



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 103 OF 2007

ROBERT MUKARANI SIMITI.....1ST PLAINTIFF

JOSEPH WANDAKA.....2ND PLAINTIFF

FRED WANGILA.....3RD PLAINTIFF

VERSUS

PETER BADHIA.....1ST DEFENDANT

PETER WEKESA.....2ND DEFENDANT

ANNE WEKESA.....3RD DEFENDANT

DR. TIMOTHY PIERCE.....4TH DEFENDANT

RULING

1. The application dated 8/2/2018 seeks an order that this court do allow the plaintiffs to liquidate the taxed costs amounting to **Kshs.672,110/-** in instalments and that the first instalment of **Kshs.300,000/-** be paid on or before **15/4/2018** and the balance thereafter to be liquidated in equal monthly instalments of **Kshs.50,000/=** with effect from **31/5/2018** until payment in full. The plaintiffs cited financial constraints as the basis of their application for the said orders.
2. The application is opposed. The defendants filed grounds of opposition dated 19/2/2018 stating that the application is of no merit and is meant to delay justice; that 4 months after taxation no amount has been paid as a sign of good faith; that no sufficient cause has been shown for the exercise of this court's discretion and that as the plaintiffs were found to be of dishonest intent in bringing this matter, the court should deny them the favourable exercise of its discretion. It is stated further that the applicants were capable of paying the decreed costs in a lump sum and they had not shown otherwise.
3. The plaintiffs filed submissions on their application on 8/3/2018 and the defendants on 28/2/2018.
4. The plaintiffs cite **Order 21 Rule 12** for their prayers and urge that the test to be applied is whether the judgment debtor has demonstrated bona fides by arranging for payment of a fair proportion of the debt. The cite the case of **Hildegard Ndalut -vs- Lelkina Dairies Ltd & Another 2005 eKLR** as cited in the case of **Maasai Kenya Ltd -vs- Hardware & Steel Centre Ltd & Another 2013 eKLR**. The cite the following passage:

“Both parties have referred to the case of Keshavji Jethabhai & Brothers Limited -vs- Saleh Abdulla [1959] EA 260, which is a case from a High Court of Tanganyika. That case followed the principles laid down in the Indian case of Sawatram Ramprasad -vs- Imperial Bank of India [1933] AIR Nag. 33 - that a defendant should be required to show his bona fide by arranging fair payment of the proportion of the debt - in persuading the court to allow payment by way of instalments. This, in my view, is the proper test to apply in granting orders for payment of a decretal amount by way of instalments. A judgement 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 genuinely be in a difficult position in paying the decretal amount at once. However, he has to show seriousness in paying the amount. In that event he should show his bona fides by arranging fair payment proposals to liquidate the amount”.

They aver that Kshs.300,000/= is a fair proportion of the judgment debt of Kshs.672,110/= and that the instalments of Kshs.50,000/= are reasonable.

5. The defendants on the other hand also cite the case of *Maasai Kenya Ltd (Supra)* and replicate the following passage therefrom which the court in the Maasai case cited from the case of *Alidina --vs- Remtulla Alidina & Another [1961]:-*

“All commentators of the Civil Procedure Code agree that the court’s discretion to order payment of the decretal amount in instalments is one which must be exercised in a judicial and not an arbitrary manner. The onus is on the defendant to show that he is entitled to indulgence under this rule”.

The defendants have emphasized that the financial constraints alleged by the plaintiffs were not proved.

6. I have considered this argument. It may not be possible for a litigant to express all their problems before court for their own personal reasons even when that may be the panacea to solving a problem like the one the plaintiffs are encountering. Besides the sum of Kshs.672,110/- herein is not a debt that was sued for; rather, it is the costs awarded by this court at the end of the uncertain litigation process. As is known to the parties costs in any litigation are at the discretion of the court. The defendants in this case got the costs of this litigation. Though they urge this court to examine the dishonesty of the plaintiffs as highlighted in this court’s judgment, this court must focus more the principle enunciated in the Maasai Kenya Ltd case cited above regardless of that. I must consider if payment of Kshs.300,000/= is an adequate initial lumpsum and also if Kshs.50,000/= is a fair monthly instalment.

7. I have no good reason for believing that those sums are not fair bearing in mind that the sum of Kshs.672,110/- was not a sum that was owed before the suit. The only insurance that this court may grant the defendants is to ensure that the stream of funds in the form of monthly instalments keeps flowing so they are not inconvenienced by any subsequent uncalled for wait. This I will do by issuing orders as follows:

(1) The application dated 8/2/2018 is granted in terms of prayer 2.

(2) The sum of Kshs.300,000/- if not paid by now shall be paid within 7 days of this Ruling.

(3) The instalments of Kshs.50,000/- shall be paid on or before the 15th day of every month with effect from May, 2018 (that month inclusive) till the full amount is fully liquidated.

(4) Any default in compliance with conditions No. 1, 2 and 3 above shall render the arrangement herein to be void and such default shall entitle the defendants to instant execution against the plaintiffs for the sum outstanding as at the date of default without any further recourse to litigation.

It is so ordered.

Dated, signed and delivered at Kitale on this 25th day of April, 2018.

MWANGI NJOROGE

JUDGE

25/4/2018

Coram:

Before: Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Analo for the plaintiff

Mr. Teti holding brief for Samba for defendant/respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

25/4/2018