



Acorn Properties Limited v Wanjohi & 2 others (Miscellaneous Civil Application 305 of 2017) [2021] KEHC 135 (KLR) (Commercial and Tax) (14 October 2021) (Ruling)

Neutral citation: [2021] KEHC 135 (KLR)

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

MISCELLANEOUS CIVIL APPLICATION 305 OF 2017

F TUIYOTT, J

OCTOBER 14, 2021

BETWEEN

ACORN PROPERTIES LIMITED APPLICANT

AND

ENG. ISAAC GATHUNGU WANJOHI 1ST RESPONDENT

ISABELLA NYAGUTHI WANJOHI 2ND RESPONDENT

GUMBA INVESTMENTS LIMITED 3RD RESPONDENT

RULING

1. The plea by applicants, through the Notice of Motion dated 5th February 2021, is that they be allowed to satisfy the decree herein by payment of Kshs.5,000,000/= upfront and subsequently monthly instalments of Kshs.750,000/= which may be reviewed in six (6) months to assess the possibility of an enhancement.
2. The dispute herein was subjected to Arbitration before a Tribunal constituted by a single Arbitrator, Eng. Paul T. Gichuhi. The Arbitrator made an award on 27th May 2016 and that award was adopted as a judgment of this Court in a ruling of Hon. Odero J on 4th October 2019.
3. An application for execution of the decree of 26th November 2019 shows that the decretal sum plus interest as at that date was in the sum of Kshs.116,322,913.30. The same is bound to have increased as no payment has been forthcoming.
4. In pleading their case, the Judgment debtors state that they are engaged in the construction industry which has suffered a hit because of the slump in the Kenyan economy. They state that the situation has been exacerbated and compounded by the restrictions of the Covid-19 pandemic. They aver inability to pay by a single instalment.



5. The Decree holder filed a notice of preliminary objection dated 19th February 2021 raising two points. That this Court lacks jurisdiction to hear and determine the application in view of the provisions of section 10 of the Arbitration Act and that the application is res judicata. In the end however the Decree holder did not argue these objections and I take it that they were abandoned.
6. What counsel for the Decree holder told Court was that the proposal was not acceptable and a deposit of Kshs.6,000,000/= was not reasonable.
7. The outstanding sums are in excess of Kshs.110 Million. If I was to allow the application as prayed then it would take the Judgment debtors about 10 years to complete payment of the decretal sum. This is oppressive and unjust to the Decree holder.
8. I think that monthly payments of Kshs.4,000,000/= reviewable upwards after 6 months is much fairer. As to the deposit to be paid, counsel for Judgment debtor had made an offer of Kshs. 6 Million. In considering what deposit to order, I have to take into account that the offer was made in May 2021 and if accepted the Judgment debtor will not only have paid that sum but at least 6 instalments by the time of delivery of this decision. As a mark of good faith the Judgment debtor would have paid that sum or kept it aside for payment towards the deposit.
9. In the end I allow the application for payment of the decretal amount by instalments as follows:-
 - 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.

DATED AND SIGNED THIS 29TH DAY OF SEPTEMBER 2021

F. TUIYOTT

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER 2021

A. MABEYA, FCI Arb

JUDGE

PRESENT:

