthly instalments, the first such instalment being payable by 30th September, 2005, and the rest on the last day of each succeeding month until payment in full.
3. In default of payment of any one instalment which is due and payable, the full amount outstanding to become due and payable and execution to issue.

Dated and delivered at Nairobi this 1st day of August, 2005.

L NJAGI

JUDGE