



REPUBLIC OF KENYA



KENYA LAW
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**Acorn Properties Ltd v Wanjohi & 2 others (Miscellaneous Application 305 of 2017)
[2023] KEHC 1428 (KLR) (Commercial and Tax) (3 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1428 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 305 OF 2017**

A MABEYA, J

MARCH 3, 2023

BETWEEN

ACORN PROPERTIES LTD DECREE HOLDER

AND

ISAAC GATHUNGU WANJOHI 1ST JUDGMENT DEBTOR

ISABELLA NYAGUTHI WANJOHI 2ND JUDGMENT DEBTOR

GUMBA INVESTMENTS LTD 3RD JUDGMENT DEBTOR

RULING

1. Before Court is a Motion on Notice dated 9/3/2022. It was brought under Article 50 of the [Constitution of Kenya 2010](#), Sections 1A, 3, 3A of the [Civil Procedure Act](#) Cap 21 laws of Kenya, Order 42 rule 6 and Order 51 rule 1 of the [Civil Procedure Rules, 2010](#).
2. The application sought that the ruling delivered on 9/3/2022 be set aside and the application dated 15/7/2021 be reinstated for hearing. The applicant's case is that judgment was entered against the judgment debtor for a decretal sum of Kshs 116,322,913.30. On 29/9/2021, the Court allowed the judgment debtor to settle the amount in monthly installments of Kshs 4,000,000/- payable on or before the 5th day each month. The court further ordered a lump sum deposit of Kshs. 10,500,000/-. It was contended that the applicants had continued to pay the monthly installments as directed by the court.
3. That the decree holder filed an application dated 15/7/2021 which sought to execute against the property of the applicant and the application was responded to despite having challenges on the e filing portal. It was averred that the applicant's advocates were absent in court during the hearing as the applicants advocate entered the wrong date in the diary and consequently the Court allowed the decree



holder's application as prayed. That the decree holder failed to inform the Court that the applicants had been paying the amount in instalments and the applicants would be highly prejudiced if the orders sought were not granted.

4. The decree holder opposed the application by grounds of opposition dated 25/5/2022. It was averred that the application was misconceived and an abuse of the court process as the judgment debtor breached the orders of the Court made on October 14, 2021.
5. The application was canvassed by written submissions. The applicants' submissions are dated 17/5/2022 whereas the respondent's submissions are dated 25/5/2022.
6. The applicants submitted that the rules of natural justice dictate that no party should be condemned unheard and the advocates absence during the hearing of the matter was as an inordinate mistake which should not be visited on them. It was further submitted that the decree holder failed to reveal to the Court that the judgment debtor had been paying the decretal amount in monthly instalments and thus the decree holder was guilty of trying to execute two parallel execution proceedings.
7. The respondent submitted that the judgment debtor failed to pay the instalments within the timelines ordered by the Court. That it had been directed that payments be made on or before the 5th of every month. However, the judgment debtor paid on 10/2/2022 and on 9/3/2022, respectively. It was further submitted that there had been no reasonable explanation that had been given by the applicants as to why they failed to pay on or before the 5th of every month.
8. I have considered the application, the response thereto as well as the submissions. The main issue for determination is whether the orders of 93/2022 should be set aside and the application dated 15/7/2021 be heard on merit.
9. This is an application to set aside an order made ex-parte for non attendance. The principles applicable are well known. The application should be made timeously, the reason for non-attendance and probably the prejudice to be suffered by the opposite party.
10. On the first principle, the order sought to be set aside was made on 9/3/2023 and the applicant made the present application the same day. The application was therefore made timeously.
11. As regards the reason for non-attendance, the applicants have not denied that they had been served with the hearing notice. They give the reason for non-attendance as the mistake of their advocate of having diarized the matter for 8/3/2022 instead of 9/3/2023. The applicants contended that the mistake was inordinate and ought not to be visited on them.
12. In *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR, Apaloo, JA held: -

“I think a distinguished equity Judge has said: ‘Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on the merits’.

I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline”.
13. I think I will echo the same sentiments here. It was not disputed that the non-attendance was due to a genuine mistake by the applicants' advocate of having mis diarized the date. It was not suggested that the applicants were overreaching or intended to commit a fraud by making the present application. In



any event, I note that although the application had been opposed by way of a replying affidavit, the Court allowed the same as unopposed. It was nevertheless incumbent upon the Court to consider that replying affidavit before condemning the applicants. The Court is satisfied with the reason advanced for the non-attendance.

14. On the third principle, the question is whether the decree holder would be highly prejudiced by the orders sought. The court allowed the decree holder to execute against the property known as LR 12053 Registered in the name of the first judgment debtor. The decree holder had faulted the judgment debtor for failing to pay the monthly installments within the timelines ordered by the Court.
15. I have perused the record and I note that the applicants admitted to paying the said amounts later than the date prescribed by the Court. In January 2022, the payment was made on 27th while in February the payment was made on the 10th day of the month.
16. While I appreciate the concerns raised by the decree holder, I note that this is not a case of not getting any payments at all but rather of delayed payments. The respondent is getting paid as ordered by the Court. My view is that the issues raised by both parties would best be determined in the application dated 15/7/2021 to ascertain whether the decree holder should proceed and execute the decree.
17. The applicants invoked section 1A of the *Civil Procedure Act* which provides for the overriding objective of the Court to facilitate the just, expeditious, proportionate and affordable resolutions of cases. I note that there was no indolence on the part of the applicants to render them unworthy of the Court's equitable relief. In any event, my take is that any prejudice occasioned to the decree holder could be compensated by costs.
18. In this regard, I allow the application as prayed. The costs shall abide the outcome of the application dated 15/7/2021.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2023.

A. MABEYA, FCIArb

JUDGE

