



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Civil Appeal 41 of 2003

WESLEY KIPTANUI KIPKEMOI APPELLANT

VS

SIMON SIMIYU WETUNDU RESPONDENT

RULING

Judgment was entered in favour of the Respondent as against the appellant by the Senior Resident magistrate in Webuye S.R.M.C.C NO. 32 of 2003. In an attempt to recover the decretal sum, a warrant of arrest was issued against the judgment debtor.

The judgment debtor now comes to this Court by way of a chamber summons dated 7th July 2003 to seek for orders that the decretal amount be paid by monthly instalments of Ksh.10,000/= and for an order of stay of execution pending the hearing and determination of the appeal. The appellant also prayed for the warrants of arrest issued to be lifted.

The reasons advanced by the judgment debtor are summarized as follows:

- a) **That the judgment debtor is unable to liquidate the decretal sum at once due to economic hardship. He annexed to his affidavit in support a copy of his payslip to show his monthly salary.**
- b) **The judgment debtor further complained that if execution is allowed to proceed he is likely to suffer irreparable loss by losing his job.**
- c) **That the instalments proposed are reasonable.**

On his part, the decree holder opposed the application on the following grounds:

- a) **That the application for payment by instalments is not well founded.**
- b) **That the application is incurably defective in that the applicant should have filed a motion instead of a summons.**
- c) **That the decree against which this application is founded is based on an admission of indebtedness.**

The guiding principles when dealing with an application of this kind are well settled. First, that courts of law have an unfettered discretion to consider the circumstances of each case.

Secondly, that the mere fact that the debtor is hard pressed or is unable to pay in full the debt at once is not sufficient reason. Ordinarily he should be required to show his bonafides by arranging prompt

payments of a fair proportion of the debt.

Thirdly, indulgence may be given to the debtor so long as the creditor is not reasonably prejudiced.

Fourthly, a debtor must show sufficient reason for indulgence and the matters to be taken into account by the Court are the circumstances in which the debt was incurred and the financial position, conduct and bonafides of the debtor.

The onus of course is on the judgment debtor to show sufficient cause for the exercise of the court's discretion in his favour.

I have considered these principles and the factors enumerated by the judgment debtor. The judgment debtor pleads hardship to settle the debt at once. He has shown that he earns a sum of Ksh.24,300/= per month. He has proposed to liquidate the decretal sum by monthly instalments of Ksh.10,000/=. In my mind, the applicant does not impress me to be a person who is candid to this Court. He has intentionally concealed the reasons advanced in support and the reasons for dismissal of his application for payment by instalments made before the subordinate Court. I think he is trying his luck. He does not impress me to be a person who faces financial difficulties.

Mr. Kweyu has raised a preliminary issue to the effect that the appellant should have filed an application under Order XLI of the Civil Procedure rules instead of Order XXI. He also argued that the applicant should have approached this court by way of a motion instead of a summons. It is admitted by the appellant that he made an application before the trial Court to liquidate the decretal amount by monthly instalments. That application was dismissed hence this appeal. The appellant is now seeking for a stay of execution of the judgment pending appeal. This can only be done under Order XLI of the Civil Procedure rules and not under XXI. Even if I were for a while to assume that the application was properly before Court under Order XLI, then the applicant must satisfy the conditions set out under Order XLI rule 4 of the Civil Procedure rules.

If this Court was to issue an order directing the applicant to liquidate the decretal sum by monthly instalments then there would be nothing to be heard on appeal. I have not been shown the record of appeal hence I am unable to state whether or not the appellant sought for leave to appeal. I believe the applicant had filed an application before the trial court under Order XX rule 11 of the Civil procedure rules. No appeal against an order issued under this rule can be filed without leave of court under Order XLII of the Civil Procedure rules.

In view of the above weaknesses, I am not satisfied that the appeal is properly and competently before this Court. Where the substratum of the whole matter is shaky then there is no need to grant the orders whether or not there is merit.

In the end, the summons dated 7th July 2003 is ordered dismissed with costs to the Respondent.

Dated and delivered this 16th day of November 2005.

J. K. SERGON

JUDGE

In the presence of Mr. Khakula for the Respondent.

NA for Kraido for the Applicant.