



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NUMBER 828 OF 2009

SURGIPHARM LIMITED.....PLAINTIFF

VERSUS

EXPRESS KENYA LIMITED.....DEFENDANT

AND

KENYA AIRWAYS LIMITED.....THIRD PARTY

RULING

1. There is a request by the Defendant to pay the Decree in installments. That request is the Notice of Motion of 27th October, 2016 brought under the Provisions of Order 21 Rule 12, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 1A, 1B and 3A of the Civil Procedure Act, Chapter 21, Laws of Kenya.

2. The Court's discretion to order for payment of a Decretal amount in installments is one that must be exercised in a Judicial manner and in **Rajabali Alidina vs. Remtulla Alidina & Another** [1961] EA 565 Law J applied the following tests in considering such an application:-

- a. The circumstances under which the debt was contracted.
- b. The conduct of the debtor
- c. His financial position, and
- d. His bona-fides in offering to pay a fair proportion of the debt at once.

3. Sometime in July and November 2008 the Defendant undertook to airlift and deliver the Plaintiff's goods from Nairobi, Kenya to Khartoum, Sudan. To enable it do so, the Defendant engaged Carriage Services of Kenya Airways ltd (**the third party**). It is common ground that some goods were lost and on 7th July 2015 the Court entered Judgement in the sum of Kshs.3,238,104 against the Defendant for this loss. At the same time the Court made an Order that the Third Party indemnifies the Defendant in the sum of US\$ 1,103.40 or its equivalent in Kenya Shillings.

4. Because of costs and interest the Decretal sum stood at Kshs.6,240,562.10 as at 27th June 2016. To date no payment towards it has been made.

5. The Financial Statements attached to the Supporting Affidavit of one Peter Mutungu, sworn on 27th October 2016 on behalf of the Plaintiff portrays a picture of a loss making Company. The Financial Statements are for the years 2011, 2012, 2014 and 2015. Looking more closely at the accounts of 2015, the loss for the year is Kshs.60,088,513/=. There is also Provision for Legal Claims at Kshs.14,400,000/=. The Notes to the Accounts shows that the Legal Claims arose due to current litigation. It is expected that this would be one of them.

6. After painting such a bleak picture of itself, the Plaintiff has made a proposal to pay the Decretal sum in monthly installments of Kshs.50,000/=.

7. But, I agree with the Defendant that this proposal is not reasonable as it will take more than 10 years going forward to pay off the Debt. When it is also considered that the amount became due in 2009 then the insensibility of the proposal is apparent.

8. The Defendant became aware that it would have to meet the Decree when judgment was entered against it on 7th July 2015 and has todate failed to pay a cent towards the Debt. That says something about the attitude of the Defendant towards this Debt. It does not portray bonafides.

9. In addition the Defendant was to be indemnified the sum of US\$1,103.40 from the third party. While this amount may be insignificant when compared to the debt due, the Defendant has not demonstrated what steps it has taken to realize this indemnity.

10. Bearing in mind that the amount became due 8 years ago and the conduct of the Defendant, I accept that the offer made by the Plaintiff to receive monthly installment of Kshs.300,000/= is reasonable as it will take about 21 months from now for the debt to be paid off. However in the face of the plea by the Defendant this Court will order payment by equal monthly installments of Kshs.200,000/-. I have also considered that whilst the Defendant has made losses in the last few years the Company is due to undertake a Construction Project (work in progress) worth Ksh.1,495,659,355/= and that is perhaps true testimony of its Financial Strength.

11. The Application of 27th October 2016 is hereby allowed to the extent that the Decretal sum shall be paid in monthly installments of Kshs.200,000/= with effect from 31st March 2017 and thereafter on or before the last day of each succeeding month.

12. Each party to bear its own costs for the Application.

Dated, Signed and Delivered in Court at Nairobi this 17th day of February, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Ochieng for Kirimi for Plaintiff

Kemunto for 1st Defendant

Alex - Court Clerk