



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 341 OF 2012

SWILA RESORTS LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

UNIVERSAL FREIGHT & LOGISTICS (K).....DEFENDANT/APPLICANT

RULING

1. This ruling relates to a Notice of Motion Application dated 24th May 2018 brought under the provisions of Order 21 Rule 12(2) of the Civil Procedure Rules 2010, Section 63(e) of the Civil Procedure Act and all the enabling provisions of the law.
2. The Applicant is seeking for orders that, there be a temporary stay of execution of decree orders issued on the 19th July 2018, and be allowed settle the decretal amounts in installments of Kshs 10,000 per month.
3. The Application is supported by an Affidavit dated 24th May 2018, and further Affidavit sworn by Daniel Ndambuki, a Director of the Applicant's Company. It is averred the Honourable Court delivered a judgment herein and subsequently a decree was issued against it on the 19th July 2016, for a sum of Kshs 4,827,973 plus costs of the suit and interest thereon. However, the Company has not been carrying out any operations since the year 2014 when it faced financial hardships and as a result it could not generate any income since then.
4. That the only movable assets which were jointly owned by financial institutions were all attached and resold by same financial institutions and the Company was forced to close all its operations and therefore it does not own any immovable or movable property, which can be sold to liquidate the decretal amount herein and it is unable to pay the said amount at once.
5. It was averred that, on 29th April 2018, the director of the Respondent's Company used the police at Gigiri Police Station, to threaten and intimidate the Applicant's Directors to sign an Agreement to pay the decretal sum by Kshs. 500,000 monthly for six months. However due to the current financial state of the Company, he together with the other Directors are only able to raise Kshs 10,000 per month from their meager earnings
6. However, the application was opposed vide a Replying Affidavit dated 31st May 2018, sworn by Hon. Samuel Arthur Weya, a Director of the Respondent's Company who termed the Application as bad in law, vexatious, an abuse of the Court process and without any merit whatsoever.
7. He averred that in the Judgment dated, signed and delivered by the Court on 19th July 2016, the Honourable Court directed that the Defendant/Applicant pay the Plaintiff /respondent a liquidated amount of Kshs 1,479,898.35 and USD 18,093, plus interest thereon and costs of the suit. Subsequently, a decree was extracted and issued on 1st November 2016, awarding the amounts specified above.
8. That after the said Judgment was delivered on 19th July 2016, the Applicant neither appealed against it nor made any immediate proposal to the Respondent to pay the decretal sum in installments and has only woken up to make a proposal after almost close to 2 years, therefore the application is not made in good faith.
9. That the Respondent has made numerous efforts to execute the decree through Garam Investment Auctioneers, who have extracted warrants of attachment of movable property and sale thereof. That the Applicant is misleading the Court, when he states that the Company closed its operations in 2014, as he has not adduced any evidence to show that the Company ceased its operations then. To the contrary, the Applicant has resorted to changing the Directors of the Company, in an effort to frustrate and delay the execution process, which is a clear indication of mischief.

10. It was averred that, on the 29th April 2018, the Directors of the Applicant's Company did executed an acknowledge of Debt Agreement out of their own free will, and it was duly witnessed by an Advocate called Odera Obar Kennedy, with no intimidation and threats from the Director of the Respondent Company and/or through the Police officer at Gigiri Police Station and neither is the claim of intimidation and threats proven and/or substantiated.

11. That the Applicant has not only admitted to being one of the Directors of the Company but has also acknowledged monies owed to the Respondent. Yet the Applicant has not demonstrated sufficient cause why he should be allowed to pay the decretal sum installments. The proposed monthly installments of Kshs 10,000, as against the decretal amount of Kshs 1,479,898.35 and USD 18,093 plus interest on the above as well as costs of the suit, unreasonable and a clear sign that this Application has not been made in good faith.

12. Further, the Statements of Accounts availed by the Applicant are neither certified nor verified by the respective banks which clearly highlights lack of sincerity on the part of the Applicant. That in the circumstances, the Applicant has not come to Court with clean hands and their conduct does not merit the Court exercising its discretion in their favour.

13. That it is as clear as pike stuff, that the Applicant has resorted to delay tactics with the sole aim to prevent the Respondent from enjoying the fruits of the Judgment and that the Application goes against the principle of scarcity and optimum utilization of judicial time and the dictates of justice. It should therefore be dismissed with costs.

14. The Application was disposed of through filing of submissions. I note that the Applicants submissions mirror the averments in the Affidavit in support of the Application in all aspect, save that, it is submitted that the Replying Affidavit is full of falsehood and borders on perjury for reasons that annexure "SAW5" purported to have originated from the Registrar of Companies is a forgery or a false document uttered, as the genuine document is annexure "DN2." The Applicant referre to the case of; A. Rajabali Aliina v Remtula Alidina & Another (1961)EA 565 to argue the Court to exercise its dicretion in its favour and allow payment by instalments.

15. The Respondent in the same vein reiterated the averments in te Replying Affidavit save to add that, the Applicant, has not placed before the Court any evidence to demonstrate its inability to pay, for example; audited financial statements or audited accounts and certified balanced sheets to show its financial standing.

16. The Respondent relied on the cases of; Keshavji Jethabhai & Bros Ltd vs Saleh Abdullah (1959) EA (J) 260, cited in Freight Forwarders Ltd vsElsek&Elsek (K) Ltd (2012) eKLR to argue that, the Applicant has not satisfied the conditions for grant of an order to pay by installments. Further, it was has not demonstrated any sufficient cause to warrant orders of stay. That it has merely pointed out that, it would be unjust if the execution goes on, when in fact it is willing to liquidate the decretal amount in installments of Kshs. 10,000 per month.

17. Finally, that it has not stated what loss if any, it would suffer, if the orders sought are not granted, yet to the contrary a stay order will be prejudicial to the Respondent as it has been denied the fruits of its judgment for close to 2 years.

18. I have considered the Application in total based on the arguments advanced herein and I find that the Application is premised on the procedural provisions of; Order 21 Rule 12(2) of the Civil Procedure Rules that states as follows:-

"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 consent of the decree holder for sufficient cause shown, order that payment of amount decreed be postponed or be made by installments on such terms as to payment of interest....."

19. From the above provisions the Applicant must show sufficient cause to be allowed to pay by installments any monies owing. The Respondent cited and relied on the case of; Freight Forwarders Ltd vsElsek&Elsek (K) Ltd (2012) eKLR, cited in Lavington Security Limited vs Nairobi City Water & Sewerage Co. Ltd (2014) eKLR, where the Court d defined what amounts to "sufficient cause" to include: the debtor is unable to pay lump sum, the debtor can pay by reasonable monthly installments and the application is made in utmost good faith.

20. That similarly Tarpo Industries Ltd vs Picasso Products Limited the Court held that:-

"the Judgment debtor's bond fides (good faith) is the most important consideration when the Court considers whether some indulgence can be fairly given to the judgment debtor without unreasonably prejudicing the decree holder."

21. The Respondent further submitted that the Court held in the case of; Freight Forwarders Ltd vs Elsek & Elsek (K) Ltd (2012) eKLR as follows:

- a) whilst creditors rights must be considered, each case must be considered on its own merits and discretion exercised accordingly;
- b) the mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of discretion;
- c) the debtor should be required to show his bona fides by arranging prompt payment of a fair proportion;
- d) hardship of a debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.

23. The question is, has the Applicant herein demonstrated good cause?

24. The Applicant has also prayed for an order of stay of execution of the decree. The provisions of, Order 22 Rule 22(1) and (3) of the Civil

Procedure Rules states that;

“(1) the court to which a decree has been sent for execution shall upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment debtor to apply to court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or execution thereof, for an order to stay execution.....”

“(3) before making an order to stay execution or for restitution of property or the discharge of the judgment, the Court may require such security from or impose such conditions upon the judgment debtor as it thinks fit.”

25. In opposing grant of stay the Respondent relied on the case of; Halal & Another vs Thornton & Turpin (1963) Ltd (1990) klr where the Court of Appeal held that;-

“the High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the Applicant must establish a sufficient cause, secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant, and thirdly, the Applicant must furnish security. The application must of course be made without unreasonable delay.”

26. I have considered the facts in this matter and find that, there is no dispute that judgment was entered in favour of the Respondent on 19th July, 2016. That is a period of over two (2) years. Apparently there is no Appeal against the judgment and therefore the same is valid and enforceable. A decree for the same was issued on 1st July, 2016.

27. It is averred and not rebutted that, the Applicant has not paid a penny of the decretal sum all the while. Apparently the Applicant alleges that, it stopped operations in the year 2014. Even if that is true, which was before judgment, why haven’t the Applicant made the “meager” payments, they are offering now from the year, 2016 after the judgment was passed?

28. The alleged deed of acknowledgment of the debt herein is contested as having been obtained under threats and intimidation. For the purpose of this application, I shall not delve into that issue. The fact remains that the decree has not been satisfied.

29. The Applicant bears the burden of proof of inability to pay the debt. Analysis of the documents annexed to the Affidavit in support of the Application reveals an annexed bank statement of the Applicant’s account at Prime Bank Ltd. It is interesting to note that it is a two page document with three entries on each page, and which cover the dates of 25th and 30th April 2015 and then 25th and 30th June 2015. It is also noteworthy that the Applicant has deposed that the Company ceased operations in the year 2014! The other statement from Barclays Bank (K) Ltd shows no useful data.

30. Assuming that the Applicant have advanced a sufficient cause is the proposed installments amount reasonable? The Judgment herein is for a sum of; Kshs. 1,479,878.35, USD 18,093.00 plus cost of the suit. How long will it take the Applicant to liquidate the amount, which is about Kshs. 3.2million? At least not less than twenty five (25), years, if the calculation is correct. The Applicant is thus not serious in its proposal and I tend to agree with the Respondent that the proposed monthly payment installments are extremely unreasonable.

31. It must never elude any party in litigation that justice is weighed on a scale which must balance for justice to be done and be seen to be done. Thus the Court cannot keep indulging one party at the extreme prejudice to the other party. The Court will therefore only exercise its discretion in favour of a deserving Applicant and whose conduct indicates good faith and attempt in settling the decretal amount. This Court has had an opportunity to state in a the case of ; Diamond Star General Trading LLC v Ambrose D O Rachier carrying on business as Rachier & Amollo Advocates [2018] eKLR that it is law that unless there are good, sufficient and adequate reasons, a judgment debtor should be allowed to enjoy the fruits of the judgment.

32. As regard the prayer for stay execution of the decree it is my opinion it does not lie, where the Applicant has admitted liability to settle the decretal sum. What will the stay achieve? Even then it was sought for pending the hearing and determination of the Application. It is thus spent

33. Be that as it were, to revert back to the may prayer of payment by installments, I find that as aforesaid, Order 21 Rule 12(2) of the Civil Procedure Rules allows the Court to order that payment of amount in the decreed be postponed or be made by installments on such terms as to payment of interest.

34. Having considered the circumstances of this case as analysed above I find that it is in the interest of justice, I make the following orders:

a) The Applicant will pay an initial lump sum of, Kenya Shillings One Million (Kshs 1,000,000) within a period of 30 days from the date of this order;

b) Upon payment of the said sum under (a) above, the Applicant will then pay a sum of; One Hundred Thousand (Kshs 100,000) per month with effect from the first day of the following month after the first instalment and (that is on or before the last day of May 2018) and continue paying the said sum on the first day of each subsequent month for a period of twelve (12) months;

c) The Applicant will liquidate the balance of the decretal in a six monthly instalment for full payment;

d) That interest at Court rates will continue to accrue on any unpaid sum until payment made in full; and

e) In default of payment of any sum or any single instalments, in accordance with the orders above given, the Respondent/Decree

holder will be entitled to execute forthwith for payment of the outstanding total decretal sum.

35. As a result of the aforesaid, a stay of execution of the Decreed is granted on the terms set above and the costs of this Application will be borne by the Applicant.

36. Those then are the orders of the Court.

Dated, delivered and signed in an open Court on this 11th day of October 2018.

GRACE L. NZIOKA

JUDGE

In the presence of:

-----for the Defendant /Applicant

-----for the Plaintiff/Respondent

Mr Langat-----Court Assistant