



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CIVIL SUIT 69 OF 2009**

**KENYA SHELL LIMITED.....PLAINTIFF**

**VERSUS**

**HUSSEIN DAIRY LIMITED.....DEFENDANT**

**Coram:**  
**Mwera J.**  
**Wafula for Plaintiff/Respondent**

**Mrs. Oluoch for Defendant/Applicant**

**RULING**

On 10<sup>th</sup> May, 2012 the defendant/applicant brought a notice of motion under Order 21 rule 12 (1), Order 51 rule 1 of Civil Procedure Rules and sections 1A, 3A of Civil Procedure Act for orders:

(i) that there be a stay of execution herein and leave be granted to the applicant to liquidate the decretal sum herein by making an initial payment of Shs. 1 million and then pay Shs. 500,000/= per month instalments with effect from 30<sup>th</sup> June, 2012.

It was stated in the grounds that the applicant was unable to settle the entire decretal sum at once due to some current debts owed – hence the above prayer.

Mohamood Kassam Hussein a director of the applicant company swore an affidavit that judgment was entered in favour of the plaintiff company on 26<sup>th</sup> April, 2012 at Shs. 20,833,456/=. The applicant was willing to settle the sum but not in one lump sum. Its business was undergoing financial crisis due to its transport business trucks having broken down. That besides, there were other creditors whose financial liability the applicant had to settle (annexure MKH 1 (a-f)). It therefore made the above proposal to repay the decretal sum.

In the grounds of opposition it was contended that the defendant's proposal to pay the decretal sum was unreasonable in the light of the sum owed. The proposed sum of repayment did not take into consideration the element of interest at all.

In the replying affidavit the plaintiff's company secretary went over the history of this case to the time it got judgment for the sum initially claimed – Shs. 20,833,456/=. Factoring in the interest rate of 24% p.a. when the suit was filed, and 29% when judgment was entered, totalled Shs. 15,000,088/32 thus the decretal sum now stands at Shs. 35,833,544/32; add to this court costs and the interest that continues to pile. It was averred that since 2010 the applicant had been promising to make payments by instalments

(annexture CM 3 (b)) without fulfilling the same. It had therefore shown bad faith and this court should not grant the prayer. The payment of Shs. 500,000/= per month was unreasonable because it will take up to six years to pay up. The goods were supplied in 2006. Thus for twelve (12) years the plaintiff would still be waiting for payment. It was charged that the directors of the defendant company were disposing of the company assets. But the case MBA HCCC 266/06 placed before court in support of that charge (annexture CM 4) had one Jetho Ramji as the plaintiff against Mohamood Kassam MiyANJI & Mussa Kassam MiyANJI. The connection of the directors of the defendant company to that case was not clear.

In submissions the defendant/applicant told the court that instead of paying Shs. 1 million it had proposed in the prayer, it infact paid Shs. 3 million by the time submissions were filed in this proceeding. The defendant could not pay the entire decretal sum because of the other creditors it had referred the court to. The prayer ought to be granted because without it, the plaintiff would move to attach the defendant's assets thereby depriving it any source to raise money and pay off the decretal sum. It had demonstrated its financial constraints, but if its finances improved the plaintiff would have liberty to move the court accordingly. For now the court do consider to allow the sought payment by instalments with such conditions as appear reasonable. At no time did the defendant act in bad faith.

The plaintiff/respondent maintained that it was entitled to the judgment passed in its favour. It had become its property to be enjoyed. Payment by instalments could jeopardize such enjoyment. The claim herein arose from a contract between parties. The defendant breached its bit regarding payments and so this court should not be seen to write that contract for the parties by granting the order sought. That the defendant company should pay up or go for winding up. Shs. 500,000/= instalment payment per month was so unreasonable that it could take six years to liquidate Shs. 35.8 million owed as of now.

In determining this matter it is significant to note that at no time has the defendant company exhibited its audited accounts to demonstrate to this court its true financial trading position over the period – e.g. at least over the past three years. An entity can have creditors, yes, but to claim inability to pay one creditor because other creditors are standing by is, to say the least to imitate Unoka the father of Okonkwo in **Things Fall Apart** (by *Chinua Achebe*) i.e. telling the creditor who has come into one's compound to demand payment that even those owed bigger sums have not come to claim payment or that those ones will be paid first before the present creditor. But be that as it may. The decretal sum now standing at Shs. 35.8 million, and is growing is no doubt a large sum. Without demonstrating by **audited** accounts how the applicant is unable to pay that sum at once or with bigger instalment than offered, makes the plaintiff to sound justified to say that it will be so long before it enjoys the fruits of its judgment and for goods delivered and consumed some six (6) years ago. In the circumstances of this case the defendant is directed to make another lump sum payment of three million shillings (Shs. 3 m) in the next thirty (30) days and pay one million shillings (Shs. 1 m) at the end of each succeeding thirty (30) days. In the event of default execution to issue. Leave to apply granted. Costs to the plaintiff/respondent.

Delivered on 17<sup>th</sup> July, 2012.

**J. W. MWERA**

**JUDGE**