REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 151 OF 2011

INVESCO ASSURANCE CO.....APPELLANT

MW (minor suing THRO' next friend and mother

(HW).....RESPONDENT

(Being an Appeal from the Ruling/Order of Hon. Soita, Principal Magistrate, Molo delivered on 23rd August, 2011 in Molo PMCC NO. 127 of 2007 and consolidated with Molo PMCC NO. 128 and 129 of 2007).

JUDGMENT

1. On the 27th November 2007, the Respondent in Molo PMCC No. 27 of 2007 was awarded a sum of Kshs.195,182/= pursuant to a full hearing of the case in the trial court. In execution of the decree, the Respondent took out warrants of attachment dated 1st March 2011 against the Appellant subsequently negotiated a settlement with the respondent in an all inclusive sum of Kshs.592,519/= – including decretal sums in other suits in the same court consolidated with the primary suit hereof being PMCC No. 128, and 129 of 2007. The sum of Kshs.195,182/= subject of this appeal was included in the negotiated sum of Kshs.592,519/= so the appellant submits. The above sum was fully paid by the Appellant bringing to conclusion the three cases as consolidated.

2. On the 30th March 2011 the Respondent issued fresh warrants of attachment in the sum of Kshs.277,158/= inclusive of Kshs.81,976/- being interest against the appellant claiming that there was an error in the calculations in the original warrants of attachment dated the 1st March 2011. Being aggrieved by the turn of events, the appellant applied to the trial court by its application dated 10th May 2011 seeking orders to set aside the fresh warrants and stay of execution of the same. Upon hearing of application, the trial court dismissed the application on the 23rd August 2011 on the grounds that the fresh warrants represented the interest that had accrued on the judgment sum during the period of the moratorium and that the moratorium did not waive or set aside the interest ordered payable by the appellant in the judgment.

3. This is the ruling subject of the appeal. In summary, the grounds of appeal are on three main issues:

> *(1) Whether the Respondent is entitled to interest accrued during period of moratorium granted to the appellant on the 1st March 2008 and the High Court conservatory order.*
>
> *(2) Whether the warrants of attachment issued on the 30th March 2011 were*

illegal as no Notice to show cause had been issued to the appellant.

(3) Whether the Respondent should be estopped from claiming further payments from the appellant through the fresh warrants of attachment after the negotiated decretal amount had been fully paid.

4. **Both parties filed written submissions on the Appeal**

The appellant in his submissions states that during the moratorium and conservatory orders period, the respondent was estopped from claiming interest. **Section 67(a) of the Insurance Act Chapter 487** provides that during the moratorium, running of time for purposes of any law of limitation in respect of any claim by any policy-holder or creditor of the insure is suspended. There is no provision that suspends accrual of interest on any sum ordered for payment by the court with interest and costs. It is the court's view that once the moratorium is lifted, any amounts ordered for payment by the court become immediately payable with or without interest as directed by the court. In the present matter, the decretal sums that included costs and interest became payable.

5. A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of *status quo* for the preservation of the subject matter.

In my view, this order can not, unless expressly stated by the issuing court, stop interest running on a principle sum upon a judgment. See **Stephen Kiarie Chege -vs- Insurance Regulatory Authority & Others Nbi HC Misc. Appl. No 601 of 2009 (2009) e KLR and Judicial Service Commission -vs- Speaker of the National Assembly and Another Petition No. 518 of 2013.**

In the above authorities, the Honourable Judges never held that interest on a judgment sum stopped to accrue during the dependency of the conservatory orders or during a moratorium ordered upon a insurance company.

It is noted that the judgment in the trial court was delivered on the 27th November 2007 and the appellant failed to make any payment upto the 30th March 2011 when upon attachment of their property, pursuant to the warrants of attachment issued on the 30th March 2011, they paid the first installment. This was after almost four years.

6. The moratorium alluded to was issued on the 1st March 2008, four months after delivery of the judgment. It is not disputed that the original warrants of attachment issued by the court on 1st March 2011 did not include the element of interest for a period of about four years. The appellant submits that thereafter, it negotiated an all inclusive payment of Kshs.592,519/= with the Respondent – including interest and party costs and which sum the appellant paid in full and the three cases were compromised. It is its submission that the said payment settled the three claims and therefore the Respondent was estopped from raising any other claim including accrued interest prior to the payment.

7. The Respondent on its part states that the initial warrants of attachment had an error that accrued interest had been omitted and that that error was corrected in the subsequent warrants said to have been issued illegally. The appellant states that having compromised the matter by paying the amount in the original warrants, the respondent should therefore be estopped from claiming any other payments.

Relying on the cases **Esther Akinyi Odidi & 2 Others -vs- Sagar Hardware Stores Ltd Kisumu HCCA No. 97 of 2005 and Mini Bakeries (K) Ltd -vs- George Ondieki Nyamanga Kisii HCCA NO. 18 of 2013** and adopting the principle of estoppel elaborated by **Denning L J** in **Kombe -vs- Kombe (1951) 2 KB 215**, thus

"The principle as I understand it is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect

> ***the legal relations between them and to be acted on accordingly, then, one the other party has taken him at his work and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him but he must accept that legal relations subject to the qualifications which he himself has introduced, even though it is not supported in a point of law by any consideration, but only by his word."***

Justice Mwera, (as the then was) in the **Esther Akinyi Odidi** case (**Supra**) expressed himself , following the above principle that*:*

> ***"--- a person should always stand by his word or deed given to another who believes and acts on that work or deed as the truth of the matter--- if the truth of the deed or word is changed, those who believed and acted on it stand prejudiced --- hence the protection under Section 120 in case a suit or proceedings ensures---"***

8. **Section 120 of the Evidence Act** states that:

> ***"when any person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither that he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."***

I fully subscribe to the spirit and purport of the above legal provision in **Section 120 of the Evidence Act**. The Respondent by its actions and words, and by the warrants of attachment dated 1st March, 2011 may have made the appellant believe that the decretal sum was as indicated in the warrants, upon which it paid the compromised sum and therefore deemed the claim fully settled.

However, **Section 120 Evidence Act** has to be interrupted in such a manner that the intention of the party is clear in the declaration of his actions or omissions are clear.

> ***"-----intentionally caused or permitted another person to believe---"***

9. In the present matter, the respondent has clearly submitted that there was an error in the warrants by excluding interest in the calculations. I do not believe that the respondent **intentionally** caused the wrong figure to be shown in the warrants and once the error was noticed, the warrants were returned to court of rectification, hence the warrants dated 30th March 2011 were issued that included the element of interest accrued from the date of judgment. I am also of the considered opinion that the appellant knew the truth of the matter, that the sum they paid did not include the interest, but as it was in its favour, it opted to keep mum, and only raised it once the second set of warrants were issued. It is my finding that **Section 120 of Chapter 120** cannot protect it nor the principles of **Promissory Estoppel** as at all times it knew the truth. It is not a matter of where a party does not know the truth of a matter, and the other party **intentionally** causes the other to believe and act on what it is declared to be the truth. To that extent, the holding and findings in the two cases above – **Esther Akinyi Odidi and Judicial Service Commission** are distinguishable and not similar in circumstances.

10. **Section 99 of Civil Procedure Act** allows amendments and corrections of clerical or arithmetical mistakes in decrees, or orders or errors arising from accidental omissions either by the courts own motion or application by any of the parties. This court finds no illegality in the amendment of the 30th March 2011 warrants to include accrued interest.

11. On the matter of the decree having been over one year old, it is trite that a Notice to show cause ought to be issued to the judgment debtor before execution pursuant to **Order 22 Rule 17 & 18 of the Civil Procedure Rules.**

It is not in dispute that the Notice to Show cause was not issued. The appellant submits that failure to have the Notice to Show Cause issued made the warrants of attachment illegal and therefore the trial magistrate erred in law in failing to declare the execution process illegal.

Rule 18 gives the court discretion to refuse execution when no notice to show cause is issued. My understanding of the rule is that the court may also exercise its discretion and allow execution where notice to show cause is not given.

The appellant acting on what it calls an illegality on the 1st March 2011 warrants proceeded to pay the sum shown as Kshs.592,519/=. By so doing, it can not now turn round to state that the payment was made in error. It actually benefited from the said error by having its property released back to it by the auctioneers. When the warrants were reissued on 30th March 2011, they were illegal in the eyes of the appellant, apparently because this time, the appellant was at the receiving end! A party cannot be right and wrong at the same time.

12. **Article159 of the 2010 Constitution** mandates the court to dispense justice without undue regard to procedural technicalities as is the case in this matter.

There was a valid judgment of the court against the appellant. The appellant knew and was aware of the decretal sums, that included costs and interest of the suit.

This court having made a finding that interest was payable by the appellant from the date of judgment at court rates upto the date of full payment, and having rendered itself that the moratorium extended to the appellant and the courts conservatory orders did not stop accrual of interest during the times, then, it follows that the appeal lacks merit, and the interest calculated at Kshs.277,158/= as at the date of the ruling, subject of this appeal and further interest accrued since, ought to be paid by the appellant.

13. Coming back to the issues as framed. The above analysis and findings by the court results to affirmative answers to the three issues, that the respondent is entitled to the interest accrued during the period of the moratorium extended on the 1st March 2008 and the High Court conservatory Orders.

It is a further finding that the warrants of attachment issued on the 30th March 2011 though not procedurally issued as provided under the provisions of **Order 22 rules 17 and 18,** they nevertheless did not make the execution process illegal - in view of the provisions of **Article 159 of the Constitution,** and that with or without the warrants, the appellant is obligated to settle the full decretal sum including interest as decreed by the trial court, and as may be updated by the court to include further interest.

14. The upshot is therefore that the Respondent is not estopped from claiming the further payments by way of interest despite the appellants payment of the compromised sum that this court has found to have been in error and which error was liable to correction by the same court that issued the warrants as the correction did not go into the merits of otherwise of the Judgment and decree of the trial court.

It was an arithmetical error that can be corrected by dint of **Section 99 of the Civil Procedure Act, Chapter 21 Laws of Kenya**. This is what the trial court in the warrants of attachment dated 30th March 2011 did.

For the above reasons, lacks merit. It is dismissed with costs to the Respondent.

Dated, signed and delivered in open court this 12th day of May 2016

JANET MULWA

JUDGE