



**Issak & another v Monarch Insurance Co. Ltd (Civil Suit  
388 of 2012) [2023] KEHC 19176 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19176 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL SUIT 388 OF 2012  
HK CHEMITEI, J  
JUNE 29, 2023**

**BETWEEN**

**ABDIRAHMAN NURROW ISSAK ..... 1<sup>ST</sup> PLAINTIFF**

**HASSAN M IBRAHIM ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**THE MONARCH INSURANCE CO. LTD ..... DEFENDANT**

**RULING**

1. In its Notice of Motion dated 24<sup>th</sup> January 2023 the applicant prayed for the following orders;
  - (a) Pending the hearing and determination of the intended appeal, the execution of the decision given on 12<sup>th</sup> October 2022 herein be stayed.
  - (b) Leave be granted to the applicant to file a Notice of Appeal against the ruling of the High Court of Kenya at Nakuru (honourable) Justice Mumbua T Matheka dated 12<sup>th</sup> October 2022 in High Court Civil Case No 388 of 2012 consolidated with Misc. Application Number E216 OF 2021 out of time.
  - (c) The Notice of Appeal dated 24<sup>th</sup> January 2023 and lodged by the applicant in the High Court of Kenya at Nakuru on the same date be deemed as properly filed.
  - (d) Leave be granted to the applicant to lodge a substantive appeal against the ruling of the High Court of Kenya, Hon. Justice Mumbua T Matheka dated 12<sup>th</sup> October 2022 in the High Court Civil Case No 388 of 2012 consolidated with Misc. Application No. E216 of 2021 out of time.
  - (e) Costs be provided for.



2. The application is supported by the grounds on the face of it as well as the sworn affidavit of Rosemary Kangwana the applicant's legal manager sworn on 25<sup>th</sup> January 2023. It is further supported by her further affidavit sworn on 16<sup>th</sup> February 2023.
3. The issues herein are clearly discerned. The parties had a dispute which resulted in them proceeding by way of arbitration. The findings of the arbitrator were thereafter filed in court for adoption and or further directions by the court. On 12<sup>th</sup> October 2022 Hon. Justice Matheka gave her judgement which among others declined to set aside the arbitral award and allowed the award to be recognised and enforceable.
4. The respondents on their part proceeded to execute against the applicants who had failed to pay the awarded sum of kshs 50,406,000 despite being issued with a notice.
5. This execution jolted the applicant into action and filed the current application. The substratum of this application is asking the court to grant it leave to file appeal out of time and at the same time stay the execution. The reasons advanced by the applicants for such a late filing of the application is that its directors did resign and there was therefore no board to make a decision on the way forward regarding the matter.
6. To this end the applicant has attached a draft notice of appeal as well as a draft memorandum of appeal.
7. The applicant deponed that unless the orders are granted it stands to suffer loss and damage and the intended appeal rendered nugatory.
8. While the application was pending and this court had issued Exparte orders, I suppose for service, the respondents on their part had directed m/s Saddbri Auctioneers to commence execution. By the time the exparte orders for stay were served it appears that the auctioneers had moved in to attach the applicants Eldoret's office properties.
9. The applicant then filed another application dated 2<sup>nd</sup> February 2023 praying that the attached goods be released forthwith as there was an order in force. The application is based on the grounds thereof as well as the sworn affidavit of Rosemary Kangwana. The court directed the said application to be argued simultaneously with the main application.
10. She deponed that at the time of attachment this court had already issued stay orders and thus it was a total abuse of the said order to proceed with the attachments. That the goods which were attached had impeded the applicant's operation especially the data in regard to its clients and the related insurance services.
11. Hassan M Ibrahim the 1<sup>st</sup> respondent has opposed the two applications vide his replying affidavit sworn on 8<sup>th</sup> February 2023. He accused the applicant of making the application too late in the day and that the same was basically an abuse of the court process. He accused the applicant of filing the application only after the execution process had been instituted and that there was no evidence that the applicant seriously wanted to settle the matter.
12. He further deponed that the application was unmerited for the counsel on record has failed to seek the leave of the court before filing the application since judgement had already been entered.
13. It was also untrue that the applicant was not aware of the matter since its former advocates on record were clearly served as per the attached emails in his affidavit.



14. As regards the second application he deponed that by the time the auctioneers were advised of the order they had already executed against the applicants Eldoret offices and they did stop. It was not therefore true that they were already aware of the stay order.
15. The court directed the parties to file written submissions which they complied. Each of them as expected pulled in their respective corners. The court has perused each of them with the attendant authorities and does not intent to reproduce them here.
16. The issues are clear, namely whether stay of execution ought to be granted and leave to appeal as prayed by the applicant.
17. There is no doubt given the chronology of events and the history by the applicant why it did not file the application immediately that it is the execution process that jolted it into action. The issue of the directors resigning and therefore the need to comply with the Insurance Regulatory Authority was in my view a purely an internal matter and had nothing to do with the respondent.
18. At any rate it was for the applicant to honour its obligations and not to use it as an excuse. It was already aware of the judgement of the court and for it to wait for over 100 days so as to respond showed ineptitude on its part.
19. It is common knowledge that for such an application to succeed it must satisfy the three grounds set under order 42 rule 6 of the *Civil Procedure rules*, namely, it must demonstrate substantial loss should stay not be granted, the application has been made without unreasonable delay and willingness to offer security for such a stay.
20. In this case and considering the reasons advanced by the applicant I find the reasons for the delay in filing not reasonable. There was nothing which stopped the applicant make the application at hand within the set time considering the magnitude of the amount in question. At any rate the applicant through the set of emails contained in the respondents replying affidavit which are uncontroverted was already aware of the decision by the court.
21. Has the applicant prove any substantial loss it may incur should the attachment continue.? I don't think so. The history of the matter clearly showed a client /insurer relationship. The applicant has not demonstrated any iota of evidence that it stands to suffer should the payment be made to the respondents.
22. On the same note it has not been demonstrated that the respondents may not pay back the decretal sum in the event that the intended appeal succeeds. It appears that the battle has lasted more than a decade and they need at least to enjoy the fruits of the judgement.
23. As regards the second application, i am satisfied with the explanations contained in the respondents' replying affidavit that by the time the auctioneer was served with the order it had already attached the applicant's goods at the Eldoret office and it did not proceed to Nakuru office after being notified by its counsel. The attachment was done around 8.30 am and they received the order at 1. 57pm.It was incumbent upon the applicant to serve the order before the attachment could be effected. As it were the auctioneer was not seized of the order at the time of the attachment.
24. In view of the above observations i find that this court will not allow the prayers of stay of execution pending appeal. The applicant has not demonstrated any substantial loss it stands to suffer neither has it offered any security pending appeal. At the same time the application has been made inordinately late without any reasonable excuse. As a matter of fact, even the notice of appeal was filed contemporaneously with the application.



25. Needlessly, this court does not want to impede the applicants chance at the Court of Appeal. Whichever way it has every right to seek further redress at the said court. In *Synergy Industrial Credit Limited v. Cape Holdings Limited* (2019) eKLR the Supreme court reaffirmed this position when it stated that;

“Having analysed the law in the identified jurisdictions, we find that there is generally no express right of appeal against the decision of the High Court in setting aside or affirming an award. Leave to appeal would, however, only be granted in very limited circumstances. In that regard therefore, Courts have held that leave to appeal may be granted where there is unfairness or misconduct in the decision-making process and in order to protect the integrity of the judicial process. In addition, leave would be granted in order to prevent an injustice from occurring and to restore confidence in the process of administration of justice. In other cases, where the subject matter is very important as a result of the ensuing economic value or the legal principle at issue, leave would also be granted. A higher Court would also assume jurisdiction in order to bring clarity to the law where there are conflicting decisions on an issue. In all these instances, care must be taken not to delve into the merits of an arbitral award because that is not the purview of Courts”.

26. Consequently, the court makes the following orders;

- (a) The applicant is hereby granted leave to appeal against this court’s ruling dated 12<sup>th</sup> October 2022 and the Notice of Appeal dated 24<sup>th</sup> January 2023 is deemed properly filed subject to the payments of court fees if any.
- (b) The other prayers in this application and the application dated 2<sup>nd</sup> February 2023 are disallowed.
- (c) The respondents shall have the costs of this application.

**DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 29<sup>TH</sup> DAY OF JUNE 2023.**

**H. K. CHEMITEI**  
**JUDGE**

