



REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 2 of 2004

DR. ESTHER KANINI MUTAKHA 1ST PLAINTIFF/RESPONENT

LUCY WAMAITHA NDEGWA 2ND PLAINTIFF/RESPONDENT

SUSAN MWIHAKI WANYOIKE 3RD PLAINTIFF/RESPONDENT

JANE WAMBUI WANYOIKE 4TH PLAINTIFF/RESPONDENT

VERSUS

MUTATI TRANSPORTERS LTD.DEFENDANT /APPLICANT

RULING

The application dated 27/06/2012 seeks for orders of stay of further execution of decree and that the applicant be allowed to liquidate the balance of the decretal sum by monthly instalments w.e.f. from 15th July 2012 and thereafter on the 15th of each succeeding month until payment in full. In the alternative that the applicant be allowed to issue post-dated cheques of the outstanding balance on the 15th of each month w.e.f. 15/07/2012.

The application is premised on grounds that judgment was delivered on 22/05/2009 in the sum of Kshs.800,000/= being damages and costs. The court ordered that there would be interest on general damages with costs. The defendant has had financial difficulties and has so far paid a sum of Kshs.1,400,000/=. A disagreement arose after payment of the last instalment as regards the amount due. The applicant had sought to pay an aggregate sum of 200,000/= per month but the respondent rejected this. The respondent also declined an offer of Kshs.50,560/=.

In the supporting affidavit, the applicant deposes that she is the only surviving director and shareholder of the applicant company and after entry of judgment, the company started depositing sums of money in June 2009, the last instalment having been paid on 22/12/2009 totalling to Kshs.1,400,000/=. In the year 2010, the company got into financial difficulties and even ceased operating. On 18th February 2010, the costs of the suit were assessed at Kshs.684,410/=. and she maintains that the balance owing is only

Kshs.400,000/- with an interest of Kshs.117,830.14/= as at 7th February, 2012.

She then wrote two personal cheques of Kshs.500,000/= on 06/02/2012 and these were released to the Respondent's advocate so that in total she has paid Kshs.84,410/= on costs and interest of Kshs.117,830.14/= and not the sum of Kshs.640,000/= sought by Respondent, or Kshs.800,000/=.

When the Respondents served applicant with a notice of the day fixed for setting a sale notification scheduled for hearing on 28/06/2012, the applicant instructed her advocate to enter into negotiations with the respondent making an offer of payment of Kshs.50,560/= instalments to liquidate the sum. This was rejected and she then wrote 3 personal post-dated cheques, after her advocate had discussions with Respondent's advocate – these were rejected yet the cheques were not returned. She urges the court to allow her to liquidate the outstanding balance by way of instalments.

The application is opposed as being made in bad faith and no good cause has been advanced as to why the outstanding sum cannot be settled once. It is the respondent's contention that this is a very old matter where judgment was entered way back in year 2009 yet the sum remains unsettled. It is deposed that the applicant owns one of the most prime and largest commercial buildings in Nakuru Town Centre named GATEHOUSE and the rental income therefrom, would be sufficient to settle the total decretal sum in one single cheque.

The applicant is described as lacking seriousness in the matter, demonstrated by the fact that on 20th June 2012, three post-dated cheques were forwarded having been drawn by the applicant's director, in the sum of Kshs.224,000/= yet when the first cheque was presented on 15th July 2012, the same was dishonoured because the drawer had stopped it, and this was after the applicant had rushed to court on 27/06/2012 and obtained exparte orders staying execution of the decree on the basis that they had forwarded post-dated cheques to the respondent's lawyer. Another act of bad faith cited is that immediately after judgment had been entered, the applicant in a bid to defeat the judgment, fraudulently and illegally caused the applicant company to be dissolved and transferred assets of the company to another entity. The Respondent only managed to contain the situation by quickly moving to court and obtaining orders reinstating the company and re-vesting the properties to the applicant. In short, the applicant is set on putting road blocks every step of the way to defeat execution.

At the hearing of the application the Applicant's counsel submitted that there has always been efforts made at settling the debt, but the sum is large and the court should allow for the balance to be liquidated by way of instalments, urging this court to be guided by provisions of Article 159 of the Constitution.

In rejecting the proposals, the Respondents counsel submits that under **Order XXI Rule 12(2)** payment by instalment can only be with the consent of the Decree Holder or where there is good cause demonstrated. Further that the applicant's action of stopping the cheques after getting stay orders demonstrates that there is no real intention to pay the sum owing. According to applicant's counsel, they moved to court to obtain stay orders because they had issued cheques but when the Respondent neither acknowledged, nor returned them, (and in the face of all this, the Respondent's counsel indicated that execution would proceed), the only option left was to ask the bank to stop payment of the cheque.

Order XXI Rule 12 (2) provides that:

“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 as to the payment of interest, the attachment of the property of the judgment debtor or the taking of security from him, or otherwise as it thinks fit.”

Obviously the bottom line is whether there is sufficient cause to warrant granting liquidation of the decretal sum by way of instalments the Respondent's consent notwithstanding. The applicant claims to be in financial difficulties, but the respondents have pointed out that the applicant has other sources of income, and that even the claim of insolvency or poor performance is defeated by the reinstatement of the

company after initial move by the applicant to have it dissolved.

I recognise the efforts made by the applicant to pay the decretal sum, but surely three years down the line, the slow pace and the offer for instalments only prolong the debt recovery and it also means the sum keeps increasing due to the interest – little wonder then that the applicant laments about what she has paid, and what she perceives to be the outstanding amount due.

The claim that applicant has financial difficulties has nothing tangible to support it, and I note that the applicant has carefully avoided to address the contention regarding other known sources of income.

Of course there appears to have been some confusion when the three cheques were issued and not returned, yet the Respondents were still threatening execution. Obviously the most prudent step would have been to inform the applicant that since one cheque had bounced, the others would not be banked and to return them. Yet to my mind, as a sign of good faith, I would expect the applicant to readily have the sum which was due in the stopped cheque – this has not happened.

So even if I was to disregard all other conduct alleged to be a demonstration of bad faith on the part of the applicants, then three factors militate against the Applicant:-

1. No money has readily been offered to replace the dishonoured cheque.
2. There is no demonstration of the purported financial difficulties.
3. It is not denied that applicant has other sources of income which could be used to pay the sum owing.

Really no good cause has been shown as to why payment should be made by way of instalments and the request sought is declined.

I note that counsel for applicant raises issues regarding interest on costs, which he seems to raise from the bar as the same does not form a limb of the prayers in the Notice of Motion. Counsel has referred to a decision i.e. **SHADI RAM MOHINDRA** (1957) 1 EA 708 regarding whether costs carry interest in the absence of a specific order – the decision addressed provisions of section 26 and 27(2) of the Civil Procedure Act; and held that when costs are awarded they do not carry interest unless there is an order for interest. The wording of the judgment by Kimaru J is clear, the plaintiff has to be paid costs of the suit – the interest was specifically on the general damages awarded from the date of judgment. But as I have noted, that is not what the Notice of Motion sought, and in any event it still does not justify payment by instalments.

The upshot is that the application has no merit and is dismissed with costs to Respondent.

Delivered and dated this 2nd day of November, 2012 at Nakuru.

**H.A. OMONDI
JUDGE**