



REPUBLIC OF KENYA



KENYA LAW

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**First Assurance Company Limited v Beko (Civil Appeal E332 of 2021)
[2023] KEHC 21722 (KLR) (Civ) (23 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21722 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E332 OF 2021**

**AN ONGERI, J
AUGUST 23, 2023**

BETWEEN

FIRST ASSURANCE COMPANY LIMITED APPELLANT

AND

SHOKO MOLU BEKO RESPONDENT

RULING

1. The application coming for consideration is dated October 16, 2022 seeking the following orders;
 - i. That this application be certified as urgent and heard ex parte in the first instance.(Spent)
 - ii. That pending the hearing of this application interpartes there be an order of stay of execution in respect of the warrants of proclamation and attachment dated September 28, 2022 by Crater View Auctioneers.
 - iii. That this court be pleased to direct that this application be determined together with the respondent's application dated September 26, 2022.
 - iv. That pending the hearing of this application interpartes this court be pleased to set aside the warrants of proclamation and attachment dated September 28, 2022.
 - v. That the court be pleased to issue an order for extension of time to deposit the balance of the decretal award held by the appellant's counsel on record being kshs.9,227,509/= be deposited in court
 - vi. That costs be provided for.
2. It is supported by affidavit of Alfred Ochieng in which he deposed that the respondent has obtained warrants of attachment dated September 28, 2022 and has proceeded to proclaim the appellant. He



- averred further that despite being requested to provide documentation for opening a joint interest account as ordered the respondent's counsel opted not to cooperate.
3. He further deposed that the respondent is hell bent on frustrating the appellant's appeal as demonstrated by the application dated September 26, 2022 which seeks to set aside orders which the appellant intends to comply with. That if a stay of execution is not granted and the warrants of attachment not set aside, irregular attachment will proceed resulting to the appellant suffering substantial loss and rendering the appeal nugatory.
 4. The respondent filed a replying affidavit sworn on October 28, 2022 in which he deposed that on October 26, 2021 the court delivered a ruling to the applicants application for stay of execution. A 30-day conditional stay of execution was allowed failure to which the order would automatically lapse.
 5. He deposed that as of November 26, 2021 the applicant had not complied with order as he failed to deposit Kshs. 9,227,509 in court. The applicant nevertheless went on to file numerous applications seeking stay of execution which four were dismissed with costs. On September 22, 2022 the applicant filed two other applications seeking stay of execution in respect of CMCC No. 6039 of 2019, the ruling delivered on October 26, 2021 and enlargement of time to comply with the lapsed orders issued on October 26, 2021.
 6. He averred that on September 23, 2022 without the audience of the respondent gave final orders by overturning its own decision and granting a stay of execution.
 7. Further, that the orders issued on September 23, 2022 were therefore illegal and bad in law. That further the applicant once again failed to deposit the amount in court or in a joint interest earning account within 21 days. The auctioneer was therefore validly undertaking his role and thus the applicant is misleading the court.
 8. The parties filed written submissions as follows; the applicant submitted that he sought to open a joint interest account but the respondent decided to frustrate efforts to open the bank account by refusing to provide documentation and propose the convenient bank to the parties. The applicant further submitted that it made part payment to the respondent despite the order likely to have significant effect on the prayers its seeking in the appeal.
 9. The applicant submitted that the power to enlarge time is discretionary in nature and ought to be exercised judiciously. Where a memorandum of appeal has been filed, orders for enlargement of time are not granted, then there will be no order of stay of execution and the respondent will be at liberty to proceed with execution thereby defeating the appeal.
 10. The respondent submitted that the application for stay of execution is functus officio. The respondent argued that the applicant exhausted its right to further litigate issues of stay of execution. The issue of stay of execution reached its finality in litigation when the Hon. Serگون ruled on the 7 applications for stay of execution.
 11. The respondent relied on section 7 of the civil procedure rules and submitted that the applications for stay of execution were determined by two other judges and therefore the application herein is res judicata and should not be issued.
 12. On enlargement of time the respondent submitted that extension of time is an equitable remedy and equity favors the vigilant. The appellant has however had over one and a half years to deposit the amount in court but failed to. The applicant has not laid a basis as to why it did not deposit the money and did not need the assistance of the respondent to deposit the money in court.



13. The respondent submitted that it will suffer prejudice if time is enlarged. Enlargement of time would be denying the respondent the fruits of the judgement yet the applicant failed to be vigilant by depositing the money in court.
14. The issues for determination in this application are as follows;
- i. Whether this application should be determined together with the respondent’s application dated September 26, 2022.
 - ii. Whether the court should set aside the warrants of proclamation and attachment dated September 28, 2022.
 - iii. Whether the time for depositing Kshs. 9,227,509 should be extended.
15. On the issue as to whether this application should be determined together with the respondent’s application dated September 26, 2022, upon perusal of the record, I find that the Application dated September 26, 2022 was heard and a ruling dated November 30, 2022 was delivered which dismissed the Application dated September 26, 2022.
16. There have been several applications in this case but the last ruling was delivered on November 30, 2022, my predecessor who, relying on the case of *Martha Wangari Karua Vs Iebc*, nyeri Civil Appeal No.1 of 2017, held as follows;
- “The rules of Natural justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be.”
17. Article 159(2) of *the constitution* of Kenya provides as follows;
- “In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
- a. justice shall be done to all, irrespective of status;
 - b. justice shall not be delayed;
 - c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
 - d. justice shall be administered without undue regard to procedural technicalities; and
 - e. the purpose and principles of this Constitution shall be protected and promoted”.
18. The Supreme Court in *Raila Odinga & 5 others Vs Independent Electoral and Boundaries Commission and 3 others* [2013] eKLR (Raila 2013) at paragraph 218 said in part with respect to Article 159(2) (d) of *the Constitution* article 159(2) (d) of *the Constitution*;
- “The essence of that provision is that a court should not allow the prescriptions of procedure and form to trump the primary objective of dispensing substantive justice to the parties. The principle of merit, however, in our opinion bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the Court as an agency of process



of justice is called upon to appreciate all relevant circumstances and the requirements of a particular case, and conscientiously determine the best cause”.

19. In the current case, I find that it is in the interest of justice that the appellant be granted an opportunity to pursue his right of appeal.
20. I find the the respondent will not suffer any prejudice that cannot be compensated by an award of costs.
21. The respondent has already been paid part of the decretal sum amounting to Kshs.4,000,000 and since the Appellant is willing to deposit the balance, this appeal should be determined on merit.
22. On the issue as to whether the court should set aside the warrants of proclamation and attachment dated 28/9/2022, I find that the court said in the last ruling delivered on 30/11/2022 where the respondent who was the applicant, the court said that the respondent will not suffer any prejudice by extension of the orders for compliance.
23. The respondent did not appeal against the said ruling and I find that it is in the interest of justice that the warrants be lifted to enable the appellant be heard.
24. I find that application dated October 17, 2022 is meritorious.
25. I allow it in the following terms;
 - i. That the warrant of proclamation of attachment be and are hereby set aside.
 - ii. That the time for depositing the Kshs. 9,227,509 be and is hereby extended by 30 days from this date.
 - iii. That the costs of this application to abide the appeal.
 - iv. That the appeal be fully prosecuted within 90 days of this date.
 - v. That the costs of the Application to abide the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF AUGUST, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

