



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 54 OF 2016

DESLEY HOLDINGS (K) LIMITEDAPPELLANT

VERSUS

MERU CENTRAL DAIRY CO-OP UNION LIMITED.....RESPONDENT

R U L I N G

1. On 12/3/2019, the appellant lodged a Motion on Notice under *Article 159 (1) & 2 (a), (c), and (d) of the Constitution, Order 21 Rule 12 (1) and (2), Order 22 of the Civil Procedure Rules and Sections 1A, 1B, 3A of the Civil Procedure Act*. It sought orders for stay of execution of the decree pending the hearing and determination of the application *inter parties*. It further sought it be allowed to settle the decreed amount in installments of Kshs. 200,000/- per month from the determination of this application until payment in full.

2. The application was based on the grounds on the face of the Motion and on the supporting and supplementary affidavit of **Douglas M. Keeru**, the Managing Director of the appellant.

3. The deponent stated that on 19/10/2016, judgment was entered in favor of the respondent for the decretal sum of Kshs. 7,000,000/- plus costs and interest in the **Meru CMCC No. 281 of 2013**. That the said judgment prompted the filing of this appeal. The appeal was determined on 9/10/2018 without notice to the appellant and the lower courts judgment was upheld with costs of the appeal being awarded to the respondent. The appellant learnt of the judgment in this appeal sometime in December, 2018 when the appellant was following up to find the status of the matter.

4. He further stated that the appellant had been experiencing financial difficulties partly due to bad debts and a poor business environment. That in the premises, the applicant was seeking to be allowed to settle the decree in instalments of Kshs.200,000/- per month from the date of delivery of this ruling. That out of the decretal sum, he applicant had paid a substantial amount and it is the balance that is the subject of this application.

5. It was further contended that on 25/7/2017, in compliance of orders of Court, the applicant paid the respondent by way of RTGS a sum of Kshs.4,852,802/50. That an additional sum of Kshs.1,800,000/- in six instalments had been paid. That todate a total sum of Kshs. 6,652,802/50 had been paid.

6. The application was opposed by the respondent vide the replying affidavit of Hiram Kirimi, Counsel for the respondent, dated 5/4/2019. He stated that there had been inordinate delay in bringing the application. That besides the amount outstanding plus interest and costs, the amount will run in excess of over Kshs.7,000,000/- if the settlement thereof is allowed to be in monthly installments of proposed. That the respondent had likewise suffered from hard economic times as well as loss of business since the Yoghurt packing machine for which it paid was delivered defective and has never worked to date.

7. *Order 21 Rule 12 (2) of the Civil Procedure Rules, 2010* provides:-

“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”.

8. It is clear from the foregoing that, under *Order 21 Rule 12 (2) of the Civil Procedure Rules*, the Court has wide discretion as to whether payment of the amount decreed be postponed or be settled by way of installments. However, such discretion must be exercised in a judicial and not an arbitrary manner.

9. In **A. Rajabali Alidina v Remtulla Alidina & Anor. (1961) EA 565**, Law JA stated:-

“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.”

10. In the present case, the applicant has alluded to adverse financial difficulties. It has so far paid a total sum of 6,652,802/50 which is over 70% of the decretal sum. That *per se* is an indication of its *bona fides*. It is not a conduct of judgment-debtor who is seeking to run away from its obligations.

11. The applicant has averred that it is incapable of settling the outstanding amount at one. On the other hand, the respondent has not stated the prejudice it will suffer if the amount due is settled by instalments.

12. The amount outstanding is not colossal as to cause the respondent any substantial detriment if its payment is spread. However, if it is paid at once, the applicant will be distressed. It would be in public interest to sustain the applicant by allowing it the orders sought than to confine it to the annals of history by forcing it to immediately settle the decretal amount and have it wound up.

13. Considering the foregoing, I am satisfied that the applicant has satisfied the Court that the orders sought are deserved. Accordingly, the applicant is allowed to settle the decretal sum by way of monthly instalments of Kshs. 200,000/- until the amount is fully settled. The same commences on the 30th of December, 2019 and every last day of the month until payment in full in default execution to issue.

14. The applicant will nevertheless bear the costs of the application.

It is so ordered.

DATED and **DELIVERED** at Meru this 11th day of December, 2019.

A. MABEYA

JUDGE