



Acorn Properties Ltd v Wanjohi & 2 others (Miscellaneous Civil Application 305 of 2017) [2023] KEHC 19995 (KLR) (Commercial and Tax) (17 July 2023) (Ruling)

Neutral citation: [2023] KEHC 19995 (KLR)

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

MISCELLANEOUS CIVIL APPLICATION 305 OF 2017

A MABEYA, J

JULY 17, 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. This is a ruling on the decree holder's Motion on Notice dated 15/7/2021. The same was brought under sections 1A, 1B, 3A, 38 (b), 63 and 98 of the *Civil Procedure Act* and Order 22 Rules 9 & 48 of the *Civil Procedure Rules*, 2010.
2. The decree holder sought three primary orders, first, valuation and subdivision of all that piece of land known as LR No. 12053/6, secondly, an order prohibiting the judgment-debtors from interfering with the property pending payment of the decretal sum and thirdly, an order for attachment and sale of the property in execution of the decree.
3. The grounds for the application are found in its body and the supporting affidavit of Peter Njenga dated 15/7/2021. The grounds were that; vide a ruling delivered on 4/10/2019, Odero J allowed the decree holder's application dated 15/6/2017 and adopted the final award of Hon. Arbitrator, Eng. Paul T. Gichuhi delivered on 27/5/2016 as a judgment of this Court. The ruling also granted the decree holder leave to enforce the final award as a decree of the Court.
4. Further, that the court issued a decree dated 1/11/2019 and ordered the judgment debtors to, inter-alia, pay to the decree holder Kshs. 75,553,177/- together with simple interest at the rate of 16% per



annum and that at the time of filing the application, the decretal amount together with interest was currently in excess of Kshs. 134 million.

5. That the judgment debtors have failed, neglected and/or refused to settle the decretal sum together with interest. That they neither appealed nor reviewed the ruling of this Court delivered on 4/10/2019 nor is there any stay of execution of the decree.
6. In opposition, the judgment debtors filed a replying affidavit sworn on 4/3/2022 by Eng. Isaac Gathungu Wanjohi, the 1st judgment/debtor who is the Managing Director of 3rd judgment debtor. He was also duly authorized by the 2nd judgment debtor who is a co-director in the 3rd judgment debtor.
7. He averred that by an application dated 5/2/2021, the judgment/debtors sought to have the entire decretal sum of Kshs. 116,322,913.30 settled by way of instalments. That the same was allowed and they were directed to pay a deposit of Kshs. 10,500,000.00 within 30 days and thereafter a monthly instalment of Kshs. 4,000,000.00 every 5th day of each succeeding month.
8. That despite financial challenges, the judgment/debtors had tried to faithfully pay the sums as ordered by the Court. The decree holder has been receiving and acknowledging the said payments.
9. It was their case that since they had continued to pay the decretal sum in instalments as aforesaid, to grant the application would lead to an abhorred situation where two contemporaneous execution processes would be ongoing. That the application was misguided as the decree holder only sought to have the property of the 1st judgment debtor used to settle the entire decretal sum despite the fact that the decretal sum ought to be settled by all the judgment debtors.
10. Further that the decree holder did not produce any shred of evidence that the 1st judgment debtor intends to sell the property and therefore, the prayer for a prohibitory order stood on the quicksand of vague assumptions. That the prayer to have the suit property transferred to the decree holder did not have any legal underpinning as a money decree cannot in turn be settled by way of transfer of property.
11. I have considered the rival contestations and the respective submissions. This is an application to value, attach and sell the property registered in the name of the 1st judgment debtor in execution of the decree dated 1/11/2019.
12. It is not in dispute that the Court did adopt an award dated 27/5/2016 as a judgment of this Court. The Court also granted the decree holder leave to enforce the final award as a decree of the Court. A decree was issued on 1/11/2019 ordering the judgment debtors to pay the decree holder Kshs.75,553,177/- together with simple interest at the rate of 16% per annum.
13. Vide a ruling dated 29/9/2021 and delivered on 14/10/2021, Tuiyott J (as he then was) allowed the judgment debtors to pay the decretal amount by instalments under the following conditions:
 - “ i) A deposit of Kshs.10,500,000/= to be paid within 30 days hereof.
 - ii) Thereafter monthly instalment of Kshs.4,000,000/- with effect from 60 days hereof and thereafter on or before the 5th day of each succeeding month.
 - iii) The Decree holder is at liberty to seek enhancement of the amount stated in (ii) above after payment of six instalments.
 - iv) In default of payment of the deposit or any one instalment, the balance thereof shall fall due and the Decree holder shall be at liberty to execute.”



14. The judgment/debtors indicated that they had paid the deposit ordered as well as the instalments. The decree holder indicated in its submissions that the judgment debtors made further instalments on 10/2/2022 and 9/3/2022 and that the last instalment payment of Kshs.2,000,000/- was made in December, 2022.
15. What comes out is that the judgment debtors have not adhered to the instalments as ordered by the Court. However, the application before me was not predicated on the fact that the judgment/debtors had defaulted, but on the fact that the amount outstanding is colossal.
16. In my view, the orders of Tuiyot J (as he then was) of 14/10/2021 amounted to a stay order on terms. My view is that, if the decree holder wants to execute the decree, it should first vary that order or have the same set aside first. There cannot be execution unless there is default on the conditions set by the Court on the stay.
17. In the premises, I find no merit in the application and I dismiss the same with costs.
It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY, 2023.

A. MABEYA, FCIArb

JUDGE

