



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO. 122 OF 2009

AMIR SULEIMAN.....PLAINTIFF/APPLICANT

VERSUS

AMBOSELI RESORT LIMITED.....DEFENDANT/RESPONDENT

R U L I N G

1. The application dated 13/9/2013 seeks the following orders:-

1. **“(Spent).”**

2. **(Spent).**

3. **(Spent).**

4. **THAT the court be pleased to grant the Defendant/Applicant an order of stay of execution and or any further execution pending the hearing of this application inter partes.**

5. **THAT the court do find the proclamation made on 12th September 2013 is in error.**

6. **THAT the court be pleased to grant the Applicant/Defendant leave to pay and settle the amount decreed in this case together with costs and interests by instalments of:-**

i. **An initial payment of Kshs.900,000.00 within seven (7) days of the court’s ruling.**

ii. **Balance in instalments of Kshs. 100,000.00 per calendar month until the amount shall have been settled in full.**

7. **THAT the court do issue any other or further orders and or directions it may deem fair and just in the interest of justice.**

8. **THAT the costs be in the cause.”**

2. The affidavit in support sworn by the Applicant, **Amir Suleiman** has deponed that no interest was awarded in the judgment herein. That the costs of Kshs.317,491/= were paid. That what is excutable therefore is the amount of Kshs.5,625,000/= entered as judgment for *mesne* profits. The Applicant’s complaint is that the warrants of execution erroneously reflect the sum due as Kshs.12,188,665/=

According to the Applicant, there was an excess of about Kshs.7,000,000/=.

3. The Applicant has also contended that the execution warrants include the amount due as costs when the same have already been paid.

4. The Applicant prays for the court to exercise its discretion and allow him to pay the decretal sum in instalments by making an initial payment of 900,000/= and thereafter payments by monthly instalments of Kshs.100,000/= until payment in full. The Applicant argues that he has very limited cash flow and his businesses have all collapsed. That the decretal sum is substantial and payment of the same is double payment of rent as he had already paid the **Wildlife Lodges/Ketain Somalia** as evident in the judgment.

5. The application is opposed. According to the affidavit in reply, the application is calculated to deprive the Respondent of the realization of the fruits of the judgment. The Respondent accuses the Applicant of failure to make a full and frank disclosure of material facts. It is further stated that the Applicant filed a similar application on 27/5/2010 seeking *inter alia*, a stay of execution of the decree which application is yet to be prosecuted.

6. That the draft decree for Kshs.5,625,000/= plus interest was approved by the Applicant. According to the Respondent, when a judgment is silent on interest then the interest is chargeable from the date of the suit to the date of judgment and further interest is chargeable from the date of the decree to the date of payment at court rates which is Kshs.14% per annum.

7. It is further contended that the costs in the sum of Kshs.317,491/= have already been taken into account in the execution warrants.

8. The Respondent has objected to payment by instalments. It is averred that there is no proof of the Applicant's financial position. That the proposal made by the Applicant for payment in instalments would take more than nine (9) years for the decretal sum to be realized. It was further contended that the issue of double payment does not arise as the judgment declared that the Applicant was a trespasser. That the Applicant is not interested in appealing the judgment as no steps have been taken since the filing of the Notice of Appeal on 5/5/2010. That the application for stay of execution filed herein on 27/4/2010 remains unprosecuted.

9. The application was canvassed by way of oral submissions which I have duly considered.

10. Judgment was entered in favour of the Defendant/Respondent on 30/4/2010 for Kshs.5,625,000/= plus costs of the suit and counterclaim. The judgment is silent on the issue of interest. What does this portend for the Defendant/Respondent? The answer to this question is found in **section 26** of the **Civil Procedure Act** which provides as follows:-

“26. (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.”

11. It is common ground that the costs of Kshs. 317,491/= have already been paid. However, although there is an approved decree herein, the same does not conform with the judgment. The judgment is silent on the question of interest. The approved decree therefore contravenes the provisions of **Order 21 rule 8 (2)**. **Order 21 rule 8 (2)** states as follows:-

“Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.

12. The test to be applied is an application for payment by instalments is well settled by case law. (See for example, **Kshevji Jethabai & Brothers Limited –vs- Saleh Abdulla (1959) E.A.** cited in **Victoria Commercial Bank Ltd –v-s Charles Lutta Kasamani H.C. Misc. Case No. 288 of 1997**). The primary consideration for allowing payment of a decree by instalments is for the judgment debtor to demonstrate *bona fides* by payment of a fair proportion of the debt.

13. On the requirement to show sufficient cause, there must be a genuine and reasonable cause why the decree cannot be met immediately in full. In the **Keshavji Jethabhai** case (supra) it was held as follows:-

“It is laid down that the mere fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reason for granting instalments and that ordinarily he should be required to show his bona fides by arranging prompt payment of a fair proportion of the debt. We are in respectful agreement with this interpretation of the law but find great difficulty in construing the last observations in the ruling in the way desired by the counsel for the Plaintiff, i.e. that prompt payment of a fair proportion of the debt is a condition precedent for the exercise of the discretion of granting instalments. Each case has to be decided on its own merits, the predominating factor being of course the bona fides of debtor”.

In **Keshavji Jethabhai** case (Supra) at page 263, the court adopted a definition of sufficient cause found in **Woodroffe and Ameer Ali on Civil Procedure Code 2nd Edition 869** as follows:-

“Sufficient reason – The existence of this will depend upon the facts of the particular case. 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”.

14. In the instant case, the Applicant has offered to pay Kshs.900,000/=at once and instalments of Kshs.100,000/= until payment in full. Considering that the judgment was entered almost five years ago and that it would take many more years to liquidate the decretal sum if the said proposal was accepted, the offer is not reasonable and lacks *bona fides*. Kshs.900,000/= is not a fair proportion of the debt. The Applicants financial position has not been revealed to this court. The averment that the Applicant has cash flow constraints is not supported by any cogent evidence. The question of the Applicant being exposed to double jeopardy regarding the payment of the rent was well considered in the judgment entered herein. No appeal has been filed.

15. With the foregoing, I arrive at the finding that the sum proclaimed is incorrect and that there are errors in the proclamation made on 12/9/2013. I find no merits in the application for payment by instalments and dismiss the same. The Respondent is at liberty to apply for fresh execution warrants. Taking into account the circumstances of this application, each party to meet own costs of this application.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 28TH day of April, 2015.

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JUDGE