



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL CASE NO. 258 OF 2002**

**PETRO OIL KENYA LIMITED ..... PLAINTIFF**

**- VERSUS -**

**OMAR TRANSMOTORS LIMITED ..... DEFENDANT**

**RULING**

The Judgment Debtor (JD) seeks an order for stay of execution and that he be allowed to liquidate the decretal sums which at the time of filing the application stood at Kshs.1,850,285/= by instalments of Shs.100,000/=. And in support of the same, Mubarak S. Omar a director of the JD gives the reasons for seeking the said orders in paragraphs 4, 5, 6 and 7 of his Affidavit in support. They read as follows:-

*“4. That the applicant has undergone severe cash flow problems due to the harsh economic conditions and the default to pay the decree is not due to any will ful neglect or deliberate refusal but due to inevitable circumstances as a result of the general down turn in the economy -----*

*5. That the Plaintiff/Respondent has already proclaimed the Defendants/Applicant’s goods ----- ,*

*6. That executing judgement against the applicant would cause great damage and loss to the defendant/applicant, shall render them unfunctional and useless as the defendant/applicant shall not be in a position to enter into any new contracts which shall enable it to offset the debt.*

*7. That the defendant is in the process of entering into new contracts and also hopes to receive payment of outstanding debts owed to it by its debtors and would be willing to review and increase the instalments payable to the plaintiff after 6 months ”*

Annexed to the said Affidavit are invoices to the JD from various creditors and a cash flow projection which shows that between September, 2002 and September 2003 open Bank Balances of between negative Kshs.15,580,000/- and 18,555,887.35are expected. There are no Bank Statements nor any audited accounts exhibited.

On their part, the Judgement Creditor (JC) has through the Affidavit by UMESH BHARGAVA the Financial Controller said that the JD has sought 4 times before their indulgence to settle the debt by instalments varying from Kshs.100,000/= per week to Kshs.2000,000/= per week from the time the debt fell due and not a single payment has been made. In September, 2001 the JD issued 4 post-dated cheques for Kshs.395,000/= each which were all dishonoured on presentation save for one. The last offer to settle the debt by monthly instalments of Kshs.100,000/= was made on 24.6.02 and still not a single shilling has been remitted.

The Debt herein accrued out of an agreement between the parties for the supply of fuel by the JC to the

JD. The JD however failed to honour its part of the agreement and the principal amounts of Kshs.1,580,000/= were demanded but the JD made promises to settle the amounts by Instalments which were never honoured. The documented such promises are contained in a letter dated 25/3/02 in which the JD requested to settle the debt by Instalments of Kshs.200,000/= per week and the same accepted by the JC vide their letter dated 10.4.02 only for the JD to reply the next day on 11.4.02 saying it was not possible to meet the said instalments and offered a lower figure of Kshs.100,000/= per week.

This too was not honoured and on 24.6.02 the JD this time through their Advocates wrote to the JC's Advocates offering to settle the debt by instalments of Kshs.100,000/= per month and which offer the JC's Advocates rejected saying it was not done in good faith.

Order 22 rule 11 (2) under which the application is grounded gives the court the discretion to consider an application for settlement of a decretal amount by instalment if sufficient cause is shown by the Judgement Debtor upon conditions set out as:

*“----- be made by instalments on such terms as to the payment of interest, the attachment of property of the judgement/debtor or the taking of security from him or otherwise as it thinks fit”*

In exercising such discretion the court needs to establish that the debtor has “sufficient reason” as was set out by Law J (as he then was) in the case of RAJABALI ALIDINA –VS- REMTULLA ALIDINA and ANOTHER (1961) E.A. 565. These are:

- a) *“the circumstances under which the debt was contracted,*
- b) *the conduct of the debtor,*
- c) *his financial position and*
- d) *His bona -fides in offering to pay a fair proportion of the debt at once.”*

I have outlined the circumstances of the debt herein as well as the debtors conduct which points to a debtor who is bent on delaying the settlement of the debt and hiding under the umbrella of its “bad financial status”. The said financial status has not been backed by any credible evidence as there are no audited Accounts, no Bank statements and also the creditors and amounts allegedly owed are not disclosed. The JD is in the transport business and says that attachment of his lorries will lead to loss and Damage and yet they do not provide any evidence to show how much they earn from the said business which has been going on. To make matters worse, the financial projection given shows the situation is expected to get worse rather than improve. In the case of KESHVAJI SETHABHA & BROS. LTD. –VS- SALEH ABDULLA (1959) E.A. 60, it was held:-

*“The mere fact that the debtor is hard pressed or 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.”*

In the present case the JD has not made any attempt to make any prompt payment of a fair proportion of the debt. Infact he has never even paid any one of the instalments proposed save for a sum of Shs.365,000/= by one of the post dated cheques but all others were stopped thereafter and unpaid. In the case of SHEIKH BIN ALI & BROTHERS LTD. –VS- SNERONI & 2 OTHERS (UR) HCC 357/97 the Court said thus:

*“Whilst the Courts must be zealous of the Creditor's rights they must consider each case on its merits and exercise discretion accordingly”*

The question is, whether in the prevailing circumstances, the JD is one in whose favour the court can exercise its discretion on the face of a JC who has indulged the JD for long before the Judgement was entered. I have considered whether there are any compelling reasons to deprive the JC the fruits of their

judgement and I see none and in the circumstances the application is dismissed with costs.

**Dated and delivered at Mombasa this 9th day of May, 2003.**

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**