REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC NO. 54 OF 2013

ELIZABETH WANJIRA EVANS.....PLAINTIFF

VERSUS

RICHARD KIPCHILAT.....1ST DEFENDANT

FRANCIS GACHANJA MWANGI.....2ND DEFENDANT

COMMISSIONER OF LANDS……...……..…3RD DEFENDANT

R U L I N G

1. In this suit, judgment was entered on 1st October,2019 by Hon. Justice Sila Munyao wherein the Plaintiff/Applicant's suit as against the 1st Defendant/Respondent was dismissed with costs.

2.The 1st Defendant's costs were taxed by the Deputy Registrar at Kshs.602,453/= on 27th May 2020 and a certificate of taxed costs issued on 26th June 2020.

3. The Plaintiff/Applicant has made partial payment of Kshs.150,000 towards settlement of the decretal amount.

4.The 1st Defendant in execution for the balance of the decretal sum applied for attachment of the judgment debtor's movable properties prompting the judgment debtor's motor vehicle Reg. No. KAZ 364Z to be attached by Crater View Auctioneers.

5.The Plaintiff/Applicant thereafter filed the instant application under certificate of urgency vide Notice of Motion dated 14th August, 2020 seeking the following orders:

i. Spent

ii. That the execution for costs in this matter be stayed and that the honourable court issues an order that the taxed amount in this matter be paid by the Applicant to the Respondent at the rate of Kshs. 50,000 per month pending the hearing and determination of the application.

iii. That pending the hearing and determination of this application the 1st Respondent be compelled to return to the Applicant Motor vehicle registration no. KAZ 346R that he had instructed the auctioneers to take from the applicant.

iv. That the Honourable court set aside the execution process already commenced in this matter or in the alternative, the honourable court issues an order that the balance of the taxed sum be paid by the applicant to the respondent at the rate of Kshs. 50,000 per month.

v. That the costs of the application be provided for.

6.The application, was supported on the grounds on the face of the application and on the supporting affidavit of the plaintiff/applicant.

7.The 1st Defendant/Respondent, filed a Replying Affidavit dated 3rd September, 2020 sworn by one Amos Andama his counsel, and a further affidavit dated 28th September, 2020 sworn by one Philip Makao Kamuya a field officer of Crater View Auctioneers in opposition to the plaintiff/applicant's application.

8. I have reviewed the application, affidavits, evidence and the submissions filed by the parties and the following issues arise for determination:

a. Whether this court has jurisdiction to hear and determine this application and order the Plaintiff/Applicant to pay balance of the decretal amount in instalments.

b. Whether there was proper service by the 1st Defendant/Respondent of the Notice of attachment and Sale of movable property.

9. Order 21 rule 12(1) and (2) of the Civil Procedure Rules provides as follows:-

(1) Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by installments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

(2) After passing of any such decree, the court may on the application of the judgment-debtor and with the consent of the decree-holder or without the consent of the decree-holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by installments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor or the taking of security from him, or otherwise, as it thinks fit.

10. In the instant case even though it was against the 2nd defendant that the plaintiff was awarded a monetary decree for payment of the sum of Kshs.2,184,510/= together with interest, the plaintiff was nonetheless ordered to pay the costs of the suit to the 1st defendant which she could however recover from the 2nd defendant who was ordered to pay the plaintiff's costs of the suit. Once the costs payable by the plaintiff to the 1st defendant were taxed, the taxed costs became a monetary decretal amount payable by the plaintiff to the 1st defendant.

11.Under order 21 rule 12(2) the court has the power and discretion to order payment of the decretal sum in instalments on application by the judgment –debtor with or without the consent of the decree holder. The judgment debtor however has to show sufficient cause as to why he ought to be allowed to pay the decretal sum in instalments and/or why the payment should be postponed. The court's discretion to order payment in instalments and/or on such terms as it deems fit must be exercised judiciously having regard to the facts and circumstances of each individual case.

12.The 1st defendant, the decree holder for purposes of the present application has submitted that the court lacks jurisdiction to entertain the instant application as it became *functus officio* upon rendering judgment. The 1st defendant reasoned that the taxation that resulted in the certificate of taxed costs was not an order of the ELC Court but one through Hon. N. Makau, Deputy Registrar of the Court. With respect I am not able to appreciate the reasoning. It is the court that made the order for payment of costs to the 1st defendant and the Deputy Registrar in taxing the costs was acting as an officer of the court. Although section 13 of the ELC Act sets out the jurisdiction of the ELC Court, the Court under section 19 (2) of the Act is bound by the procedure laid down by the Civil Procedure Act, Cap 21 Laws of Kenya. Order 21 Rule 12 of the Civil Procedure Rules provides under subrule (2) that an application such as the present application can be made by a party post judgment. The Court in the premises has jurisdiction and is not *functus officio* as submitted by the 1st defendant.

13. Hon.G.L.Nzioka J. in the case of ***Diamond Star General Trading LLC v Ambrose D O Rachier carrying on business as Rachier & Amollo Advocates (2018) eKLR*** relied on Order 21 Rule 12 (2) to exercise her discretion to allow the Applicant to pay the decretal sum in installments.The judge cited with approval the case of ***Keshvaji Jethabhai & Bros Limited V Saleh Abdulla [1959] EA 260*** which laid down the principles that should guide the court in exercising its discretion as follows:-

(a) whilst creditors' rights must be considered each case must be considered on its own merits and discretion exercised accordingly;

(b) the mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of the discretion;

(c) the debtor should be required to show his bona fides by arranging prompt payment of a fair proportion;

(d) Hardship of the debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.

15. In the present case, the Plaintiff/Applicant has made some reasonable payment towards settlement of the decretal sum aggregating Kshs150,000/= and has made an offer to settle the balance monthly in instalments of Kshs.50,000/=. This is testament of the fact that the plaintiff is willing to settle the decree.

16. The plaintiff judgment/debtor in my view has demonstrated a willingness to pay the 1st defendant the costs that she was adjudged to pay him and towards that end has paid, Kshs150,000/= to the 1st defendant's advocates. It is not lost to the court that the plaintiff was a victim of what turned out to be fraud on the part of the 2nd defendant. She lost money which she paid to the 2nd defendant as alleged purchase price and it is likely that it is money she may never recover though the court has decreed that the 2nd defendant refunds the money to her together with the costs of the suit. I think in seeking a reprieve to be allowed to pay the decretal sum in instalments the plaintiff is acting bonafides and does not intend to frustrate the 1st defendant in his recovery efforts. Whilst a party is free to choose the mode through which to enforce settlement of any decree awarded to them, the court may in an appropriate case and provided there is sufficient cause intervene and in its discretion direct the manner in which a monetary decree may be settled. The Court's discretion has to be exercised having regard to the interest of the judgment creditor and the concerns of the judgment debtor. The judgment creditor ought not to be kept away from enjoying the fruits of his judgment while the judgment debtor should equally not be consigned into financial ruins. The court must strive to strike the delicate balance between the competing interests.

17. Considering the circumstances of this matter I am inclined to allow the plaintiff judgment/debtor to pay the balance in reasonable instalments. In that regard I grant a stay of execution for the costs and order that the attachment in process be lifted and the motor vehicle belonging to the plaintiff attached by Crater View Auctioneers be released to the plaintiff against payment of the auctioneers charges by the plaintiff which must be paid within 21 days of the delivery of this ruling.

Respecting the balance of the decretal sum that remains unpaid, I order and direct that the plaintiff settles the same in instalments as follows:-

(i) Kshs.200,000/= on or before 15th March 2021.

(ii) Kshs.100,000/= on or before the 15th day of each succeeding month with effect from 15th April 2021 until payment in full.

(iii) In default of payment of either the auctioneers charges and/or any instalment on any of the due dates the 1st defendant/respondent to be at liberty to execute.

18. Orders accordingly

Dated signed and delivered virtually at Nakuru this 18th day of February 2021.

J M MUTUNGI

JUDGE