



**Insurance Regulatory Authority v Goldfield Insurance Brokers Limited; First Assurance Company Limited (Interested Party) (Insurance Appeal E062 of 2022) [2022] KEHC 16905 (KLR) (Commercial and Tax) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16905 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSURANCE APPEAL E062 OF 2022  
DO CHEPKWONY, J  
DECEMBER 20, 2022**

**BETWEEN**

**INSURANCE REGULATORY AUTHORITY ..... APPELLANT**

**AND**

**GOLDFIELD INSURANCE BROKERS LIMITED ..... RESPONDENT**

**AND**

**FIRST ASSURANCE COMPANY LIMITED ..... INTERESTED PARTY**

*(Being an appeal against the Ruling and orders of the Insurance Appeals Tribunal dated and delivered on 14th April 2022 at Nairobi)*

**JUDGMENT**

1. A brief background on the chronology of events with respect to the dispute between the parties herein would shine light on my discussion in this judgment.
2. The same is as follows: the respondent purports to have offered various services to the interested party with respect to tender KFS/02/2021-2022 advertised by Kenya Forest Services (KFS) including market intelligence services, where it collected, and submitted private and confidential information on the Kenya Forest Services Medical Insurance Scheme to the interested party, preparation and submission of the tender document; and collection of letters and relay of correspondence between the interested party and Kenya Forest Services. In the long run and courtesy of the services offered by the respondent, the interested party was awarded the subject tender but allegedly refused to pay the respondent its commission. Consequently, *vide* a letter dated January 5, 2022, the respondent sought the intervention



- of the Commissioner, Insurance Regulatory Authority to have the interested party compelled to pay the commission.
3. The commissioner responded through a letter dated March 31, 2022 declining the request for intervention on grounds that the same sought enforcement of a contract which contravenes section 191 (2) of the [Insurance Act](#). More specifically, the commissioner expressed the view that in preparing and submitting the tender documents, letters and any other correspondences, the respondent had engaged in services for which it is not licensed to offer contrary to section 2 and 191 (2) of the [Insurance Act](#). Further, that by collecting and submitting the private and confidential information on the Kenya Forest Services Medical Insurance Scheme, the respondent breached stakeholder's right to privacy as is protected under article 31 of the [Constitution](#). Taking all that together, the commissioner was persuaded that the respondent had indeed committed a punishable offence. In addition to its letter, the commissioner further issued to the respondent's principal officer, a notice to show cause why enforcement action should not be taken against him under section 152 of the [Insurance Act](#), for failing to discharge his duties with sufficient knowledge, skill and experience.
  4. Aggrieved by the commissioner's decision, the respondent lodged an appeal against in the Insurance Appeals Tribunal in civil appeal No 6 of 2022 *vide* a memorandum of appeal dated April 8, 2022. Simultaneous with the memorandum of appeal, the respondent filed an application for interim relief dated April 7, 2022 under rule 15 of the [Insurance \(Insurance Appeals Tribunal\) Rules, 2013](#) seeking inter alia orders that pending the hearing and determination of the appeal, the tribunal be pleased to suspend the notice to show cause dated March 30, 2022.
  5. The appeal was then listed for direction on April 11, 2022 and in presence of all the advocates on record for the parties herein, the tribunal directed that the notice to show cause be suspended pending the hearing and determination of the appeal before the tribunal. The tribunal further directed the parties to file submissions on the main appeal and allocated the April 27, 2022 as the date for hearing.
  6. Somehow, the appellant was aggrieved by the tribunal's decision to suspend the notice to show cause and has approached this court seeking the setting aside of the tribunal's order to suspend the notice to show cause *vide* the memorandum of appeal dated May 10, 2022. It has raised six (6) grounds of appeal which can be summarized as follows, that in suspending the notice to show cause, the tribunal erred both in fact and in law and the effect of its decision;-
    - a. precludes the appellant from exercising its legal function under sections 3, 3A and 152 (e)(i) of the [Insurance Act](#);
    - b. authorizes the respondent to carry on business without the approval of the commissioner as under section 152 (e)(i) of the [Insurance Act](#);
    - c. was made without a prior notice for hearing being issued to the appellant with respect to the application for interim relief contrary to regulation 15(2) of the [Insurance Appeals Tribunal Rules, 2013](#);
    - d. failed to give detailed reasoning for its decision; and
    - e. lastly, that the tribunal failed to determine whether the respondent had established *prima facie* case for grant of the orders sought.
  7. This court then gave directions that the appeal be canvassed by way of written submission and as the record reflects, both parties complied.



## Appellant's Submissions

8. The respondent submitted that the tribunal's decision to suspend the notice to show cause implicitly determined the same thus compromising and interfering with the appellant's administrative discretion to supervise market conduct and take action against insurance industry players. In any event, the appellant did not raise issues with the orders of the tribunal because it reasonably expected that the appeal would be heard and determined as scheduled on April 27, 2022 pending the expiry of the tribunal's period which was to lapse on May 4, 2022, but which did not happen.
9. According to the appellant, the notice to show cause was meant to facilitate the hearing of the preferred charges and achieve procedural fairness in the ultimate decision to be made. In its view, the appellant argues that the tribunal committed a jurisdictional error by issuing an order of prohibition restraining the appellant from hearing and determining the notice to show cause. In effect the appellant submitted that the tribunal by its decision, indeed allowed the respondent to carry on business without the appellant's supervision, failed to give notice on hearing of the application, failed to consider its merits and also failed to provide its reasoning for the decision in violation of the insurance laws.

## Respondent's Submissions

10. On the other hand, the respondent submitted that the appeal lacks merit, and the tribunal was justified in, and had the jurisdiction under rule 15(1) to grant the orders it did in order to preserve the substratum of the appeal. That if by any chance the orders of the tribunal are set aside, the respondent submits that the entire appeal would be rendered otiose and w the appellant allowed to proceed with its impugned decisions, an incident which this court can prevent.
11. In the respondent's view, this court's appellate jurisdiction was invoked prematurely since the appellant ought to have first sought review of the orders by the tribunal and/or seek leave to approach this court. That the appeal against the orders granted by the tribunal is not as of right and the appellant failed to seek such leave thus contravening order 42 and section 75 of the Civil Procedure Rules and Act respectively. The respondent then cited a number of decided cases to support its arguments including the cases of Proto Energy Limited v Hashi Energy Limited [2019] eKLR, Eckla Jesang Kirop & 3 others v Kenya Ports Authority [2015] eKLR, Owners of Motor Vessel Lilian "S" v Caltex Oil Kenya Ltd [1989] eKLR among other cases.

## Analysis and Determination

12. Having read and considered the record appeal, the original record of proceedings before the honourable tribunal, the submissions tendered on behalf of the parties and the authorities relied on in determination of the grounds of appeal as set out herein, I am persuaded that the following issues crystalize for determination:-
  - a. Whether in suspending the notice to show cause, the Hon Tribunal precluded, prohibited and or restrained the appellant from statutory mandates under the Insurance Act,
  - b. Whether in issuing the orders dated April 14, 2022, the tribunal determined the application dated April 7, 2022 in line with regulation 15 of the Insurance Appeals Tribunal Rules, 2013.
13. However, before delving into the merits of these two issues, I wish to address a preliminary issue which has been raised by the respondent on whether failure to seek leave to appeal against the tribunal's



decision ousts this court's jurisdiction. In that respect, the respondent submitted that section 75 of the *Civil Procedure Rules* outlines matters in which an appeal shall lie as of right. So does order 42 of the *Civil Procedure Act*. In both instances, an appeal from the tribunal's interim decision does not appear in the list. Thus, given that the appellant never sought the tribunal's leave, this court lacks the jurisdiction to determine the appeal and should forthwith down its tools.

14. On the other hand, the respondent submitted that the failure to seek leave is curable under article 159(2)(d) of the *Constitution* which enjoins the court to focus on doing substantive justice as opposed to focusing on procedural technicalities. Further, that where the challenge on jurisdiction is not taken at the earliest opportunity available, the court can infer parties acquiesce to its jurisdiction. The court is thus sought to consider that as an option to overruling the challenge now being advance by the respondent.
15. Further, the respondent submitted that it additionally has the right of appeal against the decision of the tribunal under section 173 (3) of the *Insurance Act*. And if, in any event it was mandatory to seek the leave as intimated, it was prevented from doing so by factors beyond its control including the expiry of the term of the insurance tribunal on May 4, 2022. The respondent avers that it reasonably expected that the tribunal would have heard and determined the dispute before its term expires.
16. In my understanding, order 43 of the *Civil Procedure Rules, 2010* gives a list of orders from which an appeal lies from as of right. It therefore follows that if one wishes to appeal on an order that is not on the list under order 43 of the *Civil Procedure Rules*, he/she/it must seek leave of court that made that very order. The said order 43 is the procedural order for section 75 of the *Civil Procedure Act*. It reads; "appeals from orders" and provides as follows: -

“ An appeal shall lie with as of right from the following orders and rules under the provisions of section 75 (1)(h) of the Act:

- (a) Order 1 (parties to suits);
- (b) Order 2 (pleadings generally);
- (c) Order 3 (frame and institution of suit);
- (d) Order 4, rule 9 (return of plaint);
- (e) Order 7, rule 12 (exclusion of counterclaim);
- (f) Order 8 (amendment of pleadings);
- (g) Order 10, rule 11 (setting aside Judgment in default of appearance).
- (h) Order 12, rule 7 (setting aside Judgment or dismissal for non-attendance);
- (i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
- (j) Order 19 (affidavits);
- (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
- (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
- (m) Order 24, rules 5, 6 and 7 (legal representatives);
- (n) Order 25, rule 5 (compromise of a suit);



- (o) Order 26, rules 1 and 5(2) (security for costs);
- (p) Order 27, rules 3 and 10 (payment into court and tender)
- (q) Order 28, rule 4 (orders in proceedings against the Government);
- (r) Order 34 (interpleader);
- (s) Order 36, rules 5, 7 and 10 (summary procedure);
- (t) Order 39, rules 2, 4 and 6 (furnishing security)
- (u) Order 40, rules 1, 2, 3, 7 and 11 (temporary injunctions);
- (v) Order 41, rules 1 and 4 (receivers)
- (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);
- (x) Order 45, rule 3 (application for review);
- (y) Order 50, rule 6 (enlargement of time);
- (z) Order 52, rules 4, 5, 6 and 7 (advocates);
- (aa) Order 53 (judicial review orders).

- a. An appeal shall lie with the leave of the court from any other order made under these rules.”

17. In exercise of its appellate jurisdiction, this court has the jurisdiction to hear and determine appeals from tribunals, subordinate courts or bodies as prescribed by article 165 of the [Constitution](#) and other Acts of Parliament. Nonetheless, by virtue of order 43 and section 75 as reproduced above, a party who desire to file an appeal to this court has a duty to demonstrate under what law that right to be heard on an appeal is conferred or if not, show that leave has been granted by the court that made the order which is impugned to lodge the appeal before the court.
18. In that understanding, I have read through the orders of the court dated April 14, 2022 allowing the application dated April 7, 2022 as brought under the [Insurance Act](#) (Appeals Tribunal) Rules, 2013 seeking suspension of a notice to show cause issued by the commissioner of insurance. it can persuasively be argued that the notice to show cause is considered under the [Civil Procedure Rules](#) as a sanction taken against a party and an appeal thereof lies as of right, thus that ground is competent enough to sustain the present appeal.
19. Nonetheless, it has not been denied that the term of the Insurance Appeals Tribunal lapsed on May 4, 2022 and that a new one had not been constituted by the time of filing the present appeal. This court is therefore persuaded that there was no proper forum for the appellant to seek leave and it would be unfair to strike out the appeal on the ground of failure to seek leave of the tribunal while taking into account such factors as lapse of the tribunal’s term was beyond its control.
20. I now turn to the merit of the appeal, and the first issue for determination is whether in suspending the notice to show cause, the Hon Tribunal precluded, prohibited and or restrained the appellant from exercising its statutory mandate under the [Insurance Act](#). According to the appellant, in suspending the notice to show cause, the tribunal indeed determined the cause of action and charges preferred against the respondent’s principal officer for not discharging his duties with knowledge and skill as is expected of him under section 152 of the [Insurance Act](#). Further, the appellant argued that the tribunal’s order had the effect of allowing the respondent to continue conducting business for which



it was not licensed and indeed was prohibited and restrained from exercising its mandate to control insurance practitioners as is expected under the *Insurance Act*. The respondent on the other hand maintains that the tribunal was within its mandate in issuing the orders as it did.

21. Regulation 15 (1) of the *Insurance Act* (Appeals Tribunal) Rules, 2013, serves a better reference in determining the issue. It provides as follows: -

“ 15.

- (l) The appellant may make application to the secretary that the tribunal suspends operation of a decision of the company or commissioner which is subject of appeal.

22. The above provision shows that it is within the tribunal’s mandate to grant interlocutory relief suspending a decision of the commissioner pending the hearing of an appeal. In this case, the tribunal suspended the commissioner’s notice to show cause dated March 30, 2022 summoning the respondent’s principal officer to show cause why an action should not be taken against him under section 152 of the *Insurance Act*. It is also clear that in its memorandum of appeal filed before the Insurance Appeals Tribunal, the respondent challenges the commissioner’s decision culminating to the issuance of the notice to show cause. The same provision intimates that a decision by the commissioner is not conclusive and may be subjected to an appeal before the Insurance Appeals Tribunal. Therefore, this court can only intervene upon being persuaded that the tribunal made an erroneous decision through an error of law and seek to correct the said error. In doing so, it is imperative that the court keeps in mind that its jurisdiction over subordinate tribunals is supervisory and not review.

23. The question which then ponders for an answer is whether the tribunal, in suspending the notice to show cause prohibited the appellant from discharging its mandates to control stakeholders in the insurance sector from engaging in businesses they are not licensed to.

24. In my understanding, a suspension order has the effect of temporarily preventing an action, either administrative or otherwise, from continuing or being in force. It is merely meant to give an interim protection until the substantive issues are determined. In this case, I disagree with the appellant that the order suspending the notice to show cause pending the determination of the appeal has entirely restrained it from exercising its regulatory role under section 152 of the *Insurance Act*. The order merely provides the respondent interim protection pending determination on whether the commissioner was justified in taking the action he did against the respondent, so that should the tribunal find in favour of the appellant herein, the commissioner shall carry on with the notice to show cause. Although the appellant heavily submitted on the merit of the notice to show cause and justification of its decision to decline the payment of commissions to the respondent, I do not wish to engage on the same so as not to pre-empt the appeal pending before the Insurance Appeals Tribunal.

25. The last issue is on whether in issuing the orders dated April 14, 2022, the tribunal determined the application dated April 7, 2022 in line with regulation 15 of the *Insurance Appeals Tribunal Rules, 2013*. According to the appellant, the tribunal neither gave a notice for hearing of the application dated April 7, 2022 nor did it give reasons for allowing the interim orders suspending the notice to show cause pending the appeal.

26. Regulation 15 (supra) reads as follows: -

15(2) The tribunal may determine the application on the basis of

written presentation if the parties to the proceedings in the tribunal agree in writing or it may direct the parties or any interested party to appear before it.



- (3) The tribunal shall notify the parties and the interested parties of its determination giving a statement of its reasons.
- (4) All interlocutory applications made to the tribunal shall be in such form as may be directed by the tribunal signed by applicant, his advocate, or a duly authorized agent, supported by an affidavit.
- (5) A party served with an application as directed by the tribunal may file a replying affidavit or grounds of opposition.
- (6) The tribunal shall have the power to hear any party who desires to be heard despite failure to file replying affidavit or grounds of opposition.

27. A plain reading of the above provision shows that an application for interim relief made under regulation 15 may either be canvassed by written submissions or orally by parties appearing before the tribunal. The opposing party is at liberty to file a replying affidavit or be heard orally with respect to the application. Thereafter, the tribunal shall issue/give notice to the parties for delivery of its decision and therein give a statement of its reasons.

28. In the present case, having examined the proceedings of April 11, 2022 before the Insurance Appeals Tribunal when the said orders subject of this appeal was issued, the application dated April 7, 2022 was then canvassed orally before the tribunal with M/S Murithi appearing for the appellant (who is the respondent herein), Mr Christopher Wairoma for the respondent (the appellant herein) and Mr Kiminja (for the interested party). M/S Muriithi then invited the tribunal to grant the orders suspending the notice to show cause as sought in the application and none of the other counsel objected to same. That being the case, I do not see any error that was committed by the tribunal in failing to give reasons for allowing an order which was not objected to by the respondents. Had the appellant herein wished to object to the application or granting of the orders, it could have done so when the application was canvassed orally on April 11, 2022. For the same reason, this court is persuaded that the argument by the appellant that the orders by the tribunal were granted without it being allowed a chance to be heard is misplaced.

29. In the end, based on the foregoing discussion, I am persuaded that the appeal lacks merit and proceed to dismiss it in its entirety. Each party shall however bear its own costs of the appeal.

30 It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS .....20<sup>TH</sup> .... DAY OF .....DECEMBER....., 2022.**

**D.O CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Wainaina counsel for Appellant

Mr. Kurauka counsel for Respondent

Court Assistant - Sakina

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