



**Mwangi Kengara and Company Advocates v Suri (Environment & Land Miscellaneous Case E097 of 2021) [2024] KEELC 3958 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3958 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND MISCELLANEOUS CASE E097 OF 2021**

**OA ANGOTE, J**

**MAY 16, 2024**

**BETWEEN**

**MWANGI KENGARA AND COMPANY ADVOCATES ..... DECREE HOLDER**

**AND**

**AVTAR SINGH SURI ..... JUDGMENT DEBTOR**

**RULING**

1. The Judgement Debtor has through a Notice of Motion Application dated 6<sup>th</sup> March 2024, sought the following orders:
  - a. That the Applicant/ Judgement Debtor be granted leave to liquidate the decretal sum in 12 equal monthly instalments to be paid on or before the 5<sup>th</sup> day of each consecutive month until full and final settlement.
  - b. That the Advocate/ Decree Holder, their agents, servants and/or anybody under them be restrained from taking steps towards executing against any of the Applicant/ Judgement Debtor's properties in execution of the decree herein in so long as there is no default.
  - c. That the cost of this application be in the cause.
2. This application is based on the grounds that pursuant to the Judgement dated 6<sup>th</sup> March 2024, the Judgement Debtor owed the Advocate Kshs. 525,778.70; that the Applicant has previously written to the Decree Holder acknowledging the debt and proposing to settle the same in instalments and that the Decree holder has declined this request, and the Judgement Debtor is at risk of facing execution against his properties in satisfaction of the said decrees.



3. He claims that he is 85 years old and while he has a wide real estate portfolio, he does not have liquid cash, and that he will need a year to liquidate the properties as the property market is experiencing low sale in Nairobi.
4. The Judgement Debtor further deponed that he is facing financial hardships owing to the impact that the Covid-19 pandemic had on his business, but he is desirous to settle the decretal sum until payment in full. He deponed that no plausible prejudice will be suffered by the Decree Holder in allowing the application.
5. He contends that he is also currently serving an overdraft facility with Barclays Bank with monthly instalments of KShs. 1,177,122.00/- and a decretal amount of over KShs. 34 million in ELC Suit No. 738 of 2013, Parmit Kaur v Avtar Singh Suri.
6. The Decree Holder/Advocate opposed the application by way of a Replying Affidavit sworn on 19<sup>th</sup> April 2024. She deponed that this judgement debt arises from a certificate of taxation issued on 16<sup>th</sup> March 2022 and that the Judgement Debtor is in continuous violation of a valid court order and has not come to court with clean hands.
7. The Advocate/Decree Holder deponed that on 31<sup>st</sup> January 2024, the Judgement Debtor offered to pay the taxed costs in two instalments on condition that the Decree Holder drops the claim for Party & Party Costs and Interests.
8. The Advocate deponed that the bank statement produced as Exhibit AS-2 by the Judgement Debtor is aimed at misleading the court by showing that he only has KShs. 299,275.70 in the Bank and that exhibit AS-3 shows that the Judgement Debtor and his son, Jasbir Singh Suri, have a sum of Kshs. 155,555.600 in a retail fixed deposit account at ABSA Bank.
9. The Decree Holder averred that no loan agreement or bank statements have been produced before this court to show that the Judgement Debtor is in fact financing a loan with monthly payments of KShs. 1,177,122 and that Exhibit S4 is a mutilated decree as it lacks a court seal, date and execution section.
10. The Advocate argued that the Judgement Debtor is a person of great financial means and that it would be unjust for him to be granted 12 months to pay off the monies owed herein.
11. No submissions were filed by the parties.

### **Analysis and Determination**

12. This application has been brought pursuant to the judgement dated 6<sup>th</sup> March 2024, where this court found that the Judgement Debtor owed the Advocate Kshs. 525,778.70. The issues for determination are:
  - a. Whether this court should allow payment of the decretal sum in twelve deposits.
  - b. Whether the court should order for stay of execution against the Judgement Debtor's properties.
13. The application has been brought pursuant to Order 21 Rule 12 of the Civil Procedure Rules and has sought that this court orders that payment of the decretal sum be made by way of instalments. The Decree Holder has opposed the application and has asserted that the Judgement Debtor is a person of vast means who can afford to pay the decretal sum in full and that this application is an abuse of the court process.



14. Order 21 Rule 12 of the Civil Procedure Rules provides as follows:

- “ 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 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.
- (2) After 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 be made by instalments 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.”

15. In determining whether to allow an application to pay the decretal sum in instalments, the applicable principles that should guide the court in exercising its discretion were set out in the case of *Keshvaji Jethabhai & Bros Limited vs Saleh Abdulla* [1959] EA 260 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.”

16. Similarly, in *Singh Gitau Advocates vs City Finance Bank Limited* [2013] eKLR, Mabeya J., stated the following regarding what constitutes sufficient cause;

“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.”

17. In the case of *Freight Forwarders Ltd vs Elsek & Elsek (K) Ltd* (2012) eKLR, the court narrowed the principles as regards to what amounts to ‘sufficient cause’ to include the following;

- “ a) . The debtor is unable to pay in lump sum.
- b) The debtor can pay by reasonable monthly instalments.
- c) The application is made in utmost good faith.”



18. The Judgement Debtor has supported the application by adducing an account statement from Guardian Bank, indicating that as at March 2024, he only had Kshs. 299,275.70 in the account. He has also adduced a letter of offer from the bank dated 2<sup>nd</sup> July 2021, wherein he obtained a credit of Kshs.25,523,713/-, which he asserts he has been paying off in monthly instalments of KShs. 1,177,122.00.
19. The Judgment Debtor further indicated that the security of the credit are funds on retail fixed deposit of Kshs. 155,555,600.00, held in his name and that of his son, Jasbir Singh Suri.
20. It is noteworthy that in the letter of offer, only the Bank manager has signed. The Bank attorney has neither signed nor has such signature been witnessed. The Judgement Debtor has further adduced an application in ELC Suit No. 738 of 2013, in which he has sought that the decretal sum of Kshs. 2,065,55.50 be paid in twelve monthly instalments. As pointed out by the Decree Holder, the application was not dated or signed.
21. There is no doubt that the Judgement Debtor is a man of means and wealth, with the capacity to pay the decretal sum at once. Further, as at 31<sup>st</sup> January 2024, the Judgement Debtor was willing and able to pay the taxed costs in two instalments. While this application was undoubtedly made without unreasonable delay, this court is not persuaded that it has been made in good faith.
22. The Judgement Debtor has sought for orders of stay. It is trite that in an application for stay of execution, an applicant ought to show sufficient case, and that he stands to suffer substantial loss if the order is not granted. The Applicant also ought to furnish the court with security.
23. This was held in the case of *Elena Doudoladova Korir vs Kenyatta University* [2014] eKLR as follows:

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & another –vs- Thornton & Turpin Ltd* where the Court of Appeal (Gicheru J. A. Chesoni & Cockar Ag JA) held that

“The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- sufficient cause, Substantial loss would ensue from a refusal to grant stay. The Applicant must furnish security; the application must be made without unreasonable delay.”
24. In considering the definition of substantial loss, in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR, the court stated that the process of execution does not amount to substantial loss. It held as follows;

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
25. In his application, other than the process of execution, the Judgement Debtor has not set out special factors, that would require this court to issue orders of stay. No appeal has been filed or is pending with



respect to the judgement of this court. The Judgement Debtor has further admitted the debt that he owes to the Decree Holder.

26. Having found that the Judgement Debtor has the capacity and means to pay the decretal sum at once, there is no reasonable cause to issue orders of stay.
27. The application by the Judgement debtor is therefore dismissed and disallowed with no order as to costs.

Dated, signed and delivered virtually in Nairobi this 16<sup>th</sup> day of May, 2024.

**O. A. Angote**

**Judge**

**In the presence of;**

Mrs for Decree Holder

Ms Waigwa for Judgment Debtor

Court Assistant - Tracy

ELC MISC. NO. E 097 OF 2021

RULING

