



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 125 OF 2020.

NICHOLAS GITONGA MURONGI.....APPELLANT/APPLICANT

VERSUS

SUSAN WAIRIMU &

PETER NUTHU GITHIACA

(A Legal rep of the estate of the late

JOHN KANYONYI MARATU).....1ST RESPONDENT

AHMED NJOROGE KARANJA.....2ND RESPONDENT

MICHEAL ITUGI MUNENE.....3RD RESPONDENT

RULING

1. On 11th May 2018 the Hon E. Kelly Senior Resident Magistrate in Chief Magistrate's Civil Case Number 263 of 2012 delivered judgment in favour of the 1st respondent for a total sum of Kshs. 3,128,141/=. The matter was about compensation arising out of a fatal accident involving the Applicant's motor vehicle registration number KAG 907H.

2. Subsequently the parties recorded a consent where the Appellant was to pay a monthly installment of Kshs. 300,000/= towards liquidating the decretal amount with effect from 30th April, 2019 until payment in full.

3. The appellant paid a sum of only Kshs.450, 000/= after which he fell into defaulted.

4. Via an application dated 3rd March, 2020 he sought to review the consent so as to pay the decretal sum by way of monthly installments of Kshs. 50,000/= . The reason for the application was that he was a small scale trader and therefore not in a position to comply with earlier consent orders.

5. That application was dismissed vide the Subordinate Court's Ruling of 23rd July, 2020.

6. Dissatisfied, the applicant filed this appeal and the instant application dated 28th July, 2020 under **sections 1A, 1B and 3A of the Civil Procedure Act, order 42 rule 6 and Order 51 rule 1 Civil Procedure Rules 2010 and all other enabling provisions of the law.** The applicant seeks;

1) Spent

2) Spent

3) THAT pending the hearing and determination of the appeal herein this Honourable Court be pleased to grant a conditional stay of execution of decree in Nakuru CMCC No. 263 of 2012 subject to the Appellant paying the 1st Respondent a monthly installment of Kshs.100,000/= towards settling the balance of the Decretal sum.

4) THAT the costs of this Application be provided for.

7. The grounds on the face of the Application and which were reiterated in the Supporting Affidavit were that following the Judgment in Nakuru CMCC 263 of 2012 the applicant's insurer Company Amaco Insurance Company Limited through their advocates the firm of Peter Karanja Advocates, and the firm of Mirugi Kariuki & Co. advocates for the 1st respondent entered into a consent which was adopted by the court. The insurer undertook to settle the decretal sum of Kshs. 3,128,141/= through monthly installments of Kshs. 300,000/- per month. That the insurer paid only Kshs. 450,000/= and subsequently defaulted. The appellant vide the application dated 3rd March 2020 sought to liquidate the balance of the decretal sum at a monthly sum of Kshs. 50,000/=. This was dismissed vide the court's Ruling delivered on 23rd July, 2020 giving the 1st Respondent the liberty to proceed with execution. It is the applicant's position that the learned trial magistrate was in error because she failed to take into account how the decretal sum arose and in particular that it was the insurer who was mandated to settle the decree who defaulted in settling the same; that it was in the interest of justice he should be allowed to settle the decretal balance by installment because if execution is allowed to proceed against him he will suffer irreparable damage and harm.

8. The application is opposed through the 1st respondent's replying affidavit on the grounds that it is fatally defective, misconceived, bereft of merit, bad in law, and an abuse of the court process and should be dismissed with costs. Further that the application was full of falsehoods and half-truths meant to mislead the court. That the applicant in total disregard of the Court orders and the plight of the 1st respondent has made several applications to Court meant to circumvent or delay payment of the decretal sum to their detriment. That through these applications the applicant has continued to deny the 1st respondent the right to enjoy the fruits of the judgement, that he has not demonstrated by way of affidavit evidence that he had fulfilled the requirements of **order 22 rule 22 of the Civil Procedure Code**. That it would only be fair for the applicant to pay three-quarters of the decretal sum i.e. Kshs.2,330,904/= then subject the remainder to payment in installment until payment in full.

9. The parties agreed to canvass the application by way of written submissions.

10. The applicant placed reliance on the following cases:

i. **Nairobi High Court Civil Case No. 99 of 2012 Botanics Kenya Ltd Vs Ensign Food (K) Ltd.**

ii. **Surgipharm Ltd Vs Express Kenya Ltd & Kenya Airways Ltd. - Third Party and Rajabali Alidina Vs Remtulla Alidina & Another (1961) EA 565,**

iii. **Kenya Shell Limited Vs Kabira & Another and the case of Kenya Shell Limited Vs Kariga.**

11. In the case **Nairobi High Court Civil Case No. 99 Of 2012 Botanics Kenya Ltd Vs Ensign Food (K) Ltd**

The lower court had delivered its judgement in favour of the respondent for a sum of Kshs.1, 185,000/= plus costs and interest at court rates from the date of judgment until payment in full. Subsequently the Applicant filed an application seeking an order to be allowed to pay the decretal sum of Kshs.1,185,000/= by installment of Kshs.100,000/= per month on grounds that his business was not doing well financially and could only afford installment proposed with a deposit of Kshs. 250,000/=. The Respondent opposed the application and prayed that the applicant should make a deposit of Kshs. 500, 000/= and pay the balance in installments of Kshs. 100,000/=. The court in its Ruling stated as follows;

"The Applicant had not produced any updated or recent financial statements of its accounts which further lead it to believe that the application was frivolous. If indeed the Applicant was serious he could have started paying the Kshs.100, 000/= in July 2014. Nonetheless I have noted that the Respondent is willing to accept payment by installment if the Applicant deposits Shs.500, 000/=. I have also noted that the applicant is prepared to deposit Shs.250, 000/=. To accommodate both parties, I will allow the application on the condition that the Applicant deposits Kshs.300, 000/=".

12. In the case of **Surgipharm Ltd Vs Express Kenya Ltd & Kenya Airways Ltd - Third Party and Rajabali Alidina Vs Remtulla Alidina & Another (1961) EA 565** the defendant brought an application under **Order 21 Rule 12, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 1A, 1B and 3A of the Civil Procedure Act, Chapter 21, Laws of Kenya** and sought to pay the Decree in monthly installments of Kshs.50,000/= on grounds that his company had made losses and to support his contention he attached his financial statements. The application was opposed by the respondent who averred that Applicant's proposal was not reasonable as it would take more than ten (10) years going forward to pay off the debt which stood at Kshs.6,240,562.10/=. The court took into consideration the financial statements that were attached by the applicant and referred to the case of **Rajabali Alidina Vs Remtulla Alidina & Another [1961] EA 565** which provides that in considering an application seeking to settle the decretal sum via installments the court should be guided by the following tests:-

a. **The circumstances under which the debt was contracted.**

b. **The conduct of the debtor**

c. **His financial position, and**

d. **His bona-fides in offering to pay a fair proportion of the debt at once.**

and based on the above tests the court allowed the Applicant's application to the extent that the Decretal sum be paid in monthly installments of Kshs. 200,000/= with effect from 31st March 2017 and thereafter on or before the last day of each succeeding month.

13. **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR.** The Applicant sought for stay of execution pending the

determination of appeal on grounds that if the same was not granted and the respondent proceeds with execution it will suffer substantial loss. The respondent submitted that there was no evidence that Kenya Shell, as the proposed appellant, will suffer substantial loss. The court in its Ruling stated that;

“It is not sufficient by merely stating that the sum of Kshs. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of the appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment. The applicant has not given to court sufficient materials to enable it to exercise its discretion in granting the order of stay.”

14. **Kenya Shell Limited -V- Kariga 1982-88 1 KAR**, Court of Appeal held that,

“if there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay”,

15. The 1st respondent set out three issues for determination.

On whether the applicant had met the threshold for stay of execution the 1st respondent relied on three cases;

i) **Carter & Sons Ltd Vs Deposit Protection Fund Board & 2 Others Civil Appeal No.291 Of 1997** which provided that for an application for stay to succeed:

“The Applicant must establish a sufficient cause, secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the Applicant must furnish security and the Application must of course be made without unreasonable delay.” (See also **Kenya Shell Limited Vs Kariga 1982-88 1 KAR, Kenya Shell Ltd Vs Kabiru & Another (1986) KLR 410**)

iii) **Sun Palm Limited & Another Vs David Pius Mugambi (2019)** and **Republic Vs The Commissioner For Investigation & Enforcement Exparte Wananchi Group Kenya Limited (2014)**. The substantive dispute between the parties involved rent which had fallen into arrears to the tune of 34 million Kenya shillings. The applicant sought to stay enforcement of a decree pending the hearing and determination of an intended appeal. The Respondent who held a money decree issued by the Tribunal which was unpaid rent by the 1st Applicant for over a year stated that the debt will escalate if the rent areas were not paid. The court concurred with the respondent and held as follows;

“It follows therefore that the remedy the applicants seek to stay enforcement of the decree will undoubtedly prevent the respondent from enjoying the fruits of his judgement. It is trite that lodging a notice of intention to appeal or the actual appeal does not operate as a stay unless there is evidence it would be rendered nugatory. From the draft memorandum of appeal the applicants fails to address the question that directly impeaches the decree of the tribunal. The applicants seem to be desirous of introducing new triable issues which could have been subject of litigation within the purview of the tribunal. This being money decree arising out of due and outstanding rent arrears there is no valid ground averred in the applicants affidavits for the court to exercise discretion to grant stay of execution of the decree. The right of access to an appeal court should not be used as an alternative remedy for the unsuccessful litigant to try and delay decree holder from enjoying the fruits of the judgment. I therefore reject the Applicants contention that they may suffer substantial loss if the orders sought herein are not granted.

1st Respondent also relied on **Order 42 Rule 6 of the Civil Procedure Rules** and submitted that the applicant has not met the prerequisite conditions for granting stay of execution.

On whether its justifiable for the applicants to pay via installments judging by their actions, 1st respondent relied on cases of **Lavington Security Limited, Hildegard Ndelut Vs Letkina Dairies Ltd & Another** where the court 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.”

and the case of **TK Advocates Vs Baringo County Government (2018)** in which the court considered the provisions of **Order 21 rule 12 of the Civil Procedure Rules** and stated that any decision on whether a court should allow a party to settle a decree by installment is an issue of discretion to be exercised judicially; that the Applicant was obligated satisfy the court that in the circumstances of his case such a request is deserved because a successful litigant who has a decree acquires a property right which is to be protected by courts. The court will not order a judgment debtor to pay by installment without the applicant making a case for it. The court proceeded to reject the Applicant’s application seeking to settle decretal sum via installments for the reasons that he had not shown bona fides in liquidating the decretal amount since the bill was taxed and the decree extracted.

On the issue of costs they submitted that the same follow the event.

16. I have carefully considered the parties’ rival affidavits and submissions. The following stand out as;

ISSUES FOR DETERMINATION

i. Whether the Application meets the conditions for grant of stay of execution.

ii. Whether the Appellant has satisfied the court that is prayer should to pay the balance of the decretal amount via installments is tenable.

ANALYSIS

Whether the Application meets the conditions for grant of stay of execution?

17. The application is brought under **Order 42 Rule 6 and order 51 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act**. The prerequisites for grant of stay of execution orders are set out under **Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules**, thus:

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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.

In the case of *Elena Doudoladova Korir –vs- Kenyatta University [2014]eKLR* Justice Nzioki wa Makau had this to say:-

“the application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another –vs- Thornton & Turpin Ltd where the Court of Appeal (Gicheru J. A. Chesoni & Cockar Ag JA) held that

*“The High Court’s discretion to order stay of execution of its order or decree is fettered by **three conditions**, namely:- **sufficient cause, Substantial loss would ensue from a refusal to grant stay. The Applicant must furnish security; the application must be made without unreasonable delay.**”*

18. **Was there unreasonable delay in the filing of the matter?** The ruling of the lower Court was delivered on 23rd July 2020. The instant application was filed on 28th July 2020. Clearly the Application was brought within reasonable time.

19. **Has the applicant demonstrated that he will suffer Substantial loss?** – The Applicant’s contention is that he is willing to liquidate the decretal sum via instalments of Ksh.100, 000/= per month and that if stay is not granted and the 1st respondent proceeds with execution he will suffer substantial loss. The Applicant has neither explained the exact loss he will suffer if execution ensues nor tendered evidence of the substantial loss he might suffer.

In the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR*, court stated that;

“No doubt, in law, 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. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

In the instant case the applicant has not established other factors which show that the execution will create a state of affairs that will irreparably affect or negate his very essential core should he be the successful party in the appeal.

20. It is the applicant’s position that it is his insurer who has put him in this position by failing to perform its obligation to settle the decretal sum. That it is this insurer who had entered into the consent. However it is noteworthy that the applicant has not joined this insurer to this application. Neither has the insurer sworn nay affidavit to explain the reason for the failure to pay the decretal sum as agreed.

21. **Has the applicant offered any security** as required by **Order 42 rule 6 (1) (2) of the Civil Procedure Rules**, requires that a party seeking a stay must offer such security for the due performance of the orders as may ultimately be binding on the party.

22. In the premise therefore the Application not met the threshold for grant of stay of execution pending appeal.

23. In view of the foregoing, I move to the second issue;

Whether the Appellant has established sufficient cause for the prayer to pay the balance of the decretal amount via installments is tenable;

24. It is important to note at the outset that the applicant has not established his entry into this matter for purposes of putting in the application for stay and payment of the decretal sum by instalments.

25. That besides the law applicable is **Order 21 Rule 12 of the Civil Procedure Rules** which provides as follows:

“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 installments 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”.

26. The consent of the decree holder was the payment of Ksh 300, 000 per month. That was the consent that the decree holder accepted. The decree holder has refused the current request by the applicant to pay the decretal sum by instalments of either Ksh 100,000.

27. The applicant is therefore required to show sufficient cause to draw the discretion of this court in his favour.

28. The Applicable principles were set out in **Botanics Kenya Ltd –Vs- Ensign Food (K) LTD (1959)** and **A. Rajabali Alidina Vs Remtulla Alidina & Another (1961) EA 565:**

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.

29. In the case of **Freight Forwarders Ltd v Elsek & Elsek (K) Ltd (2012) eKLR**, the learned Judge narrowed the principles as regards to what amounts to ‘sufficient cause’ to include the following;

a. the debtor is unable to pay in lump sum

b. the debtor can pay by reasonable monthly installments

c. the application is made in utmost good faith

30. The case of **Keshvaji Jethabhai & Bros Limited V Saleh Abdulla [1959] EA 260** laid down the principles that should guide the court in exercising its discretion:

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 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

31. It is upon the applicant to demonstrate how his case falls into the applicable principles. It is clear that each case must be considered on its own merit and the mere fact of inability to pay the full sum at once is not sufficient reason. Any indulgence given to the judgment debtor must not prejudice the decree holder. It must be considered that this is a 2012 matter and it is still doing the rounds in the courts and the 1st respondent is the holder of an enforceable decree. The applicant has not demonstrated sufficient reason for its stay.

32. On the issue of how the debt was contracted, the Applicant submitted that the judgement arose out of a road traffic accident and though the motor vehicle was fully insured the insurer failed to meet its obligation to satisfy the decree. However, as indicated herein above he placed nothing before the court to show that he had engaged the Insurance Company and it had refused to pay the decretal sum, nor any attempts made to make it discharge its obligation. His conduct does not auger well for him, neither has he demonstrated his financial position or good faith.

33. The 1st respondent has however extended an olive branch to the Appellant and stated that he should deposit Ksh.2million then subject the

payment of the balance of decretal amount to monthly instalments.

34. The applicant has yet to demonstrate that his insurance company will not pay or what he has done to compel their compliance with the law. The 1st respondent is entitled to the fruits of her judgment and with failure of the applicant's request for stay pending appeal, it is only fair that the following orders do issue;

1. That the applicant to pay 50% of the outstanding decretal sum as at the date of this ruling to the applicant within 30 days hereof. In default execution to issue.

2. Thereafter to continue repaying the balance in monthly instalments of Ksh 100,000 to be paid on or before the 11th day of each month until payment in full. In default of any one instalment execution to issue.

3. The costs of this Application be borne by the Applicant.

Dated and Delivered By Email By Consent of Parties this 11th day of March 2021.

Mumbua T Matheka

Judge

Court Assistant Edna

For the Applicant: Robert Ndubi & Co. Advocates

Email: ndubi2005@yahoo.com

For the 1st Respondent: Mirugi Kariuki & Co. Advocates

Email: mirugi@mirugi.co.ke