



Cytonn Investments Management PLC v Wangui (Commercial Arbitration Cause E033 of 2021) [2023] KEHC 13 (KLR) (Commercial and Tax) (6 January 2023) (Ruling)

Neutral citation: [2023] KEHC 13 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL ARBITRATION CAUSE E033 OF 2021**

**A MABEYA, J
JANUARY 6, 2023**

BETWEEN
CYTONN INVESTMENTS MANAGEMENT PLC APPLICANT
AND
ESTHER WAMBUGU WANGUI RESPONDENT

RULING

1. The respondent has a final arbitral award for Kshs.2,057,363/52 vide a decree entered on December 15, 2021. On 27/9/2022, the applicant took out a Motion on Notice under sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, orders 21 rule 12 and 40 rule 4(1) of the *Civil Procedure Rules*, seeking a stay of execution and leave to settle the decretal sum by monthly instalments of Kshs.100,000/-.
2. The grounds were set out in its body and the affidavit of Lilian Maina sworn on 27/9/2022. These were that; due to unavoidable circumstances resulting from COVID-19, the applicant was unable to settle the decree but could do so by monthly instalments of Kshs.100,000/-. That the applicant was established in Nairobi doing business for the last 8 years. That the application was being made in good faith.
3. As a sign of good faith, the applicant produced a letter dated 2/9/2022 addressed to the plaintiff's advocates proposing to settle the decretal sum by instalments of Kshs.200,000/-. It also produced. It further produced redacted statements of account(s) from SBM Bank for 31/8/2022 and 27/9/2022.
4. The application was opposed by the respondent. The parties filed their submissions which are on record and which the court has carefully considered.



5. This is an application for leave to settle a decretal sum by way of monthly instalments. The instalments proposed are Kshs. 100,000/- per month. The reason for the application is that the applicant is unable to pay the decreed sum due to effects of COVID-19.
6. Whether or not to allow settlement of a decretal sum by a party is in the discretion of the court. The court must be satisfied that the applicant deserves the exercise of that discretion. The power is donated to court by order 21 rule 12 of the *Civil Procedure Rules* which the applicant has invoked.
7. That Rule provides: -
 - “1. ...
 2. After passing of any such decree, the court may on an 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 the court thinks fit.”
8. Though the exercise of the power is discretionally, the same must be exercised judiciously and only in circumstances that justify such exercise. In *Mohamed Akbar Khan v Kasturchand Daga* that was cited with approval in *Keshavji Jethabhai & Bros v Saleh Abdul* [1959] EA, it was 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 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. In the present case, the decree is in excess of Kshs.2 million. The applicant has not offered any prompt payment of any substantial sum. Further, I am not satisfied that the applicant demonstrated its inability to pay the decreed amount. As a sign of lack of bona fides, the applicant only produced two pages of what it referred to as bank statement.
9. These documents cannot pass for bank statements because, they do not show whether it is one or two different account numbers. The account numbers were redacted, very crucial entries were redacted therefrom. These were the total debits and total credits for the period in question, that is 1/8/2022 to 31/8/2022, and 1/9/2022 and 27/9/2022. All that they showed was that the available balance was Kshs.137,241.66. With greatest respect, this is extreme lack of candour and bona fides on the part of the applicant.
10. The questions that arise are, if the applicant has been operating business in Nairobi for 8 years, what type of business? How was it affected by COVID-19? What if it was for manufacture or distribution of PPEs would it have been affected? I mean the Court has to be in a position to associate the hardship with an applicant.
11. In my view, a judgment debtor is entitled to payment of the decretal amount forthwith and in accordance with the law of his judgment without much delay otherwise the labour of long and winded litigation might have been without basis. The delay should only be allowed where there is really



warranted. The bona fides of the judgment-debtor must be demonstrated. See *Hildegard Ndelut v Letkina Dairies Ltd & anor* [2005] KLR.

12. In the present case, I am not satisfied that the applicant has demonstrated any bona fides to warrant the exercise of the discretion of this court. Accordingly, the application dated 27/9/2022 is hereby dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JANUARY, 2023.

A. MABEYA, FCIArb

JUDGE

