

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 185 OF 2017

VICTOR AMOS NANDI OTIPA.....CLAIMANT/ RESPONDENT

VERSUS

MALPLAST INDUSTRIES LIMITED.....RESPONDENT/APPLICANT

RULING

1. The application before me is the Respondent/Applicant's notice of motion application dated 15th March 2019 seeking to pay the decretal amount in instalments. It is asserted that the Applicant has financial distress arising from various suits against the Respondent at the High Court and the Employment & Labour Relations Court. The Respondent/Applicant argues that the Claimant/Respondent intends to attach its property in satisfaction of his decree. The Respondent asserts that in the event execution is carried out, it would greatly prejudice it and that it is willing to pay the decretal sum owed in instalments.

2. The Claimant is opposed and filed a replying affidavit in which he set out the chronology of events leading up to the present execution. The Claimant asserts that the Respondent is not keen on settling the decretal sum as there has been no attempt at making any payment since entry of judgment in March 2018. The Claimant argues that the Respondent's motion is yet another attempt to delay his enjoyment of the fruits of his judgment.

3. The Respondent/Applicant in relies on the cases of **Freight Forwarders Ltd v Elsek & Elsek (K) Ltd [2012] eKLR** where Mwongo J. held that the legal principles to be relied on in such an application are that whilst the creditors rights must be considered, each case must be considered on its own merits and discretion exercised accordingly; that the mere inability of a debtor to pay in full at once is not a sufficient reason for the exercise of the discretion; the debtor should be required to show his *bona fides* by arranging prompt payment of a fair proportion; hardship of a debtor may be a factor, but it is a question in each case whether some indulgence can be fairly given to the debtor without prejudicing the creditor; and finally, the court can consider the circumstances in which the debt was incurred, the conduct of the debtor, his financial position and his *bona fides*. The learned Judge granted the application to pay by instalments but varied the said instalments. Also cited was the case of **Swila Resorts Limited v Universal Freight Logistics (K) [2018] eKLR** where Nzioka J. held that *it must never elude a party that justice is weighed on a scale which must balance for justice to be done and be seen to be done. Thus, the Court cannot keep indulging one party at the extreme prejudice of the other party. The Court will therefore only exercise its discretion in favour of a deserving Applicant and whose conduct indicates good faith and attempt in settling the decretal sum.* The final case cited by the Respondent/Applicant was the case of **Medol Group Limited v Adrian Company Limited & Another [2012] eKLR** where Mutava J. (as he then was) held that in an agreement between the parties before commencement of the suit in the matter was that the Plaintiff would advance monies to the 1st Defendant which monies would be payable at a future specified date at a premium. The learned Judge went on to find that an order by instalments would not therefore significantly prejudice the Plaintiff's position as that mode of payment was already agreed upon by parties.

4. The factors to consider in such an application are as stated by my brother and sister Mwongo and Nzioka JJ. In their respective decisions, they clearly set out the principles to be considered. Imposing those considerations on the matter before me, it is clear that whilst the creditors rights must be considered, each case must be considered on its own merits and discretion exercised accordingly; that the mere inability of a debtor to pay in full at once is not a sufficient reason for the exercise of the discretion; the debtor should be required to show his *bona fides* by arranging prompt payment of a fair proportion; hardship of a debtor may be a factor, but it is a question in each case whether some indulgence can be fairly given to the debtor without prejudicing the creditor; and finally, the court can consider the circumstances in which the debt was incurred, the conduct of the debtor, his financial position and his *bona fides*. I am emboldened by the words of Nzioka J. where she states that it must never elude a party that justice is weighed on a scale which must balance for justice to be done and be seen to be done and that thus, the Court cannot keep indulging one party at the extreme prejudice of the other party. The Court will therefore only exercise its discretion in favour of a deserving Applicant and whose conduct indicates good faith and attempt in settling the decretal sum. From the date the judgment was delivered in March 2018, the Respondent has despite knowledge of the decree against it not made payment of a single shilling. It has sought indulgence to pay by instalments ostensibly as it has other debts to pay. Contrary to the efforts in the case of **Swila Resorts Limited v Universal Freight Logistics (supra)**, the Respondent's conduct does not indicate good faith and there has been no attempt in settling the decretal sum. I therefore would find it untenable to grant the motion as sought by the Respondent. The application fails and is dismissed with costs to the Claimant. Execution may proceed.

It is so ordered.

Dated and delivered at Nyeri this 24th day of May 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar