



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 38 OF 2015

BETWEEN:

FAZIL GAFAR t/a MAPETO RETREAD

PLAINTIFF

AND

KHALID OMAR t/a KHALSONS INVESTMENTS

1st DEFENDANT

KHALSONS TPT CONTRACTORS

2nd DEFENDANT

Coram: JUSTICE M.A. TEMBO,

Makiyi, Counsel for the Plaintiff
Msungama, Counsel for the Defendants
Chanonga, Official Court Interpreter

ORDER

This is the order of this Court following the hearing of the defendants' application to pay the debt herein by installments.

The defendants by judgment entered against them on their own admission owe the plaintiff a sum of K2, 183, 436.00. The defendants seek to pay that judgment by monthly installments of K200, 000.00.

The summons to pay debt by installments was filed in September 2015 but inexplicably was only assigned to this Court for hearing in this sitting.



The summons is supported by affidavit. The affidavit has been criticized by the plaintiff for not containing some exhibits showing the means of the defendants though the affidavit indicates that such exhibits are attached.

The plaintiff also lamented the fact that the defendants only made a single payment of K200, 000.00 in September 2015 and nothing else till now and contended that if the defendants were serious they would have liquidated the judgment sum by now.

The plaintiff further stated that the practice was that the defendants should have been present to be cross-examined on their affidavit which is not the case.

The defendants submitted that they would seek an adjournment to attach the relevant exhibits to their affidavit. Further that they would be present for cross-examination at the next hearing date if an adjournment was granted.

The plaintiff also objected to the summons as having been taken out under the inherent jurisdiction of this Court when in fact the Court has statutory power to order any judgment debt to be paid by installments.

The plaintiff contended that in the circumstances the defendants are just abusing the court process and that the application should be dismissed with costs.

This Court agrees with the plaintiff that firstly an application to pay debt by installments is not determined under this Court's inherent powers. Such an application is dealt with pursuant to statutory authority provided under section 11 (a) (x) of the Courts Act. It was therefore wrong for the defendants to assume that this Court has inherent powers to order payment of a judgment by installments.

This Court further agrees that if the defendants were sincere with their request to pay the debt by installments they would have liquidated the judgment herein since they made a single payment of K200, 000.00 that was accepted by the plaintiff last year.

Of fundamental concern is the matter raised by the plaintiff that the defendants' affidavit does not contain the requisite information as to their means. This Court agrees with the plaintiff that a defendant on an application to pay debt by installments must set out frankly the information as to his means and liabilities so that the Court and the plaintiff can have a fair view of the financial position of the

defendant in relation to the installments sought to be made in satisfaction of the judgment debt.

It was held in the case of *Leasing and Finance Co v Maltraco Ltd* [1997] 2 MLR 250 that the sole task of the court on an application to pay a debt by installments is to balance the interest of the judgment-creditor and his unfettered right to recover the debt at once against a genuine failure or inability to settle the debt at once on the part of the judgment-debtor upon a full factual frank and honest disclosure of the judgment-debtors means. A court ought to be more cautious and more reluctant to allow installments in a trading debt. And further that a prayer by a judgment-debtor for installments in essence is a prayer for the courts discretion and most importantly it is a prayer for sympathy. Wherefore a judgment-debtor must approach the court with clean hands.

The defendants in this matter have not made a frank disclosure of their means. This Court cannot therefore entertain his application. It cannot be adjourned in view of the prior conduct of the defendants in only making a single payment since they proposed to pay the debt by installments last year. The instant application is accordingly dismissed.

Costs normally follow the event and shall therefore be for the plaintiff.

Made in open court at Blantyre this 30th June 2016.



M.A. Tembo
JUDGE