



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 5400 OF 1991

HALL EQUITIORIAL LTD PLAINTIFF

VERSUS

OLYMIPC FRUIT PROCESSORS DEFENDANT

RULING

This is a Notice of Motion brought under Order XLIV Rule 1 of the Civil Procedure Rules in which the applicant is seeking the following orders:-

- “1. THAT the consent order of the 10th February, 1998 be stayed.
2. THAT the consent order of 10th February 1998 be reviewed.
3. THAT the guarantors be allowed to liquidate the amount outstanding in instalment of Kshs.20,000/= until payment in full”.

Mr. Kimani for the applicant conceded that the consent order was lawfully entered, and that he was seeking this court’s indulgence so that instead of paying Kshs.50,000/= per month. They should be allowed to pay Shs. 20,000/= per month.

Mr. Kawaja for the respondent has opposed this application citing authorities to show that a consent order can only be set aside if there was fraud, mistake or misrepresentation.

I agree with Mr. Kawaja’s submission that a consent order is indeed a contract which can only be set aside upon well settled criteria – fraud, mistake or misrepresentation. What we have here however is not an application to set aside but to vary the order which was made by consent of the parties. The applicant agreed that he would be paying Shs.50,000/= per month but now comes to court seeking this court’s indulgence so that he could be allowed to be paying Shs.20,000/= per month. The applicant states in his affidavit why he has found himself in this situation. It would appear that if his financial position improves he would be in a position to liquidate the decretal amount. In my view this is a proper case in which this court should exercise its discretion in favour of the applicant since the variation sought would not prejudice the respondent’s position. All it means is that the repayment period will be a little bit longer and in case the applicant makes arrangements to liquidate the decretal amount than the matter would be brought to an end.

In view of the foregoing this application is granted but I would hasten to add that the repayment of

Shs.20,000/= per month commences from the beginning of this month of December 1998.

The previous instalments still stand at Shs50,000/= per month. Orders accordingly.

Delivered at Nairobi this 7th day of December, 1998.

E.O.O’KUBASU

JUDGE

7.12.98

Coram : E. O’Kubasu, J

No appearance for applicant

Mr. Kawaja for respondent

Court Clerk – Njihia

ORDER

Ruling delivered.

E’ O’KUBASU

JUDGE



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