



Mbogo v Muigai; Ager (Third party) (Environment and Land Case Civil Suit 694 of 2017) [2025] KEELC 6643 (KLR) (2 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6643 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 694 OF 2017
OA ANGOTE, J
OCTOBER 2, 2025**

BETWEEN

IRENE MAITHA MBOGO PLAINTIFF

AND

EDWARD NGIGI MUIGAI DEFENDANT

AND

JOHNSON OCHIENG AGER THIRD PARTY

RULING

Introduction

1. Before this court for determination are two applications. The Judgment Debtor’s Notice of Motion dated the 30th October, 2024 and the Third Party’s Motion dated the 31st January, 2025.
Judgment Debtor’s Notice of Motion dated the 30th October, 2024
2. This Motion, brought pursuant to the provisions of Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 51 Rule 1 of the Civil Procedure Rules seeks the following reliefs:
 - i. That the Honourable Court be pleased to allow the Respondent leave to pay the remainder decretal sum in monthly installments of Kshs 100,000/= until full payment.
 - ii. That this Honourable Court be pleased to give further orders and directions as it may deem fit and just.
 - iii. The costs of this Application be provided for.
3. The Motion is based on the grounds on the face thereof and supported by the Affidavit of Edward Ngigi Muigai, the Judgment Debtor of an even date. He deponed that judgment in this matter was



- delivered on the 15th February, 2024; that the judgment required him to pay Kshs 5,000,000 for trespass and wrongful deprivation of property, and that he has since made partial payments amounting to Kshs 1,500,000 which was made in the months of May, June and July.
4. Mr. Muigai states that he has been complying with the court orders and has been making payments toward the decretal amount to the best of his ability. He describes himself as a man of modest means with a family to support, and expresses his willingness to settle the outstanding balance through monthly installments of Kshs 100,000/= starting from November until the full amount is paid.
 5. On the 8th October, 2024, he stated, the firm of Igeria Ngugi Advocates who have been on record for him in this matter advised him to get someone else to represent him which he did but the new advocate never formally entered appearance nor filed a change of advocates. It is his case that on the 11th October, 2024, he engaged David Chege through the firm of Chege Odeck and Gachoki Advocates to record a consent with all the parties herein and file an affidavit of means in this matter.
 6. The Judgment Debtor states that he was however surprised to receive a notice to show cause from his previous Counsel, Igeria Ngugi Advocates on the 30th October, 2024 indicating that he should appear before court on the 31st October, 2024; that he hastily proceeded to engage the law firm of Miller & Company Advocates to represent him in this matter and that he is apprehensive that should the said decretal sum of Kes 5,125,850 be executed, he may be committed to civil jail.
 7. He urges that this Motion has been brought without undue delay and is merited, that he is ready and willing to abide by any conditions issued by the court for the orders sought herein and that no prejudice will be occasioned to the Decree Holder which cannot be compensated by way of costs and interests.
 8. In response to the Motion, the Decree Holder filed Grounds of Opposition dated the 4th December, 2024 premised on the grounds that:
 - i. The Application is vexatious and made in bad faith the Judgment Debtor being in funds but deliberately dilating the matter to the decree holder's chagrin.
 - ii. The Application is frivolous, an afterthought and bereft of any merit and deliberately made to obstruct justice.
 - iii. The Application is otherwise an abuse of process filed as a knee jerk reaction to the notice to show cause.
 9. The Decree Holder similarly filed a Replying Affidavit on the 4th December, 2024 in which she deponed that the Motion is actuated by bad faith and calculated to vex her while obstructing and delaying justice. She stated that upon delivery of the Judgment, the Judgment Debtor approached her seeking to purchase the suit property from her for the sum of Kshs 5,000,000/= which she declined seeing as the offer was made in bad faith by an individual who had made money using her property over a number of years.
 10. Subsequently, she noted, the Judgment Debtor made a similar offer to her Advocates offering to settle the entire decretal sum by way of monthly installments of Kshs 500,000/=. She states that she instructed her Counsel to reject the offer as it was actuated by malafides.
 11. Contrary to the Judgment Debtor's assertions, she opined, he is not a man of straw; that he informed the court during his testimony that he is an engineer working in Kisumu and he was doing business on the plot having sunk a borehole therein, and that if he was a man of straw, he would not have offered to pay her Kshs 5,000,000 for the property.



Third Party's Notice of Motion dated the 31st January, 2025

12. This Motion has been brought pursuant to the provisions of Section 3A of the [Civil Procedure Act](#), Order 10 Rule 11, and Order 45 Rules 1, 2 and 3 of the Civil Procedure Rules, seeking the following reliefs:
 - i. That the Judgment and decree entered against the Third Party be set aside.
 - ii. That alternatively, that part of the Judgement seeking to indemnify the Defendant be reviewed and set aside.
 - iii. That the Honourable Court be pleased to issue any further orders as it deems fit.
13. The Application is based on the grounds on the face of the Motion and supported by the Affidavit of Johnson Ochieng Ager, the Third Party herein of an even date. He deponed that he became aware of these proceedings when the Judgment Debtor's Counsel sent him an email forwarding the court's judgment.
14. Prior to this, he deposed, he had no knowledge of the same service having been made vide a newspaper advert. He states that the Judgment Debtor knows him and knows where he works and there was no reason for him to seek service of the third-party notice through substituted service.
15. It was his averment that he entered into a sale agreement with the Judgment Debtor on 11th January, 2011; that the agreement was to be concluded within 90 days and time was of the essence therein and that upon the Judgment Debtor's failure to complete the contract, he served him with a completion notice and a notice of rescission of contract. A bankers cheque refunding the deposit paid by the Judgment Debtor was prepared and sent to his lawyers.
16. The Third Party states that the Judgment Debtor refused to collect the cheque and further failed to pay the balance of the agreed consideration, and that following the breach of the contract and expiry of the completion notice, he sold the suit property to the Decree Holder, and wrote to the Judgment Debtor asking him to vacate the property which he declined to do and continued to drill and sell water on the property leading to the institution of this suit.
17. He stated that he did not enter appearance or file any response to the Third Party notice not being aware of these. He urges that any part of the Judgment compelling him to indemnify the Judgment Debtor is erroneous as he was properly served with the notice rescinding the contract and a refund of his deposit.
18. In response, the Judgment Debtor filed a Replying Affidavit sworn on the 18th March, 2025. He deponed that the present Motion is an abuse of process and seeks to circumvent the court's earlier finding that the Third Party is liable to indemnify him; that the same is a delaying tactic meant to evade liability and that the court ought not countenance the same as the Third Party was duly served and failed to enter appearance.
19. According to Mr Ngigi, he included the Third Party into these proceedings because he was directly involved in the initial transaction and his failure to lawfully enforce rescission resulted in his continued occupation of the suit property. He states that he is financially pressed as a result of the court's judgment due to the heavy decretal sum involved. He urges that it would be more just for the court to review the judgment in terms of allowing the Third Party directly compensate the Decree Holder.



Submissions

20. In support of his Motion, the Judgment Debtor filed submissions on the 14th May, 2025. Counsel submitted that Order 21 Rule 12(2) of the Civil Procedure Rules allows a judgment debtor to pay a decretal sum in installments and that the principles guiding the same were set out in *National Industrial Credit Bank Ltd vs Aquinas Francies Wasike & Another*[2006]eKLR to wit consideration of the circumstances under which the debt was incurred, conduct of the debtor, his financial position and the bona-fides in offering to pay a fair proportion of the debt at once. Reliance was also placed on the case of *Freight Forwarders Ltd vs Elsek & Elsek (K) Ltd* [2012]eKLR.
21. It was submitted that the Judgment Debtor has shown good faith by paying 1.5 million between May and July, 2024 and will continue paying the balance in reasonable monthly installments of Kshs 200,000. It was urged that the court should exercise its discretion and allow the Motion guided by Sections 1A, 1B and 3A of the *Civil Procedure Act*.
22. As regards the Notice to Show Cause, it was submitted that the same should be set aside as the Judgment Debtor was given a one- day notice before the same was due for hearing. Counsel urged that having demonstrated financial difficulties, the court should also review its judgment suo moto to allow the Third Party pay the decree holder directly.
23. The Decree Holder filed submissions to the Motion dated 30th October, 2024 vide submissions of 28th April, 2025. Counsel submitted that Order 21 Rule 12(2) of the Civil Procedure Rules allows a court to order, upon demonstration of sufficient cause that the payment of a decretal sum be made in installments.
24. Speaking to what constitutes sufficient cause in the circumstances, it was noted that as stated in *Freight Ltd vs Elsek & Elsek (K) Limited* [2012]eKLR it is where the debtor is unable to pay in lump sum, the debtor can pay reasonable monthly installments and the Motion is made in utmost good faith.
25. In the circumstances, it was urged that the Judgment Debtor is a wealthy and liquid man who can pay Kshs 5,000,000 in one installment as evinced by the fact that he offered to purchase the property at Kshs 5,000,000 and settle the damages and costs at Kshs 500,000 in monthly installments. It was submitted that if conveyancing were to proceed, he would have paid Kshs 5,000,000/= within 90 days by July, 2024.
26. As to reasonableness, it was stated that the amount of Kshs 100,000/= is unreasonable and such a payment would mean full payment would be made sometime in August 2029. As to whether the plea has been made in good faith, it was urged that it has not. It was submitted that the Judgment Debtor only moved the court when his right to liberty was at risk.
27. Further, it was submitted that the Judgment Debtor has not indicated his willingness to make a substantial deposit of the decretal sum, a requirement as expressed by Gikonyo J in *Lavington Security Limited vs Nairobi City Water & Sewerage Company Ltd*[2014]eKLR.
28. Counsel submitted that the Decree holder has been unlawfully deprived of her property for a period of seven years, and despite relentless efforts over the past fourteen months to enforce the decree, justice remains elusive. It was urged that the present Motion should be dismissed and that the Judgment Debtor be committed to civil jail.
29. The Third Party filed submissions to both Motions on the 15th May, 2025 and reiterated the averments in his affidavit, which I have summarized above.



30. It was submitted that the Judgment Debtor’s continual stay on the suit property was illegal and the Third Party ought not be held liable for the same. Counsel urged that as held in *Muriithi vs Kuria* (Environment & Land Case 785 of 2007) [2024] KEELC 5607 (KLR) (18 July 2024) (Judgment) and *Njenga vs Kinuthia & another* (Environment & Land Case 21 of 2020) [2022] KEELC 3249 (KLR) (6 June 2022) (Judgment), mesne profits is payable by the person who unlawfully benefits from illegal occupation.
31. Counsel submitted that the decision that the Third Party indemnifies the Judgment Debtor would be akin to rewarding him for his unlawful trespass and the court should revisit and review its decision to ensure the Judgment Debtor is not unjustly enriched.

Analysis and Determination

32. Having considered the pleadings and submissions herein, the issues that arise for determination are:
 - i. Whether the Third Party has established a basis for setting aside the judgment entered as against him on the 15th February 2024.
 - ii. Whether the Judgment Debtor should be allowed to pay the decretal sum in installments?
33. Vide his Motion, the Third Party asks this court to set aside the judgment entered as against him by this court on 15th February, 2024. It is his contention that he was unaware of the proceedings until he received a copy of the judgment forwarded to him by the Judgment Debtor’s Counsel.
34. He asserts that the present suit was instituted by the Decree Holder on account of the Judgment Debtor’s deliberate refusal to vacate the suit property despite the sale between them having been rescinded and indemnifying the Judgment Debtor will result in him benefitting from his illegalities.
35. The Judgment Debtor asserts that this plea is unmerited because despite having been duly served, the Third Party failed to enter appearance and defend the claim. He states that he issued the Third Party with a third-party notice because he failed to lawfully rescind their agreement triggering the present dispute.
36. Where a third party, having been duly served with a third-party notice, fails to enter appearance or file a defence, the law permits judgment to be entered against him in default. The legal framework governing the entry of such judgments, as well as their setting aside is set out under Order 1, Rule 19 of the Civil Procedure Rules, which provides as follows:

“Where a third party makes default in entering an appearance in the suit, or in delivering any pleading, and the defendant giving the notice suffers judgment by default, such defendant shall be entitled, after causing the satisfaction of the decree against himself to be entered upon the record, to judgment against the third party to the extent claimed in the third-party notice; the court may upon the application of the defendant pass such judgment against the third party before such defendant has satisfied the decree passed against him:

Provided that it shall be lawful for the court to set aside or vary any judgment passed under this rule upon such terms as may seem just.”

37. It is evident from the above proviso that this court’s jurisdiction to set aside a default judgment against a third party is discretionary. In exercising this discretion, the court is guided by the well-established principles applicable to the setting aside of default judgments, as articulated in numerous



judicial decisions. In Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd vs Augustine Kubede (1982-1988) KAR, the Court of Appeal held:

“The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties”

38. It is trite that the exercise of this discretion is not intended to aid a person who deliberately seeks to obstruct justice but to avoid hardship resulting from an accident, or excusable mistake or error. As aptly expressed by the Court of Appeal of East Africa in the case of Shah vs Mbogo & Another (1967) EA 116:

“The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

39. It is now accepted that in Motions of this nature, the court’s first port of call is a determination of whether the default judgment was regular or irregular. This distinction is crucial for the reasons that where judgment is found to have been irregular, the court has no discretion to set aside the same but must do so *ex debito justitiae*. Where the same is regular, it will be set aside guided by established principles. This position was confirmed by the Court of Appeal in James Kanyita Nderitu vs Maries Philotas Ghika & Another [2016]eKLR albeit discussing default by a Defendant where it was held:

“.....In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearances or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his Memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer (see *Mbogo & Another V Shah* (supra); *Patel V EA Cargo Handling Services Ltd* [1975] EA 75, *Chemwolo & Another V Kubende* [1986] KLR 492 and *CMC Holdings Vs Nzioki* [2004]1 KLR 173).

In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo V Attorney General* [1986 – 1989] EA 456).



The Supreme Court of India forcefully underline the importance of the right to be heard as follows in Sangram Singh V Election Tribunal, Kotch, AIR 1955 SC 664, at 711:

“There must be never present to the mind the fact that ours of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not precluded from participating in them.”

40. The court is so guided.
41. By way of a brief background, the Decree Holder/Plaintiff instituted this suit against the Judgment Debtor/Defendant vide a Plaint dated the 31st October, 2017 seeking inter-alia mandatory injunctive orders directing him to surrender L.R No 209/10921, (the suit property), eviction orders and mesne profits. It was her case that she was the legitimate owner of the property having purchased the same from the Third Party. Despite this, she contended, the Judgement Debtor refused to cede possession.
42. On his part the Judgment Debtor maintained that he was the legitimate owner of the suit property having purchased the same and that the original title documents were carted away from the suit property in breach of the sale agreement between itself and the Third Party. He filed a third-party notice against the Third Party. The Third party did not participate in the proceedings.
43. Vide the judgment entered on the 15th February, 2024, the court found that the Decree Holder had established her case on a balance of probabilities and granted her the reliefs sought. The court also invoked Order 1 Rule 19 of the Civil Procedure Rules against the Third party finding him liable to indemnify the Judgment Debtor for the general damages of Kshs 5,000,000/= granted to the Decree Holder as well as costs. This is what is sought to be set aside.
44. Order 1 Rule 15 of the Civil Procedure Rules provides for notice to third and subsequent parties. Subsection 2 thereof provides that service in this regard shall be according to the rules relating to the service of a summons.
45. In the present case, it is undisputed that the mode of service undertaken was substituted service by way of a newspaper advert, a recognized mode of service pursuant to Order 5 Rule 17 of the Civil Procedure Rules. This was pursuant to the directions of the court issued on the 27th October, 2021 upon the Judgment Debtor’s Motion of 27th May, 2021.
46. In view of the foregoing, the judgment as against the Third Party was a regular default judgment and guided by the exposition in James Kanyita Nderitu (supra), the court must now determine whether the Third Party has demonstrated sufficient cause to warrant the exercise of discretion in his favour, taking into account factors such as the reason for failure to file a defence, time lapsed since the judgment was entered, whether the intended defence raises triable issues, and the prejudice likely to be suffered by each party.
47. The courts have held that in instances of substituted service, there is a rebuttable presumption that the same was seen. Speaking to this, the court in the case of Phillip Mutiso Mulalya vs Samuel Dominic Muathe & 2 others [2022] eKLR stated as follows:

“In the instant case, there is no dispute that the 2nd and 3rd Defendants were duly served with summons to enter appearance by way of substituted service by advertisement in the Newspaper and they neither entered appearance nor filed defence as required by law; hence the judgment entered against them was lawful and regular. The applicants have stated



that they did not see the advertisement herein. In my view, it is possible that indeed the applicants failed to see the said advertisement, considering that not everyone in Kenya reads all the newspapers daily. In addition, it is possible that a person may read only a section of a newspaper and fail to read other sections like the classified/advertisement section, depending on what they deem relevant to them. Therefore, substituted service is based on the rebuttable presumption that the defendant shall be able to see the advertisement. The purpose of effecting service, in whichever form, is to notify the defendant of the pendency of a suit against them and to give them opportunity to defend themselves. The provision for substituted service is allowed as an alternative where personal service is not possible. The most desirable and effective mode of service being personal service. However, the bottom-line and the expected outcome of any mode of service is to make the defendant aware of the suit pending against them. If that outcome is not achieved, then subsequent proceedings will not result in substantive justice. In the circumstances, it is my considered view that the reason given by the Applicants that they did not see the advertisement and were therefore not aware of this suit is a reasonable explanation to warrant setting aside the *ex parte* judgment.”

48. In the circumstances and considering that the Third Party’s assertion that he did not see the advert has not been controverted, the Judgment Debtor only asserting that service was proper, the court finds it plausible that he did not indeed see it.
49. As regards the timing of this Motion, it is noted that judgment having been entered in February, 2024, this Motion has been filed approximately a year later. The Third Party however states that he filed the same upon being forwarded a copy of the judgment by the Judgment Debtor’s Counsel sometime in November, 2024. This has equally not been controverted. In the circumstances, there has been no inordinate delay in the filing of the same.
50. The last aspect is whether there are triable issues as between the Judgment Debtor and the Third Party. The Court of Appeal in *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* (2015) eKLR in defining what a triable issue is observed that:

“ A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”
51. It is at the onset noted that the Third Party has not annexed a draft defence to the claim against him by the Judgment Debtor. Nonetheless, the court does not consider that this in itself renders the Motion fatal especially, as herein, the nature of the defence is outlined in the Supporting Affidavit.
52. As persuasively expressed in *Omeriye Limited t/a Light International Schools vs Hinesh Trading Limited* (Civil Appeal E018 of 2022) [2022] KEHC 12209 (KLR) (Commercial and Tax) (22 August 2022) (Judgment)

“.....Second, the learned magistrate held that failure to attach a draft defence to the application to set aside default judgment is fatal. This is a misdirection. While it is desirable, failure to do so is not fatal as the nature of the defence may be outlined in the affidavits and documents in support of the application. I would only quote the decision of the Court of Appeal in *Kingsway Tyres and Automart Ltd v Rafiki Enterprises Ltd* NRB CA Civil Appeal No 220 of 1995 [1996] eKLR where it observed as follows: To our minds, the onus



was on the respondent to fault the service. Having failed to do so, and in the absence of evidence on record to lead us to hold that the service was improper, it is our view and so hold that ex parte judgment was a regular judgment. It would only, if at all, be properly, vacated on grounds other than non-service of summons. There are ample authorities to the effect that, notwithstanding regularity of it, a court may set aside an ex parte judgment if a defendant shows he has a reasonable defence on the merits. The respondent did not annex to its application in the lower court a draft defence. A director of the company did, however, swear an affidavit to state that the appellants's claim was based on certain LPOs which had been stolen from it (the respondent) by its employees. Too, that the employees had been arraigned in court on criminal charges relating thereto. In view of that, it did not think the claim, properly, lay against it. It was desirable, we think for the respondent to annex to its application a draft defence to include all that and any other defences it may have had to the appellant's claim. Be that as it may, the defences, above, were not such as would have properly, influenced the court below to exercise its discretion in favour of setting aside. That is the more so considering the manner the parties conducted business between themselves."

53. The Third Party deponed vide his Affidavit that he entered into a sale agreement with the Judgment Debtor with respect to the suit property. Whereas time was of essence, he deposed, the Judgment Debtor did not meet his part of the bargain leading to him rescinding the contract, refunding the Judgment Debtor his deposit and selling the property to the Decree Holder.
54. He opines that despite being aware of the rescission, the Judgment Debtor deliberately refused to vacate the suit property leading to the institution of the suit. He opines that he ought not be punished for the Judgment Debtor's illegalities. The Judgment Debtor's position has always been that there was no formal rescission of the sale agreement.
55. The court considers that there are triable issues in this respect specifically on whether the sale agreement was rescinded and properly so.
56. In the end the court finds the Third Party's plea for setting aside the Judgment to be merited.

I. Whether the Judgment Debtor should be allowed to pay the decretal sum in installments?

57. The Judgment Debtor asks this court to allow him to pay the decretal sum by installments. This court's discretion to allow such a plea is found in Order 21 rule 12 (1) and (2) of the Civil Procedure Rules which provides as follows:

"Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by installments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

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 installments 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."



58. Speaking to the considerations herein, the court in *Diamond Star General Trading LLC vs Ambrose D O Rachier* carrying on business as *Rachier & Amollo Advocates* [2018] eKLR, cited with approval the case of *Vaji Jethabhai & Bros Limited vs Saleh Abdulla* [1959] EA 260 which noted as follows:

- “a. Whilst creditors’ rights must be considered each case must be considered on its own merits and discretion exercised accordingly;
- b. The mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of the discretion;
- c. The debtor should be required to show his bona fides by arranging prompt payment of a fair proportion;
- d. Hardship of the debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.”

59. Similarly, in *Singh Gitau Advocates vs City Finance Bank Limited* [2013] eKLR, the court stated:

“It is trite law that apart from looking at the peculiar circumstances of the case, the Court when considering what sufficient cause amounts to, must consider a number of factors. This includes how the debt was incurred, the bona fides of the Judgment Debtor, the financial position of the debtor and the judgment creditor, the conduct of the parties and the hardship that may result from enforcing the decree. It is also my considered view that applications of this nature ought to be made without undue delay.”

60. The Judgment Debtor contends that he lacks the financial capacity to settle the entire decretal sum in a lump sum, describing himself as a man of straw. He states that he has so far paid Kshs 1.5 million and now seeks to clear the outstanding balance through monthly installments of Kshs 100,000/=.

61. The Decree Holder, however, vehemently opposes the application. She argues that the Judgment Debtor, being a professional engineer, is financially capable and had derived substantial profits from his dealings on the suit property. She further points to a previous offer made by the Judgment Debtor to purchase the property for Kshs 5,000,000/=, which in her view undermines his claim of financial incapacity and casts doubt on the bona fides of the present application.

62. The court observes that the alleged offer to purchase the property was made on a “without prejudice” basis. In the absence of an express admission, such communication is privileged and cannot be relied upon as evidence of financial capacity and/or want of bona fides.

63. Furthermore, the mere filing of the present Motion in response to a notice to show cause does not, in and of itself, amount to proof of bad faith or an attempt to defeat the execution process. Each party is entitled to seek relief or protection under the law, and such action cannot be construed as indicative of mala fides without more.

64. It is well established that when considering whether to allow payment of a decretal sum by installments, the court must assess the debtor’s financial position, usually demonstrated through documentary evidence such as bank statements and income records. In *Kenya Power & Lighting Company Limited v. Benjamin Njiru Ndwiga* [2014] eKLR, the court affirmed that it is the debtor’s duty to provide sufficient proof of financial incapacity to justify such relief. In this case, the Judgment Debtor has not provided any such evidence.



65. Nevertheless, it is noted that the Judgment Debtor has already paid Kshs 1.5 million in three installments of Kshs 500,000/= each which the Decree Holder accepted. There is as such no need for a lumpsum payment.
66. Further, in view of this partial compliance, and the Judgment Debtor's expressed willingness to continue honoring the judgment, the court is persuaded to exercise its discretion and allow him to settle the balance of the decretal sum in installments. The installments will however be in the sum of Kshs 500,000, with a lumpsum amount of Kshs. 1,000,000 to be paid up front. The court considers that this will not unduly prejudice the Decree Holder.
67. In conclusion, the court makes the following orders:
- I. The Notice of Motion dated the 30th October, 2024 is found to be merited and allowed in the following terms:
 - a. The Judgment Debtor/Defendant is granted leave to pay the balance of the decretal sum in monthly installments of Kshs 500,000 per month, with effect from 1st November, 2025, with a lumpsum amount of Kshs. 1,000,000 to be paid on or before 15th October, 2025 until full payment.
 - b. The Judgment Debtor/Defendant shall bear the costs of this Motion.
 - II. The Notice of Motion dated the 31st January, 2025 is found to be merited and allowed in the following terms:
 - a. The Judgment and Decree entered as against the Third Party on 15th February, 2024 be and is hereby set aside.
 - b. The Third Party is granted 14 days to file his Defence to the Judgement Debtors/Defendant's claim against him.
 - c. The Claim by the Judgment Debtor as against the Third Party to be set down for hearing on priority basis.
 - d. Costs shall abide the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 2ND DAY OF OCTOBER, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Olwande for 3rd Party/Applicant

Mr. E. K. Mwangi for Decree Holder/Respondent

Mr. Mutua for Defendant

Court Assistant: Tracy

