



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**SUCCESSION CAUSE NO 124 OF 1997**

**IN THE MATTER OF THE ESTATE OF SALIM KARAMA AWADHA (DECEASED)**

**FADHIL & KILONZO ADVOCATES.....APPLICANT**

**VERSUS**

**SAID SALIM KARAM**

**AHMED SALIM KARAMA.....RESPONDENTS**

**RULING**

1. Pursuant to a decree issued on 27<sup>th</sup> May, 2011 against the respondents for payment of Kshs 669,976 arising from taxation of the advocate's/client's bill of costs in favor of the law firm of fadhili and Kalonzo advocates the applicant herein, a notice to show cause dated 5<sup>th</sup> August, 2020 was issued against the respondents. On 13<sup>th</sup> October 2020, the said application came for hearing. During the hearing, Mr Omollo appearing for the respondents herein Said Salim and Ahmed Salim Karama tried to argue that the applicant's bill of costs was taxed in the absence of the respondents and that the firm of Fadhili and Kilonzo was never instructed to appear for the respondents.

2. Mr Omollo urged that he had instructions to file an application to set aside the taxed bill of costs and the decree thereof. Mr Mulisho opposed the oral application stating that a similar application had been filed on 5<sup>th</sup> July 2012 and dismissed on 28<sup>th</sup> April 2014 hence filing another one will amount to res-judicata. In his rejoinder, Mr Omollo sought leave to file the intended application to set aside the decree arguing that a similar application had not been filed.

3. Owing to the absence of the respondents in court to show cause why they could not be committed to civil jail, Mr Mulisho applied for a warrant of arrest to issue. While opposing issuance of warrant of arrest, Mr Omollo informed the court that the notice to show cause should have been heard before a Deputy Registrar.

4. Meanwhile, the court granted Mr Omollo up to 15<sup>th</sup> October 2020 to file the intended application. The court went further and issued a warrant of arrest against the respondents who upon arrest were to be committed to civil jail for a period of 90 days for failure to pay the decretal sum.

5. Vide a Chamber Summons dated 3<sup>rd</sup> November, 2020 Said Salim Karama moved this court pursuant to rule 49 of the Probate and Administration Rules seeking the following orders;

**(a) spent;**

**(b) that the order of the court given on 13<sup>th</sup> October, 2020 committing the applicant herein to civil jail be set aside; (c) that in the meantime pending the hearing and determination of the application there be a stay of execution of the orders of the said court given on 13<sup>th</sup> October 2020;**

**(d) that the applicant herein be allowed to settle the decretal sum herein that is to say the costs awarded to Fadhili and Kilonzo advocates by monthly instalments of Kenya shillings thirty thousand (30,000);**

**(e) that the costs of this application be provided for.**

6. The application is premised upon grounds set out on the face of it and an affidavit sworn on 3<sup>rd</sup> November, 2020 by Said Salim the applicant herein. Basically, the applicant is seeking to deposit Kshs100,000 as the initial payment and the balance be paid in installments of 30,000 per month till full payment. He averred that he is a retired officer hence has no steady source of income. He further stated that the business he used to do with his brother Mohamed Salim Karama has gone under due to covid 19 and that he has no assets from which he can

raise the decretal sum .

7. He claimed that when he instructed the firm of Fadhili and Kilonzo to represent them, they had agreed at a retainer fee of Kshs 60,000 and that he was shocked when the bill of costs was taxed at Kshs 889,926.

8. In response, the respondent through Sultana Fadhil managing partner the law firm of Fedhil and Kilonzo advocates filed a replying affidavit sworn on 9<sup>th</sup> November, 2020 stating that the application herein is incompetent, bad in law, misconceived, unmeritorious and an abuse of the court process. He averred that the applicant was given an opportunity to turn up in court to show cause but failed to do so and that not even his advocate who was in court gave any indication as to his client's inability to pay the amount due. He contended that the application is an afterthought with the sole purpose of frustrating execution process.

9. He went further to state that the applicant's claim that he is financially incapacitated is not true. He contended that the applicant is a well-known businessman in Mombasa owning several properties among them; Mombasa/BlockXLI/173 and Mombasa Block XLI/75 which he jointly owns with his brother wherein they have erected a five storey building as a fact which was allegedly admitted in the applicant's affidavit sworn on 7<sup>th</sup> May, 2012 and filed in court on 8<sup>th</sup> May, 2012.

10. He further contended that the decretal sum of Kshs 889,976 exclusive of interest has been outstanding since 27<sup>th</sup> May, 2011 ten years down the line. That the proposals to pay in installments of Kshs30,000 per month will take over 2 years to repay the full sum yet the applicant is a person of means.

11. During the hearing, Mr Omollo basically reiterated the averments contained in the affidavit in support. He urged the court to consider some authorities filed among them; **Maasai Kenya Limited Vs Hardware and Steel Center limited and another ( 2031) e KLR** where the court stated that in considering an application for committal to civil jail, one ought to consider circumstances under which the debt arose. Further reliance was placed in the case of **Freight Forwarders Ltd Vs El Sek and Elsek (k) Ltd ( 2012) e KLR** where the court held that, in considering an application for committal to civil jail, the court should consider; circumstances under which the debt was incurred; the conduct of the debtor ; his financial position and, his bonafides. According to Mr.Omollo, the applicant has met all those conditions and the application is made in good faith.

12. On his part, Mr Mulisho equally adopted the averments contained in the affidavit in reply to the application. Counsel contended that the applicant owns property in town among them a five storey building a fact that was not denied. That a delay of 10 years in settling a debt is unreasonable.

13. In his rejoinder, Mr Omollo submitted that the five storey building being referred to is jointly owned with others and that the same is encumbered.

### **Determination**

14. There is no dispute that the decree herein the subject of these proceedings was entered on 27<sup>th</sup> May, 2017. It is also not in dispute that every attempt to set aside the taxed bill of costs and the decree thereof could not succeed. This is clear from Judge Odera's ruling of 28<sup>th</sup> April 2014 in which she dismissed an application to set aside the decree. The debt has remained unsettled for about 10 years now.

15. It was until 5<sup>th</sup> August 2020 that a notice to show cause was served upon the defendants. The applicant herein was notified to attend court on 13<sup>th</sup> October 2020. He did not turn up to show cause why execution by way of committal to civil jail could not issue. His advocate did turn up and pleaded for time to file an application to set aside the decree passed in the year 2011.

16. In the instant application, the applicant is not seeking to set aside the decree made on 27<sup>th</sup> May, 2011. Instead, he is seeking for the court's indulgence to review the order of committal to civil jail to that of liquidating the debt in installments of kshs 30,000 per month till full payment. Further, I do not see any attempt anywhere by the applicant seeking to challenge the order of committal on appeal hence the stay order sought is limited up to the time of the hearing and determination of the application.

17. The application herein has been brought under Rule 49 of the Probate and Administration Rules which is a saving clause for filing applications where there is no specific provision governing filing of such applications. Under order 21 Rule 12 of the Civil Procedure Rules, a decree holder and a judgment debtor can urge for liquidation of a decretal sum in installments. Courts have time and again held that for the court to exercise such discretion; the judgment debtor must prove that;

**(1) He has shown sufficient reason as to why he should pay in installments**

**(2) Whether the application is made in good faith and the proposed monthly installments is reasonable**

**(3) Whether he has shown bonafides by arranging fair payment in installments**

18. The above conditions were emphasized succinctly in the case of **Cabro East Africa limited Vr Rosaga Investments Limited ( 2019)EKL.R.**

19. Similar position was held in the case of **Kesharal Jethabhai and brothers Ltd Vs Saleh Abdul (1959) EA 260** where the court stated that the principles that should apply in considering such an application are: each case must be considered on its own merits; mere inability to pay in full at once is not sufficient reason for exercising the discretion; the debtor should show bonafides by making prompt

payment and; that though hardship may be a factor, the court has to consider whether indulgence should be given to the debtor without prejudice to the decree holder.

20. There is no doubt that the court has wide discretion in granting a prayer to pay in installments. The court has to determine on whether the applicant deserves the prayer or order; whether he has demonstrated reasonably inability to pay in installments the decretal sum and; the expression of genuine desire to clear the amount within a reasonable time. **See KTK Advocates Vs Baringo County Government (2018) e KLR.**

21. Applying the above approach, and considering the circumstances of this case, I am technically being asked to set aside the orders of my colleague with whom we have concurrent jurisdiction. Legally, I will not set aside the orders of committal as that will amount to sitting as an appellate court on my colleague's decision.

22. However, taking the approach of payment in instalments, I am being asked to review the orders. What is new before me that could not be argued before my colleague? I do not see discovery of any new evidence or important matter that was not within the knowledge of the applicant or mistake or error apparent on the face of the record to warrant review. The appellants squandered the opportunity by failing to appear and show cause.

23. Assuming for a moment that I can review the orders based on the proposed mode of paying in installments, is the proposal reasonable? Is the proposal made in good faith? What is the historical basis of the debt?

24. The debt herein arose out of professional legal services rendered by respondents to the applicant and his brother. The debt has been in force for ten years. No attempt to pay even a penny has been made. This is a person who from his past conduct cannot be taken seriously. His conduct is wanting hence an application not made in good faith.

25. Further, the respondents alleged that the applicant with his brother jointly own a five storey building. The respondent admitted that fact in some previous pleadings vide an affidavit sworn on 7<sup>th</sup> May, 2012. Even his counsel admitted in his submissions in court but was quick to add that the property is encumbered.

26. Taking judicial notice of the commercial viability of the property in Mombasa town, a five storey building should be generating reasonable income a share of which is payable to the applicant. He cannot therefore claim to be a pauper or financially incapacitated.

27. Concerning the amount proposed to be paid at Kshs30,000 monthly installments, the same is for all intents and purposes unreasonable. It will take over 2 years to clear thus further prolonging the debt repayment period to 12 years since it accrued. This cannot be said to be a reasonable proposal. I am alive to the fact that one's liberty is a Constitutional right. However, the same is not absolute. It is subject to other conditions otherwise other Kenyans would lose on their right to property which is equally a constitutional right. It is all about balancing those rights without overlooking or overstepping on other equally deserving rights.

28. In view of the above findings, I am satisfied that the application is not merited and the same is disallowed with costs to the respondents.

**Dated, signed and delivered virtually this 3<sup>rd</sup> day of December 2020.**

**HON. JUSTICE J. N. ONYIEGO**

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**JUDGE**