



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 86 OF 2017

GOHAR GLASS MART LTD.....APPELLANT

VERSUS

TEA LAND GLASS MART.....RESPONDENT

(Being an Appeal from the Ruling, Order and Decree in

Kisumu CMCC No. 654 of 2015 by Hon. W. K. Onkunya

(SRM) on 29th November, 2017)

JUDGMENT

1. **GOHAR GLASS MART LTD** (*hereinafter referred to as appellant*) sued **TEA LAND GLASS MART** (*hereinafter referred to as respondent*) in the lower court claiming Kshs. 1,250,815/- on account of a balance outstanding for goods sold and supplied during the years 2014.
2. The defendant/respondent filed a statement of Defence and denied plaintiff's claim and urged the court to dismiss it with costs.
3. In a judgment delivered on **4th August, 2017**, the trial court found that appellant had proved its case and entered judgment against the respondent for Kshs. 1,143,655.00
4. By a notice of motion dated 31.8.17 filed on 1.9.17, respondent prayed for stay of execution and leave to settle the decretal sum in instalment. The application was vehemently opposed by way of a replying affidavit sworn on 1.9.17 and filed on 13.9.17. In a ruling delivered on 31. 8.17, the court allowed the respondent to settle the decretal sum in instalments of Kshs. 35,000/- from 28.12.17 until payment in full.

The Appeal

5. The Appellant being dissatisfied with the lower court's decision preferred this appeal filed the Memorandum of Appeal dated 11.12.17 which sets out 4 grounds that: -

1. **The sum of Kshs. 35,000/- is too low and unfair to the appellant**
2. **Settlement of the decretal sum will take 2 years and 9 months which will deprive appellant the fruits of its judgment**
3. **Appellant's proposal was rejected**
4. **The ruling was against the weight of evidence**

SUBMISSIONS BY THE PARTIES

6. When the appeal came before me for mention for directions on 10.4.18, I directed that the appeal be argued by way of written submissions. On 3.5.18 when matter was mentioned to confirm if submission had been filed, appellant had filed submissions but respondent had not and though served was not represented.

Appellant's submissions

7. Appellant reiterated the grounds of appeal and placed reliance on *Maasai Kenya Limited v Hardware & Steel Centre Limited & another [2014] eKLR* where the court rejected a proposed mode of instalments that in the opinion of the court would have amounted to undue hardship to the plaintiff.

Analysis and Determination

8. It is common ground that, as a general rule, a judgment creditor is entitled to the immediate payment of the decretal sum; and that while the judgment debtor might genuinely be in a difficult position in paying the debt at once, the court must be convinced that there is sufficient reason for allowing payment by instalments. It is also common ground that to determine what amounts to sufficient reason, consideration should be given to the following principles: -

1. *The circumstances under which the debt was contracted*
2. *The conduct of the debtor*
3. *His financial position*
4. *His bona fides in offering to pay a fair proportion of the debt at once.*

9. I have considered the circumstances under which the debt was contracted. It is apparent that the parties have had a long-standing business relationship and that respondent only started defaulting in 2013. Indeed, the Plaintiff averred in the plaint that:

Paragraph 3 " ...a business relationship has subsisted between the plaintiff and the defendant over the years...."

Paragraph 4 "...Sometimes in the year 2013, defendant began defaulting....."

10. The application for payment in instalments was supported by the affidavit of one Mohammed Imtiaz Sokowalla who averred that respondent's business was bad and that that he had been diagnosed with cancer which ailment requires substantial funds for medication locally and internationally.

11. I however note that no details or particulars thereof were given by way of evidence to demonstrate the respondent's current financial position and/or difficulties or the fact that the deponent was ailing. There was also no evidence in terms of income vis-a-vis outflows that would have helped place the instant debt in perspective. Moreover, there is no indication that the respondent ever paid a fair proportion of the debt from the year 2014 to the time he applied to pay in instalments.

12. The foregoing notwithstanding, each case must be determined on the basis of its peculiar facts. Indeed, this is what the Court determined in *Keshavji Jethabhai & Bros Ltd vs Saleh Abdula [1959] EA 260* when it stated as follows:

"Whilst the courts must be zealous of the creditor's rights, they must consider each case on its merits and exercise the discretion accordingly... Hardship to a debtor might in some circumstances be taken into consideration on an application for payment by instalments; it is a question in each case whether some indulgence can fairly be given to the debtor without unreasonably prejudicing the creditor."

13. From the foregoing, the Court is satisfied that no sufficient reasons were advanced by the respondent to justify the orders sought. Looking at the entirety of the facts presented herein, the Court also finds that the amount proposed and allowed is on the lower side and was not supported by any evidence. The amount would delay the plaintiff's realization of its judgment and no doubt cause it undue hardship.

14. Plaintiff does not appear to be totally opposed to payment in instalments. It had proposed a monthly payment of Kshs. 500,000/- before the lower court and now proposes a monthly payment of Kshs. 381,885/-

15. Considering the rights of both parties, I accordingly allow the appeal and order that the instalment payments be in the sum of Kshs. 350,000/- per month commencing 19th August, 2018 and subsequently, a similar amount be paid on or before every 19th day of each succeeding month until payment in full. Respondent is also condemned to pay the costs of this appeal.

DATED, DELIVERED AND SIGNED THIS.....19th...DAY OF...July..2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - N/A

Respondent - N/A