



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
CIVIL SUIT NO. 529 OF 2001

P & O NEDLLOYD LTD.....PLAINTIFF

V E R S U S

GLOBAL GASES KENYA LTD.....DEFENDANT

R U L I N G

Before the court is application dated 7/1/2004 by Defendant/Applicant. The application seeks one main order to be permitted to liquidate the decretal amount by monthly instalments of Kshs.100,000/- each. The supporting affidavit shows that the debt was Kshs.2,684,941.21 when Plaintiff filed and summary judgment has been entered as prayed in the Plaintiff with costs.

The Applicant pleads that it is servicing other debts and has exhibited a copy of Debenture accruing the sum of Kshs.26,000,000/-. It is sworn that if the decretal amount was to be paid in full the Applicant would have to close its business. This proposal is opposed by the decree holder who says that the Applicant has previously given several proposals but never kept the promises. Further, the Applicant has not disclosed all its means and therefore no sufficient cause has been shown to grant indulgence. The court has noted as at 23/1/01 the amount was kshs.3,022,427/- and that by February, 2004 the amount has escalated to Kshs.3,357,844.55. Interest is still rising. I also note that since judgment was entered there has been no payment towards the liquidation of this debt and there is not shown any good faith in offering a substantial proportion of the debt at once so far. The instalments proposed of Kshs.100,000/- would take a very long time to cover the debt. No effort has been made to support the application by way of bank statements or books of accounts.

Order XX rule 11(2) gives court discretion to give indulgence to the decree debtor but the discretion is to be exercised fairly and judicially. It has been held in several cases that sufficient cause must be proved to enable court to exercise the discretion.

In the case of Keshavji Jethabhai and Brothers Ltd vs Abdulla, 1959 E.A. 260 it was held that:-

*“(i) Whilst the courts must be zealous of the creditors rights they must consider each case on its merits and exercise discretion accordingly.*

*(ii) The debtor should be required to show his bona fides by arranging prompt payment of a fair proportion of the debt .....the predominantly factor being of course the bona fides of a debtor.*

*(iii) Hardship to a debtor might in some circumstances be taken into account ..... It is a question in each case whether some indulgence can fairly be given to the debtor without*

*unreasonably prejudicing the creditor.”*

After considering the submissions of both parties I find it would be prejudicial to the creditor to grant orders sought.

I therefore dismiss application with costs.

Dated this 9th day of July, 2004.

JOYCE KHAMINWA

J U D G E

Khamiwna, J.

Jason – Court Clerk

Mr. V. Omollo

Mr. Okanga – H/B

Ruling read in their presence.

JOYCE KHAMINWA, J.