



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**MISC. CIVIL APPLICATION NO.06 OF 2018**

**OUMA NJOGA & COMPANY ADVOCATES.....ADVOCATE/RESPONDENT**

**VERSUS**

**JOSHUA OUMA OGWANG.....CLIENT/APPLICANT**

**RULING**

1. By a notice of motion dated 7th December, 2018 brought under Order 21 Rule (12) and order 22 Rule 22 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya; the applicant prays for orders that:

***1. That the Honourable Court be pleased to order that the judgment debtor be allowed to satisfy the decree by paying a monthly instalment of Kshs. 20,000/- only***

***2. The costs of this application be provided for***

2. The application is based on grounds among others that applicant is not a man of means and cannot afford to pay the entire amount at once and that his business has not performed well.

3. The application is supported by an affidavit sworn by the applicant on 7th December, 2018 in which he reiterates the grounds on the face of the application. Attached to the affidavit and marked **JOO 1** is a cheque dated 7th December, 2018 for Kshs. 40,000/- addressed to the respondent. The decree in this matter is also attached and marked **JOO 2**.

4. The application is opposed by way of a replying affidavit sworn by Robert Ouma Njoga on 18th December, 2018. He avers that the applicant is a man of means and owns several commercial and residential rental houses in Awasi Town, a fleet of tractors, lorries, saloon cars, luxury personal SUVs and a pickup, several large scale farms in Awasi, Chemelil and Muhoroni, three personal residences, Little Kids Nursery and Primary School and a hardware. He further avers that the applicant is a sugarcane transporter with Mumias Sugar Company Limited. The deponent denies receipt of the cheque for Kshs. 40,000/- marked **JOO 1** and states that the proposed amount is not reasonable and will stretch the payment period to close to 18 months for no justifiable reason.

**ANALYSIS AND DETERMINATION**

5. I have considered the Notice of Motion in the light of affidavits on record and also on submissions filed on behalf of the applicant.

6. Order 21 Rule 12 (2) of the Civil Procedure Rules, 2010 stipulates 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 installments on such terms.”***

7. In allowing an application for payment in instalments, it is apparent from the foregoing that the court ought to be guided by the following principles:

**The circumstances under which the debt was incurred**

8. The claim arises out of legal services rendered to the applicant by the advocate in **KISUMU HCCA 72 OF 2005** from which a Bill of Costs was taxed for the sum of Kshs. 297,646.10 and a certificate of costs thereof was issued on 7th August, 2018.

**The conduct of the debtor**

9. There is no evidence that a cheque dated 7th December, 2018 for Kshs. 40,000/- has been received by the respondent. There is therefore no evidence that the applicant has made any effort to settle the costs, either in full or in part.

**The financial position**

10. Applicant avers that his business is not doing well but failed to provide evidence in support of his claim of inability to pay the decretal sum at once. Similarly, the applicant did not counter the respondent's averments that he is a man with means to pay the decretal sum at once.

**The bonafides in offering to pay a fair proportion of the debt at once**

11. As a sign of good faith, it was expected of the applicant to have made an effort to settle the decretal sum either in part or in full and also to place material before the court to prove his inability to settle the decretal sum at once, a burden that he has failed to discharge.

**DISPOSITION**

12. Having had due regard to the application and the replying affidavit *vis a vis* the applicable law, I have come to the conclusion that the applicant has not demonstrated sufficient cause why he should be allowed to pay the decretal sum in instalments.

13. From the foregoing; I find and hold that the applicant is undeserving of the order for payment of the decreed costs in instalments and the notice of motion dated 7th December, 2018 is thus dismissed with costs to the respondent.

**T. W. CHERERE**

**JUDGE**

**DELIVERED AND SIGNED IN KISUMU THIS 14<sup>th</sup> DAY OF March 2019**

**F.A.OCHIENG**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix

Applicant -

Respondent -