



**Wasika v Omita & another (Arbitration Cause E066 of 2022)  
[2025] KEHC 9274 (KLR) (Commercial and Tax) (23 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9274 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
ARBITRATION CAUSE E066 OF 2022  
F GIKONYO, J  
JUNE 23, 2025**

**BETWEEN**

**DAVID WAMBUA WASIKA ..... DECREE HOLDER**

**AND**

**ALOIS OTIENO OMITA ..... 1<sup>ST</sup> JUDGMENT DEBTOR**

**ROSE MARIE OMITA ..... 2<sup>ND</sup> JUDGMENT DEBTOR**

**RULING**

1. The judgment debtors filed the notice of motion dated 20<sup>th</sup> June 2024, under Order 21 Rule 12 of the Civil Procedure Rules, seeking leave to liquidate the arbitral award by Kshs. 300,000 immediately and the balance by monthly instalments of Kshs. 100,000/- till payment in full and payable by the 5<sup>th</sup> of each subsequent month commencing July 2024.
2. The judgment debtors also seek that the applicant be restrained from levying execution as long as they pay the proposed monthly instalments in full settlement of the decretal sum.

**Background**

3. On 12<sup>th</sup> January 2018, the parties entered into an agreement for the sale of a parcel of land known as L. R. No. 12422/491, Balozi Estate for Kshs. 45,000,000/-. A dispute ensued, leading the applicant to file a suit before the court. According to the judgment debtors, the institution of the suit was premature and in violation of Clause 17 of the agreement, which required such disputes to be referred to arbitration.



4. The judgment debtors applied for referral of the dispute to arbitration, and their application was compromised through a consent recorded on 29<sup>th</sup> July 2021. Consequently, the dispute was referred to arbitration, and the applicant was awarded Kshs. 20,000,000/-.
5. The decree holder commenced execution proceedings to recover the arbitral award and instructed Kindest Auctioneers to issue a proclamation notice dated 11<sup>th</sup> June 2024 to the judgment debtors.

### **Grounds**

6. The application is supported by the affidavit sworn by the 1<sup>st</sup> respondent on 20<sup>th</sup> June 2024 and written submissions dated 25<sup>th</sup> September 2024
7. The judgment debtors stated that they have been paying the decretal sum in instalments, which sum up to Kshs. 4,870,000/- as at the date of the present application.
8. However, since then, they have had challenged sourcing funds to settle the lump sum amount due to economic constraints. On 11<sup>th</sup> July 2024, Kindest Auctioneers proclaimed their movable properties and the same are to be attached upon expiry of seven (7) days.
9. The judgment debtors stated that they are willing to settle the arbitral award, albeit in instalments. They mentioned that they have pending bills yet to be settled by the different customers they have done services for. They also cited substantial family obligations.
10. The judgment debtors asserted that the decree holder would not suffer any prejudice if the present application is allowed. However, they would be subjected to irreparable loss, damage and harm as the applicant can file an application for attachment of their tools of trade, rendering them out of operation and incapable of offsetting the decretal amount in instalments. They also asserted that it is in the interest of justice to allow the present application to avoid undue hardship and potential execution against their proclaimed property.
11. The judgment debtors submitted that they have met the threshold for the grant of the orders sought. That they have shown willingness to offset the lump sum amount owing in instalments by producing a payment schedule annexed and the M-Pesa statements. That they have attached debts owed to them, amounting to Kshs. 20,612,028.00.
12. The judgment debtors relied on:-
  1. Diamond Star General Trading LLC v Ambrose D O Rachier carrying on business as Rachier & Amollo Advocates [2018] eKLR
  2. Rajabali Alidina v Remtulla Alidina & another(1961) EA 565
  3. Keshvaji Jethabhai & Bros Limited V Saleh Abdulla [1959] EA 260
  4. Hildegard Ndalut v Lelkina Dairies Ltd & Anor. [2005] eKLR
  5. Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd
  6. Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR

### **Response**

13. In opposition to the application, the decree holder filed a replying affidavit sworn on 9<sup>th</sup> July 2024 and written submissions dated 9<sup>th</sup> October 2024.



14. The decree holder deposed that the judgment debtors have not paid a single cent of the decretal sum as per the court order of 21<sup>st</sup> March 2023, at all. He pointed to the warrants of attachment and sale annexed as the Exhibit “DWM 1” showing that the outstanding decretal amount is Kshs. 25,123,481/\* as at 4/6/2024 and not Kshs. 20 Million as claimed by the respondents.
15. The decree holder challenged the schedule produced by the judgment debtors because it reflected random unauthorized payments to his son, Kenneth Masika, and to Kangeri Wanjohi of Kindest Auctioneers, claiming that none of the payments were made to him or his advocates on record.
16. The decree holder contended that the bad economic situation in the Country affects all Kenyans and not just the judgment debtors alone and that it is up to every well-meaning judgement debtor to make a good faith effort to settle his/her debts, no matter the state of the economy.
17. The decree holder lamented that the judgment debtors have shown a lack of seriousness. He pointed out that if their application is granted, they will take over 17 years to settle the decretal amount. He also questioned whether, if the application is allowed, he would ever get to enjoy the fruits of his judgment, considering that he is 80 years old today.
18. Nevertheless, the applicant indicated his willingness to entertain a more reasonable proposal to pay 50% of the decretal amount upfront and the balance by monthly instalments of Kshs. 250,000.
19. The decree holder stated that he has been prejudiced since 12<sup>th</sup> January, 2018 when he parted with his hard-earned money and got no consideration for it. He has been unable to invest his money as he had intended over the past 6 years.
20. The decree holder argued that this court lacks the jurisdiction to determine the present application because the court’s only mandate in this matter was to decide on the adoption of the arbitral award.
21. The decree holder argued that the application is not merited and that by telling half-truths the judgment debtors have not come to equity with clean hands, as required. That they have not attached evidence to show the ability to pay what they are offering to pay now and in full, or the inability to pay now. That they have not made any good faith effort to pay a substantial part of the decretal amount.
22. The decree holder relied on:-
  1. The Owners of Motor Vessel Lilian “S” v Caltex Oil (Kenya) Ltd (1989] KLR 1
  2. Interim Independent Electoral Commission (Applicant) (Constitutional Application 2 of 2011) (2011) KE80 1 (KLR)
  3. Rex Kensington Income Commissioners, Ex parte Princiss Edmond De Polignac (1917) 1 KB 486
  - 4}}. Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri [2014] KLR
  5. Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No. 25 of 2002 (2009) KLR
  6. Sonko v County Assembly of Nairobi City & 11 others (Petition 11 (E008) of 2022) [2022] KESC 76 (KLR) (5 December 2022) (Reasons)



## Analysis and Determination

23. The first issue is whether the court has jurisdiction to hear and determine the present application. The application is made under Order 21 Rule 12 of the Civil Procedure Rules, which provides as follows:

“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”

24. The decree holder submitted that this court lack jurisdiction to consider the present application because flowing from its application for adoption of the arbitral award, the court’s only mandate in this matter was to decide on the adoption of the arbitral award.

25. Section 10 of the *Arbitration Act* provides that, except as provided in the Act, no court shall intervene in matters governed by the Act.

26. Section 32A of the Act provides that, except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.

27. Section 36 (1) of the Act provides that a domestic arbitral award shall be recognised as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.

28. On 21<sup>st</sup> March 2023, the arbitral award dated 27<sup>th</sup> May 2023 (Rtd Justice Mwera) was recognised as a judgment of this court and leave granted for its enforcement as a decree.

29. Following the recognition of the award as a judgment of this court, I find that the court has the jurisdiction to consider the present post-judgment application.

30. I now move to consider whether the judgment debtors have met the threshold for the grant of the orders sought.

31. The court’s power to grant leave to pay the decretal sum in instalments is discretionary. Therefore, the power must be exercised based on principles and not on a whim.

32. In *Keshvaji Jethabhai & Bros Limited V Saleh Abdulla* [1959] EA 260, the court underscored that:-

“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.”

33. The court further elaborated that:-

“Whilst the courts must be zealous of the creditor’s rights, they must consider each case on its merits and exercise the discretion accordingly... Hardship to a debtor might in some circumstances be taken into consideration on an application for payment by instalments; it is a question in each case whether some indulgence can fairly be given to the debtor without unreasonably prejudicing the creditor.”



34. With the above in mind, I have considered the grounds raised by the judgment debtors and the grounds of opposition by the decree holder.
35. The judgment debtors indicated that the outstanding decretal amount is Kshs. 20 Million. However, this was contested by the decree holder, who claimed that the amount was Kshs. 25,123,481/- as at 4/6/2024 as per warrants of sale and attachment annexed.
36. The warrant of attachment dated 4<sup>th</sup> June 2024 indeed shows that the outstanding decretal sum as at that date was Kshs. 25,123,481.
37. The judgment debtors stated that they have been paying the decretal sum in instalments, which sum up to Kshs. 4,870,000/- as at the date of the present application. However, the decree holder asserted that the judgment debtors have not paid a single cent of the decretal sum as per the court order of 21<sup>st</sup> March 2023, at all. He questioned the schedule produced by the judgment debtors, comprising of payments to his son, Kenneth Masika, and to Kangeri Wanjohi of Kindest Auctioneers, which he did not authorise.
38. There is no evidence that the decree holder authorised these payments. The judgment debtors did not reply to this, yet the onus is upon them to show the willingness and the ability to settle the decretal sum. Therefore, the purported payments cannot be deemed to have settled part of the decretal sum.
39. The judgment debtors cited economic hardship. The court must balance between the hardship by considering whether the indulgence sought would prejudice the decree holder.
40. The judgment debtors have proposed to settle the decretal sum by Kshs. 300,000 immediately and the balance by monthly instalments of Kshs. 100,000/- till payment in full and payable by the 5<sup>th</sup> of each subsequent month commencing July 2024.
41. However, the decree holder argued that he stands to be prejudiced if the proposal is allowed because he will be kept away from and may not get the fruits of his judgment due to his advanced age. He also argued that he has been kept from his hard-earned money since 12<sup>th</sup> January 2018, without consideration. He added that he has been unable to invest his money as he had intended over the past 6 years.
42. In my view, the judgment debtors' proposal for payment by instalments is prejudicial. I note, however, that the decree holder stated that he was willing to entertain a proposal for payment 50% of the decretal amount upfront and the balance by monthly instalments of Kshs. 250,000.
43. The judgment debtor's proposal for payment by instalments was on the lower side. I allow the application on the following terms: -
  1. The judgment debtors to pay 50% of the decretal sum upfront not later than 30.7.25 and the balance of the decretal sum in monthly instalments of Kshs. 250,000/-, payable by the 5<sup>th</sup> of each subsequent month with effect from 5<sup>th</sup> September 2025, until payment in full.
  2. The judgment debtors shall bear the costs of the application because they are seeking the indulgence to pay in instalments.
  3. Either party has the liberty to apply for further orders.

**DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT ONLINE APPLICATION THIS 23<sup>RD</sup> DAY OF JUNE, 2025**

.....



**F. GIKONYO M**

**JUDGE**

In the presence of: -

1. Shimoli for Applicant
2. CA Kinyua

