Beko v First Assurance Company Ltd (Civil Appeal E332 of 2021)
[2022] KEHC 15845 (KLR) (Civ) (30 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15845 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E332 OF 2021

JK SERGON, J

NOVEMBER 30, 2022

BETWEEN

SHOKO MOLU BEKO ..... APPLICANT

AND

FIRST ASSURANCE COMPANY LTD ..... RESPONDENT

(Hon Chitembwe on October 26, 2021)

RULING

1. The appellant/applicant in this instance has brought the Notice of Motion dated September 26, 2022 supported by the grounds set out in its body and the facts stated in the affidavit of Shoku Molu Beko. The applicant sought for an order for the court proceedings for September 23, 2022 and the consequential orders be set aside.

2. The respondent put in a replying affidavit sworn by Alfred Ochieng on October 7, 2022, to oppose the motion.

3. The applicant avers that as of November 26th, 2021, the respondent had not complied, specifically, the respondent had not deposited khs 9,227,509/= in court or in a joint interest-earning account of the advocates, as required by the court's ruling on the respondent's application for a stay of execution, which was granted on October 26, 2021.

4. The applicant further avers the respondent subsequently filed four applications seeking stay of execution, which were finally determined on September 22, 2022 by this court which ruled that the applications are dismissed with costs and that the orders issued by Hon Chitembwe on October 26, 2021 had automatically lapsed.

5. The applicant states that on September 22, 2022, the respondent filed two applications seeking for a stay of the orders made on October 26, 2021 and an extension of time to follow the directives of the expired order issued on October 26, 2021. That on September 23, 2022, without hearing the applicant in this case, the court made final orders to the applications. The court did this without the applicant's audience and without giving final orders.

6. The applicant further states the court overturned its own rulings granting a stay of execution without giving the applicant a chance to be heard because it lacked appellate jurisdiction.

7. The applicant avers that the orders issued on September 23, 2022 are illegal and bad in law and should be set aside reasons being that the court denied the applicant his right to a fair administrative action, right to access to justice, and right to a fair hearing, including the right to be informed of the applications filed and given the opportunity to respond to the said applications, the right to be given adequate time and the pleadings for the applicant to respond, and the right to have his cases decided in public without secrecy and non-disclosure.

8. The applicant deponed that the court determined the two applications dated September 22, 2022 with full knowledge that it was *res-judicata* and that it was *functus officio* and that the applicant is greatly prejudiced with bias and that the court stands to be embarrassed by these orders dated September 23, 2022.

9. In opposing the motion, the respondent stated that indeed the respondent herein filed two applications dated November 9, 2021 and November 30, 2021 seeking to review the orders of Justice Chitebwe issued on October 26, 2021 that mandated the respondent to pay the applicant the sum of kshs 4,000,000/= and that the respondent went ahead and paid the applicant the kshs 4,000,000/= in a bid to comply with the said orders and in a bid to equally prosecute its appeal which it reiterates has high chances of success.

10. The respondent further stated that the application dated January 14, 2022 were to seek for stay of execution owing to the fact that the applications dated November 9, 2021 and November 30, 2021 had not been determined and there was a great risk or danger of execution being carried on the respondent seeing that the decretal award involved is a huge amount of money.

11. The respondent avers that the two applications were dismissed, then the respondent moved to court again vide application dated September 22, 2022 seeking for enlargement of time to comply with the orders issued on October 26, 2022 seeing that there was part compliance of the said order and that the respondent wanted to fully comply with those orders and move to prosecute its appeal.

12. The respondent further avers that in a bid to comply with orders, the appellant/respondent released the sum of kshs 9,227.509/= to their advocates bank account which is to be released to the joint interest earning account in the names of the firms of the advocates on record for the parties herein .

13. The respondent states that it has been willing to comply with the orders of the court as the balance of the decretal award has already been released and that the applicant’s advocates are delaying the prosecution of the appeal as they never show interest in opening the joint account and that further any effort by the respondent to try proceed with the appeal has been thwarted by the applicant who seeks to reap where he did not sow.

14. The respondent further states that the applicant has not demonstrated any prejudice that he has suffered or is likely to suffer by the issuance of the order of the court extending time for compliance by the parties and that in the interest of justice that the respondent be allowed to prosecute its appeal .

15. Order 51 rule 15 of the Civil Procedure Rules. This is the provision which caters for situations where a court proceeds *ex parte* in an application. It provides that "the court may set aside an order made *ex parte*." The powers of the court to set aside *ex parte* proceedings and orders is wide. But it must be exercised judicially. In the case of Patel v EA Cargo Handling Services Limited (1974) E A 75 the court was of the view that the discretion of the court in setting aside *ex parte* judgments or rulings is very wide. It was stated:

> " There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

16. As regards the discretion to set aside *exparte* orders, the court has wide powers save that where such discretion is exercised, the court should do so on terms that are just. The court in *Shah vs Mbogo* [1967]EA 116, stated:-

> " This discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice".

17. From the record it is very clear that the respondent has partially complied with the conditions that were set down by the court by paying the applicant kshs 4,000,000/= who has acknowledged receipt. This is a clear indication that the respondent is willing to proceed to prosecute its appeal.

18. In my view the respondent is willing to comply with the orders of the court as the balance of the decretal award has already been released and that the applicant's advocates are delaying the prosecution of the appeal as they never show interest in opening the joint account and that further any effort by the respondent to try proceed with the appeal have been delayed by the applicant.

19. I will associate myself with the case of *Branco Arabe Espanol vs Bank of Uganda* [1999] 2 EA 22, Oder, JSC stated:

> " The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered."

20. In the same vein, in *Martha Wangari Karua vs IEBC* Nyeri Civil Appeal no 1 of 2017 the Court of Appeal 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."

21. I am also in agreement with the respondent that the applicant has not demonstrated any prejudice that he has suffered or is likely to suffer by the issuance of the order of the court extending time for compliance and in the interest of justice the respondent should be allowed to prosecute its appeal.

22. In the premises, I find the Notice of Motion dated September 26, 2022 has no merit. The same is dismissed with costs being in the cause.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2022.

.....

J K SERGON

JUDGE

In the presence of:

..... for the appellant/applicant

..... for the respondent