



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL CASE NO. 138 OF 2005

MN1ST APPELLANT/APPLICANT

MA T/A THE RM SCHOOL.....2ND APPELLANT

VERSUS

IB (Through her father and next friend BB) ...RESPONDENT/APPLICANT

RULING

INTRODUCTION

The applicant filed this application on 1st November 2017 seeking orders to be granted leave to pay the decretal amount and assessed costs by monthly instalments of Kshs. 5,000/- until payment in full. The judgment in the appeal was delivered on 7th May 2012 and the costs in the appeal were taxed to a tune of Kshs. 133,062/-. The applicant filed this application after the taxation was done.

APPLICANTS' CASE

The applicant states that he does not have a regular source of income and therefore is unable to pay the decretal sum of Kshs. 40,000/- and the costs of Kshs. 133,062/- at once. He is willing to make payments by instalments of Kshs. 5,000/- per month until he pays the full amount.

The decretal amount was Kshs. 40,000/-, costs in the lower court was Kshs. 90,000/- and the appeal costs were Kshs. 33,000/-. It is a total of Kshs. 199,000. Some amount was deposited as security by a co-respondent who was exonerated on appeal.

RESPONDENTS' CASE

The respondents opposed the application as the issues raised by the applicant have been determined by the court.

The offer is not reasonable as it will take 38 months to liquidate the entire decretal sum.

In their replying affidavit, the respondents submitted that the application is fatally defective as it ought to be brought under *Order 21 Rule 12* of the *Civil Procedure Rules*. The costs in the subordinate courts were assessed at Kshs. 19,800/- which was deposited in a joint interest earning account in the names of M/s Omwenga & Co. Advocates and Buluma & Co Advocates. The decretal sum was also deposited in a joint interest earning account. The costs of the appeal and the lower court were awarded to the respondent. The 1st appellant was aggrieved by the judgment in the lower court and filed a notice of appeal which he later withdrew. M/s Omwenga & Co. advocates filed a Notice of Motion Application which was determined on 16th November 2016 and the court ordered that the amount payable by the 1st appellant be paid from the money held in the fixed deposit account and the balance be released to the appellants' advocates. The appeal was never set aside or reviewed. The costs were taxed at Kshs. 133,062/- and a certificate of costs issued.

The respondent's advocates wrote to the 1st appellants' advocates severally to no avail. They then opted to file the present application. The amount due to the respondents is Kshs. 192,862/- which is to be paid from the amount in the joint interest earning account. The 1st appellant has been indolent and reluctant to make the payment. None of the grounds set out in the application warrant the orders sought herein. The respondent prays the application be dismissed with costs to the respondent.

ISSUE FOR DETERMINATION

a. Whether the Applicant should be granted leave to make the payment in instalments

The applicant has merely stated that he is unable to make the full payment. He has not provided any evidence to suggest that he is a man of straw. Further, the order directing payment of the funds from the joint interest earning account has not been appealed against or set aside.

Order 21 Rule 12 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”.

The case of *Keshvaji Jethabhai & Bros Limited V Saleh Abdulla [1959] EA 260* lays down the principles that should guide the Court in the exercise of discretion in such matter and states 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 he is 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.**

In Diamond *Star General Trading LLC v Ambrose D O Rachier carrying on business as Rachier & Amollo Advocates [2018] eKLR* the court held;

“However, the Applicant other than alleging inability to pay, has not demonstrated his financial position to enable the Court ascertain the reasonable amount that he can pay. It is trite law that unless there are good, sufficient and adequate reasons, a judgment debtor should be allowed to enjoy the fruits of the judgment. Therefore, as much as the Court will consider circumstances under which this debt was incurred, the Court will also have to consider the right of the judgment creditor to prompt payment.”

Based on the principles in the aforementioned authorities, I do find the application in want of merit and is dismissed with costs to the Respondents.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 5th day of April, 2019.

In the absence of;

The Appellant

The Respondent

And in the presence Mr. Mwelem - Court assistant