



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 809 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

NAHASHON MAINA..... 1ST CLAIMANT/DECREE HOLDER

PHILIP MAINA..... 2ND CLAIMANT/DECREE HOLDER

PENNIDICTORS MBUVI.....3RD CLAIMANT/DECREE HOLDER

LUCY ATIENO.....4TH CLAIMANT/DECREE HOLDER

JOSHUA KIBISU.....5TH CLAIMANT/DECREE HOLDER

HARACE ONGILI.....6TH CLAIMANT/DECREE HOLDER

VERSUS

CENTRAL PARK HOTEL..... RESPONDENT/APPLICANT

RULING

1. Judgment in this case was entered in favour of the Claimants against the Respondent on 13th September 2021 in the sum of Kshs.933,939/- plus costs and interest at Court rates.

2. The Respondent, pursuant to the provisions of Order 21(1) Order 22 of the Civil Procedure Rules Sections A1, 1B, 31 of the Civil Procedure Act and Article 159(1) and (2) of the Constitution of Kenya 2010 seeks the following orders –

(a). THAT the Honourable Court be pleased to order stay of execution of the judgment of the Court issued herein on 13th September 2021 pending the hearing and determination of this Application;

(b). THAT the Honourable Court be pleased to give leave to the Applicant to liquidate the judgment sum awarded to the Plaintiff herein, being Kshs.933,939/- plus costs and interest, in monthly installments of Kshs.50,000/— to be paid from the date of the order until final settlement;

(c). THAT the Honourable Court be pleased to restrain the Claimants/Decree Holders from levying execution herein for as long as the Applicant pays the proposed monthly instalments;

(d). THAT the Honourable Court be released to issue any other order as may seem just;

(e). THAT the costs of this Application be provided for.

3. The application was made under a certificate of urgency on 1st November 2021.

4. The application is supported by the affidavit of JANET NJERI WANJIKU the Human Resource Manager of the Respondent/Applicant who depones that the Respondent/Applicant obtained a thirty (30) day stay of execution which lapsed on 13th October 2021. That the Applicant is in the hospitality industries which was adversely affected by the COVID 19 pandemic and the business remained closed from March 2020 to January 2021 and recovery has been slow. That its advocates had engaged the Claimants/Decree Holders' Counsel on the way forward specifically on payment of the decretal sum by instalments.
5. It is deponed that at the onset of negotiations, the Applicant was optimistic that it would manage a high monthly instalment to liquidate the sum but the reality has been different. The business continues to record low revenue as evidenced by the bank statements of account from August to September 2021.
6. That attempts by the Applicant to delay other payment so as to liquidate judgment sum has not enhanced revenues and the business is barely surviving. That in September 2021 for instance, the total income amounted to Kshs.3,491,197/- against total expense of Kshs.7,373,946/-. That in the circumstances the Applicant is willing to settle the decretal sum in monthly instalments of Kshs.50,000/- and seeks the Claimant/Decree Holders indulgence to pay Kshs.50,000/- per month effective October 2021 and as a sign of good faith the Respondent/Applicant has complied with the nonmonetary orders of the judgment such as issuance of certificate of service.
7. That if the orders are not granted, the Applicant will not only be distressed but its business will not survive and may be wound up. That if the Applicant is permitted to settle the decretal sum as proposed, the Claimants/Decree Holders will recover all its monies with a period of one (1) year or earlier should the business recovery grow.
8. That unless a stay is granted the Applicant will suffer substantial loss if execution proceeds.
9. The Claimants responded to the application by a replying affidavit deponed by their Counsel and dated 16th November 2021. Counsel opposes the application on the ground that it is fatally defective and is an abuse of the Court processes since the Court delivered its judgment in favour of the Claimants on 13th September 2021 and additionally granted the Respondent/Applicant herein thirty (30) days stay of execution.
10. That the Applicant wrote to the Claimants' Counsel on 6th October 2021 proposing to pay the decretal amount in five (5) monthly instalments of Kshs.200,000/- for the first four (4) months and Kshs.133,939/- plus agreed costs as the last instalment. In their responses, the Claimants/Decree Holders herein declined the proposal and made a counter proposal of a payment of monthly instalment of Kshs.300,000/- in three instalments and Kshs.433,939/- as the last instalment.
11. The Applicant's Advocates responded to the proposal by emails on 12th, 19th and 26th October 2021 and requested for account details to enable the Applicant herein issue a cheque and the same were sent.
12. That on 28th October 2021, the Claimants/Decree Holders Advocates received a letter from the Applicant's Advocates enclosing the Claimants' certificates of service and information that the Applicant had deposited Kshs.50,000/- in the Claimants/Decree Holders Advocates account as part payment of the decretal sum.
13. That on 1st November 2021 the Claimants' Advocates acknowledged receipt of the Kshs.50,000/- and registered his disagreement with the deposit.
14. That on 1st November 2021, the Applicant deposited Kshs.100,000/- into the Claimants' Advocates account which did not settle the agreed instalment for the month of October.
15. It is the Claimants/Decree Holders' contention that the proposal by the Respondent/Applicant herein to liquidate the decretal sum by Kshs.50,000/- per month is ordinally low as against its earlier proposal

even after the Claimants' Counsel's indulgence that the decretal sum be paid by instalments.

16. That the Respondent/Applicant is in default of the payment of the monthly instalments as agreed and the stay granted by the Court has already lapsed.

17. That the allegation that the business was adversely affected by the COVID 19 pandemic closures and was struggling would not justify an order for stay. That the Applicant must establish sufficient cause and the Court has to be satisfied that loss would ensue from refusal to grant a stay.

18. That the application is intended to defeat the cause of justice and an excuse to frustrate and deny the Claimants their entitlement.

19. That if the Court finds it just to indulge the Applicant in settling the decretal sum by instalments, the same should be consent with the Claimants' proposal in their letter dated 6th October 2021 in response to the Applicant's letter dated 6th October 2021 since the proposal was a fair and reasonable indulgence in settling the decretal sum so as not to deny the Claimants the fruit of their judgment.

20. Finally, the Claimants pray the application be dismissed with costs.

Submissions

21. The Applicant identifies the only issue for determination as whether the Applicant is deserving of the orders sought in the application. Reliance is made on Order 21 Rule 12 of the Civil Procedure Rules which empowers the Court for any sufficient reason to order that the payment of the amount decreed be postponed or be made by instalments with or without interest. It is submitted that the Applicant has shown sufficient cause for the order to settle the decretal sum by instalments.

22. The decisions in **Keshavji Jethabhai & Brothers Limited v Saleh Abdulla [1959] E.A. 260** is relied upon to urge what amounts to sufficient cause that: -

- 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.
- 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.

23. Reliance is also made on the decision in **African Banking Corporation Limited v Florence Wangari Wangai [2012] eKLR**.

24. The Applicant submits that the delay in settling the decretal sum was not deliberate but a consequence of financial constraints owing to the effects of the COVID 19 pandemic as deponed in the supporting affidavit. That the closure of the business from March 2020 to January 2021 and the sluggish recovery has adversely affected cashflow.

25. That documents on record show that income for September 2021 was Kshs.3,491,197/- against expenses of Kshs.7,373,946/- and payment of the decretal sum is impossible. That the Applicant has already issued the Claimants with certificate of service to enable them move on.

26. On payment by reasonable monthly instalments, it is submitted that Applicant has since the date of judgement settled the decretal sum by monthly instalments in light of its constrained financial position and seeks an order to reinforce the same. That having already paid Kshs.250,000/- of the decretal sum, monthly deposits of Kshs.50,000/- is manageable and reasonable to protect the business from collapse.

27. As regards good faith, the Applicant relies on the decisions in **Benard Kipkemoi Soy v Laban Cherongony [2019] eKLR**, **Tabu Tuva Khonde v Ngomeni Swimmers Limited [2021] eKLR** and **Keshavji Jethabhai & Brothers Limited v Saleh Abdulla [1959] E.A. 260** to urge that good faith is critical in the determination of applications of this nature and the Applicant has conducted itself in good faith by for instance paying Kshs.250,000/- from the date of judgment.

28. Finally, it is submitted that the Applicant be granted leave to settle the decretal sum by instalments of Kshs.50,000/- per month and the Claimants/Decree Holders herein be restrained from levying execution against the Applicant so long as the Applicant pays the proposed monthly instalment.

29. The Claimants/Decree Holders opted to rely on the replying affidavit and did not file submissions.

Determination

30. The issue for determination is whether the Respondent/Applicant herein deserves the orders sought in the application dated 28th October 2021. Put differently whether the Respondent/Applicant has made a case for the Court to exercise discretion in its favour.

31. The orders provided for under Order 21 Rule 12 of the Civil Procedure Rules are discretionary and the Court is enjoined to exercise its discretion on the basis of the facts and circumstances presented before it by the Applicant being aware that a decretal sum remains unsatisfied and the Respondent has a judgment in its favour.

32. Under Order 21 Rule 12, the Applicant must demonstrate sufficient cause for the Court to exercise discretion in its favour.

33. As mentioned elsewhere in this ruling, the principles governing “*sufficient cause*” were laid down in **Keshavji Jethabhai & Brothers Limited v Saleh Abdulla (supra)**.

34. As regards inability to pay in lumpsum, the Respondent/Applicant relies on the effects of the COVID 19 pandemic which led to closure of the business from March 2020 to January 2021 and the sluggish recovery of business in the hospitality sector. The Claimants/Decree Holders contend that the effects of COVID 19 do not amount to sufficient cause.

35. It is not in dispute that the COVID 19 pandemic has had negative impact on the society generally and the business sector in particular. The hospitality sector has borne the brunt of it and the Applicant’s submission is plausible as evidenced by the bank statements for August and September 2021 and the statement of account for September 2021 where the total expenses exceeded the total income substantially.

36. From the evidence on record, it is evident that the Respondent/Applicant lacks the wherewithal to liquidate the decretal sum in lumpsum without compromising the business as a going concern. However, this is not sufficient cause.

37. As to whether the Applicant can pay by reasonable instalments, the Applicant relies on payment of a total of Kshs.250,000/- from September to November 2021, to urge that Kshs.50,000/- monthly instalment is reasonable.

38. The Claimants/Decree Holders are opposed to the proposal on the ground that it is inordinately low. Relatedly, it is far below the amount the Applicant had on its own motion proposed in its letter dated 6th October 2021 of Kshs.200,000/- per month to which the Claimants/Decree Holders made a counter proposal of monthly instalments of Kshs.300,000/-.

39. The Court is in agreement with the Claimants/Decree Holders’ position that the proposal to pay the decretal sum by monthly instalments of Kshs.50,000/- would largely deny the Claimants/Decree Holders the fruits of their judgment.

40. Simply stated, by this proposal, the Applicant seeks the Court's indulgence to pay the outstanding balance in more than six months which is undeniably too long. Even in the context of the harsh business environment and having regard to the Respondents/Applicants business, the Court is not satisfied that the proposal to pay the decretal sum by equal monthly instalments of Kshs.50,000/- is reasonable. As stated in **Keshavji Jethabhai & Brothers Limited v Saleh Abdulla (supra)** payment of "way of instalments should not prejudice the creditor".

41. As regards utmost good faith the Applicant relies on the payment of Kshs.250,000/- of the decretal sum between September and November 2021, dispatch of the certificate of service and being candid as stated in **African Banking Corporation Limited v Florence Wangari Wangai (supra)** as follows –

"My view is, an applicant who wishes a court to exercise its discretion and order payment of a decretal sum by way of instalments must be very candid with the court. Such an applicant must present to the court sufficient material to show that he/she is a person of no means, that whatever income she/he has is lawfully committed elsewhere. He/she must disclose to the court all his/her means and explain to the court why the proposed instalments are the best option available. Accordingly, the burden is on the applicant to prove/show that he/she deserves the order sought."

42. In **Hildegard Ndalut v Lelkina Dairies Ltd & Another [2005] eKLR** the Court stated that –

"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".

43. The issue of good faith or bona fide was also held to be an important consideration to the determination of such applications in **Benard Kipkemoi Soy v Laban Cherongony (supra)** as follows: -

"The common thread across the decisions is that courts will allow payment of decretal sums by instalments if the offer is made in good faith ..."

44. In addition to its bank statement form 1st September 2021 to 30th September 2021 and 1st August 2021 to 31st August 2021, the Respondent/Applicant herein has furnished copies of other financial commitments including security and insurance and consumables.

45. On a balance of probabilities, the Court is satisfied that the Respondent/Applicant made this application in good faith.

46. On hardship to the debtor, it is evident that the Respondent/Applicant has no capacity to liquidate the decretal sum at once or do so in huge amounts in light of its financial position but it is also clear that the amount proposed as monthly instalment would while indulging the debtor greatly prejudice the creditor.

47. Since the Claimants/Decree Holders are not averse to payment of the decretal sum by instalments, though they propose a higher figure of Kshs.300,000/-. It behoves the Court to weigh the interests of both parties on the scales of justice and render justice to both.

48. In the circumstances, the application dated 28th October 2021 is allowed in the following terms –

(a) The Respondent/Applicant herein to pay the Claimants/Decree Holders a lumpsum of Kshs.300,000/- in the next 45 days on or before 31st March 2022.

(b) The balance shall be paid in equal monthly instalments of Kshs.100,000/- effective 30th April 2022 and on the 30th of each succeeding month until payment in full.

(c) In default of (a) and (b) above, the Claimants/Decree Holders herein shall be at liberty to execute the decree and/or apply.

(d) The Claimants/Decree Holders herein are restrained from levying execution as long as the Respondent/Applicant pays the monthly instalments by the due date.

(e) Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14TH DAY OF FEBRUARY 2022

DR. JACOB GAKERI

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 15th March 2020 and subsequent directions of 21st 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.

DR. JACOB GAKERI

JUDGE