



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO. 12 OF 2018

BETWEEN

ABDISALAN ABDI ALI ISMAIL.....APPELLANT

AND

GUHART ABDI ALL.....1ST RESPONDENT

DESERT CRUISER COMPANY LIMITED.....2ND RESPONDENT

MOHAMMED FARAH.....3RD RESPONDENT

(An appeal from the ruling of Senior Resident Magistrates Court at Garissa Hon. J. J. Masiga

SRM dated 11th April 2018 in the Chief Magistrate Court at Garissa Civil Suit No. 4 of 2014)

JUDGEMENT

Introduction:

1. The appeal herein is in respect to a ruling delivered on 11th April, 2018 on an application dated 13th July, 2017 by the respondent brought under Order 21 Rule 12(2) of the Civil Procedure Rules, 2010. The appellant is challenging the trial Magistrate exercise of his Judicial discretion to allow the Respondent Judgment Debtor to pay the decretal sum in installments of Kshs. 50,000/= monthly arguing that the same should be paid at least in two equal installments alleging that the Respondent is a man of means.

Background:

2. The genesis of the suit the subject of the application in which the instant appeal arose is in respect to a Road accident involving a Motor vehicle owned by the Respondents, where the appellant was injured rendering him disabled. He subsequently filed Garissa CMMC Civil Case No. 4 of 2014 in which the appeal herein arises.

3. The appellant was awarded the sum of Kshs. 6,985,308.00/= for the resultant injuries. The Respondents insurers paid the sum of Kshs. 3,100,000/= leaving a balance of Kshs. 4, 654,124.00/= to be incurred by the Respondent.

4. Subsequently, the Respondent filed the application dated 13th July, 2017 the subject of this appeal, seeking the Court to exercise its discretion and allow him to pay the outstanding amount in Installments. The Trial Court, allowed the application, directing that the Respondent pay the decretal sum in Installments of Kshs. 50,000/= monthly until payment in full. The appellant being dissatisfied with the trial Court ruling filed this instant appeal.

SUBMISSIONS:

Appellant's Submissions

5. The appellant filed their written submissions dated 14th January, 2019 and filed on 21st January, 2019. The appellant in its submissions argues that under Order 21 Rule 12(2) the Court can indeed exercise its Judicial discretion to allow a Judgment Debtor to make payments on installments basis, however this can be undertaken in two ways, the first being with the consent of the decree-holder and secondly, where the Judgment debtor shows sufficient cause.

6. The Appellant argues that the Respondent is a man of means and capable of settling the decretal sum devoid of installments. They submitted that the Respondent being a teacher earning a net sum of Kshs. 50,000/= and owning 7 motor vehicles is enough evidence confirming that he is a man of means, and that the production of a letter showing that the said Motor Vehicles are on asset financing is not sufficient proof of the Respondents financial position.

7. Further, they submitted that reasons proffered by the Respondent that the business is facing financial challenges due to insecurity finds no basis and remains unsubstantiated and nothing has been tendered to show that the respondent is in financial hardship. Additionally, they submitted that the allegations by the Respondents that the outstanding sum of Kshs. 4, 654, 124/= was a special damage was false.

8. In sum the appellant alleges that the trial court wrongly exercised its discretion in allowing the Respondent to pay the decretal sum in installments of Ksh. 50,000/= in view of the available evidence, considering that he a able man and such would hinder the appellant from enjoying his fruits of Justice considering that he is forever confined to a wheel chair and his bad state of health.

9. In support of the appeal, the appellant relies on following Authorities *Astrazeneca UK LTD V Macnaughton (2016) eKLR*, *Lavington Security Limited v Nairobi City Water & Sewerage Company Ltd(2014) eKLR*, *Diamond Star General Trading LLC V Ambrose D O Racahier Advocates(2018) eKLR*, *Maasai Kenya Limited v Hardware and Steel Center Limited & Another(2013) eKLR*, *Narendra Chaganlal Solnki v Neepeu Auto Spares Ltd & Others(2015) eKLR*, *Kenya Shell Limited v Hussein Dairy Limited(2012) eKLR* and *Bruce Joseph Bockle v Coquero Limited(2017) eKLR*.

Respondents Submissions:

10. The Respondents in response filed their written submissions dated 20th February, 2019 and filed on even date opposing the instant appeal. The Respondent in their submissions rely on the Authority of *Jabali Alidina vs Lentura Alidina(1961) EA 565 at 566* where the Court set out the manner in which a court should exercise its discretion. These grounds include, the Circumstances in which the debt was contracted, the conduct of the debtor, the financial position, and his bona fides in offering to pay a fair proportion of the debt at once.

11. In this regard, the respondent submits that the debt was as a result of an unfortunate motor vehicle accident, arguing that the award was to cover future medical expenses and not a commercial debt, secondly that the Respondent is a committed debtor having ensured that his insurers paid the lumpsum sum of Ksh. 3,100,000/=, in respect to his financial position, he states that he is Primary School teacher earning Kshs. 50,000/= as evidenced in his supporting affidavit to the application and that he owns buses which were acquired through asset financing and that his business has faced difficulties due to insecurity forcing many travelers to opt for air transport and that he is ready to settle the decretal sum pursuant to the trial court ruling.

12. In sum the Respondent argues that the Trial Magistrate exercised his discretion judicially in view of the fact that the Respondent established his willingness to settle the debt and the fact that the payment was to be spread over a period of 25 years, for instance Cost of Wheel Chair to be replaced 7 times, cost of helper, Uvindom and costs of Checkup for over a period of 25 years. And that the sum of Kshs. 50,000/= monthly issued by the trial court was sufficient and within the law.

13. In regard to the Appellant authorities the Respondent argues that the majority of them refer to the Commercial context, which is distinguishable from the nature of the subject debt. In sum the Respondents argues that the appeal lacks merit and ought to be dismissed with costs.

ISSUES AND ANALYSIS:

14. The only issues in respect to the instant appeal is as to whether the Trial Court exercised its discretion judiciously in allowing the Respondent Judgment Debtor to pay the decretal sum in installments of Ksh. 50,000/= monthly.

15. **Order 21 Rule 12 (2)** of the *Civil Procedure Rules, 2010* which 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 installments 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”.

16. As such the provisions of **Order 21 Rule 12 (2)** of the Civil Procedure Rule, 2010 give the trial court a wide discretion as to whether payment of the amount decreed be postponed or settled by way of installments. Such discretion must be exercised in a judicial and not an arbitrary manner as was held in *A. Rajabali Alidina v Remtulla Alidina & Anor. (1961) EA 565*, Law JA where it was stated that:-

“All commentators on the Civil Procedure Code agree that the court’s discretion to order payment of the decretal amount in installments is one which must be exercised in a judicial and not an arbitrary manner. The onus is on the defendant to show that he is entitled to indulgence under this rule.”

17. The Court further went ahead and attempted to define what constitute sufficient reasons, which included **the circumstances, under which the debt was contracted, the conduct of the debtor, his financial position, and his bona fides in offering to pay a fair proportion of the debt at once.**

18. Further, in *Hildegard Ndalut v Lelkina Dairies Ltd & Anor. (2005) eKLR*, *Dulu Ag. J* as he was then stated in this regard as follows:-

“Both parties have referred to the case of Keshavji Jethabhai & Bothers Limited –vs- Saleh Abdulla [1959] EA 260, which is a case from a High Court of Tanganyika. That case followed the principles laid down in the Indian case of Sawatram Ramprasad –vs- Imperial Bank of India (1933) AIR Nag. 33 – that a defendant should be required to show his bona fides by arranging fair payment of the proportion of the debt – in persuading the court to allow payment by way of installments. This, in my view, is the proper test to apply in granting orders for payment of a decretal amount by way of instalments. A judgment creditor is entitled to payment of the decretal amount, which he should receive promptly to reap the fruits of the judgment. The judgment creditor might genuinely be in a difficult position in paying the decretal amount at once. However, he has to show seriousness in paying the amount. In that event he should show his bona fides by arranging fair payment proposals to liquidate the amount”.

CONCLUSION:

19. Considering the appellant appeal on the above established principles, It is apparent that the trial Court considered the Respondent affidavit in support of the application in that he is a teacher with a net salary of Kshs. 50,000/= and the letter from the Bank establishing that the said Motor vehicles owned by the Respondent were under asset financing.

20. In **Freight Forwarders Ltd v Elsek & Elsek (K) Ltd (2012) eKLR, Mwongo J** narrowed the principles as regards to what amounts to ‘sufficient cause’ to include the following;

- (a) The debtor is unable to pay in lump sum.**
- (b) The debtor can pay by reasonable monthly instalments.**
- (c) The application is made in utmost good faith.**

21. Therefore based on the foregoing the power to order payment by installments of the decretal amount is purely a matter of discretion of the trial Court. Except, the exercise of discretion is circumscribed; sufficient cause must be shown and the indulgence to pay by instalments may be on such terms that the Court thinks fit.

22. The onus of establishing sufficient cause rests on the Applicant, which was established in the view of the trial court. The appellant has alleged that allowing the Respondent to pay an equal installments of Kshs. 50,000/= monthly would amount to denying the appellant the fruit of the Judgment and are proposing the payment in two equal Installments. They are challenging the lower court exercise of discretion in this respect.

23. Therefore, the issue is whether the lower court erroneously exercised its discretion in allowing the Respondent to pay the debt in instalments. At the lower court, the Respondent in support of his application produced his pay slip showing a salary of the net sum of Kshs. 50,000/= and that the Motor vehicles he owns were acquired through asset financing and a letter from the bank to that effect has been produced.

24. Moreover, the appellant admits having received the sum of Kshs. 3,100,000/= from the Respondent insurer being part payment of the decretal sum. The Respondent has submitted that he is willing to abide by the lower court decision. This court in my view will not disturb the lower court ruling in view of the nature of the debt and in view of the foregoing. Thus court makes the following orders;

- (a) The appeal is dismissed.**
- (b) Parties to bear their own costs.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT GARISSA THIS 21ST DAY OF MAY, 2019.

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CHARLES KARIUKI

JUDGE