



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
MILIMANI COMMERCIAL COURTS, NAIROBI

MISC. APP. NO. 601 OF 2004

COUNTRY SIDE SUPPLIERS LTD.....APPLICANT

- V E R S U S

KENYATTA NATIONAL HOSPITAL.....RESPONDENT

R U L I N G

The application before the court is by way of a chamber summons dated 22nd September 2004, and brought under O.XX rule 11, O.XXI rule 22 of the Civil Procedure Rules, and sections 63(e) and 3A of the Civil Procedure Act. The applicant herein seeks from the court the following orders-

1. THAT this honourable court be pleased to certify this application as urgent and hear the same as ex parte in the first instance
2. THAT pending and determination of the Respondent's application to satisfy the preliminary award by instalments there be a stay of execution of the preliminary award herein and/or the applicant be restrained whether by itself, its agents or by whomsoever from attaching the respondent's proclaimed goods/assets, advertising the said goods/assets for sale or in any other way disposing off the same in execution of the preliminary award herein.
3. THAT the respondent be allowed to liquidate the preliminary award herein by monthly instalments by Ksh.2.5million each with effect from September 2004 until full payment thereof and the warrants of attachment thereof be lifted.
4. THAT the costs of this application be in the cause.

The application is based on the grounds-

- (a) That the applicant has through M/s Garam Investments Auctioneers, proclaimed the respondent's goods in execution of the preliminary award adopted by the court
- (b) That the respondent is not in a position to satisfy the whole award at once owing to financial difficulties and should be allowed to liquidate the same by monthly instalments.

It is also supported by the annexed affidavit of DR. FLORENCE M. MUSAU, the Director of the respondent herein.

On 23rd September, 2004, the applicant/respondent filed grounds of opposition/preliminary objection dated the same day. These grounds are that-

1. The application is incurably defective and does not lie as it has no basis both in law and fact as the applicant has not exhibited financial statements of accounts and affairs to justify instalment payment
2. The application is res-judicata as previous applications and/or attempts to pay by instalments was rejected by the court on 27th August, 2004 and 31st August, 2004 by virtue of explanation 5 of section 7 of the Civil Procedure Act.
3. The application is brought in bad faith and *mala fides* as offers to pay Ksh.2.5million per month was made in July, 2004 and three months later not a single cent has been tendered to show any *bona fides* .
4. The prayer for stay of execution cannot be granted as there is nothing to pend it (*sic*) on.
5. No stay can be granted on a decree given by consent following an award by consent of both parties, unless consented to by the decree holder.
6. No security for the entire decretal sum has been offered as required by O.XXI rule 22(3) before an application for stay can be granted, hence no order for stay is available to the applicant herein.
7. The application amounts to a gross abuse of the court process and should be dismissed as it is frivolous and only intended to vex and deny the decree holder its payments.
8. The entire affidavit of Dr. Florence M. Musau properly construed is evidence of misappropriation of funds as moneys including retentions as adjudged appear to have been misappropriated to other uses to the decree holder's detriment.

At the hearing of this application, Mr. Bundotich appeared for the respondent/applicant while Mr. Kopere appeared for the applicant/respondent. In his oral submission, Mr. Bundotich urged the court to grant leave to pay the decretal sum by monthly instalments of Ksh.2.5million per month from September, 2004, and to lift the warrants of attachment which had been issued. His main reason was that the respondent is currently going through acute financial problems. Its main source of funding is the Government of Kenya. It is incorporated as a public institution with a prime duty as a referral hospital. In the course of its operations, it is allowed to charge a small levy from patients, which levy is determined and regulated by the Ministry of Health. Consequent upon its acute financial problems, the applicant seeks the court's leave to liquidate its debt as proposed hereinabove, or on such other terms as the court may direct. Otherwise if attachment proceeds, irreparable damage would ensue to members of the public. The situation is desperate, submitted Mr. Bundotich. Counsel then referred the court to **CENTURION ENGINEERS & BUILDERS LTD. v. PAN AFRICA BUILDERS & CONTRACTORS & OTHERS**, H.C.C.C. No.1123 of 2002(Milimani), and also to **APEX STEEL LTD. v. MECOL LTD.**, H.C.C.C. NO.355 of 2003 (Milimani). There are many similar claims against the applicant, and therefore counsel further urged the court to exercise its discretion and allow the application.

Mr. Kopere for the respondent opposed the application and rested his opposition on the conduct of the applicant as well as its financial situation. If the applicant were an individual, the respondent would ask for the payslip, but now that it is an institution the respondent would ask for their accounts. Counsel then referred to the above cases and submitted that a creditor is also entitled to payment. The applicant has not been truthful to its word inasmuch as it has not paid that which they had earlier undertaken to pay, and therefore their *bona fides* was questionable. Mr. Kopere then proposed that the applicant may be accommodated if it paid Ksh.4,951,197.85 promptly which is the retention sum unpaid, another Ksh.5million, then their application for instalments may be considered. Secondly, they should also provide some security under O.XXI rule 22(3). Counsel also referred to O.XX rule 11. Finally, Mr. Kopere proposed that the applicant do pay a lumpsum of Ksh.10.5million and then clear the balance in three equal monthly instalments. He also requested for a default clause.

In a short reply, Mr. Bundotich submitted that O.XXI rule 22 (3) does not bar the court from exercising

its discretion under S.3A of the Civil Procedure Act. He further submitted that the court has an unfettered discretion to stay execution and urged the court to do so accordingly.

After hearing the rival submissions of both counsel, I think it is prudent to revisit the rules under which the application is made. The first one is O.XX rule 11, the relevant part of which provides-

“Where and in so far as a decree is for the payment of money, the court may for any sufficient reason... order that payment of the amount decreed... shall be made by instalments...”

The second one is O.XXI rule 22(3) which is in the following words-

“Before making an order to stay execution... the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.”

Both the above provisions confer upon the court unfettered discretion. Such discretion ought, however, to be exercised judicially, but not in an arbitrary manner. In order to justify the court to order a decretal sum to be paid by instalments, it is imperative that sufficient reason should be shown. In ALIDINA v. ALIDINA & ANOR, [1961] E.A. 565, Justice Law cited with approval a passage from WOODROFFE and AMIR ALI'S work which sets out the matters which should be considered by a court in deciding whether or not sufficient reason exists to justify the exercise of the court's discretion.

The matters to be considered 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 applicant in this case is a State Corporation established under the State Corporations Act. Some of its functions include-

- (i) receiving patients on referral from other hospitals or institutions within or outside Kenya for specialized health care;**
- (ii) providing facilities for medical education for the University of Nairobi and for research either directly or through other co-operating health institutions;**
- (iii) providing facilities for educational and training in nursing and other health and allied professions;**
- (iv) participating, as a National Referral Hospital in National Health Planning.**

In the discharge of this mandate, it is obvious that the institution would have to enter into many contracts for the supply of a wide range of goods, such as linen, furniture, foodstuffs, cutlery, medical equipment etc., to mention but a few. Otherwise one cannot belabour the circumstances under which a hospital can contract debts.

Mr. Kopere went to great length to paint the applicant as an unworthy debtor, who has failed to keep its word on payment of its debts. His argument is countered by the affidavit of the hospital director, Dr. Florence M. Musau, which paints a grim picture of the hospital's finances. According to her, the hospital admits all manner of patients, many of who can ill afford to pay the paltry charges levied by the institution. Even though the hospital is funded by the Government through the Ministry of Health, the

funds are not adequate to meet its recurrent and development expenditure. Between February and 31st August, 2004, the hospital was owed Ksh.345million by patients who are not likely to settle these outstanding claims on account of poverty. By 31st August, 2004, the hospital had pending bills amounting to over Ksh.650million. The respondent herein is not a lone creditor; there are many others waiting on the wings. Going through the affidavit and its annexures is reminiscent of citing the litany of the sorrowful mysteries. Shakespeare's words in "**Hamlet, Prince of Denmark**" would aptly sum up the situation- "**it is a pity that it is true, and that it is true is a pity.**"

My understanding of it all is that the hospital frankly admits its liability to pay, but currently lacks the ability to do so. Any attachment of the hospital property would definitely benefit the attaching creditor alone, but it would occasion untold misery and suffering among tens of thousands of Kenyans of all walks of life- the young and the old, the affluent and the poor, the employed and the unemployed – name it. I subscribe firmly to the creed that even creditors have their rights, and those rights must be respected and enforced. However, every case must be considered on its won merits, depending on its facts and circumstances.

Given the sensitive nature and present circumstances of the institution we are here dealing with, I think that the situation calls for understanding. At the same time the hospital is legally bound to pay all its lawful debts. Creditors' rights must not be compromised. Those two extremes is not easy. However, a workable formula must be found. Without losing sight of other creditors in the respondent's position, this court is of the view that the applicant has demonstrated sufficient cause as to why it should be allowed to service its decree by instalments. It is further of the view that the interests of justice will be sufficiently served if the following orders are made and obeyed-

1. Payment of the amount decreed shall be made by instalments.
2. The applicant/hospital shall make a prompt payment of Ksh.6,079,759.85 by October 31, 2004.
3. The balance of Ksh.15,000,000.00 be paid by 6 equal monthly instalments of Ksh.2,500,000.00 each, the first such instalment being payable by 30th November, 2004, and the rest on the last day of each succeeding month until payment in full.
4. The applicant will meet the costs of this application to the respondent
5. Parties be at liberty to apply.

Dated and delivered at Nairobi this 8th day of September 2004

L. NJAGI

JUDGE