



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JR NO. 433 OF 2009**

**IRIS PROPERTIES LIMITED**

**PROLAND LIMITED .....APPLICANTS**

**AND**

**THE CITY COUNCIL OF NAIROBI .....RESPONDENT**

**RULING**

**Introduction**

1. The Applicants herein, **Iris Properties** and **Limited Proland Limited**, moved this Court by way of a Notice of Motion date 20<sup>th</sup> April, 2015 seeking the following orders:
1. **That this matter be certificate extremely urgent and head ex-parte in the 1<sup>st</sup> instance, service thereof being dispensed with.**
2. **That this honourable court be pleased to order the Treasurer, the City County of Nairobi, one Luke Gatimu or such other occupier of such office to attend court appear before the honourable court and show cause why he should be cited for contempt of court for falling to pay to the claimants the sum of Kshs.129,000,000 being the decretal sums and interest as ordered by this honourable court on**
3. **That the said Luke Gatimu or such other occupier of the office of treasure, Nairobi city County be punished for contempt of court.**
4. **That the costs of this application be awarded to the Applicants.**

**Applicants' Case**

3. According to the Applicants, this court issued orders of mandamus compelling the Respondent to pay to the Applicants the sums of Kshs.35,000,000 together with interest at 12% compounded annually from the year 2002 together with costs whose existence the Respondent acknowledged. It was disclosed that the Respondent moved the Court of Appeal seeking stay of execution and though no appeal was ever filed, a stay was granted on 28<sup>th</sup> May 2012 on the twin conditions that the principal sum of Kshs.31.5 million be paid to the applicants within a period of 50 days. However, the Respondents neither filed the appeal, nor paid the said amount within the stipulated time.
4. It was therefore contended that the judgement stood unchallenged and the Applicants were entitled to calculate and demand interest. In the applicant' view, the amount demanded is simply the principle sum and interest, which sum is neither erroneous nor unjustified. The applicants disclosed that the Respondents have paid the sums due piece meal and erratically and there is not

- overpayment at all. It disclosed that Kshs.3.5 million was initially paid under the orders of 11<sup>th</sup> February 2010 as a condition of stay of execution which again was to be paid in 45 days from the date of the order but took much longer causing the stay to lapse.
5. In the applicants' view, the *obiter dicta* remark by **Justice Mwera** observing that the initial arbitral award had not included an order for interest, was unfortunately being seized upon by the Respondent as a definite finding whereas the text of the judgment was quite plain in its meaning and that there is no judgment of any Court prohibiting the Applicants from claiming interest especially in light of the length of time the amounts have remained unpaid. It was therefore averred that the Respondent's position that the payment of Kshs.45 million constitutes an overpayment was dishonest as all payment to the Applicant have had to first be approved by the director of legal services (**Mr. Karisa Iha** himself) and in any case no demand for a refund has been made to date.
  6. The applicants averred that it was not aware of any pending appeal, the last known appeal against the arbitral award having been dismissed for want of prosecution.
  7. To the applicants the instant application is for the enforcement of orders of mandamus compelling the respondent to pay which orders have not been overturned/or stayed by any Court and the subject sum continues to accrue interest. It was contended that **Karisa Iha**, the deponent of the replying affidavit is not in a position to deny the personal service of process upon **Luke Gatimu** as he is a different person and has himself not denied service.
  8. The applicants emphasised that the instant application is one for execution against the office of the County Treasurer and/or whoever is occupying that office and proper service on such office has been done and no proper or sufficient cause has been shown as to why the County Treasurer should not be summoned to court to show cause why he should not be held in contempt of court.
  9. With respect to the issue of directorship of **Proland Limited**, it was contended that the Respondent carried out an erroneous search for a company name Pro Lab having certificate no. C108433 yet the deponent of the supporting affidavit was a director in **Proland Limited** certificate number C65456.
  10. The applicants asserted that the Respondent has neither paid to the Applicant the said sums as directed by the Court nor given any acceptable payment proposal to the applicants in consonance with the said orders.
  11. It was averred by the Applicants that following the implementation of devolved system of government, the County Government of Nairobi took over the assets, responsibilities and obligation of the defunct City Council of Nairobi and is accordingly liable to satisfy all its liabilities.
  12. It contended that despite service on the County Government of Nairobi the Respondent has remained recalcitrant. To it, the authority of this court and its orders must be zealously guarded and respected by all consumers of its services hence it is in the interest of justice that this honourable court be pleased to summon the city treasurer to show cause why he should not be committed to civil jail for contempt.

### **Respondent's Case**

13. According to the Respondent, on 17<sup>th</sup> Mach 2011 this honourable court (**Justice Gacheche**) issue orders of mandamus compelling the Respondent to pay the Applicants the sum of Kshs.35,000,000 together with interest at 12% compounded annually from 2002 till payment in full. However being dissatisfied with this decision, the Respondents filed an application before the Court of Appeal vide Nairobi Civil Application No. 113 of 2011 (Ur 74 of 2011) seeking *inter-alia* a stay of execution of the orders of the **Honourable Justice Gacheche** pending the hearing and determination of an intended appeal and on 28<sup>th</sup> May 2012, the Court of Appeal partially allowed the said application granting the Respondent a stay of execution on the interest until the intended appeal was heard and determined conditional upon payment of Kshs.31.5 million within 50 days.
14. It was therefore the Respondent's position that unless and until the aforesaid appeal is heard and determined by the Court of Appeal, the Applicants herein can only be paid a maximum sum of Kshs.31.5 million as ordered by the Court of Appeal.
15. According to the Respondent, from the office of its Chief Finance Officer the Applicants have to

- date been paid more than Kshs.45 million in relation to this matter a fact which they have concealed from this Court which sum, in the Respondent's view, constitute an overpayment considering the order of the Court of Appeal aforesaid.
16. The Respondent's contention was that the award that gave rise to the instant litigation was for Kshs.35 million only and without interest thereon and that no less than an experienced Judge of the High Court has previously found that the Applicants have no reason or basis to demand any interest on the above award.
  17. The Respondent averred that the Applicant had not exhibited a computation of how the amount of Kshs.129,000,000/= is arrived at and had not even admitted that an initial payment of Kshs.3.5 million reduced the initial award from 35 million to 31.5 million. In its view, in a scenario like this one where a litigant conceals serious facts and the amount payable is unknown or contested, it would be unjust to punish the Respondent for alleged contempt or even required it to show cause as prayed herein.
  18. The Respondent further disputed that there was evidence of personal service of the Court order upon the Acting Finance Officer of the City County of Nairobi one **Luke Gathimu** requiring him to pay the decretal amount to justify the relieves sought herein. Based on legal advice, the Respondent maintained that for one to be cited for contempt of court, the Applicant must show that the alleged contemnor has previously been served in person with the orders in issue together with a penal notice on that behalf and he has wilfully disobeyed the same.
  19. The Respondent further averred that as a matter of due diligence, it had caused the investigation of the shareholders and directors of the Applicants at the office of the Registrar of companies which investigations revealed that at all material times one **Fredrick Kenneth Mungai** was never a shareholder or director of any of the Applicants. It therefore adopted the position that the Notice of Motion dated 20<sup>th</sup> April 2015 was supported by a false, incompetent and invalid affidavit and ought to be struck out *in limine*.

### **Determination**

2. I have considered the application and the material on record.
3. According to ***Black's Law Dictionary***, 9<sup>th</sup> Edition at page 360:

**“Contempt is a disregard of, disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”**

4. In ***Halsbury's Laws of England***, 4<sup>th</sup> Edition Volume 9 at paragraph 52 it is stated:

**“It is a civil contempt of court to refuse or neglect to do an act required by a Judgment or order of the court within the time specified in the judgment or order...A judgment or order against a corporate body may be enforced by an order of committal against the directors or other officers of the corporation.”**

5. Similarly, in **Hadkinson vs. Hadkinson (1952) 2 All ER 56**, the judges of the court of Appeal of England unanimously held that:

**“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt.”**

6. In ***The Law of Contempt***, Butterworths (1996) Pages 555 – 569 by Nigel Lowe and Brenda Sufirin it is stated that:

**“Coercive orders made by the courts should be obeyed and undertakings formally given to**

**the courts should be honoured unless and until they are set aside. Furthermore it is generally no answer to an action for contempt that the order disobeyed or the undertaking broken should not have been made or accepted in the first place. The proper course if it is sought to challenge the order or undertaking is to apply to have it set aside.”**

7. In my considered view, Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J (as he then was) stated:

**“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.**

8. This position was confirmed by the Court of Appeal in Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990.
9. In Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect.
10. Similarly, in Awadh vs. Marumbu (No 2) No. 53 of 2004 [2004] KLR 458, it was held that:

**“It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilised societies from those applying the law of the jungle at times referred to as banana republics. It is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the approved contemnors.”**

11. The effect of grant of an order of *mandamus* was considered *in extenso* in High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the Republic vs. The Attorney General & Another ex parte James Alfred Koroso where the Court expressed itself as follows:

**“...In the present case the *ex parte* applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society.**

Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit....The institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for *mandamus* the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not “execution or attachment or process in the nature thereof”. It is not sought to make any person “individually liable for any order for any payment” but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. In other words, *mandamus* is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus*, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the Court’s displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court.”

12. In this matter the Respondents contend that the Applicant is not entitled to claim interests. The first basis for this contention is the order of the Court of Appeal made on 28<sup>th</sup> May, 2012 in which it granted a stay of execution of the interest pending the hearing and determination of the intended appeal on condition that the outstanding balance of Kshs 31.5 million be paid within 50 days. There is no averment from the Respondent that this condition was complied with. The applicants averred which averment was not controverted that the condition was in fact not complied with. It follows that on the lapse of the 50 days given by the Court of Appeal the stay lapsed and therefore there is no order of stay in place.
13. The Respondents have further contended that based on the opinion of **Mwera, J** (as he then was) no interests is payable. With due respect, **Mwera, J** neither reviewed the decision of **Gacheche, J** nor reversed the same. **Mwera, J**’s decision was restricted to the issue whether there was an arguable issue for the purposes of granting stay. Accordingly, the decision of **Gacheche, J** which awarded interest whether lawful or otherwise could only be overturned on appeal or reversed on an application for review.
14. Although the Respondent has contested the sum due it has not adduced what in its view is due. However, the mere fact that there is a dispute as to the sum owing does not bar the Court from granting the orders sought so long as it is clear that the Respondent has not complied with the whole or part of the order. It is upon the Respondent to settle what, in its view, is due and then take the necessary steps for the determination of the sum, if any, not owing.
15. With respect to allegations that the order was not served, it is true as contended by the applicant that the person on whom the same was allegedly served has not disputed the same. In any case, parties ought to take into account the current position on the issue as held by **Lenaola, J** in **Basil Criticos vs. Attorney General & 4 Others [2012] eKLR, Republic vs. Minister of Medical Services Misc. Civil Application No. 316 of 2010** that:

“...the law has changed and so as it stands today, knowledge supersedes personal service and for good reason...where a party clearly acts and shows that he has knowledge of a court

order, the strict requirement that personal service must be proved is rendered unnecessary.”

16. This position was adopted by **Musinga, J** (as he then was) in **Republic vs. Minister of Medical Services** and **Kimaru, J** in **Gatimu Farmers Company vs. Geoffrey Kagiri Kimani & Others [2005] eKLR**. In the former case the learned Judge expressed himself as follows:

“Article 159(2) (d) of the Constitution requires the court to administer justice without undue regard to procedural technicalities. Article 10 of the Constitution stipulates various national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution or any law or implements public policy decisions. The values include the rule of law, good governance, integrity, transparency and accountability. The rule of law is vital in the stability of any nation and its institutions. In this new constitutional dispensation, it would be a mockery of justice for a respondent in contempt proceedings to come to court and say that even though he was aware of the terms of a prohibitory order, the order was not properly served upon him or that he considered the same to have some procedural defect, for example, lack of indorsement thereon, and therefore he ought not to be punished for contempt of court.”

17. As stated in *Halsbury’s Laws of England*, 4<sup>th</sup> Edn. Vol. 5 para 65:

“Where an order requires a person to abstain from doing an act, it may be enforced notwithstanding that service of a duly indorsed copy of the order has not been served, if the court is satisfied that, pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order was made or being notified of the terms of the order, whether by telephone, telegraph or otherwise.”

18. In the circumstances, the reasons advanced by the Respondent for the failure to satisfy the decree are flimsy excuses meant to deny the applicants the fruits of their judgement.

19. In the premises I hereby direct the Treasurer, the City County of Nairobi to appear before this Court to show why he cannot be punished for not satisfying a lawful order of this Court.

20. The costs of this application are awarded to the Applicant.

**Dated at Nairobi this 28<sup>th</sup> day of January, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Juma for the ex parte applicants***

***Miss Maina for the Respondent***

***Cc Patricia***