



REPUBLIC OF KENYA



**Mwangi v Happy Go Ltd (Cause 229 of 2018)
[2022] KEELRC 13321 (KLR) (29 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13321 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 229 OF 2018
DN NDERITU, J
NOVEMBER 29, 2022**

BETWEEN

GEORGE MWANGI CLAIMANT

AND

HAPPY GO LTD RESPONDENT

RULING

I. Introduction

1. In a Notice of Motion dated May 16, 2022 expressed to be brought under Order 21 Rule 12 and Order 51 of the *Civil Procedure Rules*, Sections 1A, B and Section 3A of the *Civil Procedure Act*, the Respondent prays for the following
 1. – Spent -
 2. That pending the hearing and determination of this application the honourable court be pleased to issue an order of stay of execution of the judgment of this court delivered on the April 26, 2022.
 3. That the honourable court be pleased to grant leave to the Respondent/Applicant to liquidate the judgment sum awarded herein being Kshs 2,509,753/= plus interest and costs of the suit in installments of Kshs 209,146/= from the date of the order until final settlement.
 4. That the honourable court be pleased to restrain the Claimant/Respondent from levying execution herein as long as the Respondent/applicant paid the proposed monthly installment.
 5. Costs of the application be provided for.
 2. The application is supported by the affidavit of Catherine Mwaura sworn on even date with several annexures thereto.



3. In response to the application the Claimant filed a replying affidavit sworn on May 24, 2022 with several annexures thereto.
4. By consent from Counsel for both parties the application was heard by way of written submissions. Counsel for the Respondent filed on May 31, 2022 while Counsel for the Claimant filed on June 15, 2022.

II. Respondent's Case And Submissions

5. The Respondent's case as contained in the supporting affidavit to the application and the written submissions by Counsel is that it be allowed to settle the decretal sum plus costs in monthly instalments of Kshs 209,146/= from the date of the ruling in this application till payment in full.
6. The judgment in this cause was delivered on April 26, 2022 wherein the Claimant was awarded a sum of Kshs 2,509,752/= in compensation for wrongful and unlawful dismissal. As at the time of dismissal the Claimant earned a monthly gross salary of Kshs 209,146/=, the same amount that the Respondent is seeking to pay per month.
7. Costs of the cause, which were awarded to the Claimant, have neither been agreed nor taxed. A stay of execution was granted on May 25, 2022 pending the hearing and determination of the application, the subject matter of this ruling.
8. The gist of the application is that the Respondent is unable to settle the amount awarded plus costs at once and therefore seeks time to pay in installments as alluded to above. The Respondent argues that it has no means or resources to settle the debt at once and that if it did so it would have to close down or upset other operations at a great business and financial risk.
9. The Respondent has attached what it considers to be statements of financial standing to demonstrate that it is allegedly not in good financial standing.
10. Counsel for the Respondent has identified the only issue for determination to be whether the Respondent has demonstrated sufficient cause to deserve the court's discretion in granting the prayer to pay the debt through the proposed monthly installments.
11. Counsel correctly points out that the application is to be granted or denied at the discretion of the court which discretion, as expected, must be exercised judiciously and not whimsically or capriciously. Counsel has cited *Kashavji Jethabhai & Bros Limited v Saleh Abdulla* (1956) in support of the argument that the financial hardship of a debtor should be considered in an application of this nature. Counsel has also cited *JM Mathenge T/A Builecon Associates v Kenya Tea Development Agency Limited* (2009) eKLR in his argument that the conduct of the applicant and more so good faith in making the offer to pay by installments should be considered when the court is exercising the discretion to either grant or deny the application.
12. Counsel argues that the Respondent has shown sufficient cause to be allowed to pay by way of the proposed installments and prays that the application be allowed.

III. Claimant's Case And Submissions

13. The Claimant has vigorously opposed the application and identified the one only issue for determination in this application – Whether the Respondent has demonstrated sufficient reason to be allowed to settle the decretal sum in the proposed installments.



14. The Claimant in the replying affidavit argues that the alleged statements of accounts filed by the Respondent are neither signed nor certified and hence cannot be authenticated. He deposes that the Respondent has not demonstrated bona fide as no efforts have been made to settle the judgment since the same was delivered. He argues that this application is a calculated move by the Respondent to further delay the settlement of this matter which he describes as very painful to him considering that it arose from his unlawful and wrongful dismissal by the Respondent after he had served them with so much dedication. He pleads that the application be declined to allow him enjoy the fruits of the judgment.
15. Counsel for the Claimant has identified the same issue for determination as Counsel for the Respondent – Whether there are sufficient reasons to persuade the court to exercise discretion in favour of the Respondent and allow it to settle the decretal sum in the proposed installments.
16. Counsel submits that costs have neither been agreed nor taxed and that what was indicated as costs in the notice dated May 6, 2022 in the sum of Kshs 400,000/= is proposed cost of the cause and if the Respondent is not agreeable to the same, the costs shall be taxed anyway.
17. Counsel emphasizes that the discretion given to court under Order 21 Rule 12 of the *Civil Procedure Rules* should be exercised judiciously and based on good and sound reasoning as opposed to whims and caprice. He argues that each application should be decided on own merits and circumstances, that the inability of the debtor to pay at once is not the only and most important factor for consideration, that the conduct of the debtor and good faith should be scrutinized, and that the prejudice that may be occasioned to the judgment creditor should be considered. He has cited *Kashval Jethabhai & Brothers Ltd v Saleh Abdul* (1959) EA 260 in support of this argument. Counsel submits that there has to be sufficient cause demonstrated by the Applicant for this court to exercise its discretion in its favour.
18. Counsel argues that the Claimant is entitled to the fruits of the judgment delivered way back on April 16, 2022 and that the Respondent has not taken any steps towards settlement of the same beyond filing the application to pay via the proposed installments. Counsel argues that the debt herein is compensation for unlawful dismissal which has caused and continues to cause financial embarrassment and hardship to the Claimant who lost his livelihood. Counsel submits that the Claimant sees malice in this application as the Respondent is capable of settling the debt at once. He submits that the Respondent is intent on punishing the Claimant further by delaying the settlement of this matter as much as possible.
19. The Claimant pleads that this application be dismissed with costs.

IV. Determination

20. This court has carefully gone through the application, the affidavits in support and in opposition, the annexures to those affidavits, and the submissions by Counsel for both sides, as summarized above. There is only one issue for determination in this application –

Has the Applicant shown and demonstrated sufficient cause for this court to exercise discretion in its favour to grant the orders sought?
21. The judgment in this cause was delivered on April 26, 2022 which is about six months ago. The Respondent has not made any payment towards settlement of the debt, or made any attempts in so doing. No money has been deposited with the court towards settlement of the debt, not even at the rate of the proposed monthly installments of Kshs 209,146/=. There has been no response as to whether the Respondent agrees with the proposed costs in the sum of Kshs 400,000/=. The proposal to pay



through the above monthly installments has not been explained or qualified by the Respondent other than the allegation that it is equivalent to the monthly salary that the Claimant earned before dismissal. The statements of accounts filed by the Respondent are neither signed nor authenticated in any way and hence cannot be accepted as a true reflection of the financial status of the Respondent.

22. All the foregoing demonstrates bad faith on the part of the Respondent who appears to want to delay the settlement of this matter as much as possible. The Respondent has failed to demonstrate bona fide intention to settle the judgment and also failed to disclose material facts in regard to its financial standing. In the meantime, the Claimant who was wrongfully and unlawfully dismissed continues to suffer financial embarrassment and hardship yet he is entitled to the fruits of the judgment which is a court order.
23. This court has considered the authorities cited by Counsel for both parties and agrees with them that an applicant in an application of this nature has to show sufficient cause for the court to exercise discretion in its favour. This court comes to the inevitable conclusion that the Respondent/Applicant has failed to show sufficient cause for the application to be allowed. Instead, the Respondent comes out as insensitive and full of bad faith with the intention of delaying the settlement of this matter as much as possible. That shall greatly prejudice the Claimant who played no role towards his dismissal and who is entitled to enjoy the fruits of the judgment delivered on April 26, 2022.
24. The Notice of Motion dated May 16, 2022 is thus dismissed with costs.

V. Orders And Disposal

25. In the interests of justice, however, this Court makes the following orders –
 - a. The Notice of Motion dated May 16, 2022 is hereby dismissed with costs to the Claimant.
 - b. The Respondent is ordered to pay to the Claimant the entire amount awarded in the judgment in the sum of Kshs 2,509,752/= within 30 days of this ruling.
 - c. Since the costs have not been agreed upon the Claimant is free to file a party and party bill of costs and have it taxed as soon as practically possible.
 - d. Once the costs are taxed and interest on the awarded amount calculated from the date of judgment the Claimant shall be at liberty to execute unless that amount is paid within 30 days.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 29TH DAY OF NOVEMBER, 2022.

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DAVID NDERITU

JUDGE

