



**Gulf African Bank Limited v African Water Drilling Company & 3 others  
(Civil Case 56 of 2020) [2023] KEHC 1709 (KLR) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1709 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 56 OF 2020  
OA SEWE, J  
MARCH 10, 2023**

**BETWEEN**

**GULF AFRICAN BANK LIMITED ..... PLAINTIFF**

**AND**

**AFRICAN WATER DRILLING COMPANY ..... 1<sup>ST</sup> DEFENDANT**

**ABDULLE ABULAZIZ HASSAN ..... 2<sup>ND</sup> DEFENDANT**

**AHMED HASSAN ABDULLE ..... 3<sup>RD</sup> DEFENDANT**

**COAST WATER WORKS DEVELOPMENT AGENCY ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The Notice of Motion dated May 10, 2022 was filed herein by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants under Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 21 Rule 12(2) of the *Civil Procedure Rules, 2010*. Prayers 1, 2 and 3 of the application are spent. Accordingly, what remains for consideration are Prayers 4 and 5, namely, that the Court be pleased to grant the 1<sup>st</sup> defendant leave to pay the decretal sum herein in twelve (12) equal monthly instalments of Kshs 445,000/=; and that the costs of the application be provided for.
2. In support of the application, an affidavit was sworn May 10, 2022 by the 2<sup>nd</sup> defendant, Abdulle Abulaziz Hassan to confirm that, by the ruling of the Court dated March 10, 2021, judgment was entered on admission against the 1<sup>st</sup> defendant for the plaintiff in the sum of Kshs 18,899,373.93; and that as at May 10, 2022, the 1<sup>st</sup> defendant had paid Kshs 14,835,892.95, leaving a balance of Kshs 5,338,622/=; which the 1<sup>st</sup> defendant now seeks to pay in 12 equal monthly instalments of Kshs 445,000/=. At paragraphs 14 and 15 of his affidavit, Mr. Hassan explained that the 1<sup>st</sup> defendant is not in a position to immediately settle the full debt owed at once because it has been undergoing cash flow problems occasioned by the global Covid-19 pandemic; and that unless the orders sought are granted,



- the 1<sup>st</sup> defendant will suffer irreparable harm, loss and damage as the intended attachment of the 1<sup>st</sup> defendant's goods will cripple its business operations and substantially dent its reputation.
3. The application was resisted by the plaintiff; to which end it relied on the Replying Affidavit sworn on May 18, 2022 by its Senior Legal Officer, Mr. Lawi Sato. It was averred by Mr. Sato that the proposal by the 1<sup>st</sup> defendant to pay the balance of the decretal sum by instalments is not made in good faith; granted that the debt has been outstanding since December 2018; and there being no evidence that the 1<sup>st</sup> defendant is struggling financially. He therefore asked the Court to reject the application to enable the plaintiff recover its monies.
  4. Upon directions being given on May 24, 2022 that the application be canvassed by way of written submissions, Mr. Lakicha filed his written submissions on September 19, 2022 on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. He proposed the following 2 issues for determination:
    - (a) Whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants' application for payment by instalments is merited; and,
    - (b) Whether the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendant's application for stay of execution is merited.
  5. Mr. Lakicha submitted that the instant application has been brought in good faith and that the 1<sup>st</sup> defendant has reduced the decretal sum by a substantial amount, leaving a balance of Kshs 5,338,622/= only, which the 1<sup>st</sup> defendant seeks to liquidate by monthly instalments. He relied on *Japheth Mutisya Masila T/A Japhy Commercial Enterprises v Kwale International Sugar Co. Limited* [2018] eKLR, *Hildgard Ndalut v Lelkina Dairies Ltd & Another* [2005] eKLR, *Maasai Kenya Limited v Hardware & Steel Centre Limited & Another* [2013] eKLR, *Andrew Kuria Njuguna T/A Ongatet Enterprise Sariuki Mungai v Rose Wambui Kuria* [2012] eKLR, *Benson Mbuvi Kathenge v Nelson Mutai T/A A Kandie Mutai Mudeizi & Co. Advocates* [2016] eKLR and *Sinoven International Group Limited & Another v Yalfa Cargo Handling Limited* [2021] eKLR as to the applicable principles guiding the exercise of jurisdiction for purposes of Order 21 Rule 12(2) of the *Civil Procedure Rules*.
  6. On behalf of the plaintiff, Mr. Kongere filed his written submissions on October 14, 2022 and proposed a single issue for determination, namely, whether the 1<sup>st</sup> defendant should be granted leave to liquidate the decretal sum in instalments as requested or at all. Mr. Kongere submitted at length on the disparate nature of the claims that the plaintiff has against each of the defendants; such that, in his view, the application by the 1<sup>st</sup> defendant for leave to pay the decretal sum by instalments does not necessarily cover the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. He also pointed out that it was imperative for the 1<sup>st</sup> defendant to show sufficient cause to warrant the exercise of discretion in its favour; which, according to him, has not been done.
  7. Mr. Kongere cited *Jared Kangwana & Another v Samson Keengu Nyamweya & Another* [2018] eKLR and *Daniel Obata Osemo v Exxon Investments Limited* [2021] eKLR to buttress his argument that no proof was availed to back up the 1<sup>st</sup> defendant's assertion that it was undergoing hard economic times. He argued that it is not sufficient to merely allege economic hardship. Moreover, at paragraphs 16 to 21 of his written submissions, Mr. Kongere urged the viewpoint that the 1<sup>st</sup> defendant's conduct before and after the filing of the suit works against the exercise of the Court's discretion in its favour.
  8. I have perused carefully the applicant's application herein, the averments set out in the affidavits filed by the parties and submissions put in by their counsel. The only issue that arises therefrom for determination is whether this court should grant leave to the 1<sup>st</sup> defendant to liquidate the decretal sum in instalments as sought.
  9. There appears to be no dispute that the 1<sup>st</sup> defendant has, so far, paid Kshs 14,835,892.95/= out of the decretal sum of Kshs 20,174,514.95; or that balance due now stands at Kshs 5,338,622.00 or



thereabouts. It is this amount that the 1<sup>st</sup> defendant seeks to be allowed to settle in instalments of Kshs 445,000.00/=. In support of the application, the 1<sup>st</sup> defendant indicated that it has faced cash flow constraints and has, consequently, been unable to settle the outstanding sum in lump sum. In the meantime, a Proclamation has been made on behalf of the plaintiff over its assets, notably three motor vehicles, as well as office furniture and equipment. The 1<sup>st</sup> defendant is therefore apprehensive that the said attachment has the potential of crippling its business; hence the instant application.

10. Granted the limited ambit of the instant application, I find it unnecessary to delve into the nature and extent of the indebtedness of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to the plaintiff. Thus, the only issue for determination is whether sufficient cause has been shown by the 1<sup>st</sup> defendant to warrant the exercise of the Court's discretion in its favour for the payment of the decretal sum by way of instalments. In this regard, Order 21 Rule 12 of the Civil Procedure Rules, provides: -

- (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.

11. Thus, the 1<sup>st</sup> defendant needed to demonstrate sufficient cause as to why it should be allowed to pay the decretal sum in instalments. Needless to say that the court's discretion in this regard must be exercised judiciously, due regard being given to the facts and circumstances of each case. Accordingly, in the case of *Keshavji Jethabhai & Bros Ltd v Saleh Abdula* [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."

12. The principles in *Keshavji* (supra), were summarised in the case *Diamond Star General Trading LLC v Ambrose D O Rachier carrying on business as Rachier & Amollo Advocates* [2018] eKLR, as follows: -

- (a) whilst creditors' rights must be considered each case must be considered on its own merits and discretion exercised accordingly;
- (b) the mere inability of a debtor to pay in full at once is not a sufficient reason for the exercise of the discretion;
- (c) the debtor should be required to show his bona fides by arranging prompt payment of a fair proportion;



- (d) hardship of the debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.

13. Applying the foregoing principles to the instant matter, it is noteworthy that, as a mark of good faith, the 1<sup>st</sup> defendant has paid a substantial part of the decretal sum, leaving a balance of Kshs 5,338,622.00; and although Mr. Kongere urged the Court to disregard the explanation by 1<sup>st</sup> defendant that its business was adversely affected by the Covid-19 pandemic, it is a matter of notoriety that, indeed the pandemic affected the vast majority of businesses, even if a few flourished and form part of the now so called “Covid billionaires”. Hence, in similar circumstances, Hon. Majanja, J. allowed a similar application in *COSO System Services Limited & another v SBM Bank Limited* [2020] eKLR and noted that:

“It is in light of the principles aforesaid that I am inclined to hold that the mere failure to meet the terms of the stay should not, of itself, disentitle a party to discretion in its favour. At the end of the day the court must do justice to the parties by weighing the positions of both sides. the Appellants have not deliberately failed or refused to comply with the conditions the court had imposed. They have given reasons why they could not make the payment as directed by the court and they moved the court immediately after the entreaties to the Respondent were rejected. Lastly, the court is aware and takes judicial notice of the hardship caused by the COVID-19 pandemic that has had a negative effect on the economy.”

14. I am likewise persuaded that sufficient cause has been shown by the 1<sup>st</sup> defendant to warrant the grant of leave for instalment payment. In the premises, the application dated May 10, 2022 is allowed on the following terms -

- (a) That the 1<sup>st</sup> Defendant be and is hereby allowed to settle the balance of the decretal sum of Kshs 5,338,622.00/= in twelve equal instalments of Kshs 445,000.00/= with effect from the date of this Ruling until payment in full.
- (b) The suit herein be set down for hearing for determination of the question of interest on priority basis.
- (c) Costs be in the cause.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 10<sup>TH</sup> DAY OF MARCH 2023

**OLGA SEWE**

**JUDGE**

CIVIL CASE NO. 56 OF 2020 RULING 3

