

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Miscellaneous Civil Case 814 of 2008

WARUHIU K'OWADE & NGANGA ADVOCATES PLAITNIFF/ADVOCATE

VERSUS

CHEMAGRO LIMITED 1ST DEFENDANT

HENRY OGOLA..... 2ND DEFENDANT

MERAB APONDI OGOLA 3RD DEFENDANT

RULING

The applicant was ordered in Misc. application No. 814 of 2008, to pay to the respondents a sum of Ksh.421, 756/- as per the certificate of taxation dated 19th May 2009. On 2nd June 2009. The applicant filed the present chamber summons application under order XX1 Rules 11 (2) of the Civil Procedure Rules seeking for a stay of execution and an order that he be allowed to pay the decreed amount by monthly installments of Ksh.10,000/- per month until satisfaction of the decree in full.

The reasons in support of the application are stipulated in the body of the application and elaborated in greater detail in the supporting affidavit of Henry Ogola sworn 27th May 2009. According to the applicant, he is ready and willing to satisfy the decree in installments but because the decreed sum is a huge amount, he is unable to pay the lump sum. He contends that he is retired with meager savings, while the 3rd applicant is a house wife and since the company collapsed, they intend to settle the decreed sum at the rate of ksh.10, 000/- per month. They also claimed they have school and college going children, whom they support.

This application was opposed by the respondent on the grounds that the decreed sum arose from an Advocates Clients bill of costs that related to the services rendered by the respondent in HCCC No. 857 of 2001 where the respondent represented the applicant from 2001 to 2007. However, when the respondent tendered a statement of the amount due, the applicant declined to settle which necessitated the taxation of the Advocate Client bill of costs. The ruling on taxation was delivered on 4th may 2009 and the applicant was granted a stay of execution for a period of 30 days up to 3rd June 2006. Before that day, the applicants filed the present application a day before the expiry of the stay period in order to create urgency.

Counsel for the respondent argued that no evidence has been shown to this court that the respondents are unable to settle the amount and the proposal to settle it in installments of Ksh.10, 000/- is unreasonable and made in bad faith to spite the respondents. The subject matter belonging to the applicants in which they were represented by the respondent, involved two prime properties LR No.12882/26 Karen and LR No.209/8336/116 Loresho North together with a claim of about 195.202,539.10/- which National Bank of Kenya was demanding from the applicants. The taxed costs of Ksh.421, 756/- cannot be said to be a huge amount of money.

Having set out the background of this matter and the brief summary of the rival arguments, the issue to determine is whether the applicant has shown sufficient reason to enable this court exercise its discretion and allow payments by installments. The guiding principles when dealing with an application of this kind are well settled. First the court has unfettered discretion but in all matters involving the

exercise of discretion, it is exercised on the basis of the law and evidence. In this case I have to consider the circumstances under which the debt was contracted; the conduct of the debtor; his financial position and his bona fide in offering to pay a fair portion of the debt.

As regards the financial circumstances of the applicant he had a duty to demonstrate sufficient cause why the court should grant him the order to pay in installments. What evidence does the applicant bring to court? He has not annexed any documents that such as bank statements or pay slips to support his contention that he has no money. The 1st applicant is a limited liability company similarly no documents have been shown to the court. A mere statement that the applicant is unable to pay the lump sum is not sufficient. This is also to be considered against the background that the decreed amount was as a result of an Advocate Client bill of costs covering several years of professional services rendered.

The applicant's application is not serious and borrowing from the case of *Rajabali Alidina v Remtulla Alidina and another 1961 EA page 565 as per Law J.*

“A debtor must show sufficient reason for indulgence and the matters to be taken into consideration by the court are the circumstances in which the debt was incurred and the financial position, conduct and bona fides of the debtor”.

Taking all the circumstances into consideration the applicant does not deserve the exercise of this court's discretion. There are no compelling reasons why the respondent should be denied the fruits of their costs for professional services rendered and the taxed costs. The application is dismissed with costs to the respondent.

RULING READ AND SIGNED AT NAIROBI THIS 3RD DAY OF JULY 2009.

M.K. KOOME

JUDGE