

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

SUIT NO. 179 OF 2016

ROSSLYN NJOKI KAMAU CLAIMANT/RESPONDENT

VERSUS

EMOMENTUM INTERACTIVE

SYSTEMS LIMITED RESPONDENT/APPLICANT

RULING

1. The Respondent seeks through the Notice of Motion application dated 23rd March 2018 for leave for the firm of M/s Kiragu Wathuta & Co. Advocates to come on record for the Respondent, there be a stay of execution and the grant of leave to pay the decretal sum by 10 equal monthly instalments beginning the 1st June 2018. In addition, the Respondent seeks to have sanctions against the Claimant/Respondent and the auctioneer by a subsequent application dated 20th April 2018 for the execution levied on the Respondent.

2. The Claimant was opposed and filed a replying affidavit sworn by Rosslyn Njoki Kamau on 6th April 2018. In it, she deponed that the Respondent was financially sound and had in excess of Kshs. 7,486,000/- in its account, the directors allowances stood at Kshs. 840,000/- and that the local travel and expense accounts were at Kshs. 150,000/- and Kshs. 600,000/- respectively. The Claimant asserted that the Respondent was not being candid as it had in its client list top notch IT firms with international reputation which possibly explains the multi million shillings budget.

3. I gave an *ex tempore* ruling dismissing the motion but reserved the reasons for the Ruling for today and proceed to render them. The Respondent has sought the stay of execution and the principles of grant or denial of stay are well enunciated in precedent. In the case of As regards payment by instalments, the case of **A. Rajabali Alidina v Remtulla & Another (1961) E.A. 565** the Court of Appeal held that the Court in deciding on payment of the decretal sum by instalments should consider *inter alia* the circumstances in which the debt was incurred and the financial *bona fides* of the debtor. Mere hardship of a debtor *per se* is not sufficient reason to allow payment by instalment.

4. The Respondent, in my view, made a half-hearted attempt at staying the decree. All commentators on the Civil Procedure Code agree that the court's discretion to order payment of the decretal amount in instalments is one which must be exercised in a judicial and not an arbitrary manner. The onus is on the Applicant to show that he is entitled to indulgence under this rule. The Applicant's offer to pay by 10 equal instalments went against the Respondent's own financial position articulated in the attachments to the motion the *bona fides* of the Applicant were wanting in the face of the series of expenses and payments that the Respondent could comfortably cut back on and meet its obligations under the decree. It was no doubt, like every business in Kenya, ailing from the financial malaise that afflicted the entire nation post elections 2017, but this by itself could not warrant the pretence at the purported inability to pay a debt of slightly over Kshs. 500,000/- given its ambitious provisions for the directors. The director's monthly emoluments and extras were in excess of the decretal sum further compounding the situation for the Applicant. The fact there was capacity to pay went against the tenets of stay and payment by instalments. The allegation that the goods attached belonged to another party was also not proved. No objection proceedings were taken out as required under the law and as far as the goods go, there is no claim by another over them. The mere allegation that the attached goods belonged to another or were the tools of trade remained just that, allegations. The Respondent therefore failed to satisfy the court that the payment by instalments was merited or that there was a financial constraint on the Respondent. No bank statements or cash flow analysis was shown to indicate there was no financial capacity to pay such a debt. It was for the foregoing reasons that the motion failed and was dismissed with costs to the Claimant. The Claimant is at liberty to execute the decree if the attached goods were not realized in satisfaction of the decree.

It is so ordered.

Dated and delivered at Nyeri this 3rd day of May 2018

Nzioki wa Makau

JUDGE