



Afza Capital Limited v Doctor Search Limited; Standard Chartered Bank Limited (Garnishee) (Commercial Arbitration Cause E012 of 2023) [2024] KEHC 5539 (KLR) (Commercial and Tax) (6 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5539 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL ARBITRATION CAUSE E012 OF 2023**

PJO OTIENO, J

MAY 6, 2024

BETWEEN

AFZA CAPITAL LIMITED APPLICANT

AND

DOCTOR SEARCH LIMITED RESPONDENT

AND

STANDARD CHARTERED BANK LIMITED GARNISHEE

RULING

1. Both sides of the dispute have presented to Court two different applications.
2. The Plaintiff/Decree holder seeks a raft of orders some ambirdent including an order that:
 - a) Caroline Wanjiru Kahora and Charles Miochael Githii Kamotho being the Directors of the Respondent herein do attend court and be examined as to whether the Respondent has any property or means of satisfying the decree dated June 15, 2023 and to produce the Respondent's books of accounts and other documentary evidence showing the status of the business before the court.
 - b) The veil of incorporation of the Respondent be lifted and the Directors, Caroline Wanjiru Kahora and Charles Michael Githii Kamotho, be made personally liable and be ordered to settle the decretal sum of Usd 40,000 with interest thereof from January 13, 2020 at the rate of 9.5% per annum, jointly and severally, until payment in full.



- c) In default of the said Directors complying with the above orders, they be imprisonment and committed to civil jail for a period not less than ten (10) months.
 - d) The monies held by the Garnishee, Standard Chartered Bank Limited – on behalf of the Judgment debtor, in Account No. 8702xxxxxxx, or any other account belonging to the Judgment debtor, be and are hereby attached to answer the decree herein, the amount unsatisfied being Usd 40,000 with interest thereof from January 13, 2020 at the rate of 9.5% per annum plus costs of these garnishee proceedings.
 - e) The Garnishee do appear before court to show cause why they should not pay the Decree holder Usd 40,000 with interest thereof from January 13, 2020 at the rate of 9.5% per annum plus costs from the amount held by the Respondent on Account Number 8702xxxxxxx at the Garnishee and/or any other account held by the aforesaid.
 - f) Any other ancillary and consequential orders as this Honourable Court may deem fit in the circumstances.
 - g) Any such further or other relief as this Honourable Court may deem fit.
3. On its side the Defendant/Judgment debtor seeks orders that he gets stay of the Judgment enforcing the arbitral award and for leave to pay the decretal sum by twelve equal monthly instalments of Usd 4,434.3.
 4. At the point parties attended Court to highlight the filed Submissions, the Counsel for the Decree holder told the Court that he was keeping his application for garnishee proceedings in abeyance and pursuing the orders seeking to enforce the decree against the directions.
 5. After perusal of the file, I have formed the opinion that since the tussle is only on how to realize the decretal sum, the Court shall consider the application for payment by instalments and only in the vent that application fails should there be a justification and need to consider the Decree holder's application seeking to lift the corporate veil and enforce decree against the directors.
 6. It is a discretionary power of the Court to grant leave for postponement and payment of a decretal debt by instalments, so long as the Applicant shows sufficient cause to the satisfaction of the Court.¹
 7. Mere financial disability to pay at once is not a sufficient in the absence of demonstrated financial difficulty making it difficult to pay at once². The Court must in addition consider the circumstances under which the debt was incurred, the conduct of the debtor and his financial position and the demonstrated bona fides in offering to pay a fair proportion of the debt at once³.
 8. In this matter the application allowed on the 8/5/2023 show that the obligation of the Judgment debtor to Decree holder arose out of an agreement titled 'Convertible Loan Note Agreement' pursuant to which the Arbitral Tribunal determined that the Decree holder disbursed to the Judgment debtor Usd 40,000. For that sum an award was made together with interests at 9.5% pa as well as costs of arbitration and legal costs.
 9. The record of the Court shows that a decree was extracted and warrants of attachment and sale were issued on the 5.7.2023 in the sum of Usd 53,211.51 plus Kshs. 3,000/= . While the award was made

¹ Order 21 Rule 12 (2) [Civil Procedure Rules](#)

² (content missing)

³ *Rajabai Alidina -vs- Rentila Alidina & Another* [1961] ER 565



on the 10.01.2023 and Judgment entered on 8/5/2023, there is no demonstration by the Judgment debtor/Applicant that he has paid any portion of the sum due. The Court deems the Judgment debtor not to have demonstrated sufficient good faith in paying the debt with promptitude. One gets the impression that the Judgment debtor was not willing to voluntarily pay and was only prompted to make the application for payment by instalment after warrants of attachment and sale had issued.

10. To this Court the contract between the parties does not have determined maturity date for the repayment of the loan. In fact the Judgment creditor was set to invest in the business of the Judgment debtor by incorporation of a holding company to hold the majority shares to the Judgment debtor. For that reason, the Court takes the view that it was not in the anticipation of the parties that the payment would be in lumpsum. For that reason, and while the Court disapproves the conduct of the Judgment debtor in not commencing payment in good time, the Court considers that the justice of the case favours grant of leave to pay by instalments.
11. Noting that to date no single instalment has been tendered, the Court deems it just that the Judgment debtor makes an initial instalment equivalent to four months instalment at the sum proposed by the Applicant. That is calculated to be Usd 17,737.20. Thereafter the balance of the decretal sum including accruing interest shall be paid by monthly instalments of Usd 4,434.3 till payment in full.
12. For avoidance of doubt, the first instalment shall be paid on or before the 30.5.2014 and the subsequent instalment on each of the last day of the consecutive following months till payment in full.
13. In default of payment of any one instalment on the due date, the entire sum then outstanding shall become due and payable and the Decree holder shall be at liberty to take out execution proceedings.
14. Having come to the foregoing conclusion, the Court takes the view that the decision on the Judgment debtor application be kept in abeyance unless the default clause is allowed to take effect and the decree become incapable of settlement otherwise by an order of sequestration.
15. On costs, even though the Judgment debtor has succeeded, the Court notes that the application was never made timeously and thus makes no order as to the costs of the application dated 6.10.2023. On it each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 6TH DAY OF MAY, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Orandi for the Applicant

Mr. Banji for the Respondent

Court Assistant: Polycap

