



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 98 OF 2010**

*(Before Hon. Lady Justice Maureen Onyango)*

**JOHN WANJOHI WAKAHORA**

**CLAIMANT/DECREE HOLDER**

**VERSUS**

**LINKSOFT COMMUNICATIONS SYSTEMS LIMITED**

**RESPONDENT/APPLICANT**

**RULING**

1. Judgment herein was delivered on 31<sup>st</sup> January 2020. Ruling on the bill of costs was delivered on 11<sup>th</sup> September 2020. By letter dated 23<sup>rd</sup> June 2021 and 8<sup>th</sup> July 2021, the Claimant/Decree Holder demanded payment of the decretal sum

2. The Claimant/Decree Holder thereafter proceeded to execute for the decretal sum and the judgment debtor's property was attached on 27<sup>th</sup> July 2021. It is the proclamation triggered the filing of the instant application.

3. By an application by way of notice of motion dated 29<sup>th</sup> July 2021 made under Section 1A, 1B and 31 of the Civil Procedure Act, Order 21, Rule 12(3), Order 51 Rule 1 of the Civil Procedure Rules 2010 the Applicant seeks the following orders –

i) Spent.

ii) *THAT pending the inter-partes hearing and determination of this Application, this Honourable Court be pleased to order a temporary stay of execution of the warrants of attachment and sale issued by this Honourable Court on 27 July 2021 in execution of the Decree herein.*

iii) *THAT this Honourable Court be pleased to grant leave to the Applicant to liquidate the decretal sum in equal monthly instalments of Kshs. 400,000.000 until payment in full.*

iv) *THAT as a consequence to order No. 3, this Honourable Court be pleased to set aside the warrants of attachment and sale issued on 27<sup>th</sup> July 2021 and the proclamation notice issued by Bemac Auctioneers and that an order be issued unconditionally raising or lifting the attachment of all the assets proclaimed.*

v) *THAT this Honourable Court be pleased to make any other orders as it deems fits in the circumstances.*

vi) *THAT the costs of this Application be provided for.*

4. The grounds in support of the application are that –

a) *By a judgment delivered on 31<sup>st</sup> January 2020, this Honourable Court ordered the Applicant to pay damages to the Claimant in the sum of USD 45,000.00 plus interest at court rates from the date of filing suit and costs of the suit.*

b) *The parties thereafter proceeded to tax the costs payable to the Claimant. By a Ruling delivered by Hon. D. Mutai (DR) on 22<sup>nd</sup> June 2021, the Claimant was awarded costs in the sum of Kshs.294,992.00*

c) *The Claimant thereafter extracted the decree and on 27 July 2021 warrants of attachment and sale were issued to Messr. Bemac Auctioneers to recover the sum of USD 59,850.00 and Kshs.297,373.00, the decretal sum.*

d) The Applicant was then served with a seven (7) day proclamation notice by the aforesaid Auctioneers on 27<sup>th</sup> July 2021. The proclamation notice is scheduled to lapse on 3<sup>rd</sup> August 2021.

e) Whereas the Applicant is ready and willing to settle the decretal amount, it has been experiencing cashflow/financial challenges and it has and continues to accumulate significant losses. As a result, the Applicant is unable to settle the entire decretal amount in a lumpsum payment as sought by the Claimant.

f) Having evaluated its current and projected business performance, the Applicant is ready and willing to pay the decretal sum in equal monthly instalments of Kshs. 400,000.00 starting from August 2021 until payment in full. To this end the Applicant has already issued two cheques to the Applicant's Advocate for Kshs. 400,000.00 for the months of August and September 2021 and it is committed to ensure that the said cheques are cleared on the dates they fall due.

g) In the premises, the Applicant is reasonably apprehensive that unless a stay of execution of the warrants issued herein is granted and the attachment of the assets proclaimed in the Auctioneer's notice dated 27<sup>th</sup> July 2017 is lifted, the Auctioneer will proceed to sell the said assets. Such an eventuality would not only render this Application nugatory but would also occasion the Applicant substantial loss including loss of its key tools of trade.

h) The Applicant has good, sufficient and reasonable reasons warranting the grant of leave to settle the decretal sum in instalments.

i) No prejudice will be occasioned to the Claimant in the event this Application is allowed as the Applicant fully intends to settle the decretal sum by way of instalments.

j) It is in the wider interest of justice that the Application be allowed as prayed.

k) This Application has been presented at the earliest opportunity.

5. In the supporting affidavit of ANTHONY WAHOME, the Chief Executive Officer of the Respondent, he reiterates the grounds on the face of the application and further avers that the Respondent is ready and willing to settle the decretal sum save that owing to its current financial position, it is only able to do so in monthly instalments of Kshs.400,000.00.

6. The Affiant avers that the Respondent/Applicant has been experiencing cash flow constraints and it has accumulated significant losses over the years. That the Applicant's shareholders' equity and cash balances are in the negative.

7. That the Respondent/Applicant has made several attempts and put a lot of effort into turning around its financial situation owing to the current economic times including the effects of Covid 19 on the economy and businesses at large but these efforts have not realized much progress in turning around the Company's financial position. That a total financial turn around of the company would require a longer and more reasonable timeframe.

8. The Claimant/Decree Holder opposes the application and filed a replying affidavit sworn by JOHN WANJOHI WAKAHORA, the Decree Holder. He states that by letter dated 24<sup>th</sup> February 2020, the Respondent requested to settle the decretal sum in instalments, which he categorically declined by letter dated 16<sup>th</sup> March 2020.

9. That on 3<sup>rd</sup> July 2020 and 20<sup>th</sup> July 2020 his Counsel forwarded account details together with a tabulation of costs of the suit to Counsel for the Respondent to prompt settlement which was not done.

10. That his Counsel thereafter filed a bill of costs dated 11<sup>th</sup> September 2020 which was fully taxed on 22<sup>nd</sup> June 2021, with the Respondent/Applicant fully participating in the taxation proceedings.

11. That by letter dated 23<sup>rd</sup> June and 8<sup>th</sup> July 2021 his advocates demanded settlement of the decretal sum within seven days and advised the Respondent/Judgment Debtor that in default it would execute the decree.

12. That the Claimant/Decree Holder thereafter instructed Bemac Auctioneers who proclaimed the Respondent's goods, prompting the instant application.

13. It is the Decree Holder's averment that contrary to what is deponed in the application by the Respondent/Applicant, it has not been ready and willing to settle the decree herein and is not deserving of the orders sought as its conduct is of a person who has deliberately obstructed the cause of justice. That since January 2020 it has been aware of the judgement herein which has neither been settled or set aside.

14. That no cogent grounds have been tendered by the Respondent/Applicant to justify the stay of execution sought. That the cashflow/financial challenges and losses accrued by the Respondent/Applicant in fact threaten the settlement of the decretal sum, interest and costs due to him as the Respondent/Applicant seems to be facing imminent collapse.

15. That neither particulars of any substantial loss have been proffered by the Respondent/Applicant nor any proposal been made for the issuance of such security for the performance of the decree herein. That no appeal and/or application to set aside has been filed against the judgement herein.

16. It is the Decree Holder's averment that the orders sought are incapable of being granted as stay of execution can only be granted under

Order 22 Rule 25, 49 and 50.

17. Further, that inability to pay in full at once is not a sufficient reason for exercising discretion in favour of the Applicant, for a decree that has been pending for more than 17 months.

18. The application was disposed of by way of written submissions.

19. The Applicant submits that in granting an order under Order 21 of the Civil Procedure Rules, the Court exercises its judicial discretion so as to balance the rights of a decree holder who is on the one hand entitled to the fruits of its judgement as well as the rights of a bona fide judgment debtor who is willing to honour the judgement but is otherwise unable to pay the decretal sum in one instalment but has demonstrated ability to honour reasonable instalment payments and has made arrangements for such payments.

20. The Applicant submits that it has fulfilled the requirements for grant of the orders sought having demonstrated by way of financial statements that it has been experiencing cash flow constraints and has accumulated significant losses over the years and that it has made arrangements to settle the decretal sum as demonstrated by payment of the instalments due for August, September and October 2021 towards liquidating the judgment debt.

21. The Respondent/Applicant relies on the decision in the case **Japheth Muita Githaiga v Presbyterian University of East Africa [2020] eKLR** where the Court held as follows:-

*“It is worth noting that the decree emanates from judgement of this Court which ordered the Respondents to pay the Claimant/Respondent herein his gratuity upon his resignation in 2015.*

*There is a balance which the Respondent needs to clear. In view of the prevailing Covid 19 issues which has led to scaling down of the Respondent's activities, then economic situation could be a reality. However, I note that gratuity is an employment benefit, which cannot be withheld for long. In the circumstances, I allow stay on condition that the Applicants pay the Respondent/Claimant his dues as per the decree as follows: - ½ of the balance owing within 30 days. The remainder of the decree be settled in instalments of 200,000/= per month. In default of any one instalment, execution to issues.”*

22. The Judgment Debtor further relies on the case of **Zlatko Rostocil v James Samuel Kinyanjui [2013] eKLR** where the court held as follows:

*“I find as follows. The judgment debtor does not dispute the decree... He states he has every reason to meet the decree but not by a lumpsum payment. It is common ground that the decretal sum was in the region of Kshs.25,821,374.50. It is a substantial sum. Since his release from civil jail, he has paid Kshs.10,500,000. He has paid some instalments of Kshs.200,000 per month. The decree holder concedes that the balance is now about Kshs.15,421,374.50. I do not doubt that the applicant last paid Kshs.200,000 in March 2012 .... But having paid Kshs.10,500,000, I cannot say that the applicant has not shown bona fides .... The instalments proposed may seem low in relation to the outstanding debt but they seem reasonable. The decree holder has not presented cogent evidence to show the applicant can pay higher instalments. Between 20<sup>th</sup> July 2010 and 23<sup>rd</sup> March 2012, that has been the instalment rate paid towards the decree. I see no good reason for the decree holder to hit the applicant in the teeth when he is down. In the end, I find that the applicant has demonstrated sufficient reason and bona fides for an order to postpone payment of the decree by payment of instalments of Kshs.200,000 per month.”*

23. The Applicant also relied on the case **Kenneth Mutiga v Ntima Farmers Co-operative Society Ltd & another [2011] eKLR**, where the court held as follows: -

*“The rule provides that after judgment, the decretal amount can be paid by instalments with the consent of the decree holder and if no consent is forthcoming where sufficient cause is shown to the court. The 1<sup>st</sup> defendant in its supporting affidavit ...pleaded that it would be unable to pay the whole sum at once. That its principal business is to receive coffee deliveries from its members for sale. That the minimum commission it received for the years 2006 to 2009 was 20%. That the commission earned is the only source of the 1st defendant' income and that it cannot raise any other funds to enable it pay the amount of the judgment in this case. The 1<sup>st</sup> Defendant annexed copies of income and expenditure account, statistical information for the years 2006 to 2009 amongst other documents. The 1<sup>st</sup> defendant deponed through its replying affidavit that it was experiencing serious financial constraints and pressure from its creditors who at the end of the close of the year 2009 stood at Kshs.2,703,129/=. It was also stated that it had an outstanding bank loan with the Co-operative Bank of Kenya which requires regular servicing. The 1st defendant mentioned that the coffee industry which is its main stay was experiencing a decline in Kenya. It is in that background that it sought that the court will grant it leave to pay the decretal sum by monthly instalments of Kshs.40,000/=. It should be noted that the 1<sup>st</sup> defendant has to date deposited into court Kshs.340/= towards the liquidation of the decretal sum. In that, the 1st defendant has shown good faith...Having considered the lengthy affidavits sworn on behalf of the 1<sup>st</sup> defendant and the replying affidavit of the plaintiff, I am satisfied that the 1<sup>st</sup> defendant have substantially shown sufficient cause why it should be allowed to pay the decremental amount by instalment.”*

24. The Applicant submits that its proposal of Kshs.400,000/- a month is reasonable as it is in the range of the decree holder's former monthly salary of USD 5,625.00.

25. It is further the Applicant's submissions that this Court has powers to grant the prayers for stay of execution relying on the decision in **Zlatko Rostocil v James Samuel Kinyanjui [2013] eKLR** where the court held as follows:

*“Under Order 22 rule 22, the court again has discretion to order a stay of execution .... The judgment debtor has demonstrated good faith by paying Kshs.10,500,000 towards the decree. I have made a suitable order to liquidate the balance. I will in the interests of justice and the overriding objective of the court stay the issue of warrants of arrest and committal of the defendant to civil jail. It would be to turn logic onto its head to expect the judgment debtor to service the judgment debt on the one hand and to hold the sword of Damocles over his head by threat of incarceration to civil jail. But if the judgment debtor does not meet the instalment payments on their due date, the decree holder shall be at liberty to execute the decree.”*

26. For the Decree Holder it is submitted that the factors that a court must consider before exercising its discretion to grant stay are discussed in the case of **Intel corporation v Via Technologies Inc. 2002 3 HKC 650** where it was stated that:

*"In stay of proceedings the court must consider what would serve the ends of justice between the parties to the litigation and the administration of justice. Generally, a stay should not cause an injustice to the plaintiff. The applicant for stay must satisfy the court that continuing the proceedings would be unjust to him. Where the plaintiff continues proceedings as of right he should not be deprived of the right to continue those proceedings in the absence of very good reasons. In considering the interest of justice, plainly one must consider the claims of both parties (See **Bertel Ltd v Balt Brassiere Co. Ltd 1970 RPC 469**)."*

27. It is submitted that the warrants of attachment sought to be stayed are lawful and the Claimant/Decree Holder has a right to enjoy the fruits of his judgment. That the Applicant has not tendered cogent grounds to justify stay of execution. That the Civil Procedure Rules only provide for stay of execution pending determination of suit under Order 22 Rule 25 or for withdrawal of an attachment under Order 22 Rule 49 and 50.

28. The Decree Holder further relies on the decision in **Republic v Kenyatta University; Losem Naomi Chepkemoi (Ex parte) [2021] eKLR** the court surmises the above as thus;

*".... However, as between a decree holder and judgment holder the Civil Procedure Rules only provide either for stay of execution pending determination of a suit between the parties under Order 22 Rule 25 of the Civil Procedure Rules; or for the withdrawal of an attachment or termination of execution under Order 22 Rules 49 and 50. In the latter case, an attachment can be terminated in the following circumstances;*

*(a) The decreed amount, all costs, charges, and expenses from the attachment of property are paid into the court, or*

*(b) Satisfaction of the decree is made through the court or certified to the court, or*

*(c) The decree is set aside or reversed upon application.*

*Other than the above procedure which is the one available to the Respondent herein as judgment-debtor, the only other applicable procedure for lifting warrants of attachment and sale are the objection proceedings by a third party/objector is provided in Order 22 Rule 51 to Rule 54.*

*It is evident that the Respondent has applied a wrong procedure in seeking to have the warrants of attachment and sale lifted, and has not demonstrated any of the grounds provided by law for such attachment to be substantively determined, since the decree that is the basis of the execution herein still remains valid and unsatisfied.”*

29. The Decree Holder further relies on the decision in **Keshavji Jethabhai & Brothers Ltd v Saleh Abdul [1959] EA**, quoted with approval in **Bertha Awuor Kowido v Speed Capital Limited [2021] eKLR**, where the Court held that;

*“... the mere fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reason for granting leave to pay by instalments. Ordinarily he should be required to show his bona fides by arranging prompt payment of a fair proportion of the debt, although prompt payment of a fair proportion of the debt is not a condition precedent for the exercise of the discretion of granting instalments. Each case has to be decided on its own merits, the predominant factor being of course the bona fides of the judgment debtor.”*

30. The Decree Holder concludes that the Judgment Debtor is not deserving of the order to pay by instalments as grant of the same will seriously prejudice the Decree-holder for the following reasons;

a. Since judgement was delivered on 31<sup>st</sup> January 2020, it had been more than 17 months without it making any attempts to settle the decretal sum, interest and costs, its knowledge of the same notwithstanding.

b. Up until August 2021, when the Court compelled it, the Judgment-debtor had not made any payment towards settlement of the decretal sum, interest and costs and had therefore shown no bona fides in settling the same.

c. The application is thus not made in good faith but only to frustrate the Decree-holder's realization of the just desserts of his judgment.

d. Whereas the Judgment debtor pleads cash flow and financial difficulties, the same did not start recently and the Decree-holder is in similarly if not more dire financial straits as he has never stabilized financially since the Judgment debtor unlawfully terminated his employment in the year 2009.

31. That in the circumstances, greater prejudice would be upon the Decree-holder should the Court allow the stay of execution and payment by instalments of the decretal sum, interest and costs.

### **Analysis and Determination**

32. Order 21 Rule 12(2) provides as follows –

**After passing of any such 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.**

33. From the record, it is evident that as early as 24<sup>th</sup> February 2020, the Respondent requested the decree holder to allow it to settle the decretal sum in instalments but the Decree Holder refused. This is what is deposed at paragraph 7 of the replying affidavit of the Decree holder where he states –

*7. THAT by a letter dated 24<sup>th</sup> February, 2020 the Respondent acknowledged receipt of the Judgement and requested to settle the decretal sum in instalments, determination of the rate of interest to be applied and tabulation of costs.”*

34. It is further evident that the Decree holder was all the time aware of the financial status of the Respondent. At paragraph 24(d) of the replying affidavit, the Decree Holder deposes that:

*d) Whereas the Respondent/Applicant pleads cash flow and financial difficulties, the same did not start recently and I am similarly if not more dire financial straits myself as I have never stabilized financially since the Applicant unlawfully terminated my employment in the year 2009.*

35. The Judgment Debtor has shown goodwill by starting to make the payments that it had proposed to make, even before the orders are granted. It has pleaded that it is ready and willing to pay the decretal sum but only pleads to pay in instalments due to cash flow problems as explained in the supporting affidavit.

36. Order 21 Rule 12(10 and (2) gives this Court powers to grant leave to a Judgement Debtor to pay a money decree by instalments if there is sufficient reason to do so.

37. The Claimant/Decree Holder has not contested the authenticity of the audited accounts for 2019 and draft audited accounts for 2020 produced by the Applicant at annexures “LIN-3” and “LIN-4” of the Applicant’s supporting affidavit.

38. I am satisfied that the Applicant has demonstrated goodwill and bona fides. I am further satisfied that the Judgment Debtor has demonstrated that it has been experiencing cash flow problems and that given time it will be in a position to fully settle the decretal sum.

39. I am at the same time conscious of the legitimate expectations of the Decree Holder, who is in possession of a valid decree, that he will be paid the entire decretal sum once the same is pronounced by the Court, and that he has been waiting for the fruits of his judgment since the judgment was delivered.

40. Taking all these into consideration, I make the following orders:

**(1) The decree and warrants issued to Messrs BEMAC AUCTIONEERS for execution of the decretal sum herein are suspended on the following terms: -**

**(a) That the Judgment Debtor pays the decretal sum in instalments of Kshs.500,000/- per month with effect from 1<sup>st</sup> March 2022.**

**(b) That all instalments due from the date of this Court’s orders permitting the Judgment Debtor to pay the decretal sum in instalments from 3<sup>rd</sup> August 2021 are made on or before 1<sup>st</sup> March 2022.**

**(c) That the Judgment Debtor shall pay Auctioneer’s fees for proclamation to be agreed or as taxed by the Taxing Master if not agreed.**

**(d) That in default of any one instalment or any condition herein, the suspension of the warrants shall be automatically lifted and the Decree holder shall be at liberty to execute for the entire decretal sum outstanding together with costs and interest.**

**(2) The Judgment debtor shall bear the costs of this application.**

41. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF FEBRUARY 2022**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**