



Kioko (Suing as legal representative of the Estate of the Late Mutungu Kioko) v JA Makau & Co Advocates (Civil Appeal E82 of 2020) [2024] KEHC 6879 (KLR) (7 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6879 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E82 OF 2020**

FR OLEL, J

JUNE 7, 2024

BETWEEN

CHRISTINE JAMES KIOKO (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE MUTUNGU KIOKO) PLAINTIFF

AND

JA MAKAU & CO ADVOCATES APPLICANT

RULING

A. Introduction

1. Before court for determination is the client/Applicant notice of motion Application dated 5th December 2023, which is brought pursuant to provisions of Section 3A of the *Civil Procedure Act* and Order 51 Rule (1) of the civil procedure Rules and all other enabling provisions of law. The Applicant seeks to be allowed to liquidate the advocates/Respondents taxed costs by paying an initial amount of Kshs.10,000/= and thereafter to be paying Kshs.5000/= monthly until payment in full. She deponed that she was not disputing the taxed costs but requested that her plea be allowed as she was an elderly peasant farmer with no meaningful source income.
2. The Advocate/Respondent did oppose this application and filed his replying affidavit dated 1st March 2024. He deponed that he was opposed to this Application which was unmeritorious, frivolous and constituted an abuse of the process of the court. The respondent was a lady of means and had received part of the award in excess of Kshs.400,000/= pursuant to Judgment delivered in Machakos CMCC No 1163 of 2008, but had studiously vowed never to settle legal fee due to them. The Applicant had further maliciously reported the Advocate/Respondent at the Advocates Dispute Tribunal but the said complaint was found not to have any merit, thus was dismissed.
3. That in November 2019, the applicant had received partial payment of the decree of the primary suit and he did move court and got orders to preserve the said sum in court, pending taxation of the Advocate/client bill of costs. His application was allowed but later unknown to him the said sum was



released to the client/Applicant without her paying him a single coin. It was unfair for the Applicant to benefit from further court orders yet she had willfully refused to pay his firm for work done. The Advocate/Respondent therefore urged this court to reject the prayers sought, but If the court was inclined to allow the same, the client/Applicant should settle the taxed costs by three (3) equal monthly installments

4. Whether or not to allow a party to settle a decree by instalment, is a matter of exercise of discretion. And the court must be satisfied that the Applicant deserves exercise of that discretion. Order 21 Rule 12 of the *Civil Procedure Rules* (2010), grants the court power to allow a judgment debtor pay decretal sum by instalments. The rule provides that;

“(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.”

5. It is clear from the above rules that although the court may allow settlement of a decree by instalment, that is at the discretion of the court and as usual it must be exercised judicially and only in circumstances that justify exercise of the discretion. In the case of *Keshval Jethabhai & Brothers Ltd v Saleh Abdul* [1959]EA 260, the court stated the principles that should apply in considering such an application, namely;

“each case must be considered on its own merit; mere inability to pay in full at once is not sufficient reason for exercising the discretion; the debtor should show bona fides by arranging prompt payment and that though hardship may be a factor, the court has to consider whether indulgence should be given to the debtor without prejudice to the decree holder. The above decision shows clearly that it is for the judgment debtor to show sufficient cause and justify indulgence.”

6. In *Hildegard Ndelut v Letkina Dairies Ltd & Another*[2005]eKLR it was stated that

“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.”(emphasis)

7. In *Mahomed Akbar Khan v Kasturchand Daga* cited in *Keshavji Jethabhai & Brothers Ltd v Saleh Abdul* (Supra), the court held that;

“the mere fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reason for granting leave to pay by instalments. Ordinarily he should be required to show his bona fides by arranging prompt payment of a fair proportion of the debt, although prompt



payment of a fair proportion of the debt is not a condition precedent for the exercise of the discretion of granting instalments. Each case has to be decided on its own merits, the predominant factor being of course the bona fides of the judgment debtor.

8. Where there is a submission that an Applicant has sufficient reason for allowing an application for payment by instalments, the court has to consider the circumstances said to exist in order to determine whether or not to grant the application. The court will also consider other factors such as the conduct of the judgment debtor and its financial position. More importantly, in my view, the court should be persuaded to allow payment by instalments where the judgment debtor shows willingness to pay.
9. Applying the above principles to this application, it is clear to me that the Applicant has come to court with unclean hands in equity. The advocate/Respondent's costs were taxed at Kshs.41,696.50/= on 5th March 2021 and to date she has kept the advocate busy in court with various application but has made no attempt to settle the said taxed costs even partially when she got Kshs.400,000/= as part payment of the decretal sum.
10. Further the client/Applicant has not shown, what bona fide arrangements she has made to start paying the Advocate /Respondent and the mere fact that the she is economically hard pressed or is unable to pay in full at once is not sufficient reason for granting her leave to pay by instalments especially where bad faith and ill motive have been imputed and proved. Though the Advocate/Respondent requested to have this matter dismissed, he was open to /willing to have the said taxed costs to be paid by three equal (3) monthly installments.

C. Disposition.

11. Based on the Advocate/Respondent proposition/concession I do allow the Client/Applicant to pay the Advocate/Respondent his taxed costs plus interest arising t therefrom by 3 equal monthly instalments with effect from 5th July 2024 and every subsequent 5th of every subsequent month until payment in full.
12. The Client/Applicant will also bear costs of this application and the same is assessed at Ksh.15,000/= . In default execution to issue.
13. It is so ordered.

Ruling written, dated and signed at Machakos this 7th day of June, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 7TH DAY OF JUNE, 2024.

In the presence of: -

No appearance for Applicant

Ms Macharia for Respondent

Sam Court Assistant

