

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT MISC. CIVIL CASE NO. 288 OF 1997

VICTORIA COMMERCIAL BANK LIMITED.....PLAINTIFF

V E R S U S

CHARLES LUTTA KASAMANI.....DEFENDANT

R U L I N G

In this Chamber Summons Application dated 27th June, 2001 and brought under Order XX Rule 11(2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the Applicant/Judgment Debtor (Charles Lutta Kasamani T/A Kasamani & Company Advocates) prays for, *inter alia*, an order that the decretal sum herein be liquidated by monthly installments of K.shs 125,970/= with effect from 15th July, 2001 until settlement in full. The said application is based mainly on the ground that the Applicant is presently unable to liquidate the entire decretal sum at once and that he is ready to secure the debt by issuance of a land certificate to property valued (according to him) at over K.shs. 2,000,000/=

The facts are as follows:-

The Applicant was instructed by the Plaintiff/Decree Holder sometime in 1994 to recover some money owed to the Plaintiff by one Dr. Ooko Ooki Ombaka. Pursuant to those instructions, he did file a suit (**Kisumu High Court Civil Case No. 343 of 1994 – Victoria Finance Company Limited vs. Dr. Ooko Ooko Ombaka**) and obtained judgment for K.shs. 782,147/65/= with costs which he collected for the Plaintiff/Decree Holder. He remitted K.shs. 150,000/= and Kshs. 243,200/= to the Plaintiff/ Decree Holder between 1996 and 1997, and the unpaid amount continued to attract interest at the rate of 38% per annum till payment in full. When settlement was not forthcoming, the Plaintiff filed the present suit on 2nd April, 1997 to recover the balance and interest thereon. On 23rd March, 1998, the Honourable Justice Msagha Mbogholi entered a consent judgment for the Plaintiff for K.shs. 1,224,982.60. The costs of the suit were agreed between the parties at K.shs. 106,226/= on 21st July 1998 before Mbogholi J. The rate of interest was contested by the Applicant and it was set at 38% per annum by the Honourable Lady Justice Joyce Aluoch in her ruling of 9th February, 2000. That rate of interest applies from 31st July, 1997 until the debt is paid in full. Fearing that execution may be levied against his property, the Applicant rushed to Court on 24th February, 2000 with an application for stay of execution and to be allowed to pay by installments. That application though similar to the one now before me was never prosecuted. The Plaintiff, desirous of realizing the fruits of his judgment, instructed Plancustody Auctioneers to levy a Proclamation of Attachment which they did on 25th June, 2001. That prompted the Applicant to lodge the present application. The same was heard *ex parte* on 28th June, 2001 before Githinji J. and *inter partes* on 2nd July, 2001 before the same Judge. When the parties came before me on 3rd July, 2001, Mr. Kinyanjui argued that the Applicant be allowed to pay by twenty installments as he cannot liquidate the whole sum at once. That he is ready to furnish a parcel of land as security for the amount owed to the Plaintiff. The Learned Counsel for the Applicant also submitted that the property proclaimed can only realize K.shs. 100,000/= which would not benefit the decree holder and any execution process will put the Applicant out of business. Mr. Wanjohi for the Plaintiff disagreed with his learned friend. He ably submitted that the Applicant has not shown sufficient cause why the decretal sum should be paid in installments and referred to the case of **Keshavji Jethabhai & Bros Limited v. Saleh Abdulla [1959] E.A. 260** on this point. He contended that the Applicant had not shown good faith in coming to Court as he has not paid anything despite being in a position to and is just delaying payment.

In determining whether a judgment debtor should be allowed to pay by installments, the Court must be satisfied of the existence of a sufficient reason to grant such a concession. The existence of sufficient reason will depend on the particular facts of the case.

“The Court will consider the circumstances under which the debt was contracted, the conduct of the debtor, his financial position, and so forth, and installments should be directed where the defendant shows his bona fides by offering to pay anything like a fair proportion of his debt at once.” – per Crawshaw J. in Keshavji Jethabhai & Bros. Limited v. Saleh Abdulla (supra) at p. 263.

Looking at the matter as a whole, it is clear that the Applicant has not shown any bona fides and I say so for various reasons.

First, he lodged the first application similar to the one before this Court on 24th February, 2000 but never prosecuted it. Secondly, he made the present application two years after the judgment and only after a Proclamation for Attachment was levied upon his office property. Thirdly, he had issued a cheque Number 059702 for K.shs. 243,200/= which was dishonoured on presentation on 25th July, 1996. In addition, the Court takes note that the Judgment herein is old and was entered in 1998. The Applicant has in the past made several proposals to liquidate the decretal sum, but has failed to honour any of those proposals. In fact, in the last three years he has only paid Shs. 300,000/=.

Further, he has annexed statements of his Client’s Accounts showing that he had received fees several times over and above what he owes the decree holder (Annexure “CLK 3A” of his Supporting Affidavit). He has not shown bona fides by offering to pay a substantial amount of the debt and his suggestion of K.shs. 125,970/= monthly installments will take over two years to liquidate the decretal sum. The following words of **Oldfield J. in Binda Prasad v. Madho Prasad and Others (1) [1879] 2 All. 129** were quoted with approval by **Crawshaw J. in Keshavji Jethabhai & Bross Limited (supra) at p. 262** and aptly sum up the instant application.

“The reason assigned amounts to nothing more than an inability to pay but that is no sufficient reason why execution should not at once proceed.”

This Court therefore declines to exercise its discretion in favour of the Applicant and his application is dismissed with costs to the Decree Holder.

DATED and DELIVERED at NAIROBI this 24th day of July, 2001

ALNASHIR VISRAM

JUDGE