



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 130 OF 2006

**MOHAMMED HASSIM PONDOR (Suing on behalf of THE INTERNATIONAL AIR TRANSPORT
– IATA MERCANTILE & GENERAL ASSURANCE.....1ST PLAINTIFF/DECREE HOLDER
COMPANY LIMITED.....2ND PLAINTIFF /DECREE HOLDER**

VERSUS

**DEBONAIR TRAVEL LIMITED..... 1ST DEFENDANT/JUDGMENT DEBTOR
KENNEDY GICHUHA CHEGE2ND DEFENDANT/APPELLANT
BERITA KASWII GICHUHA3RD DEFENDANT/JUDGMENT DEBTOR**

RULING

1. On 12th March 2008 Judgment was entered in favour of the Plaintiffs for the sum of Kshs.23,996,791.00 and USD 2,864.52 together with interest thereon at Court rates and costs against the three Defendants jointly and severally. Twelve years later a substantial portion of the Decree remains unpaid.

2. Notice to Show Cause proceedings were taken out by the Plaintiffs. On 26th July 2019 the Honourable Deputy Registrar issued orders requiring the 2nd Defendant (Appellant) to pay the Plaintiffs a sum of Kshs.5,000,000 within 30 days from the said date failing which he be committed to civil jail. Dissatisfied by that decision the Appellant has appealed against the entire Ruling through the chambers summons of 10th July 2019 which annexes a Memorandum of Appeal of 8th July 2015. That is the procedure of presenting such an appeal (See Order 49 Rule 7 of the Civil Procedure Rules).

3. The Appeal raises six (6) grounds. It is alleged that the learned Deputy Registrar erred in law and in fact in:-

- a. Failing to correctly evaluate the evidence adduced by the Appellant and consequently arrived at a conclusion that has no legal or factual basis.
- b. In failing to consider that the Appellant has been paying the decretal sum.
- c. In ordering the Appellant to pay a sum of Kshs.5,000,000/= within 30 days and in default be committed to civil jail which order is oppressive and unconscionable.
- d. In failing to consider, appreciate and take into account the Appellants affidavits to show cause.
- e. In failing to ensure that she considered, in toto, the provisions of the Civil Procedure Act before issuing the warrants of arrest.
- f. In not appreciating that the colossal amount of money in dispute was in itself a compelling reason for the Appellant to be given

adequate chance to show by affidavit evidence cause why execution should not issue.

4. At the hearing the Appellant argued, just as he did before the Deputy Registrar, that his client is not employed and relies on relatives and well-wishers whom have helped him pay a substantial sum of the decree. The Appellant was disappointed that the Deputy Registrar treated her the same way she treated the 3rd Defendant who has not paid at all and who has a source of income.

5. The Decree holder ask this Court to uphold the decision of the Deputy Registrar. This Court is asked to consider that this suit is more than 13 years old and the present appeal the third such appeal. The Court was asked to also consider that the amount owing is in excess of Kshs.50 million and the Appellant has only paid Kshs.5,000,000/=. Further that if the Appellants proposal to pay the sum Kshs.100,000/= a month is accepted, it would take 50 years to pay.

6. Turning to a different issue, it is pointed out that the Judgment is against the three Defendants jointly and severally and there is no legal basis for one party to say that they have paid a substantial portion of the debt.

7. Before the Deputy Registrar the Appellant relied on two affidavits of means of 4th July 2017 and 18th March 2017 and was duly cross-examined. In the end the Deputy Registrar held:-

“The 2nd and 3rd Defendants are not poor people in the general sense of the word. The 2nd Defendant has demonstrated ability to pay. He has paid Kshs.4,900,000/= and during cross-examination, he testified that he can afford Kshs.100,000/= per month from his relatives.....”.

And then made the now impugned order.

8. What does the Appellant state in his affidavit of means? That he relied on the 1st Defendant for a livelihood but that the business collapsed. He avers that he now relies on his second wife, sister and brothers. He bemoans financial burden on child support and showed Court a copy of a Notice to Show Cause in that respect. That his family helped him pay some Kshs.4,000,000/=.

9. Featuring time and again is that he is an alcoholic and is unable to read a normal life. In the further affidavit he displays cheques for payment of Kshs.900,000/= made towards the decree by well-wishers.

10. The Appellant was cross-examined by counsel for the Decree holder on 20th March 2019. He says that he drops his children to school daily but he is incapable of doing much economic activity. Instead, he does social work at his village. He stated that he lives in his wife's house and does not have any property. Generally he told a story that was consistent with his affidavits of means.

11. Both in the affidavits and at cross-examination, the picture emerging is that of a person with great financial struggles and no assets. No evidence was placed before Court by the Decree holder to debunk the averments of the Appellant. The Appellant stood firm on the state of his finances and lack of assets.

12. Although the Deputy Registrar found that the Decree holder had paid sum of Kshs.4,900,000/= towards settlement of the debt, that sum, from the evidence, had been paid from the year 2011 to 25th February 2019, a period of 8 years. In the end the Deputy Registrar make an order that the Debtor pays Kshs.5,000,000/= within 30 days from the date of ruling, failing which the debtor would be committed to civil jail for a period of 6 months.

13. In making the order, the Deputy Registrar was exercising the power donated to her by Order 22 Rule 31 (1) and (2) of the Civil Procedure Rules which reads:-

31. (1) Notwithstanding anything in these Rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in prison of a judgment debtor who is liable to be arrested in pursuance of the application, the court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison.

2. Where appearance is not made in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

14. Now, it is not the objective of those provisions of law to punish a decree holder who has no ability to pay but rather one with ability but is merely stonewalling, reluctant and obstructionist. To commit a decree holder who is truly incapable of paying may yield no positive result and amounts to a penal sanction on a person because of his financial misfortunes. The question then to be asked and answered is whether, on the material before Court, the Decree Debtor would be able to pay the sum of Kshs.5,000,000/= in 6 months when he paid an equal sum in a period of about 8 years. Given that there was no evidence of improved finances, does it not seem that the outcome of that order would be an inevitable default and therefore committal? It is only for this reason that this Court shall reluctantly interfere with the order of the Deputy Registrar because the order may not be in comport with the objective of order 22 Rule 31 (1) and (2).

15. That said, there is a substantial sum of about Kshs.50,899,960/= and USD 6,377.76 which remains unpaid. The interests of the Decree holder need also to be considered. The offer by the Judgment debtor to pay the outstanding sum in instalments of Kshs.100,000/= will mean that the debt would be paid in 50 years. That is not a reasonable offer and it looks the worse when one considers that the debt was incurred in the year 2001, about 19 years ago.

16. Trying to balance the interests of the Decree holder and the dire financial situation of the Debtor, which was demonstrated in evidence, this Court orders that the Judgment Debtor pays the decretal sum in monthly sums of Kshs.500,000/= for an initial period of 12 months with a right to the Decree Holder to thereafter apply for more enhanced payment.

17. As I conclude, I observe that the stance taken by the Debtor that the 3rd Defendants should be made to meet a greater sum of what remains outstanding does not find support in law. The Judgment was against the three Defendants jointly and severally. The effect of such an order was well explained by J. R. Karanja J in **Francis L. Oyatsi v Manani, Lilan Company Advocates & another [2015] eKLR** and I can do no better than reproduce the words of the Judge;

“...Hence, the joint and several liability which generally refers to a shared responsibility for a debt or a judgment for negligence in which each debtor or each judgment debtor is responsible for the entire amount of the debt or judgment. The plaintiff had thus the option to collect the entire decretal amount from any of the defendants and was not to be limited to a share from each defendant since the court did not make a determination on the percentage of negligence of each of the defendants. There was no request from the applicant to apportion the degree of negligence on each defendant.”

18. In the end the Appeal succeeds in part and the Court makes the following orders:-

18.1 The order of the Deputy Registrar of 25th June 2019 requiring the Appellant to pay a lump sum down payment of Kshs.5,000,000/= within 30 days is hereby set aside.

18.2 Instead the Appellant shall pay the decretal sum in monthly instalments of Kshs.500,000/= (five hundred thousand only) with effect from the date of this order for an initial period of 12 months with liberty to the Decree Holder to thereafter seek an upward revision of the payment.

18.3 In default of any payment then the Judgment Debtor shall be committed to civil jail for a period of 6 months.

18.4 For the sake of clarity this decision does not in any way interfere with the order made by the Deputy Registrar on the same day against the 3rd Defendant.

18.5 Each party to bear their own costs of the application.

Dated, Signed and Delivered in Court at Nairobi this 9th Day of June 2020

F. TUIYOTT

JUDGE

ORDER

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 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT JUDGE

PRESENT:

Mureithi holding brief for Gathu for Appellant.

Waigwa for Respondent.