



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 862 OF 2013

NELSON OUMA KANOTI CLAIMANT

VERSUS

HAREN D. MANDAVIA.....RESPONDENT

(Before Hon. Justice Hellen S. Wasilwa on 29th July, 2015)

RULING

1. The application before court is the one dated 11/3/2015 and filed in court on 12/3/3015. The application was filed under Certificate of Urgency and filed through a Notice of Motion brought under Order 22, Rule 34 and Section 1A, 1B and 3A Section 42 of the Civil Procedure Act Cap 21 Laws of Kenya.
2. The Applicants seek orders that:
 1. *The application herewith be certified urgent and be heard ex-parte in the first instance.*
 2. *The Honourable Court be pleased to issue a temporary order of stay of execution pending hearing and determination of this application.*
 3. *The Honourable Court do allow the Applicant/judgment debtor to pay the decretal sum by installments of Kshs.40,000/= per month commencing the 31st March 2015 until payment in full.*
 4. *The Honourable Court be pleased to set aside the execution process commenced by Garam Auctioneers on the 7th March, 2015.*
 5. *The costs of this application be provided for.*
3. The application is supported by the supporting affidavit of Haren Kumar Damji Mandavia the Applicant herein and grounded on the grounds herein that:
 - i. *The suit herein was concluded by consent of the parties on the 30th June 2014 in favour of the Claimant in the sum of Kshs.240,000/= all inclusive.*
 - ii. *The Plaintiff has obtained decree and has commenced the execution process.*
 - iii. *On the 7th March 2015 the Plaintiff through Garam Auctioneers duly appointed handed over a proclamation document to the security guard at the main gate to the court.*

- iv. ***On the 9th March 2015 the Applicant received the proclamation by the auctioneers from the security guard one Mr. Martin Otieno Omondi to which the auctioneer purports to have proclaimed attachable goods in the Applicant's house which was quite imaginary.***
 - v. ***The list of attachable goods in that proclamation is only imaginary because most of the goods are not in the Applicants house.***
 - vi. ***The house was let to the Applicant as a furnished apartment and hence the goods in that house belongs to the landlord and hence not attachable.***
4. The gist of the Applicants application is that he is unable to pay the decretal sum as consented in court on 30/6/2014 and this is because he is unable, as he is facing financial constraints. He depones that the goods proclaimed by the Respondent on 7/3/2015 are not his as he stays in a furnished apartment. He also depones that on 20/1/2015 he was also committed to civil jail for failure to pay a sum of Kshs.2,100,000/= owned to the Plaintiff in case (HCC No. 495 of 2011 *Gas Link Limited vs Haren D. Mandavia T/A Everest Enterprises*).
 5. He proposes that the court allows him to settle the decretal sum by enhanced installments of 40,000/= per month with effect from 31/3/2015 until payment in full.
 6. The Respondents opposed this application. It is their position that on 30/6/2014, the parties had recorded a consent in favour of the Claimant where the Applicant had agreed to pay monthly installments of Kshs.20,000/= with effect from 31/7/2014 failing which execution would issue. The Respondent failed to make any payment necessitating execution of the decree.
 7. They submit that the Applicant cannot purport inability to pay the amount yet live in a furnished apartment.
 8. The Respondents also aver that the Applicant is not bona fide as he only made the application after a proclamation for attachment was levied upon his household property yet judgment was entered on 30/6/2014 and proclamation done on 7/3/2015. The Respondents want the application for stay dismissed as the process of execution was done within the law.
 9. I have considered the submissions of both parties. The relevant law on execution is Order 21 Rule 12 (1) and (2) of Civil Procedure Rules which states that:
 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 installments, 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 installments 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.***
 10. My reading of this law is that the issue of allowing or not allowing such an application is within the court's discretion upon the application showing sufficient cause. This the onus of proving sufficient cause rests on the Applicant.
 11. In this case, the Applicant alleges inability to pay due to collapse of his business. The Applicant entered a consent with the Respondents on 30/6/2014. He never paid anything upto now. He even contends that the goods proclaimed are not his because he stays in a furnished apartment. This is actually laughable because furnished apartments are not what a person who alleges cannot pay a debt of 240,000/= can afford to pay.

12. The principle laid in **Keshavji Jethabhai & Bros Limited v Saleh Abdulla (1959) E.A.260** can guide court in the exercise of its discretion which are:

“ (a) whilst the creditors’ rights must be considered, each case must be considered on its own merit and

discretion exercised accordingly.

(b) The mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of the discretion.

(c) The debtor should be required to show his bona fides by arranging prompt payment of a fair proportion.

(d) hardship of the debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor”.

13. The applicant is not in my view showing sufficient cause why this court should exercise its discretion to allow this application. The Applicant failed to honour a consent entered in June 2014, and has never made any efforts to pay until the execution process started in March 2015.

14. This court finds that the Applicant has not shown good cause to warrant the orders sought being granted. Already there are other charges accruing from the original decree being auctioneer charges which should also be loaded on the Applicant.

15. I will however exercise my discretion and vary the original payment mode agreed upon and order that the Applicant pays the decretal sum in 2 equal installments with effect from date of this ruling. In default execution to issue.

Read in open Court this 29th day of July, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Muhuri holding brief Miss Mwandu for Claimant

No appearance for Respondents