



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
MILIMANI COMMERCIAL COURTS  
CIVIL SUIT NO. 457 OF 2003**

**PETER THARAU NGURE .....PLAINTIFF/RESPONDENT**

**VERSUS**

**MARGARET WAIRIMU MAGUGU.....DEFENDANT/APPLICANT**

**R U L I N G**

The Defendant's Chamber Summons dated 14th October 2004 is brought under Order 21 rule 22, Order 20 Rule 11 of the Civil Procedure Rules and Section 63 of the Civil Procedure Act.

The application seeks an order for the defendant to be allowed to settle the decretal amount by deposit of kshs 1 million and monthly payment of shs 200, 000 per month until payment in full.

In support of that application the defendant swore an affidavit and stated; that she has intentions of appealing against the judgment entered against her and to that end she filed a Notice of Appeal; that she is unable to immediately satisfy the decree but can only do so by instalments as prayed in the application; that she will suffer if she is committed to Civil jail; that she runs a clothing business which is affected adversely by the state of the economy and cannot therefore afford more than is offered; that she has a family of 3 who depend on the proceeds of her clothing business. Accordingly the defendant sought the leave of this court to pay the decretal amount by instalments.

It was only after the plaintiff filed his Replying Affidavit and made disclosure of other assets owned by the defendant by further affidavit sought to explain those disclosed assets.

The defendant explained how the private school was not making a profit and to this end she annexed audited accounts. She did not annex the income tax return for that school to enable the court believe without doubt that the school is running at a loss. She deposed further that the property which had tea plantation was sold to pay off debt, she failed however to state when the sale took place or even to annex documents to prove such sale. The coffee farm she deposed does not produce coffee of any value due to the current coffee market and neither does a company known as Wairyma Investment produce profit. She stated that it owned a property where the school is to be found. The rental properties on state house road the defendant stated that they are rented out and the rental income goes towards payment of the mortgage account at HFCK. The plots on Kiambu road the defendant said she had in the past offered them to the plaintiff in settlement of this debt and that offer was still available.

Mr. Wainaina counsel for the defendant informed the court that the defendant is seeking an exercise of the court's discretion in her favour to allow her to pay the decretal amount by monthly instalments, and in so doing he requested the court to take judicial notice of the economic hardship. He confirmed that he had in his custody the amount of kshs 1 million.

The plaintiff opposed the application and in so doing filed a replying affidavit and in it made

damning disclosure of the defendant's assets, which had not been included in the application. Mr. Machira in opposition said that the defendant had failed to demonstrate seriousness of settlement of decretal amount. He drew the court's attention to the fact that the defendant failed to file a memorandum of appeal.

Mr. Machira further submitted that the defendant had previously made an application for stay pending appeal upon which Justice Waweru gave a condition that the defendant should deposit Kshs 3 million in a fixed account pending the ruling of stay. The defendant failed to so deposit and accordingly the application was dismissed. This to the plaintiffs was disobedience to that Order.

The Plaintiff's counsel also was of the view that the present application seeking stay is resjudicata since Justice Waweru had already entertained such application. I agree with counsel's argument hereof in so far as the prayer in the defendant's application relating to stay. I am however of the view that that prayer was not before me for it was indeed a prayer of stay pending the hearing of this application inter parties.

In submission Mr. Machira stated that the defendant is the wife of Arthur Magugu a member of the present Parliament and yet the defendant had excluded this information to give the impression that the family was solely dependant on her income. The defence counsel did not deny this disclosure.

The application is brought under Order 20 rule 11 provides that where there is no consent of the parties the court may for sufficient cause shown order for payment by instalments.

The court in other words has the discretion to so order. I have considered the arguments before me and the affidavit evidence and I am of the view that the defendant's application is wanting. For an applicant who seeks the exercise of the court's discretion the court is of the view that she is defeated by her own failure to disclose her exact assets and when they are disclosed by the plaintiff she fails to clearly state the income she obtains. She, for example, failed to say how much she received in terms of rental income and how much of that income goes to pay the mortgage. She fails to disclose that she is married and that her husband is a member of parliament whom I am of the view participates in financial provisions for the family.

I am in agreement with the plaintiff's counsel that there is subsisting hereof an order for deposit of kshs 3 million and that order has not been appealed against. I am of the view therefore that the defendant should within 3 days make payment of the amount of kshs 3 million to the plaintiff and thereafter clear the balance by monthly instalments.

The orders of the court are that: -

- (1) The Defendant is to pay the Plaintiff kshs 3 million within 3 days from this date hereof.**
- (2) The Defendant is thereafter to make monthly payments to the plaintiff of Kshs 1 million with effect from the last day of November and thereafter payment of similar amount at the end of each succeeding month until payment in full.**
- (3) In default of any one payment as aforesaid the Plaintiff will have the liberty to execute the decree.**

Dated and delivered this 23rd day of November 2004.

**MARY KASANGO**

**AG JUDGE**