



CIVIL PRACTICE AND PROCEDURE

· Order 12 Rule (2) of the Civil Procedure Rules affords the court discretion to order payment of decretal amount by instalments.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL CASE NO. 41 OF 2003

FRANCIS MURITHI IKIUGU APPELLANT

VERSUS

JANET MWARANIA IKIUGU 1ST RESPONDENT

JOSEPH GATOBU IKIUGU 2ND RESPONDENT

RULING

By a Notice of Motion dated 31st January 2011, Janet Mwarania the 1st respondent in this appeal seeks an order to be allowed to liquidate the taxed costs of Kshs. 44,907/= by instalments of Kshs. 1000 per month. The applicant Janet is the mother of the appellant in this appeal. This appeal which was determined by the judgment of this court dated 30th April 2010 related to a land dispute which had been adjudicated upon by the land dispute Tribunal and the Appeals Committee. The decision of the Appeals Committee was the subject of this appeal. The appeal was decided in favour of the appellant. The appellant was awarded costs of this appeal which were taxed at Kshs. 44,907/=. It is those costs that Janet seeks to requidate by paying Kshs. 1,000/= per month. Janet in her supporting affidavit mainly relied on the sympathy of the court in the granting of the orders she sought. Amongst the depositions in her supporting affidavit are as follows:-

6. ***That I am elderly and sickly and my earning from farm are quite meager and I am not in a gainful employment.***
7. ***That at least I can try my best and get Kshs. 1,000/= per month which I can be paying until payment in full.***
8. ***That the respondent has given me a very hard time by fighting me all through blocking me from***

any meaningful activity on my small portion and threatening to evict me of which I suffer mental anguish, stress and depression.

9. That the respondent has never shown any mercy, understanding or kindness for his mother who has brought him up and I only look upon court for sympathy.

10. That I pray to be allowed to pay Kshs. 1,000/= per month until payment in full.

The appellant by the replying affidavit sworn on 8th February 2011 stated that Janet and her co-respondent are the owners of 3000 tea bushes and were therefore capable of paying more than they had offered in the application. The appellant deponed that he was agreeable to the payment by reasonable instalments after the initial payment of Kshs. 20,000/=. The application of Janet is based on order 12 (2) of the Civil Procedure Rules which provides as follows:-

“12. (2) 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.”

In the case of Dr. Ali Wario Vs. Dr. John Ngo’ndu Civil Appeal No. 28 of 2003 the court commented on that rule. It stated thus:-

“As can be seen from that Rule, the court has discretion on whether or not to order payment by instalments. The respondent had a burden to prove that he deserves to have the court exercise that discretion in his favour. The respondent in his affidavit in support of his application merely remarked of his inability to pay the costs. He alleged that his income was between Kshs. 25,000/= and Kshs. 30,000/=. The respondent did not attach any bank account or any other account of his practice to prove how much he earns. The bare statement in his affidavit of how much he earns does not suffice for Rule 11 (former Civil Procedure Rules). The amount of money he makes was the only basis upon which the respondent sought to pay the taxed costs by instalment. Having failed to prove his earnings, the application cannot succeed and is dismissed.”

The court has discretion where sufficient course is shown to order payment of decretal sum by instalments. Janet did not assist this court to enable the court in the exercise of that discretion. She was required to state how much, if any, her earnings were. She also should have stated how much she requires for her upkeep. Such information would have assisted the court to make a decision. I however did take notice that Janet is the mother of the appellant and with that relationship in mind, I make the following orders:-

- 1. The respondents in this appeal are ordered to pay the taxed costs hereof by making a payment of Kshs. 10,000/= on or before 31st March 2011.**
- 2. Thereafter the respondents shall pay Kshs. 2,500/= per month with effect from 30th April 2011 and thereafter payment of similar amount on every last day of each succeeding month until payment in full.**
- 3. In default of any such payment, the appellant shall have liberty to execute.**
- 4. There shall be no order as to costs in respect of Notice of Motion dated 31st January 2011.**

Dated, signed and delivered at Meru this 3rd day of March 2011.

MARY KASANGO

JUDGE