



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ELC CASE NO. 270 OF 2016

PETER MURIUNGI.....1ST PLAINTIFF/APPLICANT

KABURA LERIA.....2ND PLAINTIFF/APPLICANT

VERSUS

TRUSTEE REGISTERED CATHOLIC

PARISH D.O.M. LAARE.....RESPONDENT

RULING

1. The Plaintiff/Applicants have filed the application dated 29/10/2019 seeking orders to be allowed to liquidate the taxed costs in instalments, which costs amount to shs.107,000.

2. The application was supported by the sworn affidavit of **Peter Muriungi** on the grounds that the taxed costs is a colossal sum, the applicants are jobless hence not able to pay the lump sum and that there is a danger of the applicants being committed to civil jail unless the application is allowed. He also averred that they sued the Defendants herein to protect their interest in the suit land where they were running a garage but they lost the case and were evicted. That since they lost the case, they have completely been grounded. They therefore urge the court to allow them to liquidate the amount in monthly instalments of Kshs 5,000/=.

3. The application was opposed by the Defendant vide Replying affidavit sworn by **Fr. Nicholas Mwirigi Mukiri**, who averred that the plaintiffs are reputable mechanics in Laare and the entire Igembe North Sub County hence they are able to pay the costs herein in a lump sum. That the costs were assessed way back in July 2019 and the applicants have not made any efforts to pay the same. That the application was only filed after the applicants were served with a notice to show cause hence the application is overtaken by events.

Analysis and Determination

4. **Order 21 Rule 12 (2) of the Civil Procedure Rules** 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 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”.

5. In **Diamond Star General Trading LLC v Ambrose D O Rachier carrying on business as Rachier & Amollo Advocates [2018] Eklr**, the court opined that the provisions of **Order 21 Rule 12 (2) of the Civil Procedure Rules** give the court a wide discretion as to whether payment of the amount decreed will be postponed or settled by way of instalments. However, this discretion must be exercised in a judicial and not an arbitrary manner.

6. In **Keshvaji Jethabhai & Bros Limited V Saleh Abdulla [1959] EA 260**, the Court laid down the principles that should guide the Court in the exercise of discretion in such a matter and stated as follows:

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”.

7. In **Rajabali Alidina vs Remtulla Alidina & Another (1961) EA 565**, the Court held that the conditions to be considered were as follows:-

- 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”.*

8. The plaintiffs herein had been in the suit premises of the Defendant since the year 2007. Vide the courts judgement dated 26/01/2018 this Court found that they do not have any rights capable of being protected in the Suitland. In an application dated 18/04/2018, the plaintiff had sought a stay of execution pending the hearing and determination of the appeal. The Defendant also filed an application seeking this court to allow M/S Jocet auctioneers to use all necessary means to remove the plaintiffs. This court considered both applications, dismissed the plaintiff’s application for stay of execution and allowed the Defendants application. The court took note that on 26/01/2018 the plaintiff’s counsel had prayed for 30 days to enable the plaintiffs vacate the suit land. It is therefore apparent that the applicants had resisted to vacate the suit land and as such, their conduct is a factor to be considered herein.

9. Further, it is noted that from the date of the Ruling of the bill of costs in July 2019, the plaintiffs have not paid any sum to offset the amount.

10. I have also considered that the applicants desire to offset the costs in monthly instalment of kshs. 5,000/ which means it will take a period of 21 months to offset the amount. I therefore find that the applicants have not shown the bonafides in offering to pay a fair proportion of the debt at once.

11. In the final analysis, I find that it will be in the best interest of justice to make the following Orders;

- a) The applicants shall pay an initial sum of Kenya Shillings Fifty thousand (Kshs. 50,000/=) within a period of thirty days from the date of delivery of this ruling.
- b) Upon payment of the sum under (a) above, the applicant shall then pay a sum of Kenya Shillings Ten thousand (Kshs. 10,000/=) per month with effect from the last day of the following month (i.e. last day of April, 2020) and continue paying a sum of Kshs. 10,000/= on the last day of each subsequent months until payment in full.
- c) That interest will continue to accrue on any unpaid sum until payment of the principal, interest and costs in full.
- d) In default of payment of any single instalments, in accordance with the orders herein, the decree holder shall be entitled to execute forthwith for payment of the total outstanding amounts.
- e) A stay of execution is thus granted on the terms set above.
- f) The costs of this Application shall be borne by the Applicants.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 19TH FEBRUARY, 2020

IN THE PRESENCE OF:-

C/A: Kananu

Muthomi K. holding brief for Kimathi for plaintiffs/applicants

H. Gitonga for defendant/respondent

1st plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE