



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 57 OF 2015

SINOVEN INTERNATIONAL GROUP LIMITED.....1ST PLAINTIFF

KEYUN INTERNATIONAL LOGISTICS CO. LIMITED...2ND PLAINTIFF

-VERSUS-

YALFA CARGO HANDLING LIMITED.....DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 21st July, 2020 brought under the provisions of Sections 1A and 3A of the Civil Procedure Act, Cap 21, Order 22 Rule 22 of the Civil Procedure Rules, 2010 and Article 159 of the Constitution of Kenya, 2010. The defendant seeks the following orders-

(i) Spent;

(ii) Spent;

(iii) The defendant be and is hereby permitted and ordered to defray/pay the balance of the judgment amount being USD 86,346.63 or such other outstanding amount by way of instalments of USD. 5,000.00 per month from the date of this order until payment in full; and

(iv) Costs of this application be in the cause.

2. The application is brought on the grounds on the face of it and is supported by an affidavit sworn on 21st July, 2020 and a supplementary affidavit sworn on 13th November, 2020 by Nuuhu Ngoma Gyaza, the defendant's Head Accountant.

3. In opposition to the said Notice of Motion, the plaintiffs on 28th July, 2020, filed grounds of objection dated 27th July, 2020. Supplementary grounds of opposition were filed on 4th September, 2020. A replying affidavit sworn on the same day by Jackson Nzaro was filed on 16th September, 2020 in opposition to the said Notice of Motion.

4. The application herein was canvassed by way of written submissions. The defendant's submissions were filed on 17th November, 2020 by the law firm of Oluga & Company Advocates while the plaintiffs' submissions were filed on 4th December, 2020 by the law firm of Ndegwa, Katisya, Sitonik & Associates Advocates.

5. Mr. Mutugi, learned Counsel for the defendant submitted that it is trite law that the power of the Court in granting stay of execution of its judgment is premised on the Court's discretion which must be exercised in a judicial and not an arbitrary manner as was held in the case of **KTK Advocates v Baringo County Government** [2018] eKLR. He urged this Court to exercise its discretion in favour of the defendant as it has satisfied the set down threshold for grant of stay of execution and for an order to be allowed to pay the decretal sum in equal monthly instalments.

6. He relied on the provisions of Order 21 Rule 12 of the Civil Procedure Rules, 2010 which empowers Courts to order that monies due pursuant to the judgment of a Court be paid in instalments, where sufficient reason is given. He further submitted that in the case of **Keshvaji Jethabhai & Bros Limited v Saleh Abdulla** [1959] EA 260, the principles that should guide the Court in the exercise of its discretion in granting an order for stay of execution and in allowing the judgment debtor to defray the decretal sum in equal monthly instalments, were laid out.

7. He submitted that the overarching condition for the grant of the orders sought by the defendant is demonstration of good faith towards settlement of the decretal sum accruing to the plaintiffs' and that the defendant had taken positive and consistent steps towards settling the

debt owed. Mr. Mutugi argued that the defendant had demonstrated through affidavit evidence that it has settled a substantial part of the decretal sum leaving only a balance of USD. 86,346.33, which evidence had not been controverted by the plaintiffs. He stated that although the plaintiffs' claim is that the amount owed is USD 570,346.63 and not USD 86,346.33, the same had not been supported with any cogent evidence, thus the same should be disregarded.

8. Mr. Mutugi indicated that this Court had granted a conditional temporary order to the defendant allowing it to make monthly instalment payments in favour of the plaintiffs and that the defendant had diligently adhered to these orders. He submitted that at the time of filing its submissions, the defendant drew and forwarded four cheques each of USD 5,000.00 on 7th August, 2020, 7th September, 2020, 5th October, 2020 and 11th November, 2020, respectively, in favour of and to the plaintiffs and/or their Advocates.

9. He relied on the case of **Hildegard Ndalut v Lelkina Dairies Ltd & another** [2005] eKLR which was cited in the case of **Diamond Star General Trading LLC v Ambrose D. O. Rachier carrying on business as Rachier Amollo Advocates** [2018] eKLR, where the Court observed that a defendant should be required to show his *bona fides* by arranging for fair payment of the proportion of the debt, in persuading the Court to allow payment by way of instalments as the proper test to apply in granting orders for payment of a decretal amount in the said manner.

10. The defendant's Counsel also placed reliance on the case of **Sawatram Ramprasad vs Imperial Bank of India (1933) AIR Nag. 33**, where it was held that the prompt payment of a fair proportion of the debt is not a condition precedent for the exercise of the discretion of granting payment by instalments. It was submitted that the defendant had demonstrated through affidavit evidence that it has paid USD 484,000.00 so far thus demonstrating its willingness to make good its obligation to settle the outstanding amount owed to the plaintiffs.

11. Mr. Mutugi indicated that the plaintiffs were on the verge of carrying out execution against the defendant and if execution was not stayed, the defendant's willingness to settle the decretal balance of USD 86,346.33 would be curtailed, causing great prejudice to the defendant. He urged this Court to strike a balance between the enjoyment of the fruits of the judgment by the plaintiffs and the defendant's willingness to actualize the said enjoyment. He submitted that the defendant had satisfied the threshold set for granting of stay of execution and an order allowing the defendant to pay the outstanding amount in equal instalments. He stated that the plaintiffs would not suffer any prejudice if the prayers sought were granted since they would continue enjoying the fruits of their judgment in the event that the defendant was allowed to make the payments in instalments.

12. Mr. Karina, learned Counsel for the plaintiffs submitted that it is not in dispute that the partial judgment entered on 8th May, 2020 decreed that the defendant owed the plaintiff USD 570,346.63 as at the said date. He further submitted that a quick perusal of the defendant's statements of account shows that the dates assigned to the alleged payments except the last 2 dates establish that the payments alleged to have been made, were made before 8th May, 2020 when the partial decree was passed. He contended that the cheques so far paid were mischievously drawn in favour of persons other than the plaintiffs or their Advocates on record.

13. Mr. Karina argued that since the partial decree was entered, the defendant had paid a total of USD 20,000.00 by instalments of USD 5,000.00 each. He placed reliance on the provisions of Order 21 Rule 12(2) of the Civil Procedure Rules, 2010 which requires an applicant to establish sufficient cause to enable the Court to exercise its discretion to order payment by instalments. He also relied on the case of **Keshavji Jethabhai & Bros. Limited v Saleh Abdullah** (supra) where the Court of Appeal held that the mere fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reason.

14. He submitted that in regard to the factors to be considered in exercising the discretion to order payment by instalments, the High Court of Tanganyika in **Rajabali Alidina v Remtulla Alidina & another** [1961] EA 565 established the factors as; the circumstances under which the debt was contracted; the conduct of the debtor; his financial position; and his *bonafides* in offering to pay a fair proportion of the debt at once. He indicated that the defendant contracted the debt in the year 2013 in commercial contracts under which he bought tyres for an agreed price of USD 1,200,825.00, hence it was contractually bound to pay the purchase price in all the five contracts before 1st October, 2014. He submitted that this Court should be guided by the principle of the law of contract that parties are bound by their agreements thus Courts cannot rewrite the terms of a contract.

15. Mr. Karina relied on the case of **Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited** [2017] eKLR, where the Court of Appeal stated that it is alive to the hallowed legal maxim that it is not the business of Courts to re-write contracts between parties who are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved. He indicated that allowing the defendant to pay the decretal sum by instalments would amount to re-writing the fundamental terms of the contract.

16. In regard to the debtor's conduct, Counsel for the plaintiffs submitted that 7 years down the line, the defendant had not paid the debt and the main suit had not been heard due to the defendant's delaying tactics. He was of the view that the defendant's misconduct made it undeserving of this Court exercising its discretion in its favour. On the debtor's financial position, Mr. Karina submitted that it is trite that the person who applies to pay by instalments must exhibit materials such as audited accounts and financial statements so that the Court can verify the allegation that it had been unable to meet the payment and make a determination on the reasonable amount payable.

17. He relied on the case of **Diamond Star General Trading LLC v Ambrose D. O Rachier carrying on business as Rachier Amollo Advocates** (supra) where the applicant had failed to demonstrate his financial position and the Court held that unless there are good, sufficient and adequate reasons, a judgment debtor should be allowed to enjoy the fruits of the judgment. He stated that the same position was taken by the Court in **William Ndeti t/a Ndeti Enterprises v NIC Bank Limited** [2020] eKLR.

18. Mr. Karina contended that the proposal to pay the sum of USD 5,000.00 per month to settle the decretal sum was unreasonable as it would take over 115 months to settle the decretal sum. He further contended that the defendant had not offered any substantial down payment to liquidate the decretal sum of USD 570,346.63. He relied on the case of **Hildegard Ndalut v Lelkina Dairies Ltd & another** [2005] eKLR, where it was held that the defendant should be able to show his *bona fides* by arranging fair payment of the proportion of the debt in persuading the Court to allow payment by way of installments.

19. He submitted that in **Kenya Airways PLC v Alex Wainaina Mbugua** [2018] eKLR, the Court of Appeal while granting an order for stay of execution pending appeal held that a successful litigant should not be deprived of the fruits of a judgment in his favour in the absence of a just cause. The plaintiffs' Counsel proposed that if the defendant was allowed to pay by way of installments, this Court should order it to pay 50% of the decretal sum plus costs and interest as at the date of the ruling, within 10 days of the ruling, and pay the balance by installments of USD 20,000.00 every 5th day of the succeeding month until payment in full. In the alternative, he proposed that defendant's application should be dismissed with costs.

ANALYSIS AND DETERMINATION

20. This Court has considered the issues raised in the application as well as the affidavits in support thereof and in opposition thereto. It has also considered the grounds of objection filed by the plaintiffs and the written submissions by Counsel for the parties. The issue that arises for determination is whether the defendant has satisfied the conditions to warrant the grant of the orders sought in the application dated 17th July, 2020.

21. The defendant in its affidavit deposed that the plaintiffs commenced this suit on 27th April, 2015 seeking an amount of USD 948,675.40. The plaintiffs thereafter filed an application dated 15th May, 2019 seeking to strike out the defendant's statement of defence and for entry of judgment for the plaintiffs on admission, in the sum of USD 179,952.79. The plaintiffs also sought summary judgment in the sum of USD 390,383.84. A ruling was delivered on 5th May, 2020 by Judge P.J. Otieno wherein he entered judgment for the plaintiffs for the amount of USD 570,346.63.

22. The defendant averred that it started paying the plaintiffs on 31st January, 2015 before the suit was filed and that it had continued to pay even after the judgment was entered. It further averred that the total amount paid by the defendant to the plaintiffs to date was USD 484,000.00, leaving a balance of USD 86,346.00. The defendant stated that some of the cheques were issued in the names of companies other than the plaintiffs on the plaintiffs' written instructions. The defendant deposed that it was not able to pay the said balance at once due to the hard economic times occasioned by the Covid-19 pandemic. It proposed and prayed that it be allowed to clear the said outstanding balance in instalments of USD 5,000.00.

23. It was stated by the defendant that the plaintiffs had initiated the execution process by extracting the partial decree and taxing the costs through a bill of costs filed on 16th June, 2020. It was of the view that there is a real danger that the plaintiffs may start the execution process if the orders sought were not granted.

24. In the replying affidavit by the plaintiffs in opposition to the defendant's application, they deposed that the plaintiffs'/decree holders' companies have a legitimate expectation that they will enjoy the fruits of the judgment dated 8th May, 2020, particularly since the applicant/debtor had refused to pay since the year 2014.

25. They averred that allowing the debtor to pay by instalments would be extremely detrimental to commerce and to the financial health of the decree holders as trading companies. They deposed that it would encourage the applicant/debtor to abuse the court process by imposing credit terms arising from failure to pay for the goods supplied as per the contract of sale and instead coming to Court to force suppliers to give them unplanned credit.

26. In response to the plaintiffs' replying affidavit, the defendant in its supplementary affidavit deposed that it had so far made payments of USD 20,000.00 in furtherance of the order of this Court issued on 28th July, 2020, thereby leaving a balance of USD 66,346.33. It urged this Honourable Court to take judicial notice of the subsisting strenuous economic conditions brought about by the Covid-19 pandemic on business worldwide, yet despite the bad business, the defendant was desirous of settling the outstanding balance of the decretal sum if given time.

Whether the defendant has met and/or satisfied the conditions to warrant the grant of the orders sought in the application dated 17th July, 2020.

27. The applicable provisions for payment of decretal sums in instalments is found under Order 21 Rule 12 of the Civil Procedure Rules, 2010. It 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.” (emphasis added).

28. From the above provisions, it is clear that in the absence of the decree holder's consent, the judgment debtor has to demonstrate sufficient cause to warrant this Court to exercise its discretion in its favour, which discretion must be exercised judiciously and not in an arbitrary manner. In the case of **Lavington Security Limited vs Nairobi City Water & Sewerage Company Limited** [2014] eKLR, Gikonyo J stated as follows-

“...of great significance in application (sic) of this nature are; the circumstances of the case; the conduct of the parties; the willingness and bona fides of the applicant to pay a fair proportion of the debt; and of course, that the application is made

without undue delay...”

29. Similarly, in **Singh Gitau Advocates v City Finance Bank Limited** [2013] eKLR, Mabeya J., stated the following in regard to what constitutes sufficient cause-

“It is trite law that apart from looking at the peculiar circumstances of the case, the Court when considering what sufficient cause amounts to, must consider a number of factors. This includes how the debt was incurred, the bona fides of the Judgment Debtor, the financial position of the debtor and the judgment creditor, the conduct of the parties and the hardship that may result from enforcing the decree. It is also my considered view that applications of this nature ought to be made without undue delay.”

30. It is not in dispute that the plaintiffs and the defendant entered into 5 commercial contracts under which the plaintiffs supplied tyres to the defendant at an agreed purchase price of USD 1,200,825.00. The plaintiffs averred that the defendant breached the terms of the contracts by failing to pay the purchase price of USD 948,675.40. On 27th April, 2015, the plaintiffs filed a suit against the defendant seeking payment of the said amount plus costs and interest.

31. On 8th May, 2020, Judge P.J. Otieno delivered a ruling on the plaintiffs’ application dated 15th May, 2019 which sought entry of judgment on admission for the sum of USD 179,952.79 and summary judgment for the sum of USD 390,383.84. In the said ruling, the Judge allowed the plaintiffs’ application for the sum of USD 570,346.63. He also granted the plaintiffs costs for the partial judgment and directed that the balance of the plaintiffs’ claim of USD 378,328.77 to be tried in the main suit.

32. The defendant submitted that it had shown through affidavit evidence that it had settled a substantial part of the decretal sum leaving a balance of USD 86,346.33, which evidence had not been controverted by the plaintiffs. It further submitted that at the time of filing of its submissions, it drew and forwarded four cheques of USD 5,000.00 each, on 7th August, 2020, 7th September, 2020, 5th October, 2020 and 11th November, 2020, respectively, in favour of and to the plaintiffs and/or their Advocates. The defendant urged this Court to order that it pays the outstanding amount by way of instalments of USD 5,000.00 per month.

33. The plaintiffs on the other hand submitted that from the defendant’s statements of accounts annexed to its supporting affidavit, in regard to the dates assigned to the alleged payments made by the defendant, the last two dates establish that the payments alleged to have been made, were made before 8th May, 2020, when the partial decree was passed. They submitted that the purported cheques so paid had been mischievously drawn in favour of persons other than the plaintiffs or their Advocates on record. They argued that the defendant had paid a total of USD 20,000.00 by instalments of USD 5,000.00.

34. The defendant furnished this Court with a statement of accounts showing that it had paid the plaintiffs a total USD 484,000.00. It is however evident from the said accounts that the bulk of the said payments were made before 8th May, 2020 when the partial decree was issued. It can also be deduced therefrom that since the issuance of the partial decree, the defendant had paid USD 15,000.00 in two instalments of USD 10,000.00 on 22nd June, 2020 and USD 5,000.00 on 8th July, 2020. The plaintiffs admitted receipt of the four cheques of USD 5,000.00 each on 7th August, 2020, 7th September, 2020, 5th October, 2020 and 11th November, 2020, which makes the total amount of money paid to the plaintiffs by the defendants since the issuance of the partial judgment to be USD 35,000.00.

35. The defendant submitted that it was not able to pay the outstanding balance at once due to the hard economic times occasioned by the Covid-19 pandemic. It however failed to annex its current statements of accounts and/or audited accounts and/or adduce by way of evidence its financial position. The said failure has made it impossible for this Court to make a determination on whether or not the defendant is in a position pay the outstanding balance of USD 535,346.63 in lump sum.

36. The plaintiffs opposed the defendant’s proposal on the ground that it would take over 115 months or about 9 years to settle the decretal sum and suggested that the defendant should be ordered to pay 50% of the decretal sum plus costs and interest as at the date of the ruling, within ten days of the ruling, and pay the balance by making monthly instalments of USD 20,000.00 on every 5th day of the succeeding month starting with the succeeding month until payment in full, or else the application be dismissed with costs.

37. This Court finds that the defendant has not demonstrated sufficient cause for it to be allowed to pay only USD 5,000.00 per month. If the defendant’s proposal was to be accepted, it would take roughly 100 months or 8 years to pay the decretal sum in full to the plaintiffs. This in my view does not qualify as reasonable time since it is a very long period of time, bearing in mind that the debt fell due sometime in the year 2014. This period will certainly occasion unnecessary hardship to the plaintiffs’ businesses whereas they are rightfully entitled to enjoy the fruits of their judgment and/or to their fees.

38. The application herein was made after the plaintiffs filed their bill of costs and attempted to extract the partial decree for execution purposes. On 28th July, 2020, the defendant was granted interim orders for stay of execution on condition that it pays the plaintiffs USD 5,000.00 on the 10th day of each succeeding month and in default execution to issue. The defendant issued a cheque on 3rd August, 2020 in favour of Pan African Chain Solution Co Ltd for USD 5,000.00. The said cheque was returned for having been addressed to a party other than the plaintiffs and/or their Advocates on record, In this Court’s view, the conduct of the defendant illustrates its unwillingness to pay the decretal sum

39. This Court however notes that the defendant has been making some payments albeit in small amounts in satisfaction of the partial decretal sum. Bearing in mind the provisions of Order 21 Rule 12 of the Civil Procedure Rules, 2010, I hereby exercise my discretion in allowing the defendant an opportunity to continue paying the said partial decretal sum in the following terms-

(i) The defendant shall pay an initial instalment of USD 200,000.00 within 60 days from the date of this ruling;

(ii) The balance shall be paid in monthly instalments of USD 20,000.00 until payment in full;

(iii) Failure by the defendant to comply with the above orders shall lead to execution being levied against it; and

(iv) Costs of this application shall be borne by the defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 8TH DAY OF OCTOBER, 2021. IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO THE COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL, 2020 AND SUBSEQUENT DIRECTIONS, THE RULING HEREIN HAS BEEN DELIVERED THROUGH TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of-

Mr. Karina for the plaintiffs/respondents

Mr. Kinuva holding brief for Mr. Oluga for the defendant/applicant

Mr. Oliver Musundi – Court Assistant.