



**Safaricom Limited v Betoto aka Hadija Mkalama & another (Civil Appeal E246 of 2021) [2024] KEHC 12617 (KLR) (22 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12617 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E246 OF 2021  
JK NG'ARNG'AR, J  
OCTOBER 22, 2024**

**BETWEEN**

**SAFARICOM LIMITED ..... APPELLANT**

**AND**

**KADIDE MWAJAIRA BETOTO AKA HADIJA MKALAMA .. 1<sup>ST</sup> RESPONDENT**

**INVESCO INSURANCE COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Appellant/Applicant filed a Notice of Motion application dated 3<sup>rd</sup> May 2024 under Certificate of Urgency pursuant to Order 40, Order 45 Rule 1, 2, Order 50 Rule 6, Order 23 Rule 8, Order 51 Rule 1, Order 42 Rule 6 of the Civil Procedure Rules 2010, Section 3A, Section 79G and Section 95 of the Civil Procedure Act, Cap 21 Laws of Kenya and all other enabling provisions of the law.
2. The Applicant prays for orders of stay of execution of the decree of Hon. E. Muchoki issued on 17<sup>th</sup> August 2021 and upheld vide a ruling issued on 7<sup>th</sup> December 2021 in Mombasa MCCC E486 of 2021 following the consent dated 22<sup>nd</sup> January 2024 and filed on 26<sup>th</sup> February 2024 pending the interparties hearing of the appeal. The Applicant also prayed for a temporary order of injunction restraining the 1<sup>st</sup> Respondent by herself, her agents, employees and/or assigns from dealing with, attaching, disposing off, auctioning or otherwise interfering with the Appellant/Applicant's motor vehicle registration number KBN xxxN and KBZ xxxB and any other attached asset in satisfaction of the decree issued on 17<sup>th</sup> August 2021 and upheld vide a ruling issued on 7<sup>th</sup> December 2021 in Mombasa MCCC E486 of 2021 pending the hearing and determination of the appeal. That this court be pleased to lift the proclamation of attachment of movable property issued on 30<sup>th</sup> April 2024 together with the warrants of attachment of movable property issued on 24<sup>th</sup> April 2024. That costs of this application be provided for.



3. The application was premised on grounds on its face and the Supporting Affidavit of Daniel Ndaba sworn on 3<sup>rd</sup> May 2024 that a consent letter dated 22<sup>nd</sup> January 2024 and filed on 26<sup>th</sup> February 2024 was endorsed by the Parties' advocates allowing the Appellant/Applicant to deposit the decretal sum into a joint account for an all-inclusive sum of Kshs. 563,886. That a clause on stay of execution for 45 days was issued pursuant to the said consent letter and the period has since lapsed thereby exposing the Appellant/Applicant to imminent execution. That the Appellant is in the process of depositing the entire decretal sum in satisfaction of the consent letter within the next 21 days.
4. The Appellant/Applicant stated that they have been served with a proclamation of attachment of movable property issued on 30<sup>th</sup> April 2024 together with the warrants of attachment of movable property issued on 24<sup>th</sup> April 2024 seeking to attach and sell their movable assets. That unless the orders sought are granted, the 1<sup>st</sup> Respondent will proceed to attach and sell the Appellant/Applicant's assets leading to substantial loss and damage. That the 1<sup>st</sup> Respondent will not be prejudiced in any way if the orders sought are granted.
5. The 1<sup>st</sup> Respondent in her Replying Affidavit sworn on 16<sup>th</sup> May 2024 in opposition to the application stated that the Applicant has been indolent in prosecuting the appeal dated 20<sup>th</sup> December 2021 to conclusion. That the Applicant has not complied with the consent dated 22<sup>nd</sup> January 2024 and filed in court on 26<sup>th</sup> January 2024. That the period agreed between the parties was 45 days from 22<sup>nd</sup> January 2024 which long expired on 10<sup>th</sup> April 2024. That the application for extension of time is an afterthought calculated to delay enjoyment of the fruits of the judgment and that the Applicant has not complied with the principles for extension of time. That the Applicant has frustrated execution of the orders of court by preventing auctioneers from attaching the proclaimed motor vehicle of the Applicant. That the Applicant should not be granted the orders sought and that execution should proceed expeditiously unless the amount indicated in the warrants is paid in full.
6. This court gave directions for the application to be canvassed by way of written submissions but by the time of writing this ruling, only the 1<sup>st</sup> Respondents had filed their submissions. The 1<sup>st</sup> Respondent/Decree holders in their submissions dated 18<sup>th</sup> September 2024 contended that there is no purpose to be served by this court if a further order for extension of time is given when the period given was by consent of the parties. The 1<sup>st</sup> Respondent relied on authorities in Eldoret Civil Application No. E013 of 2023, *Aturkan Hotel Ltd & Another v Stephen Jomo Anyanje*, Mombasa Civil No. 198 of 2017, *Salim Peter Murithi v Kasiwa Gona Kirao*, and Nakuru Court of Appeal No. 131 of 2017, *Walter Kipyegon Cheruiyot v Stanley Korir*. The 1<sup>st</sup> Respondent submitted that the application for extension of time lacks merit and should be dismissed with costs.
7. I have considered the Notice of Motion application dated 3<sup>rd</sup> May 2024, the Replying Affidavit sworn on 16<sup>th</sup> May 2024 and the submissions. The issue for determination is whether the application is merited for grant of the orders sought.
8. It is not in dispute that the consent dated 22<sup>nd</sup> January 2024 was filed on 26<sup>th</sup> February 2024 with the following terms: -

“That there be a stay of execution of the Judgment/Decree of this court entered on 7<sup>th</sup> December 2021 pending appeal on condition that the Appellant deposits the sum of Kshs. 563,886 in a joint interest earning account between M. Ananda & Co. Advocates and Meritad Law Africa LLP Advocates within 45 days from the date of this consent in default the decree holder be at liberty to execute.”



9. The said consent order was adopted as an order of the court and became binding on the parties. However, this court notes that the 45 days within which the Appellant/Applicant was required to comply with terms of the consent has since lapsed. Appellant/Applicant have stated in their application that the Finance Department is grappling with insufficient funds having been caught up with a lapse in the 4<sup>th</sup> Quarter Budget implementation that failed to identify financial variances and that the payment of the decretal sum could not be initiated instantaneously due to administrative approvals pertaining to internal mechanisms as the reasons that occasioned the non-settlement of funds within the period.
10. The court in *Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd* [1982] KLR 485 held as follows: -

“... A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement...”
11. There is no evidence on record to show an attempt by the Appellant/Applicant to have the joint interest earning account as stated in the consent and payment of the said sum. The reason advanced by the Appellant/Applicant is also not satisfactory to this court as no evidence has been attached as proof. The 1<sup>st</sup> Respondent should therefore not be faulted for exercising their right to execute as per terms of the consent to enjoy the fruits of the judgment/decree.
12. Accordingly, the Notice of Motion application dated May 3, 2024 has no merit and is dismissed with costs.

**DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22<sup>ND</sup> DAY OF OCTOBER, 2024.**

.....  
**J.K. NG'ARNG'AR, HSC**

**JUDGE**

In the presence of: -

Murage for Applicant present

Ngairi for Amode for Respondent present

Court Assistant – Mr. Samuel Shitemi

