



County Government of Isiolo v Protoctor & Klein Limited & another (Civil Appeal E152 & E153 of 2021 (Consolidated)) [2022] KEHC 12539 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 12539 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E152 & E153 OF 2021 (CONSOLIDATED)**

EM MURIITHI, J

JULY 28, 2022

BETWEEN

COUNTY GOVERNMENT OF ISIOLO APPELLANT

AND

PROTOCTOR & KLEIN LIMITED 1ST RESPONDENT

BLACK TAR BUILDERS 2ND RESPONDENT

((Appeals from the Ruling and Order of the Hon. E. Ngigi (P.M) in Isiolo CMCC Nos. 32 of 2020 and 35 of 2020 delivered on 2/11/2021))

RULING

1. The court on November 23, 2021 issued the following orders by consent:

“The application dated November 3, 2021 is allowed on terms that:

- a. There be stay of execution on terms that the appellant deposits the full decretal sum into an escrow account in the names of counsel for the parties within 30 days from today.
- b. The appellant shall file and serve a record of appeal together with submissions within 60 days from today to enable the respondent also to file and serve their submissions within 30 days after service.
- c. The appeal stands admitted.
- d. Time is of essence in that if there shall be default to deposit, the stay shall stand discharged which if it shall be the default to file and serve the Record of appeal, the appeal shall stand dismissed.



- e. The application dated November 15, 2021 is withdrawn.
 - f. Mention on March 21, 2022 to confirm compliance and for further orders.”
2. The applicant/appellant filed an application under certificate of urgency dated December 8, 2021 seeking in the main variation of the court order of November 23, 2021 to enlarge time for compliance to deposit the decretal sum as a condition for stay. The court (PJ Otieno, J) in its ruling of December 28, 2021 stated as follows:
- “It is agreed by both counsel that the orders of stay have by its own terms lapsed when there was no compliance with the time frames provided. The question that arises then is whether the court can vary terms of an order that has lapsed. I find no difficulty in finding that one can only vary an order that is in existent. Accordingly, I do find that the orders of November 23, 2021 being lapsed on its terms, the same do not exist and thus not amenable to variation nor time for compliance being enlarged. For those reasons the application cannot succeed but must fail. I do dismiss the same with costs in the appeal....In addition, I doubt that the court has the liberty to impose a condition upon the government to provide security as a condition for stay even if the same is expressed to be by way of bank guarantee or an insurance bound. I take the view that the entire application for stay was propelled by an undue exercise of too much abundance of caution. As agreed by the parties this order shall apply in equal force to HCCA No 153 of 2021. Let the two appeals now be progressed in terms of the directions given on November 23, 2021.”
3. The record of appeal was filed on February 28, 2022 whereas the 60-day window as ordered by the court on November 23, 2021 closed on January 23, 2022. There is no explanation why the record of appeal was not filed within the time frame as ordered by the court on November 23, 2021. The said order was a consent order and there are no factors vitiating the contract to warrant its being set aside.

Orders

4. Accordingly, for the reasons set out above, this court declines to exercise its discretion in the applicant’s favour. The appeals stand dismissed in accordance with the order of the court dated November 23, 2021.

Order accordingly.

DATED AND DELIVERED THIS 28TH DAY OF JULY 2022.

EDWARD M MURIITHI

JUDGE

APPEARANCES:

M/S Philip Henry Associates, advocates for the appellants.

M/S Murango Mwenda & Co Advocates for the respondents.

