Kaur v Suri (Environment & Land Case 738 of 2013)
[2024] KEELC 1779 (KLR) (20 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1779 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 738 OF 2013

JO MBOYA, J

MARCH 20, 2024

BETWEEN

PARMJIT KAUR ALIAS KAUR ..... PLAINTIFF

AND

AVTAR SINGH SURI ..... DEFENDANT

RULING

Introduction and Background

1. The Defendant/Applicant herein has approached the Honourable court vide Notice of Motion Application dated the 22nd February 2024; brought pursuant to the provisions of Section 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya; Order 9 Rule 9 of the *Civil Procedure Rules, 2010*; and Order 21 Rule 12(2) of the *Civil Procedure Rules 2010*; and in respect of which same [Defendant/Applicant] has sought for the following reliefs;

    i. .....Spent.

    ii. This Honorable court do grant leave to the firm of M/s Anthony Burugu & Co Advocates to come on record for the Defendant in place of the firm of M/s Bryan Moturi & Associates Advocates.

    iii. This Honorable court be pleased to order a stay of execution of the Judgment and decree dated the 12th July 2023; pending the hearing and determination of this application.

    iv. This Honorable court do allow the Defendant to pay the balance of the decretal sum in 12 monthly instalments of Kes.2, 065, 515.50/= only.

    v. Costs of this Application be provided for.

2. The instant Application is premised and anchored on various grounds which have been enumerated at the foot thereof. Furthermore, the Application is supported by the affidavit of the Defendant/Applicant sworn on even date, as well as a Further affidavit sworn on the 5th March 2024, respectively.

3. Upon being served with the Application beforehand, the Plaintiff/Respondent proceeded to and filed a Replying affidavit sworn on the 1st March 2024; and in respect of which same [Plaintiff/Respondent] has opposed the leave [Liberty] sought at the foot of the current Application.

4. Further and in addition, the Plaintiff/Respondent has averred that the Defendant/Applicant herein has been privy to and knowledgeable of the debt beforehand from the onset, but same has deployed delaying tactic[s] whose import is calculated to deprive the Plaintiff/Respondent of her entitlement to the proceeds arising from the suit property.

5. Moreover, the instant Application came up for hearing on the 12th March 2024, whereupon the advocates for the Parties covenanted to dispose of the Application by way of written submissions. Consequently and in this regard, the Defendant/Applicant proceeded to and filed written submissions dated the 15th March 2024, whereas the Plaintiff/Respondent filed written submissions dated the 19th March 2024.

6. For coherence, both sets of written submissions are on record.

Parties' Submissions:

Applicant's Submissions:

7. Vide written submissions dated the 15th March 2024, the Defendant/Applicant herein has raised and canvassed two [2] salient and pertinent issues for due consideration and ultimate determination of the subject matter;

8. Firstly, Learned counsel for the Applicant has submitted that whereas this court has since passed and proclaimed a Judgment as against the Defendant/Applicant, the Applicant herein is not seized and/or possessed of the requisite financial ability to liquidate and/or settle the entire decretal sum.

9. Furthermore, Learned counsel for the Applicant has also submitted that owing to inability to pay and/or settle the entire decretal sum at once, it has become necessary and/or appropriate to liquidate and/or settle the decretal sum vide monthly instalment[s] of Kes.2, 065, 511.50/= only, until liquidation in full.

10. Instructively, Learned counsel for the Applicant has submitted that the Applicant herein has established and demonstrated that same [Applicant] is indeed keen and/or desirous to liquidate the Decretal sum.

11. In the premises, Learned counsel for the Applicant has thus contended that the Applicant herein deserves to be granted the latitude and/or opportunity to pay the decretal sum in the manner proposed and/or alluded to.

12. Secondly, Learned counsel for the Applicant has submitted that where an Applicant, the current Applicant not excepted, can be granted the liberty to settle and/or liquidate the decretal sum by way of instalment, in such a manner as the Honourable court may deem fit, just and expedient.

13. At any rate, Learned counsel for the Applicant has ventured forward and invited the attention of the court to the provisions of Order 21 Rule 12 of the *Civil Procedure Rules, 2010*, which underpins the Jurisdiction of the court to grant the liberty to pay and/or liquidate Decretal sum[s] by installments.

14. In any event, Learned counsel for the Applicant has submitted that the Jurisdiction of the Honourable court is not fettered and hence learned counsel for the Applicant has implored the Honourable court to find merit in the subject Application and to grant same.

15. In support of the foregoing submissions, Learned counsel for the Applicant has cited and relied upon on inter-alia the holding in the case of *Victoria Commercial Bank vs Charles Luta Kasamali* (2001)eKLR; *Nicholas Gitonga Murongi vs Susan Wairimu & 4 Others* (2021)eKLR and *Freight Forwarders Ltd vs Elsk & Elsk Kenya Ltd* (2012)eKLR and *Singh Gitau Advocates vs City Financial Bank Ltd* (2013)eKLR and *Commercial Bank Ltd vs David Njau Nduati* (2015)eKLR.

16. In view of the foregoing, Learned counsel for the Applicant has invited the Honourable court to find and hold that the Application beforehand is meritorious and thus ought to be allowed in the manner prayed.

Respondent's Submissions:

17. The Respondent herein filed written submissions dated the 19th March 2024; and in respect of which same has highlighted and canvassed two [2] issues for consideration and determination by the Honourable court.

18. First and foremost, Learned counsel for the Plaintiff/Respondent has submitted that the decree of the court, which is the subject of the current Application was rendered in July 2023; and despite of the delivery and/or rendition thereof, the Applicant herein failed to make any precipitate payment[s] to and in favor of the Respondent up to and including the 14th February 2024; which constitute[s] an inordinate and unreasonable delay.

19. Secondly, Learned counsel for the Respondent has submitted that the current Application by and on behalf of the Applicant is inspired by *mala fides* and the sole intention is to frustrate the Respondent from partaking of the fruits of the Judgment delivered by the court and by extension, to subject same [Respondent] to deprivation.

20. To the extent that the Application is inspired by *mala fides*, Learned counsel for the Respondent has contended that the Application ought not to granted and/or allowed.

21. Furthermore, Learned counsel for the Respondent has submitted that though the Applicant herein now contends that same is facing financial crisis; however, the same Applicant has elsewhere in a different matter, namely, HCC Com No. E114 of 2024, sworn an affidavit in which the Applicant has espoused and contended that same [Applicant] has impressive real Estate portfolio and not otherwise.

22. Premised on the foregoing, Learned counsel for the Respondent has submitted that insofar as the Applicant herein is reputed to have an impressive real Estate portfolio, same therefore does not deserve the liberty to settle and/or liquidate the decretal sum bay way of instalments, either as sought or at all.

23. Consequently and in view of the foregoing, Learned counsel has submitted that the Application beforehand is therefore devoid and bereft of merits and hence same ought to be dismissed with costs.

Issues for Determination:

24. Having appraised and considered the subject Application and the rRsponse thereto; and upon taking into account the written submissions filed by and on behalf of the Parties, the following issues do emerge [arise] and are thus worthy of determination;

i. Whether the instant Application has been made and mounted without unreasonable and/or inordinate delay or otherwise.

ii. Whether the Applicant herein has established and demonstrated sufficient cause to warrant the liberty to pay vide instalments, in the manner proposed or at all.

Analysis and Determination:

Issue Number 1 Whether the Instant Application has been Made and Mounted without Unreasonable and/or Inordinate Delay or otherwise.

25. It is common ground that the debt attendant to and arising from the suit herein forms and constitute[s] rental income derivable from L.R No. 4275/44 [original number 4275/16/3], which property belonged to and was registered in the name[s] of the Defendant/Applicant and the husband of the Plaintiff/Respondent, now deceased. For coherence, the monies at the foot of the Judgment/decree herein are part of the rental income which was collected by the Defendant/Applicant, but same failed and/or refused to pay out half thereof to and in favor of the Plaintiff/Respondent.

26. First forward, there is no gainsaying that the Defendant/Applicant herein was privy to and/or knowledgeable of the plaintiff/Respondent's rights to a portion of the rental income. However, same remained adamant and thus the Plaintiff/respondent was constrained and/or obliged to file the instant suit.

27. Be that as it may, it is worthy to note and recall that after substantial delay and/or dithering, which were ostensibly occasioned and/or caused by the Defendant/Applicant herein, the suit was heard and disposed of vide Judgment of the court rendered on the 7th June 2023, whereupon the curt ordered and directed, inter-alia, payments of the rental income which had accrued to and in favor of the Plaintiff/Respondent.

28. Suffice it to observe that even though the Judgment and consequential decree was rendered on the 7th June 2023, the current application which seeks liberty [Leave] to pay the decretal sum vide installment[s] was neither filed nor lodged up to and including the 22nd February 2024.

29. To my mind, the time lapse between the 7th June 2023 to the 22nd February 2024, when the current Application was filed constitutes and amounts to an aggregate of eight [8] Months. Instructively, the duration constituting eight [8] months is ex-facie unreasonable and inordinate delay.

30. Consequently and taking into account, the length and extent of delay, prior to and or before the filing of the instant Application, it was therefore incumbent upon the Applicant herein to place before the Honourable court some scintilla of explanation as to why the Application beforehand was neither filed nor lodged timeously.

31. Put differently, whenever an Applicant, the current Applicant not excepted, seeks to procure and/or partake of an Equitable relief, then same is obligated to account for each and every delay attendant to the matter beforehand. In particular, it suffices to state that it is the explanation, [if any] that was given by an Applicant, that would enable the court to consider whether the explanation tendered is reasonable, honest and bona fide and thus warrants condonation.

32. To this end, it suffices to cite and adopt the decision of the Court of Appeal in the case of *Njoroge versus Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling), where the court stated and held thus;

12. In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Condonation cannot be had for the mere asking. An applicant is required to make out a case entitling him to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.

13. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.

33. Additionally, the Supreme Court of Kenya [the apex court] has also had occasion to consider the necessity to account for and/or explain any scintilla of delay attaching to and/or concerning an Application to court.

34. For coherence, the Supreme Court dealt with and highlighted the necessity to account for every delay in the case of *Nairobi Bottlers versus Mark Ndumia & Another*, [Supreme Court 2023] [Ruling] delivered on the 28/12/2023]; where the court held thus;

> It is not in dispute that the certified copies were availed on 17th August, 2023 after the time frame for filing the appeal had lapsed. Furthermore, the impugned judgment is envisaged under Rule 40 (1) of the *Supreme Court Rules* as a primary document in the appeal. Consequently, we find that the applicant has proffered a reasonable explanation for the delay in filing the appeal up to 17th August, 2023.
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> In that, the delay was caused by the Court of Appeal and cannot be visited upon the applicant as appreciated by this Court in *County Executive of Kisumu v County Government of Kisumu & 8 Others*, SC. Civil Appl. No. 3 of 2016; [2017] eKLR.
>
> (27) Having so found, we also hold that the applicant has not offered any explanation for the delay between 17th August, 2023 and 2nd October 2023 when it filed its Motion for extension of time. In *Marvin Opiyo Ambala & another v. Oduor Hawi Ambala & Another*, SC Applic No. 1 of 2021; [2021] eKLR, this Court pronounced that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. In the circumstances, the Motion for extension of time lacks merit.

35. Arising from the foregoing, it was therefore incumbent upon the Defendant/Applicant herein to account for and/or place before the Honourable court plausible and cogent evidence explaining the delay attendant to the filing of the current Application, which ostensibly seeks for the exercise of the discretion of the court.

36. Nevertheless, it is worthy to underscore that the Defendant/Applicant herein neither found it appropriate nor expedient to tender any explanation and in the absence of any explanation, it suffices to point out that the plea for the exercise of Equitable/Judicial discretion has thus been mounted and made in vacuum.

37. Consequently and in view of the foregoing, my answer to issue number one [1] is to the effect that the instant Application has been and mounted with inordinate delay, which has neither been accounted for nor explained.

38. Invariably, I find and hold that the instant Application is defeated by the Doctrine of latches. [See the Decision of the Court of Appeal in the Case of *Chief Land Registrar and others versus Nathan Tirop Koech and Others* [2019] eKLR, on the import and tenor of the said Doctrine]

Issue Number 2 Whether the Applicant herein has Established and Demonstrated Sufficient Cause to Warrant the Liberty to Pay Vide Instalments, in the Manner Proposed or at all.

39. Before venturing to interrogate and discuss whether or not the Applicant herein has tendered and/or established a sufficient cause, to warrant an order to liquidate the decretal sum vide installments, it is imperative to recall that the monies at the foot of the decree beforehand arose from the rental income/ proceeds, which were derived from the suit property belonging to and registered in the names of the Defendant/Applicant and the husband and Plaintiff/Respondent, now deceased.

40. Pertinently, there is no gainsaying that the monies at the foot of the decree accrued to and were collected by the Defendant/Applicant on the basis of the existence of a fiduciary relationship between the [Defendant/Applicant] and the Plaintiff/Respondent herein.

41. Furthermore, it is not lost on the court that the Defendant/Applicant and the Plaintiff/Respondent herein entered into a consent which was endorsed and adopted by the court on the 4th March 2014, wherein the Parties agreed that henceforth the Plaintiff's share and/or pro- rata rents derivable from the suit property shall be paid directly to and in favor of the Plaintiff/Respondent.

42. For good measure, the only bit of the rents which were to be subjected to audit and reconciliation [read, accounts] were the monies that had been received by the Defendant/Applicant prior to the date of the consent order.

43. Nevertheless, despite the existence of the said consent, which was voluntarily entered into by the Parties, the Defendant/Applicant herein continued to collect the rental income from the suit property and thereafter retained same for own [Selfish] use, without due regard to the interests and welfare of the Plaintiff/Respondent, who is his [Defendant's/Applicant's] sister in law.

44. Worse still, even though the Defendant/Applicant was privy to and knowledgeable of the terms of the consent entered into and endorsed on the 4th March 2014 and thereafter reiterated on the 3rd April 2014, the Defendant/Applicant herein deployed various tactics, whose net effect was to frustrate the actualization of the terms of the consent orders.

45. Other than the foregoing, it is also instructive to note that the Defendant/Applicant herein continues to treat the orders of the Honorable court with contempt, insofar as at the foot of the Letter dated 14th February 2024, which has been annexed as annexure ASS 3 attached to the supporting affidavit, the Defendant/Applicant still holds out that the rents accruing from the date of Judgment have not been factored in for payments because same have [sic] not been audited.

46. In my humble view, the Defendant/Applicant herein is privy to the monies that are being derived from the suit property by virtue of being the one who has placed the various tenants in the suit property. Furthermore, it is the Defendant/Applicant, who is in possession of the various lease/tenancy agreement[s] underpinning the occupation of the suit property.

47. Besides, the Defendant/Applicant herein is also privy to and knowledgeable of the terms of the Judgment which was rendered by the court and which effectively ordered and directed that rents accruing from the date of Judgment be paid directly to the Plaintiff/Respondent.

48. Notably, the Defendant/Applicant herein appears to be one who has very little regard and/or respect for court orders and by extension the Rule of Law. For clarity, the antecedent conduct of the Defendant/Applicant of disregarding and disobeying inter-alia the terms of the consent orders entered into on the 4th March 2014, 3rd April 2014; as well as the Judgment of the court, does not sit/ portend well with Equity; Human Rights and common sense.

49. Arising from the foregoing, the question that the court must now grapple with; is whether a person who has been knowledgeable of and privy to explicit terms of court orders, but has failed to comply therewith can now be heard to approach the court with a view to partaking of an Equitable remedy/ relief[s].

50. To start with, it is trite and established [hackneyed] that all and sundry, the Defendant/Applicant not excepted, is under an unqualified obligation to adhere to and/or abide by the terms and tenor of the orders of the court, until same are varied, set aside and/or otherwise stayed.

51. In this respect, it suffices to take cognizance of and to reterate the dictum in the case of *Hadkinson versus Hadkinson* (1952)2 ALL ER 211, where the court stated and observed as hereunder;

> "It was plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment...".

52. On the basis of the antecedent conduct of the Defendant/Applicant herein [details which have been highlighted elsewhere herein before], I would proceed to decline the plea by and on behalf of the Defendant/Applicant to liquidate the decretal sum vide monthly instalments in the manner sought.

53. Other than the foregoing, it is also imperative to recall that the monies which the Defendant/Applicant is seeking to liquidate and settle by installments, accrued to and were paid in favor of the Defendant/ Applicant on a fiduciary basis, insofar as a portion thereof constituted rental income payable to the Plaintiff's husband, now deceased and by extension to the Plaintiff.

54. Consequently and without belaboring the point, there is no gainsaying that the monies which underpin the decree beforehand were paid to and held by the Defendant/Applicant as a Trustee of the Plaintiff/Respondent. In this regard, the said monies ought to have been paid out to and in favor of the Plaintiff/Respondent timeously and with due promptitude.

55. To the extent that the monies were paid out to and held by the Defendant/Applicant as a Trustee, it is settled law that such kind of monies ought to be paid and released to the beneficiary [*Cestui qui*] thereof in lumpsum as and when same became payable, unless there exist[s] peculiar and exceptional circumstances, to warrant payment by instalments.

56. Unfortunately, as pertains to the subject matter, the Defendant/Applicant has neither spoken to nor demonstrated any exceptional circumstance to warrant liquidation/settlement of the decretal sum vide installment.

57. To buttress the foregoing exposition of the law, it suffices to take cognizance of the holding of the Court in the case of *Victoria Commercial Bank Ltd versus Charles Lutta Kasamani* (2001)eKLR, where the court stated and held thus;

> " In determining whether a judgment debtor should be allowed to pay by instalments, the Court must be satisfied of the existence of a sufficient reason to grant such a concession. The existence of sufficient reason will depend on the particular facts of the case.
>
> "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 bona fides by offering to pay anything lik e a fair proportion of his debt at once." – per Crawshaw J. in *Keshavji Jethabhai & Bros. Limited v. Saleh Abdulla* (*supra*) at p. 263.
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> Looking at the matter as a whole, it is clear that the Applicant has not shown any bona fides and I say so for various reasons.

58. Lastly, where a Party seeks the discretion of the court by dint of the provision of Order 21 Rule 12 of the *Civil Procedure Rules, 2010*; to pay and/or settle the decretal sum vide installment[s] such a Party must exhibit and demonstrate *bona fides* and not otherwise.

59. Nevertheless, as pertains to the instant matter, the various endeavors, which have been deployed by the Defendant/Applicant to delay, obstruct and/or better still, to defeat the realization of the decree of this court, do not demonstrate any bona fides on the part of the Defendant/Applicant.

60. To the contrary, the conduct of the Defendant/Applicant, which colors the record of the court; and which are discernable from the various Ruling[s] hitherto made by this Court, demonstrate *mala fides* and concerted efforts to disregard lawful orders of the court. Instructively, such conduct do not sit and/or portend well with Equity, common sense and the rule of law. [See the provisions of Article 10[2] of the *Constitution*, 2010]

61. In a nutshell, it is my finding and holding that the Defendant/Applicant has neither demonstrated nor espoused sufficient cause and/or basis to warrant the intervention of the court, either in the manner sought or at all.

Final Disposition:

62. Having reviewed the thematic issues, [which were enumerated in the body of the Ruling], it must have become crystal clear that the Application reeks of and/or is wrought with *mala fides* and hence undeserving of Equitable intervention.

63. Consequently and in the premises, I find and hold that the Application dated the 22nd February 2024, is not only premature and misconceived; but is legally untenable. In this respect, same [application] be and is hereby dismissed with costs to the Plaintiff/Respondent.

64. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MARCH, 2024.

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – Court Assistant.

Mr. E. M Kamau for the Plaintiff/Respondent.

N/A for the Defendant/Applicant.