



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1081 OF 2014**

(Before Hon. Lady Justice Monica Mbaru)

**WILSON MWAURA NGIGI.....DECREE HOLDER/RESPONDENT**

**VERSUS**

**NATURE EXPEDITIONS AFRICA LIMITED.....JUDGMENT DEBTOR/APPLICANT**

**RULING**

The application before the court is dated 16th September 2020 and filed under a notice of motion under section 12(3) and 16 of the Employment and Labour Relations Court, Article 50 (1) and 159 (2) of the constitution of Kenya, 2010, and all enabling provisions of the law. The applicant seeks the following orders:

- a. Spent
- b. That this honourable court be pleased to review its judgment delivered on 14<sup>th</sup> February 2019 and set aside, vacate and/or vary the award on interest accruing on the decretal amount until payment in full and in the terms of the execution of the decree in favour of the decree Holder.
- c. That this honourable court be pleased to issue an order that the judgment Debtor/Applicant pay the Decretal amount in installments on such terms as it shall deem fit and just in the circumstances of this case.
- d. Spent
- e. That this honourable court be pleased to make any order in the interest of justice as it may deem fit and just.
- f. That costs of this application be provided for.

The application is supported by the Affidavit of James Mwangi Munene sworn on 16<sup>th</sup> September 2020 and his Further Affidavit sworn on 2<sup>nd</sup> October 2020 and on the grounds that the Applicant/Judgment debtor is unable to remit to the respondent a sum of Kshs 607,999 plus auctioneer fees. The applicant attributes this predicament to the financial constraints brought about by the CoVID-19 pandemic. The Applicant argues that since their ordinary course of business is the International Tourism sector which, according to him, was the most affected industry, the court be pleased to allow the Judgment Debtor to pay in installments and to review its orders on interest such that the interest stops accruing forthwith until the decretal amount is paid in full.

The respondent opposed this application vide Replying Affidavit sworn by the Decree Holder on 21<sup>st</sup> September, 2020 and avers that the judgment was delivered on 14<sup>th</sup> February 2019 and despite notifying the Judgment Debtor of the terms of the said judgment, they failed to satisfy the judgment.

The respondent further avers that the judgment was delivered before the pandemic and it is only being used as an excuse. Further that allowing the application would occasion him great prejudice and deny him the fruits of his judgment. He therefore prays that the application be dismissed with costs.

Parties agreed to dispose the application by way of written submissions.

The Applicant's counsel in their submissions maintains that after delivery of Judgment on 14<sup>th</sup> February 2019, they wrote to the Respondents

on 7<sup>th</sup> May 2020 where they made a proposal on how the payment would be made. He further maintains that the draft decree was forwarded to them one year after delivery of judgment.

On the issue of review of the orders on the award of interests, counsel invites court to be guided by the provisions of section 12(3) of the Employment Act, Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules and article 159(2) of the Constitution of Kenya. He further submits that the fact that their business has been adversely affected by COVID-19 is sufficient reason to warrant review of the orders as the continuous accrual of the interests would increase the hardship on the applicant whose proposal is to satisfy the judgment through payment of installments.

The Applicant's counsel submitted that the Applicant has other obligations to fulfill as well as pay for other judgments against it but that it has made an application for Tourism Stimulus Package to enable it meet its operational costs and expenses. Counsel urges the court to be guided by the provisions of Rule 32 of the Employment and Labour Relations Court (Procedure) Rules and order 21 rule 12 of the Civil Procedure Rules. Counsel also cited the cases of **Diamond Star General Trading LLC Versus Ambrose D O Racher t/a Racher & Amollo Advocates )2018) eKLR and Nelson Ouma Kanoti versus haren D Mandavia (2015) eKLR** where the court applied its discretion to vary the mode of payments. The learned counsel submitted that the orders sought for payment of the decretal amount in installments are justified and reasonable and proposes that the Applicant be allowed to satisfy the Judgment through monthly installments of Kshs100, 000 after 6 months pending the stimulus package from the Tourist Finance Corporation.

As for the issue of Auctioneer costs, counsel submitted that the Auctioneers failed to indicate that the extracted decree is subject to statutory deductions and as such, the respondents should bear the costs of the Auctioneer's fees. Counsel cites the case of **Ernest Kibet Tormoi versus Kenya Farmers Association Limited (2019)eKLR** where the court ordered the claimant therein to bear the auctioneer fees as it was not legally possible to rely on an erroneous decree to issue warrants of attachment against the respondent.

The respondent's counsel submitted that the Applicant has not met the requirements set for a review of a judgment. Counsel posits that the relevant law to guide the court is Rule 33 (1) and (6) of the Employment and Labour Relations Court (Procedure) Rules. Counsel further posits that as per the said rules the important criteria necessary for invoking a review are:

- i. Discovery of new and important matter or evidence which, after due diligence, was not within the Applicant's knowledge or could not be produced at that time or
- ii. There is some mistake or error apparent on the face of the record or
- iii. For any other sufficient reason and
- iv. There is no unreasonable delay in making the application.

Counsel urges this court to be guided by the cases of **Ajit Kumar Rath versus State of Orisa and others** and **National Bank of Kenya Ltd versus Ndungu Njau(Civil Appeal No 211 of 1996)** (unreported) where the courts set the conditions for review.

Counsel submits that the applicant has not met the above tests and urges this court to dismiss the application with costs.

## **DETERMINATION**

After carefully considering the Application, Affidavits and submissions by both parties, I have arrived at the following issues for consideration:-

1. Whether the court should review its judgment and set aside/vary the award on interest accruing on the decretal amount until payment in full
2. Whether the court should issue an order allowing the Judgment Debtor to satisfy the Judgment in installments
3. Whether the respondent should be ordered to bear the Auctioneers costs

On the 3<sup>rd</sup> issue; whether the respondent should be ordered to bear the Auctioneers costs, It is the Applicant's submission that since the Respondent did not deduct the statutory deductions as directed by the court, the resulting decree was erroneous and as such the respondents cannot extract warrants on the strength of an erroneous decree. The Respondent/decretal holder did not submit on this issue. I have diligently gone through the Applicant's Notice of motion, its grounds and the Supporting affidavit and I have found out that the issue of auctioneer costs and the apparently erroneous decree was not raised. The issue was only subtly introduced by the applicant in its further Affidavit before being expanded in the Applicant's submission. It is trite law that parties are bound by their pleadings.

With regard to the prayer for review, as submitted by the parties, the relevant law that guides the court before making a determination on review of judgments is Rule 33(1)(d) of the Employment and Labour Relations Court (Procedure) Rules 2016 and which provide that:

1. A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
  - a. If there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the

- knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
- b. on account of some mistake or error apparent on the face of the record;
  - c. if the judgment or ruling requires clarification; or
  - d. for any other sufficient reason.

It is well settled that review proceedings in employment matters have to be within the scope and ambit of above Rules. Any other attempt except for grounds falling within the ambit of these rules would amount to an abuse of the liberty given to this court to review its judgments or orders. on the reasons advanced by the first permissible ground before reviewing a judgment is the discovery of new evidence. The applicant must prove that the new evidence was not within his knowledge or could not have been obtained by exercising due diligence. By all standards, the financial constraints reason advanced by the applicant cannot be said to amount to discovery of new and important matter or evidence. it is not related to the case at hand and even if the same reason was given before delivery of judgment, it could not have affected the order on interest.

Clearly, the financial constrains due to COVID -19 cannot amount to a mistake or error apparent on the face of the record nor can it make the judgment to require clarifications the financial constraints reason advanced by the applicant cannot by any chance be categorized under the “for any other sufficient” ground. an application for review will only be allowed on very strong grounds especially when its effect affect or prejudice the other party.

Accordingly, I find that the reason advanced by the Applicant do not fall within the scope for review as contemplated under order 33(1) of the Employment and Labour Relations Court (Procedure) Rules 2016. Thus the prayer for review fails.

On the findings above, on whether the court should indulge the applicant and allow them to set off the judgment amount in installments, Order 21 Rule 12 of the civil procedure rules provides that;

**...for sufficient cause shown order that the payment of the amount decreed be postponed or be made by installments 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.**

As such, the power to order payment by installments of the decretal amount is purely a matter of discretion by the Court. in **Lavington Security Limited v Nairobi City Water & Sewerage Co. Ltd [2014] eKLR** the court held;

...It is, therefore, on the Court being convinced by the Applicant that there is sufficient cause to permit payment by installments that the Court should think about other conditions to attach to the order for payment by installments of the decretal sum. Those terms or conditions include payment of interest, the attachment of the property of the judgment debtor or the taking of security from him, or otherwise. And the list is not exhaustive. What amounts to sufficient cause will, however, depend on the peculiar circumstances of each case...

As such, the onus is on the Applicant to demonstrate that there is a sufficient cause to order the postponement or payment by installments. What constitutes to sufficient cause is addressed in the case of **A. Rajabali Alidina** that the circumstances, under which the debt was contracted, the conduct of the debtor, his financial position, and his bona fides in offering to pay a fair proportion of the debt at once. In the case of **Hildegard Ndalut versus Lelkina Dairies Ltd & Anor. (2005) eKLR**, the court held that;

... a defendant should be required to show his bona fides by arranging fair payment of the proportion of the debt in persuading the court to allow payment by way of installments. This, in my view, is the proper test to apply in granting orders for payment of a decretal amount by way of installments. A judgment creditor is entitled to payment of the decretal amount, which he should receive promptly to reap the fruits of the judgment. The judgment creditor might genuinely be in a difficult position in paying the decretal amount at once. 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.

And in the case of **Keshavji Jethabhai & Brothers Limited versus Saleh Abdulla [1959] EA 260**, the principles that should guide the Court in the exercise of discretion in such matter were addressed 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. (Emphasis mine)**

In considering the instant application vis-a-vis the above established principles, it is apparent that the reason advanced by the Applicant for not being able to pay the decretal amount is that they are facing financial constraints owing to the COVID-19 pandemic.

The judgment in this case was delivered on **14<sup>th</sup> February 2019**. the first case of COVID-19 was reported around **March, 2020** which is more than one year after the Judgment herein. Further, this instant Application was filed on **16<sup>th</sup> September 2020** and only after the Respondent had commenced to execution.. The claimant filed suit on 30<sup>th</sup> June 2014 and has therefore waited for seven (7) years before enjoying the fruits of his labours at paragraph 6 of the Applicant's Further Affidavit sworn on 2<sup>nd</sup> October 2020, the Applicant offered to make monthly installments of Kshs 100,000. Had such payments commenced, the Applicant should by now have paid the Respondent at least Kshs 400,000. There is no payment. The offer to pay in installments is not actualized in any form. Such offer I find to be a delay tactic and in abuse of the court process. Accordingly, application dated 16<sup>th</sup> September, 2020 shall not be allowed as sought save the following directions and ORDERS are hereby issued;

**That the Applicant/Decree Debtor shall pay half the outstanding amount within fourteen (14) days;**

- 1. the balance to be paid within 30 days;**
- 2. Each party to bear its own costs.**
- 3. in default (a) and (b) above the Respondent/Decree Holder shall be at liberty to execute**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2021**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistance: Okodoi..... and .....