



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**Civil Case 354 of 2002**

**MARGARET NYAWIRA (Administrator of the Estate of the deceased)**

**WASHINGTON GICHUKI KAMANGA .....PLAINTIFF/RESPONDENT**

**VERSUS**

**UNITED INSURANCE LIMITED..... DEFENDANT/APPLICANT**

**RULING**

The Defendant made an application by Chamber Summons, under Order XX Rule 2(2), Order XXI Rule 22 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act. The Applicant, who is the Judgement Debtor, was seeking leave to liquidate the balance of the decretal sum in instalments of Kshs.250,000/- per month, on such terms as the Court may deem fit.

The application was anchored on the Affidavit sworn by Ms. Eunice Mathenge, the Legal Officer of the United Insurance Co. Ltd. on 8th October, 2003 and filed with the application the following day. The pertinent facts are set out as follows:

(a) the suit arises from an earlier suit, HCCC No. 2602 of 1997 which arose from a vehicle accident occurring on 25th November, 1996 and involving the Plaintiff's husband and vehicle Registration Number KAH 125E. Judgement was later entered for the Plaintiff, for the sum of Kshs.1,484,588/- being general damages, special damages and costs and interest. Subsequently, the Plaintiff filed a declaratory suit against the Defendant/Applicant, which suit was decided in the Plaintiff's favour and judgement entered against the Defendant/Applicant. The total amount shown on the Plaintiff's warrants of attachment was Kshs.2,383,628/-.

(b) After the warrants were served upon the Plaintiff/Respondent, the Defendant/Applicant requested that the latter be allowed to liquidate the amount in 10 equal instalments. It was, apparently orally agreed, after a discussion with Plaintiff's Advocates, that the Applicant make a down payment of Kshs.400,000/-, and thereafter Kshs.250,000/- per month till payment in full. The Defendant/Applicant has already paid a total of Kshs.650,000/-. Subsequently, another sum of Kshs.250,000/- was offered by the Defendant/Applicant (Cheque No. 063533), but the Plaintiff declined to accept this, and instead instructed its agent auctioneers to attach the Defendant/Applicant's goods. The Plaintiff is claiming the whole balance of Kshs.1,765,478/- at once, disregarding the existing oral agreement.

(c) The Defendant/Applicant complains that the amount being demanded at once is so large that it would disrupt the financial stability of the insurance company.

The matter came up for hearing, but had to be taken out of the cause list, first on 10th November, 2003,

then again on 17th November, 2003. It was heard on 25th November, 2003, when Mr. Mariaria for the Defendant/Applicant argued that the Applicant was running a high-risk type of business which deprived it of the capacity to pay the entire sum owing to the Plaintiff/Respondent at once. He submitted that a re-scheduled mode of pay, as was being proposed, would not cause prejudice to the rights of the Plaintiff/Respondent. He described the oral agreement under which an agreed, scheduled mode of payment had been arrived at, and asked that this arrangement be upheld. He sought to protect the Defendant/Applicant against attachments now being threatened by the Defendant/Applicant. He proposed that if the agreed mode of payment would be upheld, the Defendant/Applicant was willing to execute a security by way of guarantee. He pleaded that too large a demand, such as was being made by the Plaintiff, at a go, would cripple the Defendant and also prejudice the insurance company's commitments to a large number of policy-holders. Mr. Musyoka for the Plaintiff/Respondent opposed the application. He maintained that the Defendant was not entitled to the Orders sought. The Orders sought were discretionary in nature (Order XX Rule 11(2)); but it was a recognised principle guiding the Court that "he who seeks equity must in turn, do equity." He challenged the candour of the Defendant when the Defendant sought to rely on an oral agreement. He said that the Defendant, after paying the initial sum of Kshs.400,000/-, had generally delayed in making further payments. This is the reason the Plaintiff instructed the auctioneer to undertake execution. After the filing of the application, a further sum of Kshs.500,000/- had been paid; but on calculation it was found that the instalment for November had not been paid when it had been due since 10th November, 2003; and there had been no explanation of the delay in making payment.

It was urged that a party could not hope to succeed in such an application, without showing sufficient cause (Order XX Rule 11(2)). Counsel cited authorities to support his argument: AYUB SALYANI AND OTHERS V. HAJI SALEH, CIVIL CASE NO. 375 OF 1997. He quoted from the Ruling in that case, of Waki, J:

"A debtor must show sufficient reason for indulgence and the matters to be taken into consideration by the court are the circumstances in which the debt was incurred and the financial position, conduct and bona fides of the debtor." Counsel argued that the debtor must show sufficient reason for indulgence. He argued that the Defendant/Applicant had, at no time, shown anyone its financial position and its general state of accounts; the Defendant had only shown rather bare statements in Affidavits; yet such a well known insurance company must have statements of account, and it is from these that financial liability could be determined.

Counsel noted that the case had been going on since 1997; and that the Defendant has generally sought to delay the disposal of the matter. He submitted that it was not true that no prejudice would be suffered by the Plaintiff if payment was not all made at once. He urged that the Defendant should either pay the remaining balance in lump sum, or execution should proceed apace.

Mr. Mariaria for the Defendant/Applicant sought to attach a more positive feature to the delayed payments to the Plaintiff; this showed a lack of capacity to dispose of the outstanding payments at once. Certain scenarios emerge from the facts and submissions, and these may be set out as follows:

- (a) The claim for payment has been outstanding since 1997, which is evidence of a considerably slow response by the Defendant/Applicant.
- (b) Since then, the Defendant/Applicant has remained in the insurance market, and has continued to do business.
- (c) The fact that the Defendant/Applicant is indebted to the Plaintiff is beyond question and the former knows it has to pay up.
- (d) The Defendant/Applicant is quite clear that it does not want to pay a lump sum, and it is prepared to give some security to support its case for instalmental payment.
- (e) The Defendant/Applicant has been falling in arrears with payments, for some time.

(f) The Defendant/Applicant has not laid bare its financial plight which renders it difficult for all the sums owing to the Plaintiff to be paid up.

(g) The Plaintiff has a right to recover the Judgement Debt against the Defendant/Applicant.

(h) In its attempt to secure a softer scheduling of its payments, the best arrangement the Defendant/Applicant has been able to make is to secure some rather vague, verbal agreement which, clearly, the Plaintiff does not regard as binding.

On what principle would the Defendant/Applicant be entitled to the mode of payment being sought? There is only one guiding principle here: Indulgence. But indulgence is not a right. Does the Defendant/Applicant deserve to be indulged by the Court, in this matter?

In this ruling, no clear case has been made by the Defendant/Applicant for being accorded the Court's indulgence, in the payment to the Plaintiff of monies well and truly due.

Consequently this application fails. The costs of the Plaintiff/Respondent in this application shall be borne by the Defendant/Applicant.

**DATED and DELIVERED at Nairobi this 16th day of December, 2003.**

**J.B. OJWANG**

**Ag. JUDGE**

**Coram: Ojwang, Ag. J.**

**Court clerk: Mutea**

**For the Defendant/Applicant: Mr. F. Mariaria, Instructed by M/s A. N. Ngunjiri & Co. Advocates**

**On record for the Plaintiff/Respondent: Mr. Musyoka, Instructed by M/s. Onesmus Githinji & Co. Advocates**