



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 601 OF 2015

SAMUEL MUREITHI MURIOKI.....PLAINTIFF/APPLICANT

VERSUS

MICHAEL NJOROGE GACHUHL.....DEFENDANT/RESPONDENT

UNCLE SAM'S GITHURAI LIMITED.....THIRD PARTY

MAIKO INVESTMENTS LIMITED.....INTERESTED PARTY

RULING

1. This is the Notice of Motion dated 21st July 2020 brought under section 1A, 1B and 3A of the Civil Procedure Act, Order 21, Rule 12(2) and Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of law.

2. It seeks orders:-

1. That the court be pleased to order that the plaintiff/judgment debtor in this matter be allowed to settle the decretal amount by the payment of a deposit of this sum of Kshs.2,000,000.00 and then liquidate the balance in monthly instalments of Kshs.200,000.00 until settled in full.

2. That the costs of this application be provided for.

3. The grounds are on the face of the application and are:-

1. The applicant/judgment debtor is desirous of settling the outstanding amounts in this matter by way of instalments.

2. The applicant is a businessman having business interests in the hospitality industry and his business has suffered tremendously under the burden of the ongoing corona virus pandemic and a payment via instalments would be sustained and just in the circumstances.

4. The application is supported by the affidavit of Samuel Mureithi Murioki the judgment debtor/applicant sworn on the 21st July 2020.

5. The application is opposed. There is a replying affidavit sworn by Michael Njoroge Gachuhi the defendant/respondent on the 28th October 2020.

6. On the 24th November 2020, the court with the consent of the parties directed that the application be canvassed by way of written submissions.

7. The plaintiff's/applicant's submission are dated 7th December 2020. It is his case that he has shown his *bonafides* by making payments of Kshs.500,000 and has made a workable proposal on how to pay the decretal sum. He has put forward the case of **Hildegard Ndalut vs Lelkina Dairies Ltd & Another [2015] eKLR** as quoted with approval in **Abdisalan Abdi Ali Ismail vs Guhart Abdi Ali & 2 Others [2019] eKLR** where Dulu Ag. J (as he then was) stated as follows:-

“Both parties have referred to the case of Keshvaji Jethabhai & Bros Ltd vs Saleh Abdulla [1959] EA 260, which is a case from High Court of Tanganyika. That case followed the principles laid down in the Indian case of Sawutram Ramprasad vs Tripural

Bank of Indian [1933]AIR Nag.33- that a defendant should be required to show his bonafides by arranging fair payment of the proportion of the debt in persuading the court to allow payment by way of instalments. This in my view is the proper test to apply in granting order for payment of decretal amount by way of instalments. A judgment creditor is entitled to payment of the decretal amount, which he should receive promptly to reap the fruits of the judgment. The judgment debtor might genuinely be in a difficult position in paying the decretal sum at once. However he has to show seriousness in paying the amount. In that event he should show his bonafides by arranging fair payments proposals to to liquidate the amount.”

8. He prays that his application be allowed as it will secure his livelihood while at the same time ensuring that the defenant is guaranteed payment of his decree.

9. The defendant/respondent submissions are dated 11th December 2020. It is his case that he who seeks equity must do equity and a party seeking discretionary orders must have acted fairly and be deserving of the court’s discretion. The plaintiff/applicant does not deserve the descretion of this court.

10. As at 18th November 2020 the principal sum stood at Kshs.5,373,000/- and the accrued interest on the principal amount stood at a sum of Kshs.3,599,910 hence the net outstanding amount as at the aforesaid date was a sum of Kshs.8,972,910/- excluding costs and interst that continues to accrue thereof. It will take a period of 35 months to clear the decretal amount which is greatly prejudicial to the defenant/respondent. The plaintiff/applicant has no intention of having the matter expeditiously concluded yet he continues to enjoy the premises he was letting out to the defendant/respondent. He prays that the applicaiton be dismissed wiht costs.

11. I have considered the notice of motion and the affiavit in support. I have also considered the notice of motion and the affidvit in support. I have also considered the replying affidavit, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether this applicaiton is merited.

12. Order **21 rule 12** of the Civil Procedure Rules 2010 provides that:-

“ (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 instalments 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 instalments 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.”

13. It is clear from the above provision that the court may excercise discretion in favour of applicant upon sufficient cause being shown. I have gone through the court record and I am not convinced that the plaintiff/respondent deserves the exercise of the court’s discretion.

14. It is clear from the facts of this case that on 22nd December 2014, the defendant/respondent entered into a tenancy agreement with the plaintiff/applicant in respect of rental premises erected on LR NO Nairobi/Block/119/2843 in Githurai 44 Estate. The defendant/respondent paid the plaintiff/applicant kshs.5,920,000 on 18th April 2015. Upon receipt of the money the plaintiff/applicant refused to hand over the rental premises to the defendant/respondent. He also refused to refund the said sum and opted to file this suit.

15. What transpired when the matter was referred to the Arbitration further confirms the plaintiff’s/applicant’s lack of good faith. I find the proposals on how to settle the decretal sum to be prejudicial to the defendant/respondent who ought to enjoy the fruits of his judgment.

16. I find that the plaintiff/applicant has failed to demonstrate that he deserves the exercise of this court’s discretion. I find no merit in this application and the same is dismissed with costs to the defendant/respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 22nd April 2021.

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Mwangi M. K for the Plaintiff

Mr. Mwangi Kigotho for the Defendant

Phyllis - Court Assistant