



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NUMBER 43 OF 2017**

**LANDMARK PORT CONVEYORS LIMITED.....PLAINTFIF/RESPONDENT**

**VERSUS**

**BUZEKI ENTERPRISES LIMITED.....DEFENDANT/APPLICANT**

**RULING**

This Ruling relates to an application dated 13<sup>th</sup> June 2018 seeking the substantive orders that the defendant/applicant be granted leave to liquidate the decretal sum of Ksh.118,566,172/- by instalments of Ksh.3,000,000/- per month until payment in full, or until the sale of the suit properties whose proceeds shall be directed to settle the balance of the decretal sum at the point of sale.

Further, that there be a restraining order against the plaintiff/respondent from commencing and or levying execution against the defendant/applicant, for as long as the defendant/applicant complies with the proposed payment plan and or further/other reasonable terms as may be ordered by this court.

The defendant/applicant has cited Article 159 of The Constitution, Order 21 rule 12(2) Order 22 and Order 51 rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act the contents of which I have considered. The orders sought in the application are discretionary which discretion should be exercised judicially.

The grounds upon which the orders are sought are set out on the face of the application alongside an affidavit sworn by the business manager of the defendant/applicant. The application is opposed and there is a replying affidavit sworn by the Director of the plaintiff/respondent. Subsequently, supplementary and further affidavits were filed by the respective deponents herein.

Counsel on record at some point informed the court that the parties were negotiating a settlement and indeed some payments followed such negotiations which, however, were breached and this application was listed for hearing. Both counsel agreed that the application shall be resolved by affidavit evidence on record.

This matter has been running for quite some time now since 2015, when the parties entered into some sale agreement relating to some property, whereupon the plaintiff/respondent paid some money towards the fulfilment of that agreement. However, the agreement could not be fulfilled for reasons that are not relevant to this application.

The thrust of the rival affidavits filed by the respective deponents is that, notwithstanding the judgment recorded in favour of the plaintiff/respondent against the defendant/applicant, and various meetings leading to partial payments, the defendant/applicant has not lived to its words, thereby leading the plaintiff/respondent to move to execute the judgment.

The record shows that both parties are business entities that require finances to sustain their operations. In that case therefore, there has to be a balance of the interests of the parties who come before the court and, many at times, this is not an easy exercise. It is never in the interest of any adjudicating authority, and more so this court, to cripple any entity but justice looks at both sides.

Going by the provisions of Order 21 rule 12 (2) of the Civil Procedure Rules, since the plaintiff/respondent has not consented to the application, the defendant/applicant is bound to show sufficient cause why the orders should be granted in its favour.

After the defendant/applicant agreed to pay the decretal sum by monthly instalments, which were accepted by the plaintiff/respondent, only a fraction of the decretal sum has been paid to-date. Indeed, as at the month of March this year when a supplementary affidavit of the Director of the plaintiff company was filed, it is clearly stated that the defendant/applicant should have by then paid Ksh.24,000,000/- but that was not the case.

It is clear that, despite the accommodating indulgence on the part of the plaintiff/respondent, the defendant/applicant has not lived to its word or the legitimate expectation of the plaintiff/respondent. Good faith is demonstrated by, *inter alia*, consistency and predictability. Going by the record of this case, that is lacking in the conduct of the defendant/applicant.

My consideration of this matter is that, the defendant/applicant has not demonstrated any sufficient cause and must now come to terms with its legal obligation, in this case, the settlement of the plaintiff's dues owing and payable. I find that the orders sought are not deserving in the circumstances of this case.

The end result is that, this application is dismissed in its entirety with costs to the Plaintiff/respondent. What this means is that, the plaintiff/respondent is now at liberty to proceed with the execution of the judgment in its favour against the defendant/applicant.

**Dated, signed and delivered at Nairobi this 13<sup>th</sup> day of June, 2019.**

**A. MBOGHOLI MSAGHA**

**JUDGE**