



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC CAUSE NO. 224 OF 2015

SAMUEL BUNDI MOKORA.....CLAIMANT

-VERSUS-

MUSA CHEBIRINGET T/A FARMERS INN CLUB..... RESPONDENT

RULING

1. This ruling is in respect of the Respondent/applicant's application dated 14th June, 2021 filed under certificate of urgency on 15th June, 2021 via the firm of Mongeri & Company advocates seeking the following orders;

- a) **That the Service of this application be dispensed with in the first instance and the same be certified as urgent.**
- b) **That there be a stay of execution pending the hearing and determination of this application inter partes.**
- c) **There be a stay of execution of the judgment, decree, warrants of attachment /Arrests and any other consequential orders in this suit pending the hearing and determination of the application.**
- d) **That this Honourable Court do issue an Order allowing the Respondent /applicant to liquidate the decretal sum by monthly instalments of Kshs. 30,000/- per month till payment in full.**
- e) **That the costs of this Application be provided for.**

2. The application is supported by the grounds on the face of the application and the affidavit sworn by the Respondent **Musa Chebiringet** on 14th June, 2021 on the basis that he operated a bar business known as Farmers Inn which was closed in 2020 as a result of losses attributed to COVID-19 Pandemic. Farmers Inn was the only business he operated and obtaining the entire decretal sum has become impossible. He therefore seeks to repay the decretal sum in monthly instalments of Kshs. 30,000/-.

3. The Respondent/ Claimant opposed the Application and filed a replying affidavit deposed upon on the 5th July, 2021 contending that the application is res judicata in that the issue such as stay of execution was dealt with by the court in applicant's application dated 24.02.21 and delivered on 10th June, 2021.

4. The claimant also stated that this Court is functus officio having dealt with the issue and delivered its judgment on 17th December, 2019.

5. The Claimant stated that if this Court allows this application then the Respondent would take 22 months to clear the decretal sum, a period almost 2 years which in their opinion will not be of much economic value.

6. It was contended that the Respondent/ Applicant has not paid any sum towards the satisfaction of the decree from the time judgment was delivered therefore there is no good faith on their part.

7. The issue that this Court is functus officio and the lack of good faith on the Part of the Respondent in satisfying the decretal sum was further emphasized in the Respondent's grounds of Opposition dated 5th July, 2021 and filed in Court on the 7th July, 2021.

Submissions

8. The applicant submitted that that he has satisfied the conditions required under Order 42(6) of the Civil Procedure Act to persuade this Court to issue it with the orders sought. Under substantial loss it was submitted that the applicant does not have any other source of income save for the Farmers in bar that was shut down and the Respondent there he will suffer substantial loss if execution proceeds. It was also

submitted that they have filed this application timeously after their application of 24.02.2021 was dismissed on 10th June, 2021 and on security the Applicant submitted that he is willing to abide by the Court direction as to security and cited the case of **National Industrial Credit Bank Limited V Samuel Orindo Manani Omokaya [2018] eKlr.**

9. On whether this Court can make an order that the decretal sum be paid in instalment, the Respondent referred the Court to Order 21 Rule 12 and submitted that this Court has power to allow the application and reinforced its argument by citing the case of **Diamond Star General Limited LLC v Ambrose D.O Rachier t/a Rachier Amollo and co advocates [2018] eKlr.**

10. The Claimant/ Respondent on the other hand submitted that the application is res judicata for all purposes under section 7 of the Civil Procedure Act as the application seeks to stay execution of judgment, decree and warrants of attachment /arrest issues that had been dealt with by this Court in a previous application. The claimant reinforced his position by citing the case of **Independent Electoral and Boundaries Commission v Maina Kiai & 5 others ,civil Appeal No. 105 of 2017[2017] eKlr.**

11. Accordingly, it was submitted that since the issues for determination have already been determined in the earlier application of 24.02.2021, the current application is frivolous,vexatious and an abuse of Court process which this Court ought to invoke its powers under Order 2 Rule 15 and strike it out. In this he cited the case of **County Council of Nandi Vs Kibet Rutto & 6 Others [2013] Eklr.**

12. On the issue of payment in instalments he Claimant /respondent submitted that as much as the law under Order 21 Rule 12 has allowed payment of decretal sum by instalment, sufficient reason has to be shown to justify the same. He argued that the basis for payment of instalment was on COVID-19 pandemic that allegedly paralyzed the business leading to closure. However, the respondent argued that the Applicant ought to have paid some substantial sum from the date judgment was delivered to show good faith and his request to pay in instalment now will mean that the Claimant will receive the said sums for 22 months about 2 years from now. In this he cited the case of **Essau Kasaya Mmasi v Violet Khalayi[2016]eKlr.**

13. The Respondent also submitted that, as much as the prayer to pay in installments is a discretionary one, the Court has to look at the conduct of the applicant whether it is in good faith. He reinforced his argument by citing he case of **Keshral Jetha Alias Brother limited – Saleh Abdul[1959] eKlr** and the case of **Diamond star General forwarding Limited v Ambrose D.O. Rachier 2018 eKlr.**

14. Accordingly, the Respondent submitted that the Applicant has failed to discharge the burden that would persuade this Court to allow the payment in instalment and cited the case of **Thabu Tuva Konde v Ngomeni Swimmers Limited [2021] eKlr** where the Court dismissed a similar Application.

15. The Respondent then urged his Court to dismiss the application herein for lacking merit and award the Respondent costs.

16. I have examined the averments of the parties herein. The applicant filed a similar application and this court delivered a ruling on 10/6/21.

17. In the previous Ruling however I failed to address the issue of payment of the decretal sum in instalments. The applicant wants to discharge the decretal sum in instalments of 30,000/= per month.

18. For a decree of about 600,000/=, paying it in instalments of 30,000/= would take a considerable long time to discharge.

19. I therefore direct that there be stay of execution on condition that ½ the decretal sum is paid in 90 days and thereafter the balance to be paid in equal installments of 30,000/= per month until payment in full.

20. In default of any one instalment execution to proceed.

Ruling delivered virtually this 26TH day of **OCTOBER, 2021.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Daye for claimant – present

Moenga for respondent – present

Court Assistant – Fred