



**Republic v City Council of Nairobi; Morintant & 3 others (Interested Parties);
Iris Properties Limited & another (Exparte) (Application 433 of 2009)
[2022] KEHC 18087 (KLR) (Judicial Review) (25 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 18087 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION 433 OF 2009
J NGAAH, J
NOVEMBER 25, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

CITY COUNCIL OF NAIROBI RESPONDENT

AND

SIMON MORINTANT INTERESTED PARTY

PAULINE KAHIGA INTERESTED PARTY

HALKANO D. WAQO INTERESTED PARTY

JOHNSON AKONGO INTERESTED PARTY

AND

IRIS PROPERTIES LIMITED EXPARTE

POLAND LIMITED EXPARTE

RULING

1. On December 11, 2020, Nyamweya, J as she then was, directed the deputy registrar of judicial review division of this Honourable Court to, among other things, compute the sums, if any, of the decretal sum and interests thereon that is still owing to the to the ex parte applicants on a decree the latter had obtained against the respondent.



2. The deputy registrar complied and filed her report on what she thought were the correct computations of what the respondent owed the applicant.
3. In her report dated April 7, 2021, the deputy registrar came to the conclusion that the outstanding amount was Kshs 7,638,778.75.
4. The background of the direction of the learned judge to the deputy registrar is an order of mandamus made on March 17, 2011 according to which the Town Clerk of the then City Council of Nairobi was compelled to pay the ex parte applicants decretal sum of Kshs 35,000,000/= and interest compounded at the rate of 12% per annum from September 25, 2002 until payment in full.
5. Subsequently, the decree holder and the judgement debtor entered into a consent more particularly on November 9, 2016. According to that consent, the judgement debtor undertook to settle the sum owing by way of monthly instalments of Kshs 7,000,000/= till payment in full. It was also agreed that in default of payment of any one instalment, contempt of court proceedings would be commenced against the officers of the City Council of Nairobi and its successor, the County Government of Nairobi.
6. It would appear that the judgement debtor did not honour the consent and in a ruling delivered on December 11, 2021, the court held, *inter alia*, that the decree had not been settled. Accordingly, it directed that the sum of Kshs 14,000,000/= which the judgement debtor had deposited in this Honourable Court be released to the applicants. In the same breath, the court directed the deputy registrar to 'compute the sums if any, of the decretal sum and interest thereon that remains unpaid to the ex parte applicants, taking into account various rulings, made herein, and file a report thereon within the said sixty (60) days'.
7. As noted, the learned deputy registrar filed her report. However, on September 27, 2021, Mr Mungu, the learned counsel who appeared for the applicant together with Mr Juma were not satisfied with the figure that the deputy registrar came up with as the amount owing to their clients. Earlier, and more particularly on June 16, 2021, Mr Mokua, the learned counsel for the respondent acknowledged that the deputy registrar had filed her report. His comments on the report were as follows:

We need 60 days either to pay the sum of 7.6 Million or appeal. We pray for extension of stay orders'.
8. On September 27, 2021, I directed the parties to move the court appropriately if they were not satisfied with computation by the learned deputy registrar.
9. Following this direction, the respondent filed a motion dated January 21, 2022 which is the subject of this ruling. The motion was filed under Order 22 Rule 52, Order 42 Rule 6 and Order 42 of the [Civil Procedure Rules](#). The respondent has sought the following orders:
 1. That the instant application be certified as urgent and the same be heard ex parte in the first instance.
 2. That the honourable court be pleased to grant a temporary stay of execution of the warrants of arrest issued on December 5, 2017 pending the hearing and determination of this application.
 3. That this Honourable Court be pleased to grant a temporary stay of execution of the warrants of arrest issued on December 5, 2017 pending the hearing and determination of Nairobi High Court Civil Appeal No E234 of 2021 Nairobi city County v Iris Properties Ltd & Anor.
 4. That the City County Secretary be discharged from the warrants of arrest issued on December 5, 2017.



5. That the costs of this application be provided for.'
10. It is clear from these prayers and the law that has been invoked that the respondent is not seeking to impeach the computations by the deputy registrar of the sum it owes the ex parte applicants; rather, it is an application seeking stay of execution of that part of the decree that remains unsettled. On this score alone the application should fail to the extent that it is inconsistent with the direction given by this Honourable Court on September 27, 2021.
11. Even then, the affidavit sworn in support of the application, by Erick Abwao Odhiambo who has described himself as 'the County Solicitor for the City County of Nairobi' is clear that the respondent does not contest the figure arrived at as owing. In paragraph 26 and 27 of the affidavit he has sworn as follows:
26. That the ruling of the deputy registrar having been made in the 2021/2022 financial year, the payments of Kshs 7,638,778.75 to the ex parte applicants/respondents can only be processed in the 2022/2023 financial year.
27. That the respondent/applicant has taken steps including but not limited to writing to the controller of budget seeking for an overdraft of Kshs 7,638,778.75 so that the ex parte applicants/respondents can be paid.'
12. In the face of these depositions, there can never be any doubt that there is no basis for the respondent to challenge the computations by the deputy registrar. If anything, the depositions are clear that the respondent has conceded that the decretal sum owing as at the date the deputy registrar filed her report is the amount given by the latter.
13. Assuming that the respondent's application was properly before court, it cannot succeed because a similar application was made in Civil Appeal No E234 OF 2021. In a ruling delivered on October 5, 2022 dismissing the application Serگون, J held as follows:
14. The background of this matter is that the appellants on May 5, 2021 filed this appeal against the decision of CA Muchoki dated April 7, 2021. On July 12, 2021 however this court by consent granted the stay of execution on condition that the appellant deposits the decretal sum in court within sixty (60) days. Since then the appellant has deposited some of the money and has asked this court severally to grant them another extension to meet their obligation.
- '15. The applicants have failed to meet their obligation. Since the appellant was granted the stay of execution provided that a certain amount to be deposited in court. Counsel for the appellant did confirm that the appellant was granted conditional stay lasting sixty (60) days. On September 23, 2021 this court granted the appellant an extra twenty (21) days to deposit the money in court.
16. The court cannot keep issuing orders for stay of execution to a party who fails to comply with the conditions imposed by the court. I do find that the application dated May 13, 2021 lacks merit. The same is hereby dismissed with costs.'
14. What the applicant is now seeking in this application is what it failed to achieve in a similar application filed in Civil Appeal No E234 of 2021. The application is thus a classic example of an abuse of the due process of the court.
15. In the circumstances, I am not satisfied that the applicant/respondent's motion dated January 21, 2022 is merited; it is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED ON 25 NOVEMBER 2022



**NGAAH JAIRUS
JUDGE**

