



**Shitoko v Maxiguard Equities Limited (Employment and Labour Relations Cause 303 of 2014) [2023] KEELRC 2316 (KLR) (3 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2316 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 303 OF 2014**

**HS WASILWA, J  
OCTOBER 3, 2023**

**BETWEEN**

**GEORGE SHITOKO ..... CLAIMANT**

**AND**

**MAXIGUARD EQUITIES LIMITED ..... RESPONDENT**

**RULING**

1. Before me for determination is the applicant's Notice of Motion dated June 19, 2023, brought pursuant to order 51 rule 1 & 15, order 10 rule 11, order 22 rule 22 & 52, order 42 rule 6, order 21 rule 8 & 9, and order 2 rule 22 of the *Civil Procedure Rules*, sections 1A, 1B, 3A, of the Civil Procedures Act, seeking for the following Provisions; -
  1. Spent.
  2. That pending the hearing and determination of this Application interpartes, this Honourable Court be pleased to grant leave to the firm Mongeri & Co Advocates of Spikes Centre, 3<sup>rd</sup> Floor, Po Box 187, Nakuru to come on record on behalf of the Applicant.
  3. That pending the hearing and determination of this Application interpartes, this Honourable court be pleased to order a stay of execution of the Decree Judgement/ Ruling, notice to show cause warrants of arrest, taxation and any other consequential orders against the Applicant herein.
  4. That this Honourable Court be pleased grant the Applicant herein leave to liquidate the decretal sum in Monthly installments of Kshs. 10,000 as from July 30, 2023, till settlement in full.
  5. The costs of this application be provided for.



2. The Application is supported by the grounds on the face of the Application and the supporting affidavit of Josephine Kagendo Gichuru, the Director of the application. She stated that the applicant herein is willing to pay the decretal sum in instalment of Kshs 10,000 per month.
3. She stated that she does not have another source of income and therefore is unable to pay the entire sum in lump sum. She added that she has been ill and the sickness had drained all her finances.
4. The application is opposed by the respondent herein, who filed a replying affidavit deposed upon on July 1, 2023. In the affidavit, the affiant stated that the applicant has not annexed any evidence to show that she is unwell and unable to pay the decretal sum in lump sum. In any case that she has never communicated the intentions of paying in instalment to the respondent herein.
5. He stated that the respondent is a legal entity that cannot be said to be affected by the illness of one individual.
6. The respondent stated that the applicant has not indicated her willingness to pay the decretal sum with the proposed costs. But that she had indicated, through her advocates, that she intends to oppose the Bill of costs and has not acted to date.
7. He opposed the proportion made for payment of the decretal sum in instalment because the instalments are so low, that would mean that the applicant will complete payment of the decretal sum of Kshs 210,065.10 in 2 years and further 2 years to complete the proposed costs.
8. The respondent contends that the applicant is jumping the gun in seeking for stay of execution when, the said execution has not been commenced because the Bill of costs has not yet been taxed.
9. The affiant also stated that if stay is granted at this stage, their Bill of costs will not be taxed, when the said applicant has not opposed it. He thus urged this court to dismiss the application with costs.
10. Directions were taken for the application to be disposed of by written submissions with the applicant filing on July 10, 2023 and the respondent on July 13, 2023.

### **Applicant's Submissions.**

11. The applicant submitted that order 21 rule 12 (2) of the *Civil Procedure Rules* empowers this court to make orders for payment of the decretal sum in installments. That in considering whether to allow an application for payment of the decretal sum in instalments, the court is guided by four elements; the circumstances under which the debt was contracted, the conduct of the debtor, His financial position and his bonafide in offering to pay a fair proportion of the debt at once. These conditions were set out in the case of *Botanics Kenya Ltd v Ensign Food (K) Ltd* [1959] and the case of *A Rajabali Alidina v Remtulla Alidina & Another* [1961] EA 565.
12. The same elements were reiterated in the case of *Keshvaji Jethabbai & Bros Limited v Saleh Abdulla* [1959] EA. where the court listed the elements to consider as follows; -
 

“ . Each case must be considered on its merits; · Mere inability to pay in full is not sufficient reason for exercise of discretion; · The debtor must show his bonafide by arranging prompt payment of a fair proposition and Hardship to the debtor might be a factor. The question in each case is whether some indulgence can fairly be given to the debtor without prejudicing the creditor.”



13. The applicant also relied on the case of *TK Advocates v Baringo County Government* [2018] eKLR where the court held that; -

“any decision on whether a court should allow a party to settle a decree by installment is an issue of discretion to be exercised judicially; that the applicant was obligated satisfy the court that in the circumstances of his case such a request is deserved because a successful litigant who has a decree acquires a property right which is to be protected by courts. The court will not order a judgment debtor to pay by installment without the applicant making a case for it...”

14. Accordingly, the applicant urged this court to consider the reasons given for stay and payment in installments and allow the application as prayed.

### **Respondent Submissions.**

15. The respondent submitted on three issues; whether the Application is merited, whether the proposed payments are justified and who should bear costs of the application.

16. On the first issue, it was submitted that the applicant is seeking to stay taxation of the Bill of costs under its prayer 3 of the application, when she has not given a reason for stay of the said taxation. Further that the applicant is seeking for stay of notice to show cause, when the Bill of costs is yet to be taxed as such execution proceedings have not been placed on motion to warrant the prayers being sought. Furthermore, that there is no evidence tabled before this court to support the assertions that the Director of the applicant is unwell and the company is unable to pay the decretal sum in lump sum.

17. On whether the proposed instalments are justified, it was submitted that the applicant has not tabled any financial report in support of allegations that the company is struggling. Secondly that the proposed instalment is so low that it will see the applicant finish payments in instalments in 2 years for the decretal sum and another 2 years for payment of the costs. Also that the proposals made herein have not been made to the respondent before the application herein was filed, raising questions whether the same was brought in good faith or to deny the Respondent enjoyment of the fruits of his judgement.

18. On that basis, the respondent urged this court to disallow the Application herein with costs.

19. I have examined all averments and submissions of the parties. There are 2 orders sought before me and the first one is to allow the firm of Mongeri & Co. Advocates come on record on behalf of the applicants.

20. There is no opposition to this prayer. I therefore exercise my discretion and allow the firm of Mongeri & Co. come on record on behalf of the respondents.

21. The 2<sup>nd</sup> application is for stay pending execution and also for this court to allow payment of the decretal sum in instalments of 10,000/= per month.

22. The applicant avers that he has been indisposed and is unable to pay the entire decretal sum.

23. The applicant indicated that he is the Director of the respondent applicant. He never attached any documents to prove the illness alleged nor did he display the accounts of the respondent to show their inability to pay the decretal sum.

24. The application to pay the decretal sum in instalments is a discretionary remedy which this court may grant or not based on the circumstances of the case.



25. The decretal sum awarded by court is in excess of 200,000/=. If this court was to allow payment in instalments of 10,000/= the amount would finally be paid after 2 years.
26. This is a 2014 matter and allowing payment in instalments of 10,000/= would be unfair to the claimant who has waited for close to 9 years to get the fruits of his Judgment.
27. I therefore decline to grant the orders for payment in instalments of 10,000/= per month.
28. I will exercise my discretion and allow payment of the decretal sum as follows;
  - a. ½ the decretal sum be paid within 30 days.
  - b. The balance be paid in instalments of 5 equal amounts until payment in full.
  - c. In default, execution may proceed.
  - d. Costs in the cause.

**RULING DELIVERED VIRTUALLY THIS 3<sup>RD</sup> DAY OF OCTOBER, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of:-

Maragia for Claimant – present

Moenga holding brief for Mongeri for Applicant – present

