



Case Number:	Civil Case 99 of 2012
Date Delivered:	11 Mar 2016
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Ruling
Judge:	Eric Kennedy Okumu Ogola
Citation:	Botanics Kenya Limited v Ensign Food (K) Limited [2016] eKLR
Advocates:	M/s Gathara for Plaintiff Mr. Mwaniki for Defendant
Case Summary:	-
Court Division:	Commercial Tax & Admiralty
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Defendant/Applicant's Notice of Motion dated allowed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL &ADMIRALTY DIVISION

CIVIL CASE NO.99 OF 2012

BOTANICS KENYA LIMITED.....PLAINTIFF

VERSUS

ENSIGN FOOD (K) LIMITED.....DEFENDANT

RULING

1. The Notice of Motion before the Court is dated the 25th September 2015 and filed in Court on the 4th November 2015. It is expressed to be brought under **Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and Order 10 Rule 11 and Order 51 Rule 2 of the Civil Procedure Rules 2010.**

2. The Defendant/Applicant seeks an order that it be allowed to pay the decretal amount sum of Ksh.1,185,000 by instalments of Ksh.100,000 per month.

3. The application is based on the grounds that following the Judgement of the Court the Applicant approached the Plaintiff/Respondent with a proposal of paying the decretal sum of Ksh.1,185,000 by instalments of Ksh.100,000 which would be increased in due time. The Respondent declined the request and threatened the Applicant with execution within 7 days from 16th September 2015. The application is supported by the affidavit sworn on 25th September 2015 by **Eugene Ongaka Matiro**, one of the Directors in the Applicant's Company.

4. The brief facts of the application are that on **27th June 2014**, judgement was entered for the Respondent for the sum of **Ksh.1,185,000/= plus interest at court rates** from the date of judgment until payment is made in full. The court further directed the parties to set a date for hearing within thirty (30) days from the date of the Ruling with regard to a contested balance of Ksh.1,623,000/=. The cost of the application was given to the Plaintiff.

5. The Applicant sought a stay of execution pending appeal for 30 days which was duly granted by the Court. This extension was not extended.

6. It is the Applicant's case that the Respondent has declined the proposal by the Applicant to pay the judgement sum in instalments. The Applicant further states that had the Respondent accepted the proposal made immediately after Judgement and subsequent proposals, a substantial amount would have been cleared.

7. The application is opposed vide the Replying affidavit sworn on 27th January 2016 by **Titus Okuku**, the Managing Director of the Respondent. The Respondent avers that the Applicant is misleading the court that it is unable to pay the Respondent the decretal sum by using documents which precede the Ruling of the Court dated 27th June 2014. It is the Respondent's case that the Applicant should make a deposit of Ksh. 500,000/= and pay the balance in instalments of Ksh.100,000/=.

8. The Applicant avers that the business has not been doing well financially and can only afford an instalment proposal with a deposit of Ksh.250,000/= and not Ksh.500,000/= as proposed by the Respondent.

9. The application was prosecuted by way of oral submissions on the 15th February 2016.

ANALYSIS

10. I have considered the application herein, the affidavits on record as well as the submissions made by both parties.

11. The law on paying of a decretal sum in instalments is to be found Under **Order 21 Rule 12 of the Civil Procedure Rules** which provides as follows:

“12. (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 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.”

12. The exercise of discretion as regards payment of the decretal sum by installments, like any other, must be exercised in a judicial and not an arbitrary manner as was espoused in the case of **A. Rajabali Alidina v Remtulla Alidina & Anor. (1961) EA 565, Law JA**

“All commentators on the Civil Procedure Code agree that the court’s discretion to order payment of the decretal amount in installments is one which must be exercised in a judicial and not an arbitrary manner. The onus is on the defendant to show that he is entitled to indulgence under this rule.

13. As regards what constitutes “for any sufficient cause” as detailed in **Order 21 rule 12**, in the case of **Freight Forwarders Ltd v Elsek & Elsek (K) Ltd (2012) Eklr, Mwongo J** narrowed the principles as regards to what amounts to ‘sufficient cause’ to include the following;

- a. ***The debtor is unable to pay in lump sum***
- b. ***The debtor can pay by reasonable monthly installments***
- c. ***The application is made in utmost good faith.***

14. Having perused the Application, it is not in dispute that the Applicant made attempts to settle the debt. What is however in contention is whether the proposals were in good faith.

15. The Applicant avers that the Respondent who seeks equity is doing so with unclean hands because it refused to accept the proposed payments in 2014 and as such has delayed the repayment of the decretal amount which by now could have been paid in full. The Applicant further stated that it had been willing and ready to pay the installments and even convened a meeting to discuss the same, but the meeting was unsuccessful due to financial difficulties.

16. The sum owing to the Respondent has been steadily accumulating since 2009 and as such it has been nearly 7 years that the Applicant has failed to pay the Respondent. In those 7 years the Applicant has been trading, utilizing and/or using for benefit the sum due to the Respondent who has not been able to trade, utilize and/or use for benefit the sum despite the sum being due and owing.

17. In light of the above and the submissions made herein I find that the Applicant is being disingenuous. The Applicant has included in its submissions various letters marked “**without prejudice**” to elucidate the attempts made at reaching a settlement with the Respondent which in my opinion should not have been included as no settlement was agreed to between the two parties.

18. The Applicant has not produced any updated or recent financial statements of its accounts which further lead me to believe that the application is frivolous. If indeed the Applicant was serious he could have started paying the Kshs.100,000/= in July 2014. Nonetheless I have noted that the Respondent is willing to accept payment by installment if the Applicant deposits Shs.500,000/=. I have also noted that the applicant is prepared to deposit Shs.250,000/=. To accommodate both parties, I will allow the application on the condition that the Applicant deposits Shs.300,000/=.

19. In light of the foregoing, I make the following orders;-

- a. ***The Defendant/Applicant’s Notice of Motion dated 25th September 2015 and filed in Court on 4th November 2015 is allowed in the following terms:-***

- i. ***There shall be a stay of execution of Judgment herein subject to the following further orders.***
- ii. ***The Defendant/Applicant shall pay the decretal sum by first making down payment of Ksh 300,000/= by 31st March 2016.***
- iii. ***The Defendant/Applicant shall thereafter pay monthly installments of Ksh.100,000/= with effect from 1st May 2016 until payment in full.***
- iv. ***In default of any one payment execution shall issue.***
- v. ***Costs shall be for the Plaintiff/Respondent.***

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI

THIS 11TH DAY OF MARCH 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

M/s Gathara for Plaintiff

Mr. Mwaniki for Defendant

Teresia – Court Clerk



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