



REPUBLIC OF KENYA



Republic v Abdalla, Senior Principal Kadhi, Mombasa & another; Mohamed & another (Exparte); Shafi & 2 others (Interested Parties) (Judicial Review Application E002 of 2022) [2024] KEHC 8666 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8666 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E002 OF 2022**

OA SEWE, J

JULY 18, 2024

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF
JUDICIAL REVIEW**

AND

**IN THE MATTER OF ARTICLES 165(3)(A) OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF WAKF OF MWANA MISHI BINTI AZIZ
DATED 19TH AUGUST 1938 FOR PLOT NO. 12 (ORIGINAL 251
& 259/1, NOW KNOWN AS TITLE NO. MOMBASA/BLOCK
XXXIV/12**

AND

**IN THE MATTER OF THE MOMBASA KADHI'S COURT CIVIL
CASE NO. 166/2020 FOR INTERPRETATION AND
ADMINISTRATION OF THE WAKF OF MWANA MISHI BINTI
AZIZ**

BETWEEN

REPUBLIC APPLICANT

AND

**JUMA ALI ABDALLA, SENIOR PRINCIPAL KADHI, MOMBASA 1ST
RESPONDENT**



**KHADIJA ABBULRAHMAN MWINZANGU AKA KHADIJA KHAMIS
SHAFI 2ND RESPONDENT**

AND

KHADIJA AHMED MOHAMED EXPARTE

ZAINAB AHMED MOHAMED EXPARTE

AND

KALTHUM KHAMIS SHAFI INTERESTED PARTY

SHAFFA KHAMIS SHAFI INTERESTED PARTY

FADHILA ZAHARAN MOHAMED INTERESTED PARTY

RULING

1. This is a matter in which the ex parte applicants moved the Court for an order of Certiorari to quash the judgment dated 6th October 2021 together with its consequential orders issued on 7th October 2021 for want of jurisdiction. The suit was heard and determined on 21st September 2022 by way of dismissal with costs to the respondents and the interested parties. The 2nd and 3rd interested parties thereafter filed their respective Party and Party Bill of Costs dated 21st October 2022 for taxation. By a ruling dated 27th April 2023, the Deputy Registrar taxed that Bills at Kshs. 359,919.66 and Kshs. 351,196.66, respectively.
2. The ex parte applicants thereafter filed the Notice of Motion dated 30th May 2023 pursuant to Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 21 Rule 12 of the Civil Procedure Rules, 2010 for the following orders:
 - (a) Spent
 - (b) That the Court be pleased to order stay of execution of the ruling of the Court issued on 6th April 2023 and the Certificates of Costs issued in this matter on 8th May 2023 and 9th May 2023 pending the hearing and determination of the application. (spent)
 - (c) That the Court do grant leave to the ex parte applicants to pay the decretal sum amounting to Kshs. 711,016.32 in monthly instalments of Kshs. 10,000 until payment in full.
 - (d) That the Court be pleased to restrain the respondents and the interested parties from levying execution herein for as long as the applicant pays the proposed monthly instalments.
 - (e) That there be no order as to costs.
3. That application is the subject of this ruling. It was premised on the grounds that, whereas the applicants are willing and ready to settle the decretal amount, they have been experiencing financial constraints and are therefore unable to pay the amount at once. They further stated that they are old and not in any form of employment or business for gain. They also pointed out that the dispute concerns a family Wakf and therefore ought not to bring hardship to any of the parties.
4. The applicants relied on the affidavit sworn on 1st June 2023 by Zainab Ahmed Mohamed. She averred that they are sisters and now have the responsibility of paying costs awarded to the 2nd and 3rd interested parties. The deponent further stated that they are both housewives aged 67 and 58 years, respectively,



- and have the obligation of taking care of their ailing father and other members of their respective families. They accordingly proposed instalment payments at the rate of Kshs. 10,000/= per month until payment in full.
5. The application was opposed by the respondents. They relied on the Replying Affidavit sworn on 19th June 2023 by the 2nd respondent and averred that the application lacks merit and does not meet the requisite threshold for such applications as set out in Order 21 Rule 12(2) of the Civil Procedure Rules. They averred that the applicants have not shown bona fides in the in that, despite being served with the Certificates of Costs, they did not make any attempt towards paying the sums due from them.
 6. The respondents further deposed that, in any event, the proposal by the applicants, if accepted, would take 36 months or three years, for them to settle the sum due at Kshs. 10,000/= per month. They added that the proposal is in all fairness unreasonable and would be prejudicial to them. They averred that they are much older than the applicants; and that it is in the interest of justice that they be allowed to realize the fruits of their litigation. They further deposed that the applicants failed to annex an affidavit of means to show their exact financial position; and therefore that it is impossible for the Court to ascertain their financial inability to pay the decretal amount in lump sum.
 7. In the alternative and without prejudice to the foregoing, the respondents proposed that the applicants be required to pay Kshs. 200,000/= followed by monthly instalments of Kshs. 25,000/= till payment in full.
 8. The application was canvassed by way of written submissions, pursuant to the directions given herein on 4th July 2023. Accordingly, the applicant filed written submissions dated 29th September 2023. They proposed a single issue for determination, namely, whether they have satisfied the conditions to warrant the grant of the orders sought in the application dated 30th May 2023. They relied on Order 21 Rule 12 of the Civil Procedure Rules and the Supporting Affidavit of the 2nd applicant and urged the Court to find that sufficient cause has been shown as to why they are unable to pay the decretal sum in lumpsum.
 9. To buttress their submissions, the applicants relied on *Sinoven International Group Limited & Another v Yalfa Cargo Handling Limited* [2021] eKLR, *Zlatko Rostocil v James Samuel Kinyanjui* [2013] eKLR, *Kenneth Mutiga v Ntima Farmers Co-operative Society Ltd & Another* [2011] eKLR, *John Wanjohi Wakaharo v Linksoft Communications Systems Limited* [2012] eKLR and *Lavington Security Limited v Nairobi City Water & Sewerage Co. Ltd* [2014] eKLR and urged the Court to find in favour of the applicants.
 10. The 2nd respondent as well as the 1st and 2nd interested parties (hereinafter referred to as the respondents for purposes of the instant application) relied on their joint written submissions dated 1st September 2023. They proposed the following issues for determination:
 - (a) Who moved the Court in the subject application;
 - (b) Whether the application has met the threshold of payment by instalments;
 - (c) Whether the Court should grant the orders staying execution;
 - (d) What orders ought to issue on costs.
 11. The respondents took issue with the fact that no authority was filed by the 1st applicant to demonstrate that the application had been brought by the 2nd applicant on her behalf. The respondents relied on Order 1 Rule 13(1) and (2) of the Civil Procedure Rules and the case of *Hezekia Kipkorir Maritim & 10 others v Philip Kipkoech Tenai & 2 others* [2016] eKLR for the proposition that a party cannot



purport to appear, plead or act on behalf of others in a proceeding until and unless he is so authorized to do so in writing and the authority filed in such a proceeding.

12. On whether the application has met the requisite threshold for payment by instalments, the respondents made reference to Order 21 Rule 12 of the Civil Procedure Rules and urged the Court to find that no sufficient cause has been shown for the orders sought. It was submitted that mere inability to pay in full at once is not a sufficient reason to warrant the exercise of the Court's discretion under that provision of the law. The respondents relied on *Nicholas Gitonga Murongi v Susan Wairimu & 4 others* [2021] eKLR and *Keshavji Jethabhai & Sons Limited v Saleh Abdulla* [1959] EA 260 in support of their submissions.
13. The respondents further pointed out that, at the rate of Kshs. 10,000/= proposed by the applicants, it would take 36 months or 3 years to settle the certified costs. In their submission this is not only unreasonable but would also be prejudicial to them. They reiterated their stance that the applicants are only out to frustrate the respondents who have a right to enjoy the fruits of their successful litigation.
14. On stay of execution, the respondents submitted that, since no security was offered by the applicants for the due performance of the orders that may ultimately be binding on them, no justifiable cause has been shown for stay of execution. The respondents relied on *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR to support their contention that the fact that the process of execution has been put in motion or is likely to be put in motion, by itself, does not amount to substantial loss. They accordingly prayed for the dismissal of the application with costs.
15. The 3rd interested party filed written submissions dated 14th September 2023 in which similar arguments were advanced. In addition, the 3rd interested party relied on *Hildegard Ndelut v Letkina Dairies Ltd & another* [2005] eKLR for the proposition that a judgment creditor is entitled to payment of the decretal amount; and that where a judgment debtor is genuinely in a difficult position in paying the decretal amount at once, he must show bona fides by arranging fair payment proposals to liquidate the amount. In the 3rd interested party's view, the applicants' proposal is not a serious one, granted that it means each of the applicants would have to pay Kshs. 5,000/= only for three years to settle the decretal sum.
16. I have given careful consideration to the application, the averments set out in the parties' respective affidavits as well as their written submissions. The first issue to grapple with is whether the application is defective and therefore a non-starter on the grounds of lack of written authority by the 1st applicant. The respondents contended that the 2nd application brought the instant application on her own behalf and on behalf of the 1st applicant without the 1st applicant's written authority. The respondents relied on Order 1 Rule 13(1) and (2) of the Civil Procedure Rules which state:
 - (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
 - (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.
17. This suit was not commenced by the instant application, but by the Notice of Motion dated 23rd January 2022. At pages 11 to 40 of the documents filed with the application, the applicants filed consent to the 2nd applicant to plead and sign affidavits. The consents include that of the 1st applicant, Khadija Mohamed Ahmed. No additional consent would be required to progress the suit to its logical conclusion or to make consequential applications post-judgment. I therefore find no merit in the objection raised by the respondents.



18. Turning now to the merits of the application, the applicants relied on Order 21 Rule 12 of the Civil Procedure Rules, and sought leave to be allowed to settle the decretal sum in Kshs. 10,000/= installments per month until payment in full. Order 21 Rule 12 of the Civil Procedure Rules provides: Decree may direct payment by instalments [Order 21, rule 12.]
- (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 judgment or 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.
19. Consequently, the single issue for determination is whether sufficient cause has been shown for the Court to grant leave to the ex parte applicants to pay the decretal sum amounting to Kshs. 711,016.32 in monthly instalments of Kshs. 10,000 until payment in full.
20. As a general rule, a judgment creditor is entitled to the immediate payment of the decretal sum. While the judgment debtor might genuinely be in a difficult position in paying the debt at once, for the Court to allow instalment payment, it must be convinced that there is sufficient reason for allowing payment by instalments. It is also common ground that to determine what amounts to sufficient reason, consideration should be given to:
- (a) The circumstances under which the debt was contracted
 - (b) The conduct of the debtor
 - (c) His financial position
 - (d) His bona fides in offering to pay a fair proportion of the debt at once.
21. Ultimately, each case must be determined on the basis of its peculiar facts. Hence, in *Keshavji Jethabhai & Bros Ltd v Saleh Abdulla* [1959] EA 260 it was held:
- “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.”
22. In the instant matter, what the interested parties seek to recover are certified costs upon the dismissal of the applicant's application. An order was thereupon issued by the Court on 22nd September 2022 which formed the basis of the taxation and certification of party and party costs payable to the respondents and the interested parties.
23. That said, it is noted that other than a broad statement that the applicants are unable to pay the sums due from them at once, nothing was availed by way of evidence to demonstrate the applicants' current financial position and/or difficulties. It was simply averred in paragraph 9 of the Supporting Affidavit



that the 2nd applicant received rent of Kshs. 20,000 per month for the upkeep of their family, including the medical expenses of their 91-year-old father, no evidence was presented to back up those assertions. I have also taken into consideration the uncontroverted averment by the respondents that at the rate proposed by the applicants it would take about 3 years to settle the debt.

24. I have nevertheless considered the circumstances of this matter, particularly that the dispute involved relatives and that it concerned the Wakf of Mwan Mishi Binti Aziz. In the premises, I am convinced that that the applicants deserve some reprieve.
25. Thus looking at the entirety of the facts presented herein, the Court is satisfied that whereas sufficient cause has been shown to warrant payment by instalments, the amount proposed is on the lower side. In *Lavington Security Limited Nairobi City Water & Sewerage Co. Ltd (supra)* Hon. Gikonyo, J. grappled with the question of whether the Court is bound by the proposal made by the parties. Here is what he had to say, which I agree with entirely;

“(13) Should I accept one or other of the proposed amount of instalments by parties or should the Court order a separate amount of instalment altogether? In strict sense, the Court is not bound by the proposals made by the parties although such proposals are critical in determining an application to pay by instalments. Of great significance in application of this nature are; the circumstances of the case; the conduct of the parties; the willingness and bona fides of the Applicant to pay a fair proportion of the debt; and of course, that the application is made without undue delay.”

26. In the premises, while I find merit in the application dated 30th May 2023, the amount of Kshs. 10,000/= proposed by the applicants is unreasonable, particularly in the absence of affidavits of means to demonstrate inability to pay. In my view an amount of Kshs. 50,000/ per month would be reasonable in the circumstances.
27. In the result, the application is hereby allowed on the following terms.
- (a) That leave be and is hereby granted to the ex parte applicants to pay the decretal sum amounting to Kshs. 711,016.32 in monthly instalments of Kshs. 50,000/= with effect from the 15th day of August 2024 and thereafter on the 15th day of each succeeding month until payment in full.
- (b) In the event of default, the respondents shall be at liberty to execute the order of the Court issued herein on 22nd September 2022.
- (c) That there be no order as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18TH DAY OF JULY 2024

OLGA SEWE

JUDGE

