



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC CASE NO. 11 OF 2016

DESTERIO NYONGESA WANYAMA.....APPELLANT/RESPONDENT

VERSUS

GILBERT WESONGA MUGENI

AHMED MOHAMED.....APPLICANTS/RESPONDENTS

R U L I N G

1. The Applicant brought the application dated 17th March 2021 under the provisions of order 12 rule 12(1) & (2) of the Civil Procedure Rules and section 3A of Civil Procedure Act seeking the following orders;

a) Spent.

b) Spent.

c) Spent.

d) That the Applicant be granted leave to liquidate the Respondent's taxed costs by;

(i) Monthly instalments of Kshs.10,000/=.

(ii) That at any given time in the course of No. 4(i) above, should the Applicant be seized of any substantive and or the balance of the entire outstanding sum of the taxed costs, he be at liberty to pay off such outstanding sum.

e) Costs be costs in the cause.

2. The application was based on the following grounds;

a) That the Respondent has already taken out warrants of arrest against the Applicant for committal to civil jail.

b) The Applicant is willing to pay off the taxes if afforded a time frame for restructured payment.

3. In the affidavit in support of the application, GILBERT WESONGA MUGENI deposed that he is not contesting the Respondent's taxed costs but he is approaching the court for a relief to liquidate the said taxed costs by monthly instalments of Kshs.10,000. He further deposed that should he be seized of a lump-sum amounts equivalent to any outstanding sum of the taxed costs he will pay off any such outstanding sum. That it is only due to the current lean economic times which have adversely affected his business compounded with the court directing direct deposit of monthly rents into court that distressed his economic status.

4. The Appellant responded to the application by filing Grounds of Opposition together with authorities which the court has considered. The grounds are as follows;

i) The application is misconceived, made in bad faith and therefore an abuse of court process.

ii) The applicant is guilty of laches.

iii) The applicant has not sworn an affidavit of means.

iv) *The application does not satisfy the prerequisites for the grant of the orders sought.*

5. The application came up for hearing on 24th March 2021 and the parties submitted orally in court. Mr. Ipapu, learned counsel for the Applicant submitted that the applicant is a businessman and that once he finds funds, he will settle the taxed costs. That the record shows that both the Respondent and the Applicant are people of means/businessmen. However, business has been affected by Covid-19 internationally.

6. Mr. Omondi learned counsel for the Respondent submitted the application is a clear manifestation of impunity by litigation. That the impugned Costs were taxed ex-parte for non-attendance on 18/12/2019 before corona. The applicant has come to court 1½ years later to seek payment by instalments. The applicant seeks to pay by instalments yet his advocate submits that he is a man of means. The Respondent contends that in the absence of affidavit of means, the court cannot exercise discretion in favour of a party who has not demonstrated source of income and inability to pay.

7. The Respondent relied on the case of ***Lavington Security Ltd v. Nairobi Water & Sewerage Co. Ltd (2014) eKLR***, where it was held that mere inability to pay is not a good reason to get an order for payment by instalments. That the proposed sum of Kshs.10,000 is too low as it would take approximately 3 years to settle the decree. He urged that the application be dismissed with costs.

8. Order 21 Rule 12 of the Civil Procedure Rule provides as follows;

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.”

9. The power to order for payments by instalments vested to the court by this Order is discretionary and the party making the application has to show sufficient cause. The taxed costs at the centre of this application is Kshs.315,076/=. If the court were to allow the Applicant’s prayer of settling the same at the rate of the proposed amount, the full settlement will be final after 3 years. The application after 1½ years from the date of taxation which delay the applicant explains away that there had been no demand for the costs. That would almost be a 5 year wait for what they are owed.

10. The court record does show that the applicant had filed previous applications seeking other orders thus making him aware of his obligation towards the Respondent. In the present application, he is seeking discretionary orders therefore, he who comes to equity must come with clean hands. In the case of ***Freight Forwarders Ltd v Elsek & Elsek (K) Ltd (2012) eKLR*** highlighted what amounts to sufficient cause where Justice R.M. Mwangi quoted ***A Rajabali Alidina v. Rehmatulla Alidina & Anor (1961) EA 565*** which held: -

“the court can consider the circumstances in which the debt was incurred; the conduct of the debtor; his financial position; and his bona fides”.

11. Applying the above principles, the Applicant’s conduct towards the settlement of the taxed costs has not been encouraging. He took the matter serious only after he became aware that a warrant of arrest was issued against him. The amount proposed will delay the Appellant from enjoying his taxed costs. Further, the Applicant has not filed affidavit of means to persuade the court about his financial position as at now. Therefore, it is my opinion that the Applicant has not demonstrated sufficient cause to invoke the discretion of this court to be allowed to settle the costs in monthly instalments of Kshs.10,000.

12. However, in the interest of justice and this court taking judicial notice the impact of covid-19 pandemic on businesses generally, I shall allow the applicant to settle the taxed costs in five (5) equal instalments effective from 20th July 2021 and on the 20th of every subsequent month. In default of any one instalment, execution shall issue. Each party to meet their respective costs of this application.

Dated, signed and delivered at BUSIA the 30th day of June, 2021.

A. OMOLLO

JUDGE