



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 174 of 1998

MWANGI MATHAI.....PLAINTIFF

-VERSUS-

ROCKY DRIVING SCHOOL.....DEFENDANT

RULING

In this application the applicant is asking for Orders that:

- (1) The applicant be allowed to pay the decretal amount by monthly instalments of Kshs.20,000/-
- (2) There be a stay of the execution of the Decree.

The background to this application is that following a road accident the applicant was sued and a judgement against him was obtained.

The parties eventually after negotiations agreed on liability at 25% as to the Plaintiff and 75% as to the Defendant. The Defendants Insurance was to indemnify the Defendant to the extend of kshs.600,000 and the Defendant would pay the balance.

The Defendants Insurance Company was informed of this settlement and gave their approval in their letter of 9.3.2000 which is annexed to this application.

Following this arrangement a consent judgement was entered on 7.4.2000 and it read

“It is ordered by consent

- (1) That judgement be and is hereby entered for the Plaintiff against the Defendant in the all inclusive sum of Shs.726,173.22
- (2) That the said sum of Kshs.726,173.22 be liquidated in six equal installments of kshs.121,028.90 commencing on 30.4.2000 and thereafter on or before the 30th of each succeeding month until payment in full.
- (3) In default of any one installments, execution to issue.

It will be noted that this consent order did not include the arrangement as to the apportionment between

the Defendant his Insurance Company, probably for the reason that this arrangement did not rightly concern the Plaintiff. Following an attachment of the Defendants' goods on 21.8.2000 the Insurance Company did write to the lawyers of the Plaintiff on 28.8.2000 and undertook to pay the sum of Kshs.600,000 which was their portion. The Defendant has paid his portion of the money being Shs.128,623 under the arrangement.

The Defendant now says that he is unable to pay the decretal amount by installments of kshs.100,000 per month demanded by the Plaintiff which was undertaken by the Insurance Company in their letter dated 28.8.2000 the Plaintiffs advocates.

The application is opposed on the grounds that the Defendant has not shown sufficient cause to warrant the court to issue the orders prayed for. It further contended that the applicant should have sought a review of the consent order instead of making the present application.

After going through all the attached documents to this application I have noted that the consent letter did specify the mode of payment.

This consent judgement was entered into with the understanding that the United Insurance Company Limited the Defendants Insurance would pay the sum of Shs.600,000/- as confirmed in their letter of 28.8.2000. There is no doubt that had it been within the knowledge of the parties when they were negotiating the settlement that this sum would not be forthcoming the Defendant would have proposed a lower sum of these installments. As it is the Defendant was misled by the Insurance Company to believe that the money would be paid. The Plaintiff does not deny that these were the arrangements which led to the consent judgement as it is. For these reasons the terms of payment of the consent judgement cannot stand as they were made as a result of misrepresentation by the Insurance Company. True enough the misrepresentation was not by the Plaintiff but they had a direct consequence in making the Defendant accept those installments.

The Defendant had offered to pay the decretal amount by monthly installments of Kshs.20,000 which he increased to kshs.30,000/- since the month of December,2000. He has attached to his bank statement to show his financial position. The debt in question now was incurred as a result of the failure by the Insurance Company to make its payment. It is not therefore the defendants default.

In my view the Defendant has shown sufficient reason. The Bank Statement supports his plea, and above all, he has demonstrated good faith by paying his part of the decretal amount and by paying the monthly installments of Ksh.30,000/- which he is paying since December, 2000 during the pendance of this application.

For these reasons I shall allow the application. The Defendant shall continue to pay the decretal amount by monthly installments of kshs.30,000/- and there shall be a Stay of the Execution of the decree.

Costs shall be to the Plaintiff.

Delivered and dated this 14th of March, 2001

KASANGA MULWA

JUDGE