



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 73 OF 2002

DIETRICH BOELLING PLAINTIFF

- VERSUS -

GEORGE KAROLYI DEFENDANT

R U L I N G

The defendant invoked the discretionary power of this court under Order XX rule 11 (2) of the civil Procedure rules by filing a chamber summons dated 10th September, 2003 in which he sought to liquidate the decretal sum by monthly instalments. The defendant swore the supporting affidavit to support the summons.

When the summons came upon for interpartes hearing the parties' advocates agreed by consent not to argue the application but left it to this court to make a decision on the basis of the application and affidavits for or against the summons. The plaintiff filed a replying affidavit to resist the summons.

What can be discerned from the chamber summons and the supporting affidavit of George Karolyi sworn on 11th September, 2003 is that the defendant is unable to settle the decretal sum at one go but can gradually settle by instalments. The defendant proposed to settle the decretal sum in the following manner:

- (i) A sum of Kshs.15,000/= per month for the first twelve (12) months.
- (ii) A sum of Kshs. 25,000/= per month for twelve months from the date of completion of the instalments in (i) above and
- (iii) Kshs.35,000/= per month for 12 months from the last date of payments in (ii) above.

The applicant has attempted to show by affidavit that his business empire and that of his company known as Malibu Safaris have collapsed due to hard economic times. The applicant has also listed the number of suits facing him which he is yet to settle and the fact that he is about 60 years and therefore cannot work harder unlike before.

Another aspect which was raised by the defendant is that the plaintiff has a personal vendetta against the defendant.

The plaintiff opposed this application stating that judgment was entered by consent on 6th March, 2003 and the defendant has not paid a single penny as a sign of good faith towards reducing the debt.

It was further averred in the affidavit that the defendant has not been candid because he only came to court to make this application when he was threatened with a notice of intention to execute after taxation.

The defendant finally swore in his affidavit in reply that the applicant has concealed his property with a view of defeating the plaintiff's claim

The provisions of order XX rule 11 (2) reads:

“After the passing of any such decree, the court may on the application of the judgement 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 instalments on such terms as the payment of interest, the attachment o f the property of the judgment debtor or taking of security from him or otherwise, as it think fit”

It is clear that the power donated under this rule is discretionary. However I must exercise my discretion judicially. Sufficient reason or cause must be shown. What the applicant has enumerated are details of legal suits confounding him but has failed to show to this court the nexus between those suits and this instant one. The applicant has failed to show to this court his financial statement of account to enable me consider his plea. It has crossed my mind that the defendant is bent to delay settlement of this matter. It is not denied that judgment was entered by consent on 6th March, 2003 and the applicant went to sit in his laurels without making any attempt to make payments to reduce the decretal sum. It is only when he was threatened with execution after taxation that he saw it fit to file this application. The applicant knew that a threat of execution was looming but decided to ignore. His delay to make the application betrays his conduct. I concur with the plaintiff's averment that the Defendant/Applicant has not been candid.

I refuse to exercise my discretion in favour of the defendant. Consequently, the chamber summons dated 10th September, 2003 is ordered dismissed with costs to the plaintiff for there is no good cause shown on record.

Read this 9 day of October 2003.

J.K. SERGON

JUDGE