

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM NO. E222 OF 2019

GULF AFRICAN BANK LIMITED.....PLAINTIFF

-VERSUS-

SPACETECH LIMITED.....1ST DEFENDANT

CHARLES THAIRU NJUGUNA2ND DEFENDANT

TITUS MWINZI MUTHAMA.....3RD DEFENDANT

RULING

1. The application before me is dated 3rd February 2025. It has been brought under the provisions of Order 51 of the Civil Procedure Rules, 2010, and Section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya. The 2nd defendant/applicant prays for orders of stay of execution and stay of the Ruling delivered on 20th December 2024 and all consequential orders emanating therefrom. The applicant also prays that he be allowed to pay the decretal amount in reasonable instalments.
2. The application is supported by an affidavit sworn on 3rd February, 2024 (sic) by Mr. Charles Thairu Njuguna, the applicant herein. He averred that on 20th December 2024, the Court delivered a Ruling to the effect that he be committed to civil jail for six (6) months for the debt he owes the plaintiff/respondent. He further averred that on 9th December 2024, through his Advocates, he made a proposal to the respondent on how he would pay the debt in instalments. He indicated that his proposal was accepted but the Ruling was delivered before they recorded and filed a consent. He stated that he is willing and committed to pay the debt, but the same will be defeated if he is committed to civil jail as he will not be able to conduct his daily businesses with the 1st defendant, wherein he is a Director.

3. He contended that the respondent will not suffer any harm if the application herein is allowed. He stated that the application has been made without delay and it is in the interest of justice for the same to be allowed.
4. The respondent filed a replying affidavit sworn on 7th April 2025 by Mr. Lawi Sato, the respondent's Senior Legal Officer. He stated that the application has been brought in bad faith because since entry of the Judgment, the applicant has engaged the respondent in myriad applications, all aimed at frustrating the realization of the fruits of the said Judgment.
5. Mr. Lawi further stated that the applicant even went to the Court of Appeal in **Civil Application No. E335 of 2021**, which was dismissed on 13th May 2022. He deposed that at the time of the application for committal to civil jail, the applicant proposed to settle the decretal amount in monthly instalments of Kshs.10,000/=, a proposal that would take 335 years to pay the decretal amount as it then stood. He indicated that at the time of making the said proposal, the 2nd defendant swore on oath that the proposed payment of Kshs.10,000/= monthly was the only amount he could afford, but after being committed to civil jail, he wrote to the respondent proposing to pay Kshs.150,000/= monthly.
6. Mr. Sato stated that despite the latter proposal, the applicant did not swear an affidavit of means to show that the said amount was all that he could legitimately raise. He stated that the applicant had not disclosed the "*reasonable instalment*" he was asking to be allowed to make, or the frequency of the payments.
7. In making reference to his earlier affidavit sworn on 19th July 2024, Mr. Sato averred that the loan amount was withdrawn in cash by the applicant, who had not disclosed where he took the money, and why he cannot now repay it.

8. Mr. Sato contended that it would take 268 months, that is 22 years, to settle the decretal amount at a monthly payment of Kshs.150,000/= for the decretal sum which stood at Kshs.40,256,102.35 as at 19th July 2024. He stated that would be grossly unfair to the respondent who has had a Judgment in its favour since the year 2019, but has been frustrated in realization of the said Judgment through myriad applications by the applicant.
9. Mr. Sato noted that the applicant had not proposed to pay a “*reasonable proportion*” of the debt even as the instant application was being considered. He asserted that there is no reason to stay execution of the Committal Order given on 20th December 2024 or to order for payment in instalments as has been sought.
10. He stated that in the event that this Court orders for payment in instalments, it should be on condition that the applicant pays a lumpsum of Kshs.10 Million within sixty (60) days and the balance of Kshs.30,156,102.35 in instalments of Kshs.500,000/= monthly, which would mean that the debt would be cleared in 60 months (5 years).
11. He prayed for the application to be dismissed, but if allowed, it be on the terms proposed by the respondent.
12. The application proceeded for hearing by way of written submissions. The respondent’s submissions were filed by the law firm of Muriu Mungai & Company Advocates on 7th April 2025.
13. The applicant’s submissions were filed by the law firm of Njathi & Company Advocates on 3rd February, 2026. It must however be noted that the applicant’s submissions were filed way out of time by 3½ months after this Court gave the said Advocates fourteen (14) days from 2nd October 2025 to file their submissions. For the purposes of hearing the instant application on merits, I will deem them as being properly on record.

14. Mr. Njathi, learned Counsel for the applicant stated that the Civil Procedure Code (sic) has illuminated the grounds for setting aside a Judgment/Ruling and what constitutes sufficient cause for setting aside the same, which is a matter for the Court's discretion.
15. He cited the case of **Wachira Karani** [2016] eKLR, where Mativo J., (as he then was) relied on the case of **Esther Wamaitha Njihia & 2 others v Safaricom Ltd**, and held that the discretion is free and the main concern of the Courts is to do justice to the parties before it.
16. Counsel stated that the applicant is willing to repay the loan amount and has started paying in instalments of Kshs.150,000/=, and that since the applicant and the respondent are in good terms, they have agreed to increase the monthly instalments over time, when the financial circumstances of the applicant change.
17. Mr. Njathi submitted that the applicant is acting in good faith and willing to pay the debt of Kshs.24,114,579.00, money he never received or benefited from, but he is in the present situation because he never entered his defence in time. Counsel stated that the applicant was acquitted from a criminal case which emanated from the said loan.
18. Mr. Kongere, learned Counsel for the respondent submitted that under Order 21 Rule 12(2) of the Civil Procedure Rules, 2010, Courts have the discretion to grant leave for payment of debts in instalments, but the said discretion must be resolved on a case to case basis. He added that the onus is on the applicant to justify such exercise of discretion, as was held in the case of **Amir Suleiman v Amboseli Resort Limited** [2015] KEHC 4696 (KLR).
19. Counsel stated that the applicant must demonstrate that he is unable to pay all the decretal amount at once, which he has failed to do. He also stated that the applicant's financial means have been something of a mystery to the

respondent and to the Court, as even in the committal proceedings, his financial means remained closely guarded. He contended that even if the applicant is financially hard-pressed, that would still be insufficient to discharge the burden as was held in the case of **Amir Suleiman v Amboseli Resort Limited** (supra), wherein in declining to grant the orders sought therein, the Court noted that the averment that the applicant had cash flow problems was not supported by any cogent evidence.

20. Mr. Kongere submitted that the applicant had fallen short of showing *bona fides* and urged this Court not to exercise its discretion in the applicant's favour. He cited the case of **Synergy Industrial Credit Ltd v Oxyplus International Limited & 2 others** [2022] KEHC 12940 (KLR, to support his assertion. He contended that lack of *bona fides* has been exhibited by the applicant's conduct of filing the instant application after years of other applications to thwart recovery.
21. Counsel made reference to the applicant's affidavit sworn on 5th May 2024, wherein he said he was only capable of paying Kshs.10,000/= monthly, but when he was cornered with the Committal Order issued on 20th December 2024, he is now able to raise Kshs.150,000/= monthly. He stated that according to them, the shifting positions by the applicant means that he has the means to pay the debt but he is determined to test the respondent's endurance and zeal as legal ingenuity will permit him to, which is evidence of bad faith
22. Mr. Kongere contended that the applicant's proposals, or lack thereof, is the other evidence of bad faith. He submitted that authorities agree that it is a sign of good faith for the debtor to pay a "*fair proportion*" of the debt, which depends on the quantum of the debt, but there must be professed willingness to pay or evidence that it has been paid.

23. In making reference to the case of **Amir Suleiman v Amboseli Resort Limited** (supra), Mr. Kongere pointed out that a proposed payment of Kshs.900,000/= was considered to be too little, for a debt of Kshs.5,625,000.00, which had remained outstanding for seven (7) years. He stated that in this instance, the debt of Kshs.24,114,579.89 which has risen to Kshs.40,256,102.35 has been outstanding for six (6) years, but not a single shilling has been paid, let alone a “*fair proportion*”.
24. He stated that the Court in **Synergy Industrial Credit Ltd v Oxyplus International Limited & 2 others** (supra), rejected meagre instalments on a substantial debt because the proposed instalments were too minimal as would amount to an injustice to the plaintiff who should be allowed to enjoy the fruits of its judgment.
25. Counsel submitted that in this application, the proposal to pay monthly instalments of Kshs.150,000/= is unreasonable and in bad faith, because the applicant who received Kshs.20,000,000/= in May 2018, with a promise to repay it within six (6) months, cannot now suggest that he be allowed to pay the debt over a period of 268 months (approximately 22 years). The respondent prayed for the application to be dismissed with costs.

ANALYSIS AND DETERMINATION.

26. I have read the application filed by the applicant and his supporting affidavit I have also read the replying affidavit and the written submissions by Counsel for the parties herein. The issue for determination is whether the applicant should be allowed to pay the decretal amount in instalments.
27. Order 21 Rule 12 of the Civil Procedure Rules, 2010, provides as follows on payment of money decrees by instalments -

(1) 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

of the decree Order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable; and

(2) After the passing of any such Judgment or 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 made by instalments on such terms as to the payment of interest, the attachment of the property of the Judgment debtor or the taking any security from him, or otherwise, as it thinks fit.

28. In this instance, the applicant offers to be making payments in instalments of Kshs.150,000/= per month towards settlement of the decretal amount. The said proposed instalments were vehemently rejected by the respondent as it would take an unreasonable period of time, 268 months or approximately 22 years, to clear the payments.

29. In the case of **Keshvaji Jethabhai & Bros Limited v Saleh Abdulla** [1959] E.A 260, the Court stated as follows on payment of a debt by instalments –

The Court will consider the circumstances under which the debt was contracted, the conduct of the debtor, his financial position, and so forth, and instalments should be directed where the defendant shows his bonafides by offering to pay anything like a fair proportion of his debt at once.

30. Similarly, in the case of **Hildegard Ndelut v Letkina Dairies Ltd & another** [2005] eKLR, the Court stated as follows -

A judgment creditor is entitled to payment of the decretal amount, which he should receive promptly to reap the fruits of the Judgment. The judgment debtor might generally be in a difficult position in paying the amount in that event he should show his bonafides by arranging fair payment proposals to liquidate the amount.

31. Although the applicant's Counsel stated that his client is willing to pay the debt of Kshs.24,114,579.00, the said amount was contested by the respondent's Counsel who claimed that the amount owing had risen to Kshs. 40,256,102.35 over the years, and that not a single Shilling had been paid for the last six (6) years.
32. Although the applicant has claimed inability to pay a substantial amount monthly, of the money due and owing, I am of the considered view that the proposal to pay only Kshs.150,000/= per month out of a debt of Kshs.40,256,102.35 is not a sign of good faith, but goes to show the extent of the applicant's delaying tactics in settling the decretal amount.
33. The assertion that the applicant was cleared of criminal charges arising from the money in issue is neither here nor there, since there is a valid decree in place, in favour of the respondent that needs to be settled.
34. I agree with the respondent's Counsel that the monthly deposits being proposed are not reasonable, but would only prolong the payment of the full decretal sum to decades later.
35. Given the circumstances of this case, I am not persuaded that the application herein has been made in good faith. It is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 19th day of March 2026. Ruling delivered through Microsoft Teams Online Platform.

**NJOKI MWANGI
JUDGE**

In the presence of:-

Ms Cheruiyot h/b for Mr. Kongere for the plaintiff

Mr. Njathi for the 2nd defendant/applicant

Ms B. Wokabi – Court Assistant.