



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 76 OF 2016

KOSAR SULTANA.....PLAINTIFF/RESPONDENT

VERSUS

KHALID IQBAL.....DEFENDANT/APPLICANT

RULING

1. The ruling herein relates to a Notice of Motion application dated 26th November 2018, brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Order 21 Rule 12; Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The application is supported by an affidavit dated 26th November 2018, sworn by the Defendant.

2. The Applicant is seeking for orders that; the Defendant be granted leave to liquidate the interest on the decretal sum being a sum of; GBP 36,549.74, by way of twenty four 24 equal instalments until full and final payment; and the court issue any further orders it deems fit in the interest of justice.

3. The brief facts of the case are that, on 18th July 2016, judgment on the principal sum herein was entered into by consent of the parties in favour of the Plaintiff as against the Defendant, in the sum of; GBP 225,000. The Defendant has fully settled the principal debt, as here below set out: -

- a) 7th September 2017 USD 47,000;
- b) 16th November 2017 USD 7,000;
- c) 25th January 2018 USD 7,000;
- d) 6th February 2018 USD 50,000;
- e) 15th August 2018 USD 50,000;
- f) 17th August 2018 USD 50,000; and
- g) 27th August 2018 USD 14,000

4. However, the interest accrued from the date of filing of the suit being; 15th March 2016, to 27th August 2018, when the final payment of the principal sum was made, being an amount of; £36,549.74 has not been paid. That, by the consent of the parties dated 28th February 2018; it was agreed that the issue of interest would be canvassed at the Court of Appeal.

5. However, the Applicant avers that he is not in formal employment and relies on rental income from a tenancy in the United Arab Emirates for his livelihood, therefore he is not able to meet the costs of the Appeal and neither is he interested in further prolonging of the matter. He has thus abandoned the Appeal.

6. He avers that, although he has continuously engaged the Plaintiff with various proposals for settlement of the matter the negotiations have not borne any fruit. He argues that, he has conducted himself honourably and paid the entire decretal debt as aforesaid, therefore it is in the interest of justice, fairness, and proportionality that he be allowed to liquidate the interest in monthly instalments of; GBP 1522.90,

equivalent to **Kshs. 200,539.22** at the exchange rate of 131.68, prevailing on 26th November 2018, until full and final settlement. The proposed monthly sum is reasonable in the prevailing circumstances.

7. That the Plaintiff will not suffer any prejudice if the application is allowed as the entire amount advanced has been fully repaid and the application is made in good faith and without unreasonable delay.

8. However, the Application was opposed by the Respondent through an undated replying affidavit, sworn by the Plaintiff and filed on the 13th December 2018, in which it is conceded that, judgment was entered into by the consent of the parties against the Defendant in the principal sum of; GBP 225,000 which has been fully liquidated.

9. That the interest accruing since the filing of the said suit was computed at a sum of; GBP36, 549.74 based on 12% court's interest rate, but the Applicant was aggrieved and the parties agreed that, the issue of interest to be determined by the Court of Appeal. In due consideration, the Respondent opted for an out of court settlement on the issue and instructed his Advocates to address the Applicant with a view of coming up with settlement terms. However, despite numerous consultations and the Applicant has been adamant in settling the amount, despite the Respondent's leniency in ensuring the matter is settled.

10. The Respondent argues that, by failing to file an Appeal for determination of the issue of interest and rejecting the terms of settlement of the debt, the Applicant is on escape goat mission and is using the Application as means to garner more time. Hence the Application is an abuse of the process of the court, and should be dismissed.

11. However the Applicant filed a further affidavit in response to the replying affidavit and averred that, during the pendency of the subject Application dated 26th November 2018, the Respondent has obtained warrants for the attachment of his movable goods to recover the sums GBP 109,821.43 and Kenya shillings 2,450, and on 13th December 2018, M/s Okuku Agencies Auctioneers purported to proclaim his goods for amounts of GBP 60,281.42 and Auctioneers fees of Kshs. 781,182.60.

12. He argues that, the proclamation is a trespass, as none of the attached properties belong to him and whereas the warrants are for the attachment of movable property, the Auctioneer has purported to attach immovable properties. Therefore, unless the court issues the stay of execution order urgently, the pending application will be rendered nugatory.

13. The parties disposed of the Application by filing submissions whereupon the Applicant submitted that the court is empowered under Order 21 Rule 12 of the Civil Procedure Rules, to exercise its discretion and allow for the satisfaction of a decree by way of instalments without the consent of the decree holder, where sufficient reason and cause are demonstrated. However, it is notable that the Plaintiff did not file any submissions.

14. Be that as it were, I have considered the Application in full and I find that first and foremost, although the Applicant has submitted on the issue of stay of execution, there is no prayer in the Application seeking for the same, therefore the submissions under heading "c" thereof in relation to the issue will not be considered.

15. Be that as it may, the provisions of; Section 3A of the Civil Procedure Act stipulates as follows: -

"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

16. Similarly, the procedural provisions of; Order 21 Rule 12(2) of the Civil Procedure Rules, 2010 provides as follows:-

"Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable."

After passing of any such decree, the court may on the application of the judgment-debtor and with 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."

17. Based on the above provisions, it is the duty of the Applicant to show sufficient cause if the orders sought for herein are to be granted. In the instant matter it is evident that, the Plaintiff was filed on 15th March 2016, and judgment entered by consent on 18th July 2016. It is not in dispute that the principal decretal sum has been fully settled.

18. However, it suffices to note that, although the Respondent did not address the issue of payment of the interest sum by instalments, as no submissions were filed the court has been seized of the matter and is aware that, it has been over two (2) years and ten (10) months, since judgment was entered in favour of the plaintiff in the sum of USD 225,000 plus interest. Thus the interest amount has not been paid for a period of over two and half (2 ½) years from the date of judgment.

19. Therefore, if the court were to allow the Applicant's plea to liquidate the subject amount, in twenty-four (24) months as sought, it will take another two (2) years, giving a total of four (4) years and ten (10) months to pay the Respondent the interest on the principal sum. That will not be reasonable in the given circumstances and will not serve the interest of justice.

20. I further note from the schedule of payments made that, the 1st instalment of payment of the principal sum was made on 7th September 2017 and the last on 27th August 2018. Thus it took the Applicant (1) year to pay the same.

21. As such, to allow the Applicant another twenty-four (24) months to pay the interest by instalments, will amount to disregard of the interest of the Respondent who is entitled to enjoy the fruit of judgment. As is well settled the grant of the orders sought for herein is discretionary.

22. The sum involved is GBP 36,549.74 which is approximately, Kshs. 4,385,968.80 at a conversion rate of Kshs. 120 per pound. In that case, I think it will serve the interest of justice if the Applicant and/or the Judgment debtor pays a first lump sum amount of; GBP equivalent to Kenya shillings one million (Kshs. 1,000,000) a within thirty (30) days of the date of this order and then liquidate the balance in the equivalent sum of Kenya shillings (Kshs. 500,000) monthly until payment in full. In default of payment of any of the instalment, execution to issue. The costs of the Application are awarded to the Respondent.

23. It is so ordered.

Dated, delivered and signed in an open court this 5th day of June 2019

G. L. NZIOKA

JUDGE

In the presence of:

Mr. Manwa for the Plaintiff/Respondent

Mr. Waigwa for the Defendant/Applicant

DennisCourt Assistant