



**First Assurance Company Ltd v Beko (Civil Appeal E332 of 2021)
[2022] KEHC 13064 (KLR) (Civ) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13064 (KLR)

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

**CIVIL
CIVIL APPEAL E332 OF 2021**

**JK SERGON, J
SEPTEMBER 22, 2022**

BETWEEN

FIRST ASSURANCE COMPANY LTD APPLICANT

AND

SHOKO MOLU BEKO RESPONDENT

RULING

1. This ruling is the outcome of two applications. The first application is the motion dated November 9, 2021 taken out by the appellant/applicant where it sought the orders to vary and or alter the ruling delivered on October 26, 2021 by the Honourable Justice Said Chitembwe.
2. The applicant filed the affidavit of Sophie Omolo, the Legal Manager for the applicant company in support of the motion.
3. The respondent filed the replying affidavit sworn by Shoku Molu Beko to oppose the motion.
4. I have considered the grounds stated on the face of the motion dated November 9, 2021 and the facts deponed in the rival affidavits. I have further considered the rival oral submissions of learned counsels.
5. The applicant stated that they were aggrieved by the ruling of the court delivered on October 26, 2021 and preferred a review against the order in respect of the conditions set for the grant of stay. That the applicant discovered new and important information which was not within the knowledge of the court and the applicant at the time when the said ruling was delivered.
6. The applicant further stated that it had come to their attention that indeed the subject motor vehicle is not a salvage but is in current use by the respondent and therefore a conditional order of payment for Kshs 4,000,000/= which is the pre accident value would render the intended appeal nugatory.



7. The applicant avers that the use of the said motor vehicle should be sufficient ground to warrant this court to direct that the only monies that ought to be deposited in a joint interest earning account and/ or payable ought to be for the repair costs.
8. The applicant is apprehensive that in the event that this court order relating to conditional stay were to be complied with then the applicant is likely to suffer great prejudice as it may be unable to recover any monies paid to the respondent in compliance with the order as his means of income is unknown to the applicant.
9. The respondent opposed the application arguing that the court cannot vary stay orders that have lapsed and if the application is allowed, miscarriage of justice will be occasioned and the respondent will be prejudiced as the applicant has not fulfilled the prerequisite conditions established by law and the court order issued on October 26, 2021.
10. The respondent avers that there is no new and important matter or evidence adduced by the applicant and that the deponent is relying on hearsay evidence that cannot be relied upon by the court as the author of the newspaper cutting is Richard Munguti and not the person deposing herein on behalf of the applicant.
11. The respondent further avers that the money liquidated decree if paid to him cannot render the intended appeal nugatory since he is a man of means and equally the director in Zam Zam Ltd and relies on bank statement and logbooks filed in this case.
12. This court will only vary the terms of the order for stay of execution if the applicant satisfies any of the grounds for application for review. The grounds upon which an application for review may be premised, are found under order 45 of the *Civil Procedure Rules*, 2010 and they are as follows: -
 - i. Where there is a discovery of new and important matter or evidence, which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order was made.
 - ii. On account of some mistake or error apparent on the face of the record.
 - iii. For any other sufficient reason.
13. Counsel for the applicant told the court that in bringing the present application, the applicant was relying on the new and important information which was not within the knowledge of the court. On the other hand the respondent stated that the evidence she relied on was hearsay evidence that cannot be relied upon by the court.
14. Since the days of *Butt v Rent Restriction Tribunal* [1979] eKLR, it has been affirmed that the power to grant or deny stay of execution is discretionary power, to be exercised in favour of a deserving party. Stay of execution is therefore not an absolute right and a party pursuing this relief must demonstrate to the court that they merit it.
15. The applicant came to this court and obtained a conditional stay of execution but appears not to have liked the conditions attached to the stay. The applicant therefore made no attempt to comply with the conditions set by the court and the stay granted thereby lapsed.
16. When a party approaches the court for discretionary orders, it is not for that party to dictate the terms of the orders to be granted. I find no reason to review or vary my orders.



17. The second application is the motion dated November 30, 2021 also taken out by the appellant/ applicant where it sought the orders
18. I have considered the grounds stated on the face of the motion dated November 30, 2021 and the facts deponed in the rival affidavits. I have further considered the rival oral submissions of learned counsels.
19. The applicant stated that they were aggrieved by the ruling of this court delivered on the October 26, 2021 which they preferred a review against the ruling on the issue of quantum of damages and that application dated November 9, 2021 had been scheduled for hearing but the judge had proceeded on leave.
20. The applicant avers that the respondent has since instructed auctioneers to proceed with execution taking advantage of the stay of execution has lapsed and since the judge proceeded on leave ,they are apprehensive that their appeal will be rendered nugatory.
21. In response, the respondent avers that the applicant failed to comply with the conditions of the order of stay of the decree that were issued and are now seeking a stay of execution of a stay of execution order that it has not complied with.
22. The respondent avers that by law, the court's hands are tied due to being *fantus officio* and the court cannot issue contradictory orders and that this application has not fulfilled the criteria and prerequisites for a stay to issue.
23. Principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides as follows:
 - No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
24. The applicant is apprehensive that if the application dated November 9, 2021 and the appeal filed by them will be rendered nugatory if the stay of orders are not granted. On the other hand the respondent is of the view that a court cannot grant a stay order to a stay order as there is no law on the same.
25. I am in agreement with the respondent that there is no law that an order for stay of execution can stay an order of execution since these orders are normally discretionary and at the same time the application has not complied with conditions under order 42 rule 6 of the [Civil procedure rules](#).
26. Having considered the material placed before this court and the rival oral submissions, I am satisfied that the appellant's application has no merit since this application is not anchored in law as no provisions of law provides an order staying an order for stay execution.
27. In the end the two applications vizly, one dated November 9, 2021 and the other dated November 30, 2021 are dismissed with costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2022.

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J K SERGON

JUDGE

In the presence of:

..... for the appellant/applicant

..... for the respondent

