



Otundo & 5 others v Creek Marketing and Development Limited (Environment & Land Case 14 of 2013) [2024] KEELC 7147 (KLR) (29 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7147 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 14 OF 2013
NA MATHEKA, J
OCTOBER 29, 2024**

BETWEEN

**BERNARD ONKUNDI OTUNDO 1ST PLAINTIFF
BARNABAS KIPRONO BWAMBOKA 2ND PLAINTIFF
KEFA NYAMONGO OENGA 3RD PLAINTIFF
DANCAN OCHENGE OYARO 4TH PLAINTIFF
KENNETH ODUOL ESAU 5TH PLAINTIFF
JAMES KAMBO MUTHUSI 6TH PLAINTIFF**

AND

CREEK MARKETING AND DEVELOPMENT LIMITED DEFENDANT

RULING

1. The application is dated 5th June 2024 and is brought under Order 21 Rule 12 of the Civil Procedure Rule, Section 63e and Section 1A, 1B of the [Civil Procedure Act](#) seeking the following orders;
 1. The matter herein be certified urgent and be heard ex-parte in the first instance.
 2. There be a temporary stay of execution of the Warrants of Arrest and Committal to Civil Jail issued on 5th June 2024 against the 1st, 4th and 6th Plaintiffs pending the inter parties herein of this matter.
 3. The warrants of arrest and committal to Civil Jail issued against the 1st, 4th and 6th Plaintiffs on 5th June 2024 herein be set aside.
 4. There be a temporary stay of execution of the Judgement and Decree of this Honourable Court.



5. That the Plaintiffs be allowed to liquidate the decretal sum herein by way of twelve (12) equal monthly installments.
 6. That costs of this Application be provided for.
2. It is based on the grounds that the Court of Appeal vide its Judgement dated 12th April 2024 set aside the Decree of this Honourable Court issued on 27th September 2022. The Defendant has not extracted a fresh Decree pursuant to the Judgement of the Court of Appeal issued on 12th April 2024. The Defendant has now irregularly obtained warrants of Arrest and committal to Civil Jail of the 1st, 4th and 6th Plaintiffs. The Plaintiffs have fallen on hard financial times, having been unable to secure their investment herein and are thus proposing to pay the decretal sum by way of twelve (12) equal monthly installments. The Plaintiffs have written to the Defendant to make this proposal but the Defendant has not acceded to the same. The 1st Plaintiff is of frail medical health and would suffer irreversible damage if he were to be committed to Civil Jail.
 3. This court has considered the application and the submissions therein. The applicable provisions for payment of decretal sums in instalments is found under Order 21 Rule 12 of the Civil Procedure Rules, 2010. It provides as follows-
 - “(1) Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments with or without interest notwithstanding anything contained in the contract under which the money is payable.
 - (2) 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.” (emphasis added).
 4. From the above provisions, it is clear that in the absence of the decree holder’s consent, the judgment debtor has to demonstrate sufficient cause to warrant this Court to exercise its discretion in its favour, which discretion must be exercised judiciously and not in an arbitrary manner. In the case of *Lavington Security Limited vs Nairobi City Water & Sewerage Company Limited* (2014) eKLR, Gikonyo J stated as follows;
 - “...of great significance in application (sic) of this nature are; the circumstances of the case; the conduct of the parties; the willingness and bona fides of the applicant to pay a fair proportion of the debt; and of course, that the application is made without undue delay...”
 5. Similarly, in *Singh Gitau Advocates vs City Finance Bank Limited* (2013) eKLR, Mabeya J., stated the following in regard to what constitutes sufficient cause;
 - “It is trite law that apart from looking at the peculiar circumstances of the case, the Court when considering what sufficient cause amounts to, must consider a number of factors. This includes how the debt was incurred, the bona fides of the Judgment Debtor, the financial position of the debtor and the judgment creditor, the conduct of the parties and



the hardship that may result from enforcing the decree. It is also my considered view that applications of this nature ought to be made without undue delay.”

6. It is not in dispute that the plaintiffs and the defendant entered into a sale agreement for the purchase of the suit property and that a decree has been entered against the plaintiffs in this matter. One Stephen Blanchet in his replying affidavit swore on behalf of the defendant in his capacity as a director that no evidence was tendered in court to show why the applicants did not appear in court on 5th June 2024 during the hearing of the notice to show cause and that the plaintiffs had been directed by the court to file an affidavit of means by 20th March 2024 which they never did. He stated that the plaintiffs have approached this court with unclean hands because they never deposited a valid certificate of title as ordered by the Court of Appeal on 6th October 2023; that the plaintiff’s counsel misled the Court of Appeal that they were in the process of physically delivering a title deed in the same court which they never did; that to date they have never paid the decretal sum and that this court should not rely on the plaintiffs’ empty promises. He also challenged the jurisdiction of this court on determining a notice to show cause for the second time; that this court is functus officio and this application is requesting the court to sit at an appellate level; that this court cannot stay the execution of the judgement of the Court of Appeal and that the request for payment of installments can only be made to the Court of Appeal under Order 21 Rule 12 of the Civil Procedure Rules.
7. Mr. Stephen Blanchet further stated that the Court of Appeal upheld the order of the high court that the plaintiffs should pay 6,540,005 to the defendant; that under rule 35 and 38 of the Court of Appeal rules 2022, the Court of Appeal’s decree was registered in the CTS and all the parties appeared before the Deputy Registrar who confirmed that the new decree had been registered and ordered that the Notice to show cause be amended to reflect the new decree from the Court of Appeal; that the amended notice to show cause was served on the plaintiffs but they never put any response. He said for reason of the above, there is no legal requirement to extract a fresh decree and that the plaintiffs are guilty of non-disclosure on material facts. Furthermore, he dismissed the 1st plaintiff’s allegations of being in poor health because he did not attach any evidence; that the 1st plaintiff is a director/shareholder at a big pharmaceutical company named Sphinx Pharmaceuticals Limited with assets debentures of Kshs. 245,000,000 and that neither did he did attach any evidence showing his state of income; that the 1st plaintiff does not have the capacity to explain the financial status of the other plaintiffs nor did the other plaintiffs provide proof of their inability to pay; that this application is intended to delay the defendant’s fruits of judgment.
8. The 1st, 4th, 5th and 6th plaintiffs swore a supplementary affidavit on 10th June 2024 where the 1st plaintiff cited Order 21 Rule 12 which allows the court passing the decree to order payment of the same by way of installments. He then narrated the events that transpired when they mortgaged the suit property for Kshs. 45,000,000; that the financier HFCK remitted the balance of the mortgage on 21st July 2012 which they forwarded to the Defendants and despite receiving the full purchase price have continued enjoying possession of the suit property for over 11 years; that the Court of appeal had passed judgement that the Defendant ought to not have continued occupation and was not entitled to mesne profits; that the plaintiffs have been servicing the mortgage of the suit property despite the fact that the defendants have been enjoying the suit property; that the defendant is aware of the financial difficulties the plaintiffs are going through as the same acknowledged in its replying affidavit sworn by Mr. Stephen Blanchett on 24th October 2022; that the Rule 35 and 38 of the Court of Appeal rules have not been complied with; that Sphinx Pharmaceuticals Limited is a separate legal entity and not party to the proceedings; that his current salary is Kshs. 319,659.65 and has proposed to apply 1/3 towards liquidation of the debt; that he is suffering from diabetes and was admitted on 5th June 2024 and that committing him to civil jail will have devastating and disastrous consequences to his well-being.



9. The 4th and the 6th plaintiff each stated that they are currently self-employed and earn Kshs. 200,000 per month and that they associate themselves with the depositions of the 1st plaintiff's affidavits. The 5th plaintiff stated that he is currently unemployed but committed himself to looking for Kshs. 90,000 per month to enable him satisfy the decree.
10. Mr. Stephen Blanchet swore a further affidavit on 14th June 2024 where he stated inter alia that no leave was sought for filing the above-mentioned supplementary affidavit and that it is a cure to the weaknesses of the said supporting affidavit of the 1st plaintiff; he reiterated that no explanation had been given as to why the plaintiffs did not appear in court on the hearing of the notice to show cause on 5th June 2024. That the application is res judicata as an appeal had already been determined. Mr. Stephen Blanchett narrated that the plaintiffs had applied for review before the Court of Appeal and offered to deposit Kshs. 1,000,000 but were ordered to deposit a title worth Kshs. 6,000,000 which they failed and that even the title deed which they had promised would be delivered physically in the court of appeal never arrived. He alleged that the said title deed worth Kshs. 1,000,000 has never been deposited and that the plaintiffs are being dishonest in alleging that they have no funds to satisfy the decree; he also questioned why the plaintiffs have been unable to use the balance of the Kshs. 45,000,000 mortgage from the financier HFCK since it only paid Kshs. 33,150,000 and left a balance of Kshs. 11,850,000.
11. Furthermore, he stated that the property has been vacant since the sale agreement and that the defendant has been ready to comply with the terms of the agreement of sale; that the decretal sum continues to lose its value and that another twelve months would cause great prejudice to the defendant; he denied that the plaintiffs are facing financial difficulties. He was adamant that the 1st plaintiff as the majority shareholder of Sphinx Pharmaceuticals Limited has not placed any evidence of the profits he shares or dividends he receives as a shareholder; that the payslip the 1st plaintiff attached is not genuine and that his allegations of being of frail health were not true.
12. Mr. Stephen stated the 4th and 5th plaintiff's further affidavit and stated that they were not genuine and that the 4th plaintiff is self-employed in a company known as ESF Consultants and that he has not produced any income from the dividends. He also questioned where the 5th plaintiff will get Kshs. 90,000 from if he is unemployed. He also alleged that the 6th plaintiff is in the said company of ESF consultants. In conclusion he generalized that the further affidavits are not in good faith and the application is only meant to delay the realization of the fruits of judgment.
13. I noted that the 2nd and 3rd Plaintiffs have not been affected by the warrants however, this application is made on behalf of all the Plaintiffs. I find that from the affidavits on record the Plaintiffs have demonstrated sufficient cause for them to be allowed to pay by installments. This is due to illness as well as the prevailing harsh economic times. They have attached pay slips as well as medical records to back up their claims. I find that this application is merited and I grant the following orders;
 1. The warrants of arrest and committal to Civil Jail issued against the 1st, 4th and 6th Plaintiffs on 5th June 2024 herein be set aside.
 2. The Plaintiffs are allowed to liquidate the decretal sum herein by way of twelve (12) equal monthly installments.
 3. Failure by the Plaintiffs to comply with the above orders shall lead to execution being levied against it; and
 4. Costs of this application shall be borne by the Plaintiffs.

It is so ordered.



DELIVERED, DATED AND SIGNED AT MOMBASA THIS 29TH DAY OF OCTOBER 2024.

N.A. MATHEKA

JUDGE

