



REPUBLIC OF KENYA



**Acorn Properties Ltd v Wanjohi & 2 others (Miscellaneous Civil Application 305 of 2017)  
[2024] KEHC 14389 (KLR) (Commercial and Tax) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14389 (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  
NOVEMBER 20, 2024**

**BETWEEN**

**ACORN PROPERTIES LTD ..... DECREE HOLDER**

**AND**

**ENG. ISAAC GATHUNGU WANJOHI ..... 1<sup>ST</sup> JUDGMENT DEBTOR**

**ISABELLA NYAGUTHI WANJOHI ..... 2<sup>ND</sup> JUDGMENT DEBTOR**

**GUMBA INVESTMENTS LTD ..... 3<sup>RD</sup> JUDGMENT DEBTOR**

**RULING**

1. Before Court is the judgment debtor's application dated 18/3/2024. It was brought under order 45, order 21 rule 12, order 51 rule 1 of the *Civil Procedure Rules* 2010 and sections 1A, 1B and 80 of the *Civil Procedure Act* Cap 21 laws of Kenya.
2. The application sought the setting aside of the ruling Tuiyott J (as he then was) dated 29/9/2021 which ordered the applicants to settle the decretal sum in in monthly instalments of Kshs 4,000,000/-. They wanted the said instalments reduced to Kshs. 1,000,000/- pm till payment in full. That the interest accrued on the decretal sum from 27/5/2016 to 10/11/2021 amounting to Kshs.72,531,049/- be waived and interest payable to the decretal sum be interrogated.
3. The application is supported by the grounds on the face of the Motion and the supporting affidavit of Eng Isaac Gathungu Wanjohi. He stated that the parties were engaged in arbitral proceedings and an award was made in favour of the decree holders for Kshs 75,553,177/-. That the award was enforced as a judgment of the Court.
4. That following an application to Court, they were allowed to liquidate the decretal amount by making an initial deposit of Kshs 10,500,000/- and monthly installments of Kshs. 4,000,000/-. According to



- the applicants, the interest arising out of the application was Kshs. 77,274,555/- which is more than the decretal sum and it continues to accumulate.
5. It was averred that the respondent served the applicant with a notice to show cause as to why their movable property should not be attached. That further, the respondent served the applicants with a statutory demand of Kshs 117,827,732/- and if the statutory demand was not set aside, the 3<sup>rd</sup> applicants employees would be laid off. It was the applicants' position that the 1<sup>st</sup> and 2<sup>nd</sup> applicant were citizens of ages 80 and 86 and had medical issues and the warrants of attachment on their matrimonial home occasion them emotional stress and great harm. That they were willing to remit monthly repayments of Kshs 1,000,000 and the respondent would not suffer any harm if the orders sought were granted.
  6. The respondent opposed the application vide a replying affidavit sworn by Peter Njenga on 30/4/2024. The respondent stated that; following the orders of 29/9/2021, the applicants made 9 installment payments and had not made any payments since December 2022. That the Court was functus officio and could not interrogate the interest on the arbitration award as the same was adopted as a judgment of the Court.
  7. It was the respondent's position that the applicants had not complied with the orders they seek to set aside as even the last payment made in December 2022 amounted to only Kshs 2,000,000/-. That the applicants had not given any reason for blatantly disregarding the Court order and the applicants attempt to review the said order is inappropriate as it would beat the objectives of arbitration on finality.
  8. It was contended that the application did not meet the threshold of an application for review and the applicants were underserving of the orders sought in view of their breach. Further, that the Court could not stay the insolvency proceedings since it was not an Insolvency Court and therefore lacked jurisdiction. That the application was structured to defeat the very purpose of arbitral proceedings and to prevent the respondent from realizing the fruits of the award obtained almost 8 years ago.
  9. The application was canvassed by way of written submissions which I have considered. Counsel for the applicants submitted that, the application for review was founded on any other sufficient reason under order 45 rule 1 of the *Civil Procedure Rules*. That the reasons for the review were that, the applicants were facing undue economic strain in the repayment of the installments and the 1<sup>st</sup> and 2<sup>nd</sup> applicant being elderly were faced with health issues.
  10. That the applicants had so far paid a total of Kshs. 35,000,000/- of the decretal sum. That they were desirous of paying the decretal sum but they still have other financial obligations that they were attending to. It was further submitted that the applicants were not asking for an appeal in terms of interest rather they requested the Court to declare that interest owed to the respondent is limited to 6years from the date of arrears in line with section 4(4) of the *Limitation of Actions Act*.
  11. For the respondent, it was submitted that the applicants had admitted to receiving Kshs 5.6 million as monthly rent from their property but the same was applied towards settling the loan arrears thus prioritizing loan repayment with KCB as opposed to settling the decretal sum. That no sufficient reason had been advanced to justify the review of the ruling of 29/9/2021.
  12. On interest, it was submitted that the Court did not have jurisdiction to intervene and waive interest on an arbitral award already enforced and adopted as an order of the Court. That the Insolvency Court dealing with liquidation application was the proper court to grant stay of insolvency proceedings.
  13. I have considered the application, the response as well as the submissions on record. There are two issues for determination. The first issue is whether the review of the ruling of 29/9/2021 is merited



to allow the applicants to settle the decretal sum by monthly installments of Kshs 1,000,000/-. The second issue is whether the Court should interfere with interest and the Insolvency proceedings.

14. A brief background is that the parties were subject to arbitral proceedings and an award was published for Kshs 75,553,117/- in favour of the respondent. The award was adopted as an order of the Court on 4/10/2019. The applicants then applied to be allowed to liquidate the decretal sum by way of installments. The Court acceded to the application and ordered that the applicants do deposit Kshs. 10,500,000/= and make monthly instalments of Kshs 4,000,000/-. The present application has sought to vary these orders and reduce the installment amount from Kshs 4,000,000/- to Kshs 1,000,000/-.

15. Order 21 Rule 12(2) of the Civil Procedure Rules that: -

“After passing of decree, the court may on the application of the judgment debtor and with the consent of the decree- holder or without consent of the decree- holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment debtor or the taking of security from him, or otherwise as it thinks fit.”

16. The grounds for a review of judgment or ruling are laid out under order 45 rule 1 as follows: -

“ 1.

(1) Any person considering himself aggrieved—

- a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

17. The applicant’s grounds for seeking to vary the orders of the Court are that, the applicants were elderly citizens who had medical health issues and the respondents warrants of attachment of their matrimonial property would cause them great harm. That they were servicing a facility with KCB bank out of the rent obtained from their construction development and therefore were finding it difficult to pay the Kshs 4,000,000/- monthly installments.

18. In rebuttal, the respondent stated that the applicants only made 9 installments and had not made any further payments since December 2022.



19. The jurisdiction to order payment by installments of the decretal amount is purely a matter of discretion by the Court. In *Lavington Security Limited v Nairobi City Water & Sewerage Co. Ltd* [2014] eKLR, the Court held: -

“ ... It is, therefore, on the Court being convinced by the applicant that there is sufficient cause to permit payment by installments that the Court should think about other conditions to attach to the order for payment by installments of the decretal sum. Those terms or conditions include payment of interest, the attachment of the property of the judgment debtor or the taking of security from him, or otherwise. And the list is not exhaustive. What amounts to sufficient cause will, however, depend on the peculiar circumstances of each case...”

20. And in *Keshavji Jetbbhai & Bros Limited -vs- Saleh Abdalla* [1959] EA 260, it was held as follows: -

“ ... it is laid down that the mere fact that the debtor is hard pressed or unable to pay in full at once is not sufficient reason for granting instalments and that ordinarily should be required to show his bonafides by urging prompt payments of a fair proportion of the debt.... prompt payment of a fair proportion of the debt is a condition precedent for the granting of the discretion of granting instalments. Each case has to be decided on its own merit, the predominant fact being of course the bonafides of a debtor.”

21. In the present case, the Court had previously exercised its discretion by allowing payment of the decretal sum in monthly installments of Kshs. 4,000,000/-. However, the applicants are now requesting a reduction of this amount to Kshs. 1,000,000/-.

22. On their payment history, it is clear that they were making installment payments until they encountered financial difficulties, with the last payment being made in December 2022. The applicants did not inform the Court why they stopped making payments, even the proposed Kshs 1,000,000, during the pendency of this application. The applicants were primarily concerned about their matrimonial house, which risks attachment, as well as the insolvency proceedings the respondent intends to initiate to recover the decretal sums.

23. The Court finds that for the orders sought to be granted, the applicants must demonstrate good faith in their willingness to comply with the Court's directives. While the Court acknowledges the financial difficulties faced by the applicants, it was important for the applicants to show attempts to settle the decretal amount as a show of their commitment to fulfilling their obligations. This proactive approach would invoke the discretion of the Court in finding in their favour.

24. That notwithstanding, the Court acknowledges that the applicants are indebted elsewhere in excess of Kshs.300m owed to Kenya Commercial Bank. That the entire sum of Kshs.5,600,000/- received as rent is applied towards repayment of that loan. Both the loan and the decree herein are obligations owed by the applicants. They must be met. If any is left to overshadow the other, the applicants will collapse and none will be repayable.

25. In this regard, considering the peculiar circumstances that the applicants find themselves in, I think it will be in the interests of justice that the applicants are accommodated and made to within acceptable parameters that does not hurt them or the respondent who has an unsatisfied decree. I think a bullet payment of Kshs 5,000,000/= as a deposit within one month and thereafter monthly instalments of Kshs 1,500,000/- would be just.



26. On the issue of suspension of the interest, I think this is a novel issue that the *Limitation of Actions Act*. The parties did not properly canvass the same before me. The issues that arise are; is it that all interest that emanates from a contractual relationship must be capped at 6 years? What happens when the interest, though under a contract, is awarded in a decree. Is it also subject to the 6year limitation? What about interest ordered in decrees generally?
27. The above issues are of a serious nature because, for how long can interest apply? Is it applicable ad infinitum having in mind that even judgments and decrees have a lifespan under the same Act? This coupled with the in duplum rule which is applicable to lending are issues that fall for serious argument and consideration.
28. Since the parties did not seriously address the said issue, I decline to make any determination thereon. I leave it open for the parties to raise it in future and argue the same effectively. In this regard, I make no determination thereon.
29. As regards, the Insolvency proceedings, there was a submission that this Court sitting as Commercial Court has no jurisdiction to stay the Insolvency proceedings. That it is the Insolvency Court that can give a stay to those proceedings.
30. That may be so but the Insolvency proceedings only stem from the decree herein. Those proceedings cannot lie without the foundation of the decree herein. Once the execution of the decree herein is stayed, the Insolvency proceedings are stayed as a matter of cause as they are but an execution process of the decree herein.
31. In view of the foregoing, I find that the application dated 18/3/2024 is meritorious and I allow the same in the following terms: -
- a. The ruling of this Court of 29/9/2021 is hereby reviewed and the orders thereof for payment by instalments varied to the extent following.
    - i. The applicants do settle the decree herein by instalments by making one bullet payment of Kshs. 3,000,000/- by 31/12/2024 and thereafter make monthly instalments of Kshs.1,500,000/- from 28/2/2025 and on the last day of each subsequent month until payment in full.
    - ii. That subject to the foregoing, there shall be a stay of further execution of the decree herein and the warrants of attachment dated 27/2/2024 are hereby set aside.
  - b. The applicants shall bear the costs of the application in any event.
- It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

