



REPUBLIC OF KENYA



**Kabaru & another v Maina (Miscellaneous Civil Application
E172 of 2023) [2025] KEHC 4785 (KLR) (Civ) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4785 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E172 OF 2023**

TW CHERERE, J

MARCH 6, 2025

BETWEEN

PETER NJOROGE KABARU 1ST APPLICANT

BANANA HILL MATATU SACCO SOCIETY LIMITED 2ND APPLICANT

AND

OBED MACHARIA MAINA RESPONDENT

RULING

1. Following the dismissal of this appeal, the Respondent instructed auctioneers to execute the judgment issued on 31st May 2022 in Milimani CMCC No. 7797 of 2017.
2. The Applicant subsequently filed the Notice of Motion dated 19th November 2024, seeking the following orders:
 - a. That the Honourable Court be pleased to allow the Applicant to pay the pending balance of Kshs. 2,000,000 to the Respondent herein within 30 days and the outstanding balance within 45 days
 - b. That Betabase Auctioneers be directed to tax their costs.
 - c. That costs be in the cause.
3. The application is based on the grounds that following the dismissal of this appeal, the Respondent instructed auctioneers to execute the judgment issued on 31st May 2022 in Milimani CMCC No. 7797 of 2017.
4. Through the affidavit of Janerose Nanjira, Advocate for the Applicant, sworn on 19th November 2024, it is deposed that the Applicant is willing to pay KES. 2,000,000/- in 30 days and the balance in 45 days.



5. In an affidavit sworn on 03rd December 2024, the Respondent opposes the application, arguing that since the appeal has been dismissed, the warrants of attachment have been lawfully issued for non-payment of the decretal sum. The Respondent emphasizes the legality of the execution process and expresses concerns over the Applicant's payment proposal.
6. I have considered the application in light of the affidavit on record. Although not expressly stated as such, the application before me is essentially a request to settle the decretal sum in instalments.
7. Order 21 Rule 12 (2) of the Civil Procedure Rules, 2010 gives the court discretion to allow payment of the decretal sum by way of instalments, stating: -

“After the 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 installments on such terms.”
8. In determining whether a judgment debtor should be allowed to pay by installments, the Court must be satisfied that a sufficient reason exists for granting such relief, based on the particular facts of the case.
9. The case of Keshvaji Jethabhai & Bros Limited v Saleh Abdulla [1959] EA 260 established principles guiding the court's discretion as follows:
 - i. The circumstances under which the debt was contracted
 - ii. The conduct of the debtor
 - iii. The debtor's financial position
 - iv. The bona fides of the debtor in offering to pay a fair proportion of the debt
10. Similarly, in Freight Forwarders Ltd v Elsek & Elsek (K) Ltd (2012) eKLR, the court outlined principles for determining 'sufficient cause' as follows: -
 - (a) The debtor is unable to pay in lump sum.
 - (b) The debtor can pay by reasonable monthly instalments.
 - (c) The application is made in utmost good faith.
11. In Diamond Star General Forwarding Ltd v Ambrose D O Rachier (2018) eKLR the court held that: -

“That my view is an applicant who wishes a court to exercise its discretion and order payment of a decretal sum by way of installments must be very candid with the court. Such an applicant must present to the court sufficient material to show that he/she is a person of no means, that whatever income she or he has is lawfully committed elsewhere. He or she must disclose to the court all his/her means and explain to the court why the proposed installments are the best option available. Accordingly, the burden is on the applicant to prove/show that he/she deserves the orders sought”.
12. Applying the foregoing principles to this case, the debt herein accrued from the judgment in Kikuyu SPMCC No. 25 of 2016 that was delivered on 08th November, 2018, and is now 7 years old.
13. The conduct of the Applicant is a relevant factor. Over the past seven years, the Applicant has neither paid the decretal sum nor made any efforts towards partial settlement. Good faith would have required some effort to settle the judgment debt, whether partially or fully.



14. In assessing whether a debtor can pay the decretal sum in instalments, the court considers the debtor's financial situation, typically demonstrated through financial records such as bank statements and income declarations. In *Kenya Power & Lighting Company Limited v. Benjamin Njiru Ndwiga* (2014) eKLR, the court emphasized that it is the debtor's responsibility to provide sufficient evidence of financial incapacity to justify instalment payments.
15. In this case, the Applicant has failed to provide any evidence proving an inability to settle the decretal sum in full.
16. Consequently, I find that the Applicant has not satisfied the conditions required for the court to exercise its discretion in permitting installment payments. Allowing further delays would be prejudicial to the Respondent, who has already waited seven years to enjoy the fruits of the judgment.
17. In the result, the Notice of Motion dated 19th November 2024 is disallowed with costs to the Respondent.

DELIVERED AT NAIROBI THIS 06TH DAY OF MARCH 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances:-

Court Assistant - Ubah

For Applicant - Ms. Wachira for Kimondo, Gachoka & Co. Advocates

For Respondent - Mr. Asimwa for Magee Law LLP

