



**Directline Assurance Co Ltd v Kariithi (Civil Appeal
E086 of 2022) [2023] KEHC 3738 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3738 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E086 OF 2022
HK CHEMITEI, J
APRIL 27, 2023**

BETWEEN

DIRECTLINE ASSURANCE CO LTD APPLICANT

AND

PETER MWANIKI KARIITHI RESPONDENT

RULING

1. In its Motion dated 7th July 2022 the applicant prays for orders of stay of execution of the judgement and decree in Molo CMCC No E115 of 2021 and leave to file an appeal out of time. The applicant is also praying that the memorandum of appeal already on record be deemed filed within the requisite time.
2. The said application is based on the grounds thereof and the sworn affidavit of Kelvin Ngure the applicant's Deputy Claims Manager dated the same date.
3. The applicant as well filed the application dated 22nd July 2022 in which it seeks to compel the respondent to release its attached goods pending the determination of the application dated 7th July 2022. The application is supported by the sworn affidavit of Pauline Waruhiu the head of Claims and legal department of the applicant.
4. The two applications are essentially intertwined and that is why the court directed that they be heard together. The application dated 22nd July 2022 was filed after the respondent proclaimed and attached the applicant's goods in satisfaction of the decree in Molo CMCC No. E115 OF 2021.
5. The applicant in the application dated 7th July 2022 deponed that the applicant was unable to file the appeal within the requisite time because of the internal discussions within itself and its advocates. That according to it the trial court misrepresented the issue surrounding the provisions of section 5(b) (iv) of Cap 405.



6. The applicant went on to state that it has an arguable appeal and that it had already settled part of the decretal amount as per the judgement of the trial court. It prayed that failure to file the appeal within the requisite period was not deliberate.
7. On the second application, that is the one of 22nd July 2022 the applicant deponed that the goods were attached and proclaimed while the application for stay of execution was pending. That the attached goods will hamper the applicant's day to day operations and the same ought to be released unconditionally.
8. The respondent vide his replying affidavit sworn on 14th July 2022 vehemently opposed the application arguing that the reasons advanced by the applicant for not filing the appeal within time was flimsy and not excusable. He argued the court to disallow the application and let him enjoy the fruits of the judgement.
9. The court directed the parties to file written submissions which they have complied and the court has perused the same with the attendant authorities. They all gravitate around their respective affidavits and centrally Order 42 rule 6 of the *civil procedure rules*.
10. The first issue to determine is whether the reasons advanced by the applicant for not filing the appeal within the requisite time was plausible. In my view it was not. The issue before it was honouring a courts decree which was timely. The parties knew that it ought to make a decision within a specific period which in this case was 30 days or by extension of the court. There is no evidence of what the applicant has called "internal discussions".
11. Generally, the applicant was well aware of the decree having settled it partially. To advance the reasons of internal discussions showed the laches and a don't care attitude by the applicant to say the least.
12. Nonetheless the 15 days' period may not be too inordinate in the circumstances. More importantly there seems to be a legal issue of whether the trial court appreciated the import of Section 5 of Cap 405. Again this is not the forum for determining this question for now.
13. Secondly is whether the respondent stands to suffer any loss should the application be granted. Definitely he shall suffer having waited for all the years to enjoy the fruits of the judgement. Although he has already been partially paid its the believe of the court that the balance ought to be settled eventually if the intended appeal is meritorious.
14. There is however the question of whether or not he will be in a position to repay the same if the appeal goes against him. Save from the response in the replying affidavit there is no evidence of his pecuniary ability or at all.
15. Therefore, since the parties have all agreed in their affidavits as well as in the submissions that the security pending appeal be provided and the applicant is willing to provide, I find that it will be necessary to do so so as to cushion the respondent as well.
16. Before making final determination and or directives, the application dated 22nd July 2022 came up after the goods had been proclaimed and attached. The respondent had not been served with the order staying the same. At least no affidavit of service was attached to show any form of service upon the applicants or the auctioneers. The attachment was therefore lawful.
17. For the above reasons this court directs that;



- (a) The decretal sum of kshs. 1,538,816 be deposited in a joint interest earning account in the names of both advocates for the parties on record within 30 days from the date hereof and in default execution to issue.
- (b) The appellant to file its memorandum of appeal within 14 days from the date herein.
- (c) The respondents do release the applicants attached goods forthwith upon the payment of any auctioneer's fees to be agreed or taxed.
- (d) Costs of this application to the respondent.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 27TH DAY OF APRIL 2023.

H. K. CHEMITEL.

JUDGE.

