



REPUBLIC OF KENYA



**Britam General Insurance Company Limited v Infamy Insurance Agency Limited (Commercial Case E174 of 2019) [2023] KEHC 3539 (KLR) (Commercial and Tax) (19 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3539 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E174 OF 2019  
DO CHEPKWONY, J  
APRIL 19, 2023**

**BETWEEN**

**BRITAM GENERAL INSURANCE COMPANY LIMITED ..... PLAINTIFF**

**AND**

**INFAMY INSURANCE AGENCY LIMITED ..... DEFENDANT**

**RULING**

1. Before the court for determination is the Notice of Motion application dated 20<sup>th</sup> May, 2022, brought under Article 159 of *the Constitution* of Kenya, 2010, Order 21 Rule 12 (2) and Order 51 Rules both of the *Civil Procedure Rules* 2010 and Sections 1A, 1B, and 3A of the *Civil Procedure Act*. Therein, the Applicant seeks stay of execution by the Respondent, as well as an order for leave to liquidate or pay the total decretal sum inclusive of costs and interests in instalments of Kenya Shillings One Hundred Thousand (Kshs.100,000/=) per month until payment in full.
2. The application is premised on the grounds that the Applicant is unable to pay the decretal sum in lump sum due to severe financial constraints, but is willing to pay the same in the proposed instalments, which he contends will reduce further costs that may be incurred through the execution process. The Respondent has proclaimed the goods of the Applicant ready for execution.
3. The application is supported by the annexed affidavit of Steve Wanjau the Managing Director of the Applicant. He depones that the arbitral proceeding awarded Kshs.126,571,885/= plus cost and interest in favour of the Respondent which was enforced by the high court. The Respondent duly instructed Nairobi Connection Services Auctioneers to proclaim property belonging to the Applicant, the proclamation was to recover a decretal sum of Kshs.155,850,101.53/=. The amount as per the proclamation note is erroneous since the parties continue to do business and the Applicant pays premiums and the current decretal amount is approximately Kshs. 113,000,000/=



4. The amount proclaimed belong to Infama Limited a sister Company to the Applicant/Defendant. The Applicant has been in a severe financial crisis since COVID-19 Pandemic hit the country.
5. In opposition to the Notice of Motion, the Respondent filed a Replying Affidavit dated 10<sup>th</sup> June, 2022(not in the court file)
6. The application was heard through written submission, in which both parties complied.

### **Applicant's Submissions**

7. By the submissions dated on 27<sup>th</sup> July, 2022, filed on behalf of the Applicant, counsel submits that by the provisions of Order 21 Rule 12(2) of the *Civil Procedure Rules* it is not an abuse of the Court process for the Applicant to settle the decretal sum in instalments. That the Applicants have shown sufficient cause for granting the orders of paying in instalments.
8. The Applicant has demonstrated its inability to pay the decretal amount once as a lump sum due it severe financial constraints since the COVID-19 Pandemic. The Applicant has made efforts to settle the decretal amounts.
9. Counsel urged the court to find the Applicant has satisfied the conditions for granting leave to pay the decretal sum in instalments and allow the Notice of Motion application dated 20<sup>th</sup> May, 2022.

### **Respondent's submissions**

10. In the submissions dated 26<sup>th</sup> July, 2022, on behalf of the Respondent counsel submits the Applicant has failed to meet the threshold of granting leave to settle the decretal amount by instalments of Kshs.100,000/= as per Order 21 Rule 12(2) of the *Civil Procedure Rules*. Cited the case of HCCC No.603 of 2015 - Astrazeneca UK Ltd –vs- Macraughton, where the court held:-

“from the totality of the authorities cited, it is common ground that, as a general rule, a Judgment Creditor is entitled to the immediate payment of the decretal sum and that while the Judgment Debtor might genuinely be in a difficult position in paying the debt at once, the court must be convinced that there is sufficient reasons for allowing payment in 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.”
11. Counsel submits the debt was incurred due to the Applicant deliberate and fraudulent refusal to remit Insurance Premiums collected on behalf of Britam, and abused the trust bestowed on it, and converted the premiums collected for its own use, that Britam has over the years continued to pay out claims whose premiums are still held by the Applicant.
  12. The conduct of the Applicant is underserving as the Arbitral Award was made on 17<sup>th</sup> November, 2020, and adopted by the court on 16<sup>th</sup> September, 2021 and there have no attempts made in payment of the decretal sum.



13. Counsel submits that allowing the Applicant to pay an instalment of Kshs.100,000/= would take 126 years to complete the payment. No bona fides have been demonstrated by offering to pay a fair portion of the debt in lump sum.
14. In conclusion counsel submits the Applicant is undeserving of the orders and urged the court to dismiss the application.

### **Analysis and Determination**

15. I have considered the application the supporting affidavit and the submissions in support of the respective arguments, the issues for determinations are:-
  - a. Whether the Applicant has meet the threshold of granting injunction.
  - b. Whether the Applicant has meet the threshold of granting leave to pay the decretal amount in instalments.
    - a. Whether the court should grant stay of execution
16. The principles guiding the grant of a stay of execution is provided under Order 42 Rule 6(2) of the *Civil Procedure Rules* which provides as follows:-

No order for stay of execution shall be made under sub rule (1) unless—

  - a. the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and
  - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.
17. I have read through the Applicant’s application and grounds upon which it is premised, both on its face and Supporting affidavit sworn by Steve Wanjau, the Defendant/Applicants’ Managing Director and find that the Applicant has not addressed this prayer and hence has not satisfied the threshold for granting stay of execution, as the Applicant has neither demonstrated the substantive loss it is likely to suffer if stay is not granted or furnished security to be deposited in due performance of the decree.
18. On the issue of whether the court should allow the Applicant leave to liquidate the decretal sum in instalments the applicable provisions for payment of decretal sums in instalments is found under Order 21 Rule 12 of the *Civil Procedure Rules, 2010* which provides as follows:-
  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.



19. From the wording of the above provision, a Judgment-Debtor may apply to court for payment of instalments or postponement of the payment of the account decreed and the same may be granted with or without the counsel of the Decree-Holder as long as sufficient cause is demonstrated on such terms as to payment of interest, attachment of Judgment-Debtor property or his/her security.
20. In the case of *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”.
21. It is the Applicant’s contention that it is in severe financial constraints occasioned by the COVID-19 Pandemic and is thus not in a position to pay the decretal sum in lump sum.
22. In opposition to the Applicant’s application, the Respondent contends that the Applicant is undeserving of the orders as the debt was incurred due to the deliberate and fraudulent refusal by the Applicant to remit insurance premiums it collected on behalf of Britam the Respondent herein. It also states that if its prayer and proposed instalments are allowed, it will take the Applicant 126 years to pay the whole decretal amount.
23. It is worth-noting that a Judgment is like a debt hence why the Applicant became and are Judgment-Debtors in relation to the Respondent. Therefore, the mere fact that the Applicant is hard pressed and hence in financial crisis is not a sufficient cause for grant of leave to pay in instalments.
24. It is noteworthy that counsel for the Respondent has pointed out that the Applicant has not offered or made any attempts to settle the decretal sum since the decree was extracted and its offer to settle the decretal sum of Kshs.126,571,885/= in instalments of Kshs.100,000/= is a mockery.
25. In the circumstance I do not find that the Applicant has made out a case to be allowed to pay the decretal sum in instalments, the Applicant contends it’s still in business. In my view allow the Applicant to pay an instalment of Kshs.100,000/= per month would be a total joke/face of/mockery as expressed by the Respondent that they will have to wait for close to 126 years in order to receive the entire decretal sum. This period is unreasonable and unrealistic and will only occasion total hardship to the Respondent who continues to pay out claims arising from the premiums that were collected by the Applicant.
26. It is clearly not a sign of good faith on the part of the Applicant that despite the decree having been extracted, it has not made any efforts to pay the decretal sum in the circumstance.
27. Bearing in mind the provisions of Order 21 Rule 12 of the *Civil Procedure Rules*, it is in the interest of justice that I find the Applicant is undeserving of the orders to pay the decretal sum in monthly instalments of Kshs.100,000/= and proceed to allow the Respondent the right to enjoy the fruits of its Judgment.
28. In the circumstances therefore and taking into consideration the facts of this case, I am not satisfied that the Applicant is deserving of the orders. Consequentially, the application dated 20<sup>th</sup> May, 2022 is declined for lack of merit and dismissed with costs to the Respondent.

It is so ordered.



**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 19TH DAY OF  
APRIL, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

**In the presence of:**

**No appearance by and for either party**

**Court Assistant: Martin**

