



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

WINDING UP CAUSE NO 2 OF 2019

THABU TUVA KONDE.....APPLICANT

versus

NGOMENI SWIMMERS LTD.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Gicharu Kimani & Associates for the applicant

P. G. Kaingu & Company Advocates for the Respondent

RULING

This is an application dated 9.2.2021 expressed order 21 Rule 12 of the Civil Procedure Rules 51(A) 1 (B) 3 and 3(A) of the Civil Procedure Act seeking leave of the court on the following declarations:

- 1. That the decretal sum be discounted to Kenya Shillings One Million (Kshs. 1,000,000.00)**
- 2. That the Respondent does pay a deposit amount totally to Kenya Shillings Five Hundred Thousand (Ksh 500,000.00)**
- 3. That the balance thereof be settled in installments of Kenya Shillings One Hundred Thousand (Ksh. 100,000.00) payable in monthly until payment in full.**

In support of the application are grounds couched as follows:

- a) The Decretal sum is as a result of taxation costs dated 6th November, 2017**
- b) The said matter is still pending in a court of law**
- c) The respondent/applicant is not a business entity but a land owner with no source of regular income.**
- d) Due to the present happenings and the effects of the Covid-19 global pandemic the Respondent/applicant is facing financial constraints thus cannot fully settle the said decretal sum.**
- e) The Respondent/applicant is desirous the decretal amount as proposed herein and unless the order sought are granted, the Respondent/Applicant stands to suffer great prejudice and irreparability. In addition, an affidavit deponed by Daniel Ricci.**

The respondent on the other hand filed a replying affidavit vehemently opposed to the application to have the Judgement debt be settled discounted with a sum of Ksh 1,000,000 and the balance be liquidated by way of a one of deposit of Ksh 500,000 and further monthly installments of Ksh. 100,000 until payment in full.

Having considered the notice of motion, affidavits in support and the rejoinder in answer to the application, the question which begs for an answer is whether the motion is within the purview of the laid principles, on liquidating the decree on installments.

Determination

The law on settling the decree by way of installments, or postpone it to a future date is contained in order 21 Rule 12 of the Civil Procedure

Rules. The factors listed by the court in **Keshral Jetha alias & Brothers Ltd v Saleh Abdul (1959) E.A 260** attempt to answer the requisite guidelines in which exercise of discretion to decline or grant the order could be based.

“That is each case must be weighed on its merits and facts. The inability to pay the decretal sum at once may not be considered as a sufficient reason. While its possibly true that hardship to pay may account for the court to consider the application, but the Judgement debtor must demonstrate good faith or bonafide on his conduct to make arrangements for prompt payment and in a variety of ways such leave to permit the judgment debtor to pay the debt by way of installments should not prejudice the judgment creditor”.

The second principle considered in the case of **Hildegard Ndelut v Leckena Dairies Ltd & Another (2005) KLR**

“admittedly is whether the judgment creditor should be denied, the fruits of his or her judgment by recovering it promptly. The approach adopted in this case is that the judgment debtor might genuinely be in 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 bonafides by arranging fair payment proposals to liquidate the amount”

See also **Diamond Star General Forwarding Ltd v Ambrose Do Rachier (2018) EKLR. In African Banking Corporation LTD V Florence Wangari Wangu (2012) EKLR.** This same question had been considered by the court as follows:

“That my view is an applicant who wishes a court to exercise its discretion and order payment of a decretal sum by way of installments must be very candid with the court. Such an applicant must present to the court sufficient material to show that he/she is a person of no means, that whatever income she or he has is lawfully committed elsewhere. He or she must disclose to the court all his/her means and explain to the court why the proposed installments are the best option available. Accordingly, the burden is on the applicant to prove/show that he/she deserves the orders sought”.

In the instant case briefly the facts of the case revolve around a certificate of taxation dated 6.11.2017 for Ksh 2,526,402.00 being costs awarded the ELC No 18 of 2013.

It is not in dispute that the settlement of the amount in the certificate of taxation remains unpaid. Although the applicant claims that the failure has been due to Covid -19 Pandemic, this case as presented such circumstances never existed in 2017, 2018 or 2019 calendar years. This means that the applicant did not comply with the requirements in the certificate of taxation to pay the awarded costs promptly. It is the finding of this court that the applicant took no reasonable steps to give a fair proposal to liquidate the debt in installments. If the court was to believe that Covid -19 pandemic financially ruined every business enterprise as sufficient reason without cogent or credible evidence to default in repayment of a debt. It would be opening a pandoras box. To that extent the certificate of costs remained in existence to be executed by the respondent against the applicant. The contention by the applicant to be allowed to pay the decretal sum, in the proposed installments including discounting a whole Ksh 1,000,000.00 is illegal, dishonest and in bad faith to say the very least. One would therefore expect the applicant to act in good faith by making a lumpsum payment and seize the opportunity to seek court indulgence to liquidate the balance in a fair and proportionate installments. It seems to me that the basis why the applicant has kept the respondent out of his money since 2017 is not convincing and the courts discretion would not be used to compromise and prejudice the rights of the judgment creditor. It is apparent from the records and annexures, matters so raised by the applicant seem hardly capable of being admitted to invoke the unfettered discretion of the court. There are more wisely left to the sound judgment of the taxing master, leaving some to be governed by the general analogies of the law on execution including winding up which in its own is a sense of justice.

The reasoning is that the applicant’s notice of motion if granted would not be promoting the purpose and letter of Order 21 Rule 12 of the Civil Procedure Rules. The duty of the court is to dispense justice to parties in accordance with the Constitution and the Law. It is to the constitution, statute law I concur law and equity that form the fountain called judicial discretion is drawn from so that parties beg of it to seek reliefs and enforcement, of decree or orders of the court.

In the result, I find no merit in the application I decline to grant it with costs to the respondent

DATED, SIGNED AND DELIVERED AT MALINDI THIS 07TH DAY OF APRIL, 2021

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R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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