



Conrad Maloba & Associates Advocates v Bashir, Noor & Co. Advocates (Civil Case E264 of 2021) [2024] KEHC 683 (KLR) (Civ) (1 February 2024) (Ruling)

Neutral citation: [2024] KEHC 683 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE E264 OF 2021

JN MULWA, J

FEBRUARY 1, 2024

BETWEEN

CONRAD MALOBA & ASSOCIATES ADVOCATES APPLICANT

AND

BASHIR, NOOR & CO. ADVOCATES RESPONDENT

RULING

1. On 20/07/2023, this court by consent of the parties Advocates recorded a consent order, in respect of the Applicants Notice of Motion dated 21/06/2023 that:
 1.
 - (a) The judgment debtor do reserve the sums of Kshs. 20 Million and Kshs. 7 million in interest at Stanbic Bank, international life House, Account No. 010000XXXXXXXX the names of Conrad Maloba & Associates pending the hearing and determination of the application.
 2. That the Applications dated 15/06/2023 and 21/06/2023 be heard on 4/10/2023.
 3. That the Respondents in both Applications to file their responses together with submissions each within 14 days.
2. The above Applications and subsequent consent orders arose from the judgment delivered on 16/06/2023 by this court (Mulwa J.) and a decree drawn thereafter dated 21/06/2023.



3. In the Application dated 15/03/2023, the Judgment Debtor/Applicant sought orders to be allowed to liquidate the judgment sum being Kshs. 20 million plus interest and costs in monthly installments of Kshs. 2 million to be paid from the date of the order until payment in full, and a further order to restrain the decree holder/respondent from levying execution herein for as long as the applicant pays the proposed monthly installments.
4. In the Application dated 21/06/2023, the applicant seeks orders of Garnishee nisi attaching the Judgment Debtor Bank Account at Stanbic Bank in its name and to restrain the Garnishee from paying out or releasing or utilizing the decretal sum of Kshs. 20 million plus interest of Kshs. 7 million pending hearing and determination of the application.
5. The Decree Holder further seeks an order that Garnishee Absolute be issued so that the Garnishee may release to the Decree Holder, the Applicant, and forthwith pay Kshs. 2 million and Kshs. 7 million from the Judgment Debtor's Bank Account under its name Conrad Maloba & Associates in Account NO. 010000XXXXXXX in Stanbic Bank (K) Ltd to satisfy the Decree of this court.
6. It is upon the two applications that the Consent Orders recorded on the 20/07/2023 by the court arose from.

Both applications are opposed by replying affidavit sworn on various dates and submissions filed by the parties.

Application Dated 15/03/2023 Brought By The Judgment Debtor

7. The court has considered the party's affidavits in support, and in opposition and their respective submissions.
8. The Applicant/ case is grounded upon provisions of re Rules, Order 21 Rule 12 of the CPR 2010 that: -

“The Court upon application and with consent of the decree holder or without such consent, upon sufficient cause shown to order payment of the decretal sum in such installments as the court may deem appropriate.

Together with this prayer, the judgment debtor sought an order of stay of execution pending full payment.

9. An interim stay of execution was granted by the court on the 17/03/2023, and is in force.

The guiding principles that the court need to consider are:-

1. The circumstances under which the debt was contracted and
 2. Conduct of the debtor
10. The Judgment Debtor relied on the case of Rajabali Alidina vs. Remutulla Alidina & Another [1961] EA 565 for its inability to pay the full decretal sum as it deposes that it never received the said money from its client before giving the professional undertaking as well observed in the judgment that it issued the same upon a promise to refund by its client, but which was not honored, to forfeit two three bedroom residential units in the subject project which after conducting due diligence it was found that the title thereto was not clean as was subject to criminal investigations.



11. Those were the unfortunate circumstances, but nevertheless, the professional undertaking, having been given has to be honored by the Applicant as it had attached and crystallized as held in *K'owade & Ng'ang'a Advocates vs. Mutune Investments Ltd* [2016] eKLR.

12. What the court is called upon to do is to consider whether these unfortunate circumstances are sufficient grounds to allow the applicant to pay the decree in instalments of Kshs. 2 million per month as proposed.

I am minded that a professional undertaking need not be pegged upon whether or not the purpose of the same materializes or not – see *STG Muhia t/a Muhia & CO. Advocates vs. J. M. Chege & CO. Advocates* [2009] eKLR.

13. The Respondent in opposition to the application by its Replying Affidavit sworn by Jibril Noor on the 30/03/2023 is categorical that the decretal sum plus interest were to be paid within 30 days, by the judgment of the court dated 16/02/2023. I agree with the Respondent that the court's Deputy Registrar possessed no powers to issue prayers 3 and 4 nor alter the judgment of the court.

14. At paragraph 7(1) of the judgment, the court stated:

1. The respondent shall within 30 days from the date of this judgment honour the professional undertaking dated 15/06/2021 by refunding to the applicant the sum of Kshs. 20,000,000/= together with interest at court rates from the date of filing this summons.

The interpretation I attach to the above is that the Judgment debtor was to pay the debt within 30 days of the judgment; i.e. by 16/03/2021; meaning the full decretal sum within the 30 days; not until payment in full.

15. By this application, the JD seeks a review of the payment method as directed by the court, to vary the same to instalment payments in ten equal monthly instalments.

That in my view does not lie under the purview of Review under Order 45 CPR which envisages either, there being an error on the face of the record or a mistake.

16. In the instant Application (dated 15/03/2021), it is the Respondents submissions that this court has powers to review its orders if moved under Order 45 CPR, that it can stay execution of its orders under Order 42 CPR, but that non have been exercised by the Judgment Debtor.

The court has therefore been urged to find no merits in the Notice of Motion dated 15/03/2023 and dismiss it with costs.

Determination

17. Order 21 Rule 12 of the Civil Procedure Rules permits and grants power to a court, upon application by a Judgment Debtor with or without consent of the Decree Holder for sufficient cause being shown, to order payment of the decretal sum in instalments, on such terms as the court may deem fit.

18. I have earlier in this ruling stated the two conditions for consideration by the court;

1. The circumstances under which the debt was contracted and
2. The conduct of the debtor, as stated in the case *Rajabali Aliding vs Remtulla Alidina & Another* [1961] EA 568



19. The Applicant has shown willingness to pay the debt, hence has shown its bona-fides in offering what it states as fair installments to liquidate the debt for reasons and circumstances stated.
20. The court in the case *Hildegard Ndelut v. Letkina Diaries Ltd. & Another* [2005] eKLR stated;

“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 amount at once.

However, he has to show seriousness in paying the amount. In that event he should show his bona-fides by arranging fair payment proposals to liquidate the amount”
21. In *KTK Advocates vs. Baringo County Government* [2018] eKLR the court held that what ought to be considered is not how big the debt is but whether to grant or not; that it is a judicial discretion to be exercised judiciously; upon sufficient reasons.
22. The above principles have been applied in numerous decisions. To cite a few: -

Freight Forwarders Ltd vs. Elsek & Elsek (K) Ltd [2012] eKLR, *Keshvaji Jethabhai & Bros Limited versus Saleh Abdulla* [1959] EA 260, to the opposition that the fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reasons.
23. Further, a party who wishes to be granted leave to pay a debt in installments ought to provide some evidence of its inability to pay at once; say by providing its financial statements to enable the court verify for itself the allegation of inability to pay at once, and also determine the reasonable installments if allowed, or by filing an affidavit of means, where applicable.
24. In *Diamond Star General Trading LLC V Ambrose D. O. Rashier* carrying on business as *Rachier Amollo Advocates*, the applicant failed to demonstrate its financial position. The application was dismissed. Likewise, in *William Ndeti t/a Ndeti Enterprises vs. NIC Bank Limited* [2020] eKLR, the same position was upheld.
25. It is therefore trite that a court, apart from considering the peculiar circumstances of each case, must be satisfied that the application was made without undue delay as well as the hardship the applicant may result from enforcing the decree as it is. see also *Singh Gitau Advocates vs. City Finance Bank Ltd* [2013] eKLR.

Determination

26. Having considered the factors as enumerated above, as well as the parties submissions, I am satisfied that the Applicant, *Conrad Anangwe Maloba T/A Comrad Maloba & Advocates* have persuaded me sufficiently to allow its Application dated 15/03/2023, upon terms as appears here below:
 1. That the Applicant shall pay a lump sum of Kshs. 10 million to the Respondent on or before 28/02/2024.
In default, the full decretal sum shall become due and payable, and the Respondent shall be at liberty to execute for the same.
 2. The balance of the decretal sum shall be paid in four equal monthly installments w.e.f. 30/03/2024, 30/04/2024, 30/05/2024 and 30/06/2024.
In default of any of the above installments, the Respondent shall be at liberty to execute.



3. Costs of this Application shall be borne by the Applicant to the Respondent.

Notice Of Motion Dated 21/06/2023

27. On the 20/07/2023, by consent of the parties' advocates, the following order was recorded;
 - a. The Judgment Debtor do reserve the sum of Kshs. 20 million and Kshs. 7 Million in interest earning at Stanbic Bank, International Life House, Account Number 010000XXXXXXX in the names of Conrad Maloba & Associates pending the hearing and determinations of the application.
28. Having made orders on the Motion dated 15/03/2023 allowing the Judgment Debtor to liquidate the decretal sum by installments as stipulated above it would be premature to order that the Garnishee Nisi be made absolute. To that extent, the said application shall remain in abeyance upto when the full decretal sum shall be liquidated in full.
29. However, should the Judgment Debtor fail and or default in the payments as aforesaid, the garnishee, Stanbic Bank (K) Limited, upon mention for directions on the application by the Decree Holders, by an order of the court, in terms of prayer no. 3 of the application, the Garnishee shall be made absolute and ordered to release to the Decree holder/Applicant, the sum of Kshs. 20 million plus interest of Kshs. 7 million from the Respondents/Judgment debtors Bank Account under name Conrad Maloba & Associates in Account No. 010000XXXXXXX in Stanbic Bank (K) Limited to satisfy the decree of the court or as the case may be.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 1ST FEBRUARY, 2024.

J. N. MULWA

JUDGE

