



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Musimba v Kituyi (Commercial Case E110 of 2018)  
[2025] KEHC 2766 (KLR) (Commercial and Tax) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2766 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E110 OF 2018  
A MABEYA, J  
MARCH 13, 2025**

**BETWEEN**

**HON DR PATRICK MWEU MUSIMBA ..... PLAINTIFF**

**AND**

**HON DR MUKHISA KITUYI ..... DEFENDANT**

**RULING**

1. This ruling determines the application dated 28/5/2024. The same was brought pursuant to sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 22, Rules 1, 22, 25 and 59, Order 27 rule 1, Order 42 Rule 7 and Order 51 rule 1 of the *Civil Procedure Rules*.
2. The application sought the setting aside of the Warrants of Attachment issued on 15/5/2024, the immediate payment to the decree/holder of Kshs. 10,000,000/- out of the decretal sum and the balance thereon by monthly instalments of Kshs.2,000,000/- until payment in full. That consequently, there be a permanent stay of execution.
3. The application was based on the grounds set out in the body of the Motion and the applicant's supporting affidavit it sworn on the 28.5.2024.
4. The applicant av erred that he had already paid the principal sum of Kshs. 35,000,000/- to the respondent and was willing to settle the outstanding decretal sum with an initial payment of Kshs. 10,000,000/- and monthly installments of Kshs. 2,000,000/- until payment in full.
5. The applicant placed reliance in the cases of *Diamond Star General Trading LLC v Ambrose D O Rachier* [2018] eKLR and *Nicholas Gitonga Murongi v Susan Wairimu & 4 Others* [2021] eKLR in which the courts considered issues precedent to allowing an application seeking to settle a decretal sum v ia installments.



6. The applicant submitted that he had demonstrated sufficient cause for the Court to exercise its discretion in his favour as he had not only settled the principal sum but also proposed a mode of settling the outstanding balance in light of the fact that he had lost his job at UNCTAD, unsuccessfully plunged into politics and was only earning an income from sugar cane farming. He cited the case of *Freight Forwarders Ltd v Elsek & Elsek (K) Ltd* [2012] eKLR in support of his contention of having sufficient cause.
7. The respondent opposed the application vide his replying affidavit sworn on the 7/6/2024. He deposed that the application ought to be struck out on grounds that it was res judicata as the applicant previously sought stay of execution in Civil Appeal (Application) 91 of 2020 that was dismissed. There was an application before this Court dated 23/6/2023 that was similarly struck out for being res judicata and other similar application dated 23/6/2023 to the Court of Appeal was also struck out for being res judicata.
8. The respondent further deposed that the applicant had failed to show any basis upon which this Court will be inclined to exercise its discretionary jurisdiction to allow him settle the decretal amount in installments. That to allow the payment by installments would be unjust as he would be denied the fruits of his judgement for a period of over 5 years. Reliance was placed on amongst others, the case of *Lavington Security Limited v. Nairobi City Water and Sewerage Co. Ltd* [2014] eKLR.
9. The respondent proposed in the alternative, that the applicant should pay half of the outstanding decretal sum and clear the balance in no more than three equal installments.
10. The respondent submitted that the applicant had not laid a satisfactory basis to warrant grant of stay of execution as he had not demonstrated how he would suffer substantial loss and prejudice as was held in the cases of *Elena Doudoladara Korir v Kenyatta University* [2014] eKLR and *James Wangalwa & Another v Agnes Naliak Cheseto* [2012] eKLR.
11. I have carefully considered the pleadings, submissions and authorities relied on. There are two issues for determination namely: -
  - a. Whether the instant application is res judicata.
  - b. Whether the applicant merits an order allowing him to settle the outstanding decretal sum in installments.
12. Regarding res judicata, in *Uhuru Highway Development Ltd v Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni* [1996] eKLR the Court of Appeal ruled that the Application before it was res judicata as the issue of injunction had been twice rejected both by the High Court and the Court of Appeal on merits and that the Ruling by the High Court had not been appealed against. It stated that: -
 

“That is to say, there must be an end to applications of similar nature, that is to further, under principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or *Civil Procedure Act* caters for.”
13. Judicial determinations must be final, binding and conclusive. There is injustice if a party is required to litigate afresh matters which have already been determined by a court. A decision of a court, unless set aside or quashed in a manner provided for by the law, must be accepted as incontrovertibly correct.



14. In the instant case, it is undisputed that the applicant made an application for stay of execution in the Court of Appeal that was dismissed on the 20/11/2020. Other applications seeking stay before this Court have similarly been dismissed. The applicant also sought to set aside the warrants of attachment however this issue was similarly considered by this court and dismissed in its ruling of 9/02/2024. Accordingly, it is this court's finding that the two issues are res judicata and cannot fall for determination before this Court again.
15. Turning to the question whether the applicant merits an order to settle the outstanding decretal sum in installments, the law applicable is Order 21 Rule 12 of the *Civil Procedure Rules* which provides: -

“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 installments 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”.
16. The decree holder refused the request by the applicant to pay the decretal sum by a lump sum of Kshs. 10,000,000/- and monthly installments of Kshs. 2,000,000/-. The applicant was therefore required to show sufficient cause to draw the discretion of this Court in his favour.
17. The applicable principles were set out in *Botanics Kenya Ltd v Ensign Food (K) Ltd (1959) and A. Rajabali Alidina v Remtulla Alidina & Another (1961) EA 565*. These can be summarized as; circumstances under which the debt was contracted, the conduct of the debtor, his financial position and his bona fides in offering to pay a fair proportion of the debt at once.
18. In *Freight Forwarders Ltd (supra)*, the court narrowed the principles as regards to what amounts to ‘sufficient cause’ to include that, the debtor is unable to pay in lump sum, the debtor can pay by reasonable monthly installments and that the application is made in utmost good faith
19. In *Keshvaji Jethabhai & Bros Limited v Saleh Abdulla [1959] EA 260* laid down the principles that should guide the court in exercising its discretion: -
  - a. Whilst creditors’ rights must be considered each case must be considered on its own merits and discretion exercised accordingly;
  - b. The mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of the discretion;
  - c. The debtor should be required to show his bona fides by arranging prompt payment of a fair proportion;
  - d. Hardship of the debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor
20. It was upon the applicant to demonstrate how his case fell into the applicable principles. It is clear that each case must be considered on its own merit and the mere fact of inability to pay the full sum at once is not sufficient reason. Any indulgence given to the judgment debtor must not prejudice the decree holder.
21. It must be considered that this is a 2018 matter. It is still doing the rounds in the courts and the respondent is the holder of an enforceable decree. It is not lost on this Court that the debt herein accrued following an advance of Kshs. 35,000,000/- to the applicant by the respondent upon the



applicant's own request. The applicant has pleaded and submitted that he is unable to settle the balance of the decretal sum in one lump sum on account of having lost his job at UNCTAD and failed in his political aspirations and as such only relies on income from sugar cane farming. However, the applicant has not attached any evidence for this Court's scrutiny as to his inability to settle the debt.

22. The respondent has however extended an olive branch and proposed that the applicant pay half of the outstanding decretal sum and clear the balance in no more than three equal installments. The respondent is entitled to the fruits of his judgment as the judgment debtor is entitled to some respite.
23. Accordingly, the application is allowed on condition that the applicant pays half of the outstanding decretal sum and clear the balance in five (5) equal installments. The respondent will have the costs of the application.

It is so ordered.

**SIGNED AT KISUMU ON THIS 25<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**A. MABEYA, FCI Arb**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF MARCH, 2025.**

**F. GIKONYO**

**JUDGE**

