



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL APPLICATION NO. 120 OF 2014

PATRICK O. OTIENO & GEOFFREY O. YOGO.....RESPONDENTS

VERSUS

MUHORONI SUGARCANE OUTGROWERS.....APPLICANT

RULING

1. By a notice of motion dated 5.2.18 brought under Section 1A, 1B and 3A of the Civil Procedure Act Order 41 rules 4, 5 and 6 the Civil Procedure Rules and all enabling provisions of the law; the applicant prays for orders that:

1. There be a stay of execution pending the hearing and determination of this application

2. The Honourable Court be pleased to order the applicant to pay an amount of Kshs. 20,000/- per month from the month of March 2018 till payment of the decretal sum in full

3. The court be pleased to stay the intended attachment and sale of applicant's property pending the hearing and determination of this application

4. Costs be in the cause

2. The application is based on grounds among others that respondent has obtained a warrant of sale in execution of the decree and that applicant is currently in financial crisis and can only raise Kshs. 20,000/- per month.

3. The application is supported by an affidavit sworn on 5th February, 2018 by Samwel Odunga who describes himself as the applicant's accountant. He reiterates the grounds on the face of the application. Attached to the affidavit are Warrants of Attachment and Sale, proclamation Notice and Auctioneer's Bill of Costs marked MSO 1 a, b and c respectively..

LEGAL ANALYSIS

4. The application is brought under Order 41 which deals with receivership and is therefore irrelevant to the application. The application ought to have been brought under the provisions of Order 21 Rule 12 (2) of the Civil Procedure Rules, 2010 that give the court discretion to allow payment of decretal sum by way of instalments. The same stipulates 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."

5. In the case of **Lavington Security Limited vs Nairobi City Water & Sewerage Company Limited [2014] eKLR cited by the applicant**, Gikonyo J had stated thus:-

"...of great significance in application (sic) of this nature are; the circumstances of the case; the conduct of the parties; the willingness and bona fides of the applicant to pay a fair proportion of the debt; and of course, that the application is made without undue delay..."

6. This was the common thread in the cases of **Freight Forwarders Limited vs Elsek & Elsek (K) Limited (2012) eKLR cited by the respondent** and **Singh Gitau Advocates vs City Finance Bank Limited (2013) eKLR** cited by the applicant that the court could allow settlement of decretal sum by way of instalments if a debtor was unable to pay in lump sum, if the application was made in good faith and the monthly repayments were reasonable.

Analysis and Determination

7. In allowing an application for payment in instalments, it is apparent from the foregoing that the court ought to be guided by the following principles:

1. The circumstances under which the debt was incurred

8. The claim arises out of a services rendered to the applicant by the advocate in HIGH **COURT MISC.APPL NO. 120 OF 2004** from which a Bill of Costs was taxed for the sum of Kshs. 3,544,282.10 and a certificate of costs thereof was issued on 11th December, 2017.

2. The conduct of the debtor

9. Since the Bill of Costs was taxed, the applicant has not made any effort to settle the costs, either in full or in part.

3. The financial position

10. Applicant's accountant avers that applicant is currently in a financial crisis and can only raise Kshs. 20,000/- per month but fails to tender any evidence to show the applicant's financial status to support its claim of inability to pay the decretal sum at once

4. The bonafides in offering to pay a fair proportion of the debt at once

11. As a sign of good faith, it was expected of the applicant to have made an effort to settle the decretal sum either in part or on full and also to place evidence before the court to prove its inability to settle the decretal sum at one but that has not been done.

DISPOSITION

12. Having had due regard to the pleadings and submissions on record, I have come to the conclusion that the applicant has not demonstrated sufficient cause why it should be allowed to pay the decretal sum in instalments as had been set out in the cases it has relied upon.

13. From the foregoing: I find and hold that the applicant is undeserving of the order for payment of the decretal sum in instalments and the applicant's notice of motion dated 28.8.12 is thus dismissed with costs to the respondent.

DATED, DELIVERED AND SIGNED THIS 10TH DAY OF MAY 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - N/A

Respondent - Mr. Ojoro