



**Africa Reit Limited v China National Aero-Technology International
Engineering Corporation (Arbitration Cause E077 of 2022)
[2025] KEHC 5135 (KLR) (Commercial and Tax) (25 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5135 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ARBITRATION CAUSE E077 OF 2022**

RC RUTTO, J

APRIL 25, 2025

BETWEEN

AFRICA REIT LIMITED APPLICANT

AND

**CHINA NATIONAL AERO-TECHNOLOGY INTERNATIONAL
ENGINEERING CORPORATION RESPONDENT**

RULING

1. By Notice of Motion dated 13th May 2024, the applicant invoked the provisions of section 1A, 1B and 3A of the Civil Procedure Act, order 21, rule 12 and order 51 rule 1 of the Civil Procedure Rules seeking the following reliefs:
 1. ... Spent;
 2. ... Spent;
 3. ... Spent;
 4. Spent;
 5. ... Spent;
 6. That the applicant be and is hereby granted a period of six (6) months within which to transfer to the respondent one-acre parcel of land excised from Dagoretti/Mutuini/74 in part settlement of the decretal sum;



7. That any outstanding balance of the decretal sum upon transfer of the property in order number 6 above be settled by way of monthly installments of Kshs. 1,000,000.00 until full and final payment of the same;
 8. That the Honourable Court be pleased to cancel, lift, recall or set aside the warrants of attachment dated 7th May 2024 and the proclamation notice dated 9th May 2024;
 9. That the costs of this application be provided for.
2. The application is based on the grounds on its body together with the supporting affidavit of Joyce Wanjiru Ndungu, the applicant's finance and operations director. The facts giving rise to this application are that the respondent has instructed Mbusera Auctioneers who have since served the applicant with warrants of attachment dated 7th May 2024 and a proclamation notice dated 9th May 2024. The attachment of the proclaimed assets was scheduled to take place on 16th May 2024. The applicant had since managed to pay part of the decretal sum.
 3. The applicant subsequently entered into direct negotiations with the respondent's directors and officers to forfeit the interest sum of Kshs.70,410,664.00. That the respondent had accepted to receive the principal sum of Kshs.60,074,550.02 in the form of a one-acre prime property excised from Dagoretti/Mutuini /74 valued at Kshs.60,000,000.00. The applicant further stated that it has since obtained a confirmation of grant in which the applicant is listed as one of the beneficiaries. Regrettably, the title deed has never been transferred to the applicant as the administrator passed on during the pendency of the transfer. He is following up with the estate of the deceased administrator to conclude the remaining legal process. The applicant further stated that it is genuinely unable to pay the lump sum decretal sum since it had suffered massive losses and cash flow issues. That the attachment of the proclaimed items shall not resolve the huge debt owing but only cause substantial loss as they are used as the applicants' tools of trade and hence it will ruin its business. He also stated that the respondent's officials are not in the country impeding deliberations on a payment plan in settling the outstanding decretal sum owed.
 4. The applicant maintained that it was willing to settle the sum of Kshs.131,088,244.42 as captured in the warrants of attachment comprised of principal and interest sums of Kshs.60,074,550.02 and Kshs.70,410,664.40 respectively. It stated that owing to cash flow issues as a developer, coupled with the global COVID-19 pandemic, it has been unable to settle the sums due. It lamented that the sum of Kshs.146,188,244.42 as per the proclamation notice dated 9th May 2024 was colossal and could not be settled within 7 days. In any event, the sums set out there were not a correct reflection of the amount it owed the respondent.
 5. The applicant continued that the goods attached were their tools of trade and would therefore paralyze their operations if the proclamation notice was allowed to proceed. To allow execution to proceed would completely disorient the applicant and distort its business activities for good.
 6. The applicant thus urged this court to allow the application as it is very much intent on settling the decretal sum in installments. That the project leading to the dispute between the parties caused it untoward losses and it has never recovered from it. Finally, if the orders sought are not granted, the applicant will suffer irreparable losses.
 7. In opposing the application, the respondent filed a replying affidavit sworn on 7th June 2024 by Wang Jin. It chronologized that by an award dated 31st August 2022, the arbitral tribunal found in the respondent's favor. This final award was recognized and enforced by this Honourable Court in these proceedings as set out in the decree dated 19th May 2023.



8. It lamented that since publication of the award, that occurred on 31st August 2022, the applicant has never settled the debt. The respondent further pointed out that the applicant only commenced to pay after the respondent elected to proceed with execution in recovery of the decretal sum. It further stated that the applicant entered into a settlement agreement with the respondent in 2014 prior to the COVID-19 pandemic. It could therefore not use the pandemic as an excuse for not settling the decretal sum.
9. The respondent stated that it was the applicant who elected to liquidate its debt by way of transfer of one-acre portion of the property namely L.R. NO. Dagoretti/Mutuini/74 and the balance to be paid within 24 months in its letter dated 4th August 2015. Since then, the applicant has been making several offers for payment but has never settled the amount in full. For these reasons, the respondent was apprehensive that the application was a delaying tactic intended to deny the respondent from enjoying the fruits of its judgment.
10. The respondent stated that it has been more than 10 years that the applicant has been indebted to it. That the applicant had ample time since 2015 to sell the property namely L.R. NO. Dagoretti/Mutuini/74 but has never concluded that sale. In the circumstances, it was apprehensive that the property was either not available for sale or could not be transferred. Furthermore, it pointed out that the respondent was a foreign juristic person and could not therefore acquire freehold property. For those reasons, the respondent prayed that the application be dismissed in its entirety. The respondent rejected the proposal to receive 1,000,000/- per month since the applicant had been indebted to it for more than 10 years and it would take more than 11 years to settle the decretal sum.
11. In a brief rejoinder, the applicant filed a supplementary affidavit sworn by Joyce Wanjiru Ndungu on 12th July 2024. It joined issues with the contents of its application save to add that the settlement agreement was entered deceptively under the impression that it was for administrative purposes only. In any event, that agreement was not executed. The applicant was aware that the transfer of the property would be concluded any time now as all the gridlocks had been removed. It stated that the letter annexed to the respondent's replying affidavit marked WJ5 was on a without prejudice basis. That since the final award was entered in 2023, time only started running at that time. It stated that if the respondent was unwilling to take the property, then it intends to sell the property and use the proceeds to settle the debt owed to the respondent.
12. It was also deponed that the applicant suffered losses exceeding Kshs.100,000,000/- from the project and the extension requested was necessary to forestall closure of its business.
13. The application was canvassed on the strength of the parties' written submissions. Mr. Waithaka, learned counsel for the applicant relied on its written submissions dated 11th July 2024. He set out brief facts leading to the filing of this application and set out four issues for determination namely whether the court has jurisdiction to entertain the instant application; does the applicant have sufficient reason to be allowed the payment of the decretal sum in instalments; when did the decretal sum fall due and what orders should the court grant.
14. The applicant submitted that since this court was clothed with the requisite jurisdiction to hear and determine the subject application, the same ought to be allowed as sufficient reason had been established as to demonstrate why the orders sought ought to be granted. They placed reliance on the case of *Wainaina v Aboge* (Miscellaneous Application E133 of 2018)(2022)KEHC 186 and *Diamond Star General Trading LCC v Ambrose D O Rachier* [2018]eKLR.
15. It was their submission that the award of the arbitrator was adopted as a judgment of this court on 19th May 2023, warrants of attachment issued on 7th May 2024 while this application was filed on 14th May



2024 hence there was no delay. He also urged that the attachment of the proclaimed goods will not settle even 1% of the debt claimed but will indeed collapse the applicant's business. They urged this court to allow the application as prayed.

16. For the respondent, it was submitted that the application ought to be dismissed as argued in the written submissions dated 28th August 2024. They set out the issue for determination as whether the judgment debtor's application has any merit. The court was urged to consider the background of the matter, that the property is valued at Kshs.60,000,000/- which is not even half of the amount owed to the decree holder. It was extensively argued that the application lacked merit and ought to therefore fail. Reliance was placed on the case of *Keshval Jethabhai & Brothers Ltd v Saleh Abdul (1959) EA 260* and *Hildegard Ndelut v Lelkina Dairies Ltd & Another [2005] eKLR*.
17. It was the Respondent submission that the applicant had not demonstrated its financial position to enable the court ascertain the reasonable amount that it can pay. That the proposed instalment is too small and the payment plan to settle the decretal sum owed will last for a period of more than 10 years. They urged that if the court is minded to grant the orders to pay in instalments the instalment be structured to settle the entire decretal sum in a maximum period of two years. They urged the court to dismiss the application.
18. I have considered the application, the response and the parties opposed written submissions. It is not disputed that the applicant is indebted to the respondent by dint of the decree issued on 19th May 2023. The applicant seeks to, however, settle the sums by either transferring ownership or sale of one-acre of that parcel of land namely L.R. NO. Dagoretti/Mutuini/74 within a period of six months. The land is valued at Kshs.60,000,000/-. It has further proposed that any outstanding decretal sum after the sale be paid in monthly installments of Kshs.1,000,000/- until payment in full. In that regard, the applicant has urged this court to set aside the warrants of attachment dated 7th May 2024 and the proclamation notice dated 9th May 2024.
19. The application is hinged on the provisions of Order 21 rule 12 of the Civil Procedure Rules which 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 judgment or 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.

The relevant provision applicable is order 21, rule 12 (2) of the Civil Procedure Rules. In *Keshavji Jethabhai & Bros Limited v. Saleh Abdulla [1959] E.A. 260* the court held that

“The Court will consider the circumstances under which the debt was contracted, the conduct of the debtor, his financial position, and so forth, and instalments should be directed where the defendant shows his bona fides by offering to pay anything like a fair proportion of his debt at once.” – per *Crawshaw J. in Keshavji Jethabhai & Bros. Limited v. Saleh Abdulla (supra) at p. 263.*



20. Thus, in determining this application the Court must evaluate the peculiar existing circumstances and be satisfied that there exists a sufficient reason to grant such an order. It is also instructive to note that this being a discretionary power, the court must be satisfied that sufficient cause has been demonstrated as to show that the decretal sum ought to be paid in instalments. Given the discretionary nature of the orders sought, I am reminded to exercise the same absent of caprice, whims or sympathy. Once satisfied that the applicant is deserving of the exercise of discretion, the court is at liberty to make any orders including but not limited to the attachment of property of the judgment debtor.
21. In this case, the applicant has proposed to settle the decretal sum by way of sale of or transfer the one-acre parcel of land namely L.R. NO. Dagoretti/Mutuini/74. The said parcel of land is subject to succession proceedings where confirmation of grant was issued but the administrator died before concluding the transaction. From the above it can be discerned from the depositions that the property does not belong to the applicant since he also requires time to allow the conclusion of the succession proceedings. This is confirmed by the applicant in its supplementary affidavit where it is deponed that the applicant has always been ready and willing to transfer LR Dagoretti/Mutuini/74 but there has been a delay in the conclusion of the transaction due to the succession delays brought about by the demise of the administratrix of the estate of the said property.
22. The applicant does not disclose in exactitude what the current position is. It only stated that things are on course to the favor of the respondent. That information is too scanty for the court to arrive at a decision that indeed the transfer of the property be effected in the respondent's favor. This court has also not been presented with the proceedings the subject of succession, the title deed and the correspondence if any, regarding the progress and developments regarding the sale and transfer of L.R. NO. Dagoretti/Mutuini/74. Moreover, until the grant is confirmed, any disposal or dealings on the said property amounts to meddling in the estate of the deceased. This court is not willing to make directions over property that is subject to an active succession cause especially with unclear position of the administrators and other beneficiaries of the said estate in relation to the property being offered in settlement of the decree.
23. Even if I was inclined to allow the said proposal, the suggested value of the property is barely half the total undisputed decretal sum. The applicant's proposal to pay KShs.1,000,000/- per month is not feasible as it would mean over 10 years, without factoring in interest that continues to accrue.
24. The applicant explained that during the process of transfer, the administrator of the estate died, no evidence was adduced to this effect. The respondent pointed out that this proposal was actually introduced to the respondent about ten years ago. That fact was not denied by the applicant. No affirmative steps have been laid out before this court demonstrating that the applicant intent on disposing off the property to the benefit of the respondent.
25. I also find that the applicant has not demonstrated that this application is justifiable, let alone furnished sufficient cause why the court ought to delay the execution of the judgment. It is important to remind parties that execution is a lawful process and the party dissatisfied with the execution must ably demonstrate why execution ought not to proceed.
26. It is evident that the applicant has continued making proposals without adhering to any one of them. In view of the foregoing analysis, I come to the resolute conclusion that the Notice of Motion dated 13th May 2024 lacks merit. It is hereby dismissed with costs to the respondent.
27. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF APRIL 2025.



RHODA RUTTO

JUDGE

In the presence of;

..... For Applicant

..... for Respondent

Sam Court Assistant

