



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE 575 OF 2003

**JAMES KARIUKI NGANGA T/A NDARUGU MERCHANTSPLAINTIFF/JUDGMENT
CREDITOR**

VERSUS

JOSEPH NGAE NJUGUNA

**CROSSBOW LIMITED.....DEFENDANT/JUDGMENT
DEBTORS**

RULING

The defendant by application brought under Order XX Rule 11 (2), Order XXI Rule 22 (1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeks the following orders: -

- That the Honourable court be pleased to order payment of the decretal amount herein as follows: -
 - a) Kshs 300, 000 immediately to the judgment creditor or to the court;
 - b) The balance in monthly instalments of kshs 500, 000/- beginning six months from the date of the order until payment in full.
- That there be a stay of execution of the decree herein pending the hearing of this application interparties and/or upon issuance of the orders on 3 above.

By an application for summary judgment, judgment was entered against the defendants on 17th February 2004.

The defendant sought stay pending appeal and that was dismissed on 27th April 2004.

The Defendant thereafter offered the judgment creditor payment by way of a cheque for kshs 200, 000 which cheque on presentation was dishonoured. In the mean while the wife of the defendant made an application of objection proceeding which application was dismissed on 25th June 2004.

The defendant in support of the present application argues that he is a businessman carrying on the business of farming and construction, whilst the 2nd defendant is a Limited Liability Company. That the judgment creditor has made several attempts to execute decree and had previously attached house hold goods and if such execution is allowed to continue it would cause the 1st defendant irreparable harm to his relationship as a family man. That the attachment of those household goods would not sufficiently settle the decretal amount; and that the defendants were appealing against the judgment entered against them. The defendant also stated that he is willing to give his immovable property as security of the decree. The 1st defendant attached documents in proof of other debts that he is servicing but my comment is that those debts related to Limited Liability entities and the same were not prepared by an accountant nor audited.

The plaintiff objected to the application and in so doing gave the history of this matter as stated herein before which Plaintiff's counsel said that it proved that the present application is an attempt to delay the plaintiff from enjoying the fruit of its judgment and also proved the lack of bona fide of the defendant.

Both parties referred to the case of **KESHAVJI JETHABHAI & BROS LTD – versus – SALEH ABDULLA (1959) E.A. 260** and quoted the 2nd holding as follows: -

“the mere fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reason.....; ordinarily he should be required to show his bona fides by arranging prompt payment of a fair proportion of the debt..... Each case has to be decided on its own merits, the predominating factor being, of course, the bona fides of debtor.”

The defendant's have failed to show their bona fides by making payment towards the decretal amount. Indeed the payment made of kshs 200,000 by cheque was dishonoured. I am of the view that on that ground alone the present application is not merited.

I am of the view that the prayer seeking stay of execution is res judicata and cannot therefore be entertained by me.

The order of this court is that the defendant's application dated 29th October 2004 is dismissed with costs to the plaintiff.

Dated and delivered this 24th November 2004.

MARY KASANGO

AG JUDGE