



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JR NO. 433 OF 2009**

**IRIS PROPERTIES LIMITED**

**PROLAND LIMITED.....APPLICANTS**

**AND**

**THE CITY COUNCIL OF NAIROBI.....RESPONDENT**

**RULING**

1. This suit has a rather chequered history. As the number indicates the matter has been pending before this Court since 2009, about 9 years now. That in my view is a rather long period for a judicial review application to be determined.
2. The matter was originated as an arbitration proceedings in which the applicant herein was awarded Kshs 35,000,000.00.
3. The applicants then moved this Court in Misc. Application No. 399 of 2002 seeking that the said award be enforced as a decree of this Court which decree was issued accordingly. Thereafter these proceedings were instituted seeking judicial review in the nature of mandamus compelling the Respondent to satisfy the said decree. On 17<sup>th</sup> March, 2011 this Court (**Gacheche, J**) granted an order of mandamus compelling the Town Clerk, City of Nairobi, the predecessor to the Respondent herein, to pay the said decretal sum of Kshs 35,000,000.00 plus interest at the rate of 12% from 25<sup>th</sup> September, 2002 till payment in full with costs.
4. Following the failure by the Respondent to satisfy the said judgement, this Court on 28<sup>th</sup> day of January, 2016 directed the Treasurer, the City County of Nairobi to appear before it to show why he cannot be punished for not satisfying a lawful order of this Court.
5. On 22<sup>nd</sup> February, 2016 when the matter came up for Notice to Show Cause, Learned Counsel for the Respondent informed the Court that the Respondent's Treasurer who was present in Court had deposed that the Respondent was prepared to satisfy the decree and that the only point of divergence was the total sum due and payable. Accordingly, it was requested that the sum due be computed by the Deputy Registrar a request that this Court acceded to. On 16<sup>th</sup> May, 2016 the Respondent's advocate informed the Court that the Respondent had paid Kshs 3,000,000.00 and had committed to pay the balance in 60 days' time. It was disclosed that the applicant had by then been paid Kshs 70 million. The Court then directed that the Respondent pays the undisputed sum of Kshs 7,583,794/= within 30 days from 16<sup>th</sup> May, 2016 and in default committal orders would issue.
6. In my ruling dated 22<sup>nd</sup> September, 2016, I found that the Respondent herein has, at each stage of the proceedings set out to stall these proceedings with appeals which it has no intention of pursuing and that even when granted conditional leave, it still failed to comply therewith. I therefore found that the facts of the case disclosed a gross abuse of not only this Court's process but the Court of Appeal's as well. I then concluded that the plain truth is that the Respondent herein has been unable to pay its just debt and has used the machinery of the Court to postpone what must be the day of reckoning which day had come.
7. One would have expected that the Court's message had been driven home to the Respondent in clear terms. However on 9<sup>th</sup> November, 2016 the parties recorded consent by which the Respondent was to pay the decretal sum in monthly instalments of Kshs 7,000,000.00 on the 15<sup>th</sup> day of each month with effect from 15<sup>th</sup> November, 2016 and in default committal orders would issue.
8. It would seem that the said consent was only partially complied with and on 14<sup>th</sup> June, 2017, the Respondent's counsel informed the Court that the Respondent had no money. Thereafter followed another cat and mouse game orchestrated by the Respondent and on 15<sup>th</sup> August, 2017 the parties recorded a consent by which the warrant of arrest which was in force was discharged and it was ordered that the instalment due for the month of August, 2017 be deposited by the Respondent into the ex parte applicant's bank account on or before 31<sup>st</sup> August, 2017 and thereafter the outstanding amount was to be paid by the Respondent in terms of the original consent order by 15<sup>th</sup> of each succeeding month. On 4<sup>th</sup> April, 2018, following several court appearances, the Applicant's advocate disclosed that substantial sum of monies owing had been paid to the applicant and the parties agreed by consent that the outstanding sum be paid by 6<sup>th</sup> April, 2018. Come

11<sup>th</sup> April, 2018 when the parties appeared before the Court, it turned out that the said consent had not been complied with on the ground that the Respondent's Governor had suspended and sacked the County Executive and Chief Officer, Finance who had been replaced. However this position seemed to have been rectified as the proceedings of 3<sup>rd</sup> May, 2018 show. However, as there was still some outstanding amount the Court on that day issued a Notice to Show Cause to the Respondent's County Secretary and County Treasurer to attend court in person on 5<sup>th</sup> June, 2018. On the said day the Court gave the Applicants the green light to execute the warrants of arrest issued on 5<sup>th</sup> December, 2017.

9. Thereafter, there seems to have been 5 applications filed by the respective parties herein. On 12<sup>th</sup> July, 2018, **Mativo, J** gave extensive directions as regards the hearing of the said applications and directed that they be heard on 15<sup>th</sup> October, 2018. However on that date it turned out that the Respondent herein had been served with the Applicant's replying affidavit to one of the applications out of time. Accordingly, it was granted 10 days to file the replying affidavit and parties were directed to exchange their submissions on their respective applications and the matter listed for highlighting submissions on 19<sup>th</sup> November, 2018.

10. On 19<sup>th</sup> November, 2018, before the submissions could be highlighted, **Dr Khaminwa** who appeared with **Mr Juma** for the Applicant raised an objection to the Respondent being heard in the matter arguing that the Respondent had continuously disobeyed court orders. On the other hand **Mr Mboya**, Learned Counsel for the Respondent contended that since directions had been given as regards the hearing of the said applications, to bar the Respondent from being heard would amount to reversing the orders given by **Mativo** and **Mwita, JJ**.

11. I have considered the submissions of counsel. I have also deliberately summarised the history of this matter, a history which does not portray a good picture of the manner in which parties ought to relate to the orders issued by courts. I however will say no more on that issue at this stage.

12. Suffice it to say that on 12<sup>th</sup> July, 2018, **Mativo, J** directed *inter alia* that applications dated 29<sup>th</sup> June, 2018, 25<sup>th</sup> June, 2018 and 5<sup>th</sup> July, 2018 be argued together. He further directed that the *status quo* be maintained. That order has not been varied.

13. That being the position, it is my view that to bar the Respondent from being heard while hearing the Applicant would amount to a variation of the said order. Secondly, in light of the order maintaining the status quo, to direct that the Respondent's officers be arrested would amount to a variation of the same. Accordingly, I decline to grant orders barring the Respondent from being heard.

14. It is so ordered.

**Dated at Nairobi this 21<sup>st</sup> day of November, 2018**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Dr Khaminwa for the ex parte applicant***

***Mr Mboya for the Respondent***

***CA Patricia***