



**Metal Merchants Limited v Takaful Insurance of Africa Limited (Civil Appeal E066 of 2021) [2023] KEHC 17335 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17335 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E066 OF 2021**

**DAS MAJANJA, J**

**MAY 12, 2023**

**BETWEEN**

**METAL MERCHANTS LIMITED ..... APPELLANT**

**AND**

**TAKAFUL INSURANCE OF AFRICA LIMITED ..... RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon. E. M. Kagoni, PM dated 1st July 2021 at the Nairobi Magistrates Court, Milimani in CMCC No. E079 of 2021)*

**RULING**

1. Before the Subordinate Court, the Respondent filed an application dated October 27, 2020 made, *inter alia*, under sections 1A, 1B and 3A of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) (“the CPA”) and section 6(1) and (2) of the [Arbitration Act, 1995](#) seeking the following orders:
  - (1) The Honourable Court be pleased to strike out the suit on account of the action being time barred by the terms of Clause 13 of the Burglary Cover (Policy Document).
  - (2) In the alternative to Prayer 1, the Honourable Court be pleased to stay these proceedings and refer the parties to arbitration in accordance with the terms of Clause 12 of the Burglary Cover (Policy Document).
2. The application was supported by the affidavit and further affidavit of the Respondent’s officers, Halima Ibrahim Hussein and Safiya Karua, sworn on October 27, 2020 and February 14, 2021 respectively. It was opposed by the Appellant through the affidavit of its director, Shezad Fazal, sworn on November 2, 2020.
3. The Subordinate Court considered the application alongside written submissions and rendered the ruling dated July 1, 2021 which has precipitated this appeal. In essence, the court struck out the suit on



the ground that the suit was time barred under the limitation of time clause under the subject policy. The court also referred the dispute to arbitration.

4. In its Memorandum of Appeal dated July 28, 2021, the Appellant contests the ruling dated July 1, 2021 and prays that the appeal be allowed and the ruling be discharged and set aside with costs to the Appellant.
5. In response to this appeal, the Respondent raised a preliminary objection that this appeal is incompetent as this court lacks jurisdiction to entertain the appeal on the ground that no leave was sought and obtained before filing the appeal. It argues that the appeal was from orders of the Subordinate Court made under sections 1A, 1B and 3A of the CPA, section 6(1) and (2) of the Arbitration Act and the inherent jurisdiction of the court from which there is no right of appeal in accordance with sections 75 and 76 of the CPA as read with Order 43 rule 1 of the Civil Procedure Rules (“the Rules”).
6. Since the competence of the appeal is a fundamental issue, the court must satisfy itself that it has jurisdiction to entertain this appeal in line with established principles set out in many cases among them Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited [1989] 1 KLR 1 and S K Macharia v Kenya Commercial Bank Limited and 3 Others [2012] eKLR. In the former case, the dictum of Nyarangi JA, that, “..... jurisdiction is everything without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction” is apposite.
7. The High Court does not have inherent appellate jurisdiction. Apart from appellate jurisdiction conferred specifically under the Constitution, Article 165(e) of the Constitution provides that the High Court has jurisdiction to hear and determine appeals from tribunals, subordinate courts or other bodies as conferred by legislation. This means that a party who desires to file an appeal to this court must demonstrate that it has a statutory right to lodge an appeal. In Nyutu Agrovet Ltd v Airtel Networks Limited NRB CA Civil Appeal (Application) No 61 of 2012 [2015] eKLR Karanja JA, citing other decisions on the issue, observed as follows:

“I hold the view that no right of appeal is provided for in arbitral awards save for matters pegged on Section 39 of the Act. I am convinced that a right of appeal is conferred by statute and cannot be inferred. On this point, I am in agreement with Omollo, JA in his decision in the Kenya Shell case (supra) where he stated;

“I agree with Onyango Otieno JA that the right of appeal to this Court can only be conferred by statute and cannot be implied or inferred. That is now old hat.”

See also Attorney General-vs-Shah (No 4) (1971) EA 50, and Nova Chemicals Ltd vs Alcon International Ltd, High Court Misc. Application No 1124 of 2002, and this Court’s recent decision in Kakuta Maimai Hamisi –vs- Peris Peris Tobiko & Others Civil Appeal No. 154 of 2013, where it was held;

“It is enough to say that the right of appeal must be statute or other law based and so viewed there is nothing doctrinally wrong or violative of the constitution from such right to be circumscribed in ways that render certain decisions of courts below non appealable”.



8. In ordinary civil matters, appellate jurisdiction is conferred by the CPA. Since the appellant seeks to appeal against an order of the Subordinate Court striking out the suit, the relevant provision of the CPA is section 75 which states as follows:

"75. Orders from which appeals lie

- (1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with leave of the court making such order or of the court to which an appeal would lie if leave were granted-
  - (a) An order superseding an arbitration where the award has not been completed within the period allowed by the court;
  - (b) An order on an award stated in the form of a special case;
  - (c) An order modifying or correcting an award;
  - (d) An order staying or refusing to stay assault where there is an agreement to refer to arbitration;
  - (e) An order filing or refusing to file an award in an arbitration without the intervention of the court;
  - (f) An order under section 64;
  - (g) An order under any of the provision of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
  - (h) An order made under rules from which an appeal is expressly allowed by the rules
- (2) No appeal shall lie from any order passed in appeal under this section."

9. The import of section 75 aforesaid is that appeals from the orders enumerated under subsection (1)(a) to (h) are as of right while all other appeals from any other orders in civil proceedings are regulated by the Rules. Order 43 rule 1 of the Rules proceeds to sets out the orders from which an appeal is allowed as or right and those not provided for are with leave of the court. The said order provide as follows:

"43. Appeals from Orders.

- (1) An appeal shall lie 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).
- (2) An appeal shall lie with the leave of the court from any other order made under these Rules."

10. Turning to the undisputed facts of the case, the Appellant invoked sections 1A, 1B and 3A of the CPA and section 6(1) and (2) of the *Arbitration Act, 1995*. As the suit was struck out under those



provisions for want of jurisdiction, the resulting decision could not give rise to a decree since the rights of the parties were not settled as such this appeal is not as of right. From the relevant provisions of the law, the orders sought and granted do not fall within the list of enumerated provisions which entitle an aggrieved party to appeal as of right. The Appellant therefore required leave to appeal as the order resulting therefrom was not appealable as of right under Order 43 rule 1(2) of the Rules. This appeal is therefore incompetent as leave was not sought as a pre-condition for the filing the appeal.

11. For the reasons I have advanced, this appeal be and is hereby struck out with costs to the Respondent. The costs of the appeal are assessed at Kshs 20,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF MAY 2023.**

**D. S. MAJANJA**

**JUDGE**

**Court Assistant: Mr M. Onyango.**

Mr McCourt instructed by Kairu and McCourt Advocates for the Appellant.

Mr Akach instructed by Abdulhakim and Company Advocates for the Respondent.

