



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 126 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 15th October, 2020)

JAPHETH MUITA GITHAIGA.....CLAIMANT

VERSUS

THE PRESBYTERIAN UNIVERSITY

OF EAST AFRICA.....RESPONDENT

RULING

1. The Application before Court is the Applicant's application dated 28th July, 2020 seeking the following orders:-

1. Spent.

2. THAT leave be granted to the firm of M/S JK Mungania & Company Advocates to come on record for the Respondent.

3. THAT this Honourable Court be pleaded to order that payment of the decretal amount be made by monthly instalments of Kshs. 200,000/- until satisfaction of the Decree.

4. THAT there be a stay of execution of the Decree pending the hearing and final determination of the application.

5. THAT costs of this application be provided for.

2. The application is based on grounds that:-

1. This Honourable Court has discretion to grant such orders and the Respondent has appointed the firm of JK Mungania & Company Advocates to represent them instead of P.M. Kamaara & Company Advocates.

2. The Applicant is a judgment debtor is unable to pay the decretal amount in lump sum and it can only afford to pay reasonable monthly instalments.

3. The application is made in utmost good faith and that the Applicant is likely to suffer substantial loss of the order for stay is not granted.

3. The Application is supported by the affidavit of J Mugao Dominic the Applicant's Human Resource Manager, sworn on 28/7/2020. He deposes that the Applicant did not know the specific details of the Judgment in this matter until 28/7/2020 when the Respondent attached the Applicants movable goods.

4. He deposes that the carting of its goods, which included computers, office chairs, office tables, filing cabinets, reception seats, a bus and a pick up, will not only disrupt the functions of the office but will cause prejudice to the Respondent when the students return to the University.

5. He deposes that with the closure of universities and other learning institutions and the effect of Covid -19 pandemic the Applicant has been unable to generate enough income to pay the decretal sum in lump sum. He deposes that the Respondent proposes to pay Kshs. 300,000/- on or before 5/9/2020 and thereafter Kshs. 200,000/- on or before each succeeding month until payment in full.

6. He urges the Court to take judicial notice of the unfavourable economic climate as a result of the Covid-19 pandemic and fact that out of

the Kshs. 2,030,815/- being sought, half the amount consists party and party costs. He avers that costs were taxed at Kshs. 211,497/- and not Kshs. 703,210/- and further costs of Kshs. 239,955/-.

7. The Respondent filed a Replying Affidavit sworn by Ateko Ivy Ingati, an Advocate of the High Court of Kenya, on 11/8/2020. She deposes that the issue in dispute was the fact that the Applicant failed to pay the Respondent his gratuity as provided in the contract and that the said sum was due in 2015 when he resigned from employment.

8. The affiant deposes that the Respondent is 70 years old and that the application merely seeks to deny the Respondent his right to enjoy the fruits of the judgment. She avers that the Applicant has failed to demonstrate that it will suffer irreparable injury if the execution proceeds and has not stated the loss it will suffer or offered adequate security for due performance of the decree.

9. She avers that on several occasions during the pendency of the suit including on 13/10/2019, the Applicant indicated to the Honourable Court that it wanted to settle the suit by paying the Respondent's gratuity in instalments. She avers that the Applicant's advocates wrote to them on 26/2/2018 seeking to adjourn the hearing as the Applicant intended to settle the Respondent's gratuity by instalments.

10. She deposes that upon a series of communication, the Respondent in a letter dated 2/7/2018 informed the Applicant's advocates that the claimant was agreeable to Kshs. 100,000/- in instalments and costs of Kshs.148,249/-.

11. She avers that on 13/8/2018, the Respondent's advocates wrote to the Applicant's advocates conveying the Respondent's displeasure as it had not made any payment instalment.

12. She avers that the Judgment in the cause was delivered in the presence of the Respondent's advocate and that a perusal of the proceedings will prove that. She avers that on 5/11/2019, they served the Applicants' advocates with a draft decree for their approval and they filed pleadings in taxation proceedings.

13. She avers that if the Applicant is unable to honour debts because it is financially embarrassed, the court is not the correct avenue and that the Covid-19 pandemic should not be pleaded as it became an issue in April 2020.

14. She avers that the deponent is misleading the court by deposing that half of the amount is costs. She avers that the Court awarded the Respondent Kshs. 1,085,200 together with interest at court rates from 3/1/2015 and the taxing master calculated interest on the warrants of attachment is Kshs. 703,210/-.

15. The application was canvassed by way of written submissions.

Applicant's submissions

16. The Applicant submitted that the Court has discretion to grant leave for a Respondent to pay the decretal amount by instalment. It submitted that the law required the Respondent to pay a fair amount of down payment before he can be allowed to pay by instalments and that the Court ordered it to pay Kshs. 500,000 before 10/8/2020 which it did.

17. It urged the Court to take into consideration the Applicant's case in exercising its discretion under Order 21 Rule (2) of the Civil Procedure Rules. It further urged the Court to take into account the retrogressive outbreak of the Covid-19 pandemic and that the reopening of schools has been put off until January 2021.

18. It therefore urged the Court to take these aspects into account when exercising its discretion and extend the date for commencement of payment of the balance of the decretal amount to January 2021.

19. It submitted that the lesser prejudice will be suffered by the Respondent who will continue to receive payment until the decree is satisfied as opposed to the Applicant whose goods will be attached and sold.

Respondent's submissions

20. The Respondent submitted that Order 21 Rule 2 of the Civil Procedure Rules deals with service when a defendant is in another district. He further submitted that the rule allows settlement of a decree by instalments at the discretion of the Court. He relied on the case of **KTK Advocates v Baringo County Government [2018] eKLR** where the Court held that discretion must be exercised judicially and only in the circumstances that justify exercise of discretion.

21. He further submitted that in **Keshbal Jethabhai & Brothers Ltd v Saleh Abdul [1959] EA 260**, the Court held that the principles in considering an application as the current one include; each case must be considered on its own merit; that the mere inability to pay in full at once is not sufficient reason for exercising the discretion; that the debtor should show bona fides by arranging prompt payment and though hardship may be a factor, the court has to consider whether indulgence should be given to a debtor without prejudice to the decree holder.

22. He submitted that the Applicant is guilty of laches and inordinate delay and no plausible reason has been advanced why the instant application could not have been made immediately the judgment was delivered on 1/11/2019. He submitted that indulging the Respondent would prejudice him as he falls within the age bracket pre-disposed to contracting Covid-19 and other lifestyle conditions.

23. He further submitted that the Applicant has failed to show bona fides yet it is a must for the Applicant to show bona fides in its efforts to settle the indebtedness. He submitted that the Applicant has not produced records of its accounts and that the letters produced in Court were

authored by it.

24. He submitted that it is not an issue for the Court to determine the decretal amount and that such an issue was to be settled before the taxing officer and if not settled it should have filed a reference which it didn't.

25. In conclusion, he submitted that allowing the Applicant to pay instalments of Kshs. 200,000/- from 5/1/2021 would be unjust and fair. He stated that if the Court is inclined to allow the application the remaining sum be paid in 3 months instalments beginning 5/10/2020.

26. I have examined the averments of the Parties. On 13/8/2020, the counsel for the Applicant was allowed to come on record for the Respondents instead of counsel previously on record.

27. The issue that remains is whether the Respondents can now be allowed to pay the decretal sum in instalments as applied.

28. It is worth noting that the decree emanates from judgement of this Court which ordered the Respondents to pay the Claimant/Respondent herein his gratuity upon his resignation in 2015. Gratuity is an employment benefit for the Claimant herein. Judgement was delivered in November 2019.

29. There is a balance which the Respondent needs to clear. In view of the prevailing Covid 19 issues which has led to scaling down of the Respondent's activities, then economic situation could be a reality. However, I note that gratuity is an employment benefit, which cannot be withheld for long. In the circumstances, I allow stay on condition that the Applicants pay the Respondent/Claimant his dues as per the decree as follows:-

- ½ of the balance owing within 30 days. The remainder of the decree be settled in instalments of 200,000/= per month. In default of any one instalment, execution to issues.

30. Costs in the cause.

Dated and delivered in Chambers via zoom this 15th day of October, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mungania for Respondent – Present

Aseko Ingati for Claimant – Present