



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO.143 OF 2007**

**JOSEPH BORO NGERA T/A NGERA FANCY FARM.....APPELLANT/APPLICANT**

**VERSUS**

**SAMWEL NDEGWA KIRUNGUMI.....RESPONDENT**

**RULING**

1. This is a ruling on **Notice of Motion dated 8<sup>th</sup> June 2020** seeking the following orders: -

*i. Spent*

*ii. spent*

*iii. That this honorable court be pleased to allow the applicant/ judgment debtor to pay the decretal sum of Ksh. 305, 600/= by monthly installments of Ksh. 20,000/= every 5<sup>th</sup> day of the month beginning 5<sup>th</sup> July 2020 until payment in full.*

2. Grounds on the face of the application are that the applicant has been undergoing some cash flow problems due to the reduced operations and low customer turnout occasioned by the Covid-19 pandemic resulting in a total shut down in operations and the minimum operations ongoing only cater for operational costs.

3. The application is supported by the annexed affidavit sworn by **Joseph Boro Ngera** and filed on 11<sup>th</sup> July 2020. He averred that he desires to pay the entire sum in monthly installment and unless the orders sought are not granted, the appellant will suffer irreparable harm, loss, and damages if the respondent commences execution of the decree.

4. Brief summary of this case that the respondent filed a suit against the appellant in Nakuru CMCC No. 361 of 1996 for the injuries caused at the place of employment. Judgment was delivered on 19<sup>th</sup> December 2003, in favor of the respondent for the sum of Kshs.343, 800/= plus costs and interest of the suit.

5. The appellant appealed against the said award and the court pronounced its judgment on 21<sup>st</sup> May, 2020 where liability was apportioned at 20:80 in favour of the plaintiff and award of 382,000/= when subjecting to contribution the award reduced to 305,600/=.

6. In response the respondent filed his submission dated 28<sup>th</sup> July 2020

7. Parties have filed written submissions in respect to the application.

**APPELLANT'S SUBMISSIONS**

8. The applicant in submissions filed on 9<sup>th</sup> November, 2020, submitted that he is a businessman and his sole earnings revolve around his farm and subsequent clients and as a result of the Covid- 19 pandemic, the business has experienced a low customer turnout.

9. He submitted that he is willing to liquidate the decree in monthly installments of ksh. 20, 000/= on every 5<sup>th</sup> day of the month till payment in full. He submitted that **Order 21 Rule 12 of the Civil Procedure Rules (2010)** allow a judgment debtor to pay in installment and quoted the case of **Lavington Security vs Nairobi City Water & Sewerage Company Ltd (2014) eKLR** which held that the significance of such applications is determined by the nature of every case.

10. Further that the judgment creditor will not be prejudiced if the application is allowed. He urged this court to stay the execution of the judgment as he intends to amicably solve the matter by settling the decretal amount.

### **RESPONDENT'S SUBMISSION**

11. The respondent submitted that the court be guided by **Order 21 Rule 12**. The respondents submitted that the trial court issued a judgment on 19<sup>th</sup> December 2003 and the applicant preferred an appeal against the said award and judgment was delivered on 21<sup>st</sup> May 2020; and submitted that the appellant has had enough time to satisfy the award rather than filing the current application.

12. He further submitted that the appellant is a large-scale farmer capable of settling the decretal sum and that the appellant has not given sufficient reasons as to why the court would allow the payment of the decretal sum in installment.

13. The respondent submitted that there is no evidence adduced by the appellant to support his averments that it is experiencing low turnouts and the proposal to pay in installment is not acceptable as the amount of Ksh. 20,000/= is too low and submitted that if this court is allow payment by instalments, it will then take 1 year 3 months for the appellant to clear the decretal amount and allowing this application is tantamount to delayed justice.

14. Further that the Appellant has not shown the extent of loss it will incur if the application is not allowed. He urged court to find the application has no merit and disallow it as is aimed at frustrating the respondent and prevent him from enjoying the fruits of the judgment.

### **ANALYSIS AND DETERMINATION**

15. I have considered arguments by both parties herein. The applicant is willing to pay the decretal amount but by monthly instalments of kshs 20,000 which the respondent opposes on ground that it will take long to pay the whole amount being a period of one year three months to clear.

16. The respondents argument is that the applicant has not demonstrated inability to pay the decretal amount and that it is a large scale farmer able to pay the decretal amount once.

17. I note from the pleadings and judgment delivered both in the trial court and High Court, that the accident giving rise to this suit occurred on 27<sup>th</sup> December 1995 and the claim for damages was filed in the lower court in 1996. There is no doubt quest for justice has been a very long journey for the respondent. This is the 26<sup>th</sup> year since the respondent was injured.

18. I know the matter had to be fully finalized before the appellant/defendant commence payment but the waiting period by the respondent has to be taking into consideration while looking at reasons for the need to pay by instalments as proposed by the applicant.

19. I take note of the fact that many businesses were affected by covid-19 pandemic but I have to balance with the need to allow the respondent access justice by enabling him enjoy fruits of his successful litigation without further delay. I note that the applicant proposed to pay kshs 20,000 from July 2020. Its 8 months now and if he had paid the said amount for the 8 months, he would have paid kshs 160,000 and kahs 180,000 by end of March.

20. Having looked at boths sides, I am inclined to direct that the applicants makes a deposit of kshs 180,000 within 30 days of this ruling and therefore pay monthly instalments of kshs 30,000 on every 5<sup>th</sup> day of succeeding month beining with 5<sup>th</sup> April 2021 till payment in full.

### **21. FINAL ORDERS**

- 1. Applicant to pay the respondent kshs 180,000 within 30 days from the date of this ruling.**
- 2. Thereafter the applicant to pay monthly instalments of kshs 30,000 with effect from 5<sup>th</sup> April 2021 and 5<sup>th</sup> of every other succeeding month till payment in full.**
- 3. Failure to comply the respondent to be at liberty to execute.**
- 4. Costs of this application to the respondent.**

**Judgment dated, signed and delivered via zoom at Nakuru This 3<sup>rd</sup> day of March 2021**

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Schola/Jeniffer - Court Assistant

Ms.Kinuthia counsel for appellant/applicant

