REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

J.R. NO. 433 OF 2009

IRIS PROPERTIES LIMITED.....APPLICANT/RESPONDENT

PROLAND LIMITED.....APPLICANT/RESPONDENT

VERSUS

CITY COUNCIL OF NAIROBI.....RESPONDENT/APPLICANT

RULING

Introduction

1. By a Notice of Motion dated 2nd September, 2012 expressed to be brought under Order 42 Rule 6(1) and Order 51 Rule (1) of the Civil Procedure Rules, 2010, the applicants herein, **City Council of Nairobi,** seeks the following orders:

> **1) THAT the instant Application be and is hereby certified as urgent and the same be heard *Ex – Parte* in the first instance.**
>
> **2) THAT there be a temporary stay the Ruling and or Orderof the Deputy Registrar at Nairobi (Hon. E. W. Mburu Mrs.)dated 18th August 2016 pending the hearing and determination of the instant Application or further orders of the Court.**
>
> **3) THAT this Honourable Court be pleased to stay the Ruling and or Order of the Deputy Registrar at Nairobi (Hon. E. W. Mburu Mrs.) pending the hearing and determination of the intended Appeal to the High Court against the same.**
>
> **4) THAT costs of this Application be provided for.**

Applicant/Respondent's Case

2. According to the applicant, by this Application, it seeks in the main, a stay of the Ruling of the Deputy Registrar dated the 18th day of August 2016 pending the hearing and determination of the Applicant's Appeal or until further orders of this Court. The impugned Ruling, according to the applicant made findings to the effect that the amount due to the Respondents is as per the Order by **Gacheche, J** made on 17th March 2011 less the amount already received by them and that interest on the decretal sum shall continue to accrue until payment in full.

3. It was averred that pursuant to the said ruling, the balance of the decretal sum due to the Respondents is likely to be in excess of One Hundred and Forty Million Shillings (Kshs 140,000,000/-) whilst the

Applicant contends that the balance is Ten Million Five Hundred and Eighty Three Thousand Seven Hundred and Ninety Four Shillings (10,583,794/-), which amount the Applicant has since settled.

4. The Applicant was therefore aggrieved by this finding by the Deputy Registrar and has filed a Memorandum of Appeal before this Honourable Court which Memorandum sets out the grounds upon which the Applicant relies in contesting the said Ruling. To the applicant, the Memorandum of Appeal, raises serious issues of law and fact and involves the interpretation of a fundamental provision of the applicable Statute, to wit, the ***Limitation of Actions Act***, Chapter 27 Laws of Kenya. Since the ruling the subject matter of this Application was delivered on 30th August 2016, it was the applicant's position that the instant Application has been brought before this Court timeously and without unreasonable delay on its part.

5. The applicant contended that unless a stay of the impugned Ruling is granted by this Court, the Applicant stands to suffer substantial loss since the disputed amounts are colossal and the Respondents had already commenced the process of execution against the Applicant by serving it with a Hearing Notice in respect of their Notice to Show Cause why execution should not proceed for the said disputed decretal sum on the strength of the impugned Ruling.

6. The applicant reiterated that it has an arguable Appeal with a high chance of success and ought to be allowed the opportunity to ventilate the merits of the same before this Court and that unless the orders sought herein are granted the appeal would be rendered nugatory. On the other hand the Respondents will suffer no prejudice if the instant Application is allowed.

Respondents' Case

7. In opposition to the application, the Respondents disclosed that this matter commenced in 1999 and was filed in the High Court as HCCC No. 947 of 1999. By consent, of the parties, the said matter was referred to arbitration and the duly appointed arbitrator, **Mr. Stephen K. Kiplagat**, issued his award on 5th November, 2001 by which he awarded the ex parte applicants herein Kshs 35,000,000 in damages. However, soon after the award, the respondent herein appealed to the High Court against the award in HCCA No. 829 of 2001 which appeal was, due to want of prosecution, was on 18th June, 2015.

8. It was averred that in the year 2002, the ex parte applicants filed a miscellaneous application No. 399 of 2002 seeking the enforcement of the arbitral award as a decree of the court and on 16th September, 2002, the **Waki, J** (as he then was), adopted the award as a decree of the High Court and directed the respondents herein to deposit the said sum of Kshs 35,000,000 into an interest earning account in the joint names of counsel for the parties which order the applicant herein failed to comply with.

9. It was averred that following the adoption of the said award, as an order of the Court and issuance of a decree thereon, the applicant herein in 2002, appealed to the Court of Appeal against the decision of the **Waki, J** and contemporaneously therewith, obtained orders of stay of execution pending appeal. After seven years, the applicant on 19th May, 2009, withdrew the appeal after which they again on 10th June, 2009, filed an application for orders of stay of execution pending the filing, hearing and determination of fresh appeal against the decision of **Waki, J**. On 11th February, 2010, the **Mwera, J** granted the respondent an order of stay of execution conditional upon payment of Kshs 3,500,000, being 10% of the decretal sum, to the applicants within 45 days of the ruling which condition as once again not complied with and the order of stay lapsed and no appeal has been filed to date.

10. It was averred that following the withdrawal of the initial appeal and the lapsing of the orders of stay of execution, the applicants herein filed the instant Judicial Review proceedings for execution of the orders of the **Waki, J** and on 17th March, 2011, the **Gacheche, J** allowed the Judicial Review application and issued an order compelling the respondent to pay to the applicants the sum of **Kshs 35,000,000** together with interest at 12% compounded annually from the year 2002 until payment in full together with costs. Following the judgment of **Justice Gacheche**, the respondent filed Civil Application No.113 of 2011/UR No. 74 of 2011 in the Court of Appeal, seeking stay of execution of the said judgment

pending the filing of an intended appeal against the award of interest and on 28th May, 2012, by consent of the parties herein, the respondent's application No.113 of 2011/UR No. 74 of 2011 was allowed by the Court of Appeal, conditional upon payment to the applicants of Kshs 31,500,000 being the balance of the principal decretal sum within 50 days from the date of the order. It was disclosed that while seeking the stay orders before the Court of Appeal, the respondent stated that they only intended to appeal against the award on interest and not the principal sum, hence the consent order. However, the consent order was not complied with hence the stay lapsed and to date, the intended appeal against the judgment of **Gacheche, J** has never been filed. To the ex parte applicants, the respondents had an opportunity to appeal against the judgment of **Gacheche, J** or seek review thereof, which opportunity they squandered hence the said orders compelling the respondent to pay to the applicants the sum of Kshs 35,000,000 together with interest at 12% compounded annually from the year 2002 until payment in full together with costs, remain valid since no appeal has ever been filed to overturn the same nor has it been reviewed.

11. It was averred that when the parties appeared before this Court on 22nd February, 2016 for the Notice to Show Cause issued against the Chief Officer of Finance for the respondent, the respondent filed two affidavits. In the first affidavit filed on 17th February, 2016, the respondent admitted liability to the applicants but sought time to engage the applicants on a payment plan. In another affidavit sworn two days after the first one, the respondent requested the court to refer the matter to the Deputy Registrar to determine the actual amounts owing since they believed there was an arithmetical error in our computation. To the ex parte applicants, by filing two contradicting affidavits, the respondent is engaging the Court in Ping-Pong games, thereby wasting the scarce judicial time.

12. It was disclosed that while requesting this Court to refer the matter to the Deputy Registrar aforesaid, the Director Legal Services of the respondent swore an affidavit in which the respondent undertook to be bound by the determination of the Deputy Registrar. When the parties appeared before the Deputy Registrar under the Court's directions, the respondents presented to the deputy registrar a legal question, challenging the judgment of **Gacheche, J**, instead of an arithmetical question and asked the deputy registrar to determine whether it was lawful for the decretal award made by **Gacheche, J** to attract interest beyond six years in light of section 4 (4) of the ***Limitation of Actions Act***. To the ex parte applicants, the question put before the deputy registrar by the respondent was not only beyond the scope of the directions of the court while referring the matter to the deputy registrar but also beyond the jurisdiction of the deputy registrar. To the ex parte applicants, by asking the Deputy Registrar to determine whether interest should accrue on the decretal award made by **Gacheche, J** on 17th March, 2011 beyond six years is tantamount to asking the Deputy Registrar to review and/or sit on appeal against the decision of the learned judge which is beyond the jurisdiction of the Deputy Registrar.

13. It was therefore the ex parte applicant's position that that the learned Deputy Registrar's ruling delivered on 30th August, 2016 was legally sound when she held that she lacked jurisdiction to determine whether interest on the decretal award as made by **Gacheche, J** should continue to accrue as doing so would amount to sitting on appeal against the judgment of her ladyship. Further, since the decision of the **Gacheche, J** has not been appealed against nor an application brought for review, the same stands and must be implemented.

14. To the ex parte applicant, the respondent's application and memorandum of appeal both dated 2nd September, 2016 are vexatious, mischievous, legally unsound and incompetent for asking this Court to sit on appeal against the decision of a court of concurrent jurisdiction as the same is meant to overturn the judgment of **Gacheche, J** and that this application and memorandum of appeal are meant to further delay determination of this matter which has now taken seventeen years in court hence the application ought to be dismissed with costs.

Determination

15. I have considered the application.

16. Under Order 42 rule 6(2) of the ***Civil Procedure Rules,*** for an application for stay pending an appeal

to be granted the applicant has to show that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay; and such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant. Further being an exercise of discretion the applicant should show that his conduct does not disentitle him to the favourable exercise thereof.

17. In considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent have to be considered. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** it was held that:

> "**to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court".**

18. It is the law that it is not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted since by granting stay would mean that the *status quo* should remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be done if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See **Kenya Shell Limited vs. Kibiru & Another [1986] KLR 410**.

19. In this case, there is no allegation at all that the respondent will be unable to repay the decretal sum if the same is paid over to the respondent.

20. By an affidavit sworn on behalf of the applicant in the instant application by **Karisa Iha**, its Director of Legal Affairs, the said applicant requested that the matter be referred to the Deputy Registrar to compute the amounts payable. The said deponent went ahead to undertake that the said applicant would pay all sums found as due and payable by the Deputy Registrar. Based on this averment the matter was accordingly referred to the Deputy Registrar for that determination.

21. It would however seem that as soon as the matter was placed before the Deputy Registrar the applicant changed tact and contended that the claim was time barred. I form a dim view of that claim in as much as the same was raised before the Deputy Registrar who was directed to deal with specific issues.

22. From the replying affidavit, it seems that the applicant has at each stage of the proceedings set out to stall these proceedings with appeals which it has no intention of pursuing and even when granted conditional order, it has failed to comply therewith. In **Commercial Exchange Limited and Another vs. Barclays Bank of Kenya Ltd. Civil Appeal No. 136 of 1996**, the Court of Appeal expressed itself as follows:

> **"It became crystal clear that as the appellants were unable to pay the sum of Shs 3,500,000 a legal ingenuity was employed and this was discontinuance of the former suit and filing the fresh suit. The discontinuance of a suit does not affect consent orders already made in that suit. Whatever the financial predicament the appellants were in, they used the process of court wrongfully in attempting to seek yet again orders similar to those sought in the earlier case after recording the aforementioned consent orders. As the Judge was minded to dismiss the application, he was simply being kind to the applicants. The appellants wanted to buy**

time, it appears, and they have managed to buy some time. Yet, they have made no payments towards reduction of the debt. The world of business cannot survive if such frivolous applications are allowed."

23. In my view the facts of this case disclose a gross abuse of the process of not only this Court but the Court of Appeal as well. In **Mitchell and Others vs- Director of Public Prosecutions and Another (1987) LRC (Const) 128** it was held that:

" ….in civilized society legal process is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly, it can be used improperly, and so abused. An instance of this is where it is diverted from its proper purpose, and is used with some ulterior motive, for some collateral one or to gain some collateral advantage, which the law does not recognize as legitimate use of that process. But the circumstance in which abuse of process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes extrinsic evidence only. But if and when it is shown it happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instance. Others attract the *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop proceedings, or put an end to it."

24. As was held by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**:

"A court of law would not be entitled in our view to abdicate its cardinal role of making a determination. Section 57(8) contemplates a speedy process to have the rights of both the caveator and caveatee determined and not a protracted trial. In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice…We approve and adopt the principles so ably expressed by both *Lord Roskil* and *Lord Templeman* in the case of *ASHMORE v CORP OF LLOYDS [1992] 2 ALL E.R 486* at page 488 where *Lord Roskil* states:

> **"It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues."**

At page 493 of the same case *Lord Templeman* delivered himself thus:

> **…"an expectation that the trial would proceed to a conclusion upon the evidence to be produced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge."**

…….

In the case of *FREMAR CONSTRUCTION CO LTD v MWAKISITI NAVI SHAH 2005 e KLR* at page 6 where the Court said:-

> **"Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open court. Unless a trial is on discernable**

issues it would be farcical to waste judicial time on it."

…..In our view he, knowingly and dishonestly used the legal process to accomplish an ulterior purpose to that of the court process, which is to protect the interests of justice… The 1st respondent and *Mr Church* did manifestly exploit the process whereas it was in our view clear to them that they lacked good faith in instituting the Originating Summons thereby causing prejudice and delay. The action was also wanting in *bona fides* and was oppressive to the appellant. All these in our view constitute abuse of process."

25. The plain truth is that the applicant in the instant application has been unable to pay it just debt and has used the machinery of the Court to postpone, what to it, must be the day of reckoning. That day has now come and the court has the duty to tell them so in plain terms.

26. In the premises the application dated 2nd September, 2016 lacks merit and the same is dismissed with costs.

Dated at Nairobi this 22nd day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Juma for the applicant/Respondent

Mr. Mwango for Mr. Omoti for the Respondent/Applicant

Cc Gitonga