



Monarch Insurance Company Limited v Ibrahim & 5 others (Civil Application E054 of 2023) [2024] KECA 53 (KLR) (2 February 2024) (Ruling)

Neutral citation: [2024] KECA 53 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E054 OF 2023
P NYAMWEYA, FA OCHIENG & WK KORIR, JJA
FEBRUARY 2, 2024**

BETWEEN

THE MONARCH INSURANCE COMPANY LIMITED APPLICANT

AND

HASSAN M. IBRAHIM 1ST RESPONDENT

HASSAN M. IBRAHIM 2ND RESPONDENT

HASSAN M. IBRAHIM 3RD RESPONDENT

ABDIRAHMAN NURROW ISSAK 4TH RESPONDENT

ABDIRAHMAN NURROW ISSAK 5TH RESPONDENT

ABDIRAHMAN NURROW ISSAK 6TH RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an intended appeal from the Ruling of the High Court of Kenya at Nakuru (Mumbua T. Matheka, J.) dated 12th October 2022 in HCCC No. 388 of 2012 consolidated with Misc. Appl. No. E216 of 2021)

RULING

1. Before us is an application dated 5th July 2023, in which the applicant prays for an order of stay of execution of the impugned ruling pending the hearing and determination of the intended appeal.
2. The application is brought under Rule 5(2)(b) of the *Court of Appeal Rules*, 2022, and Sections 3A and 3B of the *Appellate Jurisdiction Act*. The application is based on the following grounds:
 - “ a) The respondents were awarded Kshs. 50,406,000/- by the tribunal on 30th July 2021.



- b. Aggrieved by the award, the applicant moved to the High Court on 29th October 2021 and applied to set aside the award.
 - c. The respondents also filed an application dated 5th November 2021 seeking recognition and enforcement of the award.
 - d. The two applications were consolidated and heard together.
 - e. In the impugned ruling, the applicant’s application was dismissed, while the respondents’ application was allowed.
 - f. Being dissatisfied with the ruling, the applicant lodged a Notice of Appeal dated 24th January 2023.
 - g. In the draft Memorandum of Appeal dated 24th January 2023, the applicant has raised eight (8) grounds of appeal.
 - h. The applicant has emphasized that the award is contrary to public policy, as it entailed the rewriting of the terms of the contract between the applicant and the respondents; and that the award is contrary to the general legal principle that parties should be held to the terms of their contracts and courts, and by extension, arbitral tribunals, should not interfere with the said terms.
 - i. The applicant was not served with the order issued on 30th November 2022 and only became aware of the same on 19th January 2023.
 - j. At the time the impugned ruling was delivered, the applicant’s board was not properly constituted.
 - k. The Insurance Regulatory Authority appointed new directors on 12th January 2023.
 - l. The applicant’s board reviewed the ruling thereafter, and decided to appeal.
 - m. The respondents sought to execute the order of the court on 19th January 2023 by attaching the applicant’s property.
 - n. An interim order of stay was issued on 26th January 2023 by the High Court.
 - o. The applicant also applied for typed proceedings through its advocates by a letter dated 7th February 2023.
 - p. The interim stay orders lapsed on 29th June 2023 when the applicant’s application for stay was dismissed.
 - q. The applicant was granted leave to appeal to this Court.
 - r. There is an impending risk of execution if the order sought is not granted; and the applicant stands to suffer irreparable harm, including being unable to financially honor its claims to its customers.”
3. The applicant further supported the application with three affidavits sworn by Rosemary Kangwana, its Legal Manager, in which she reiterated the grounds set out in the application.



4. In his replying affidavit, the 1st respondent stated that:

- “ a) He was relying on his replying affidavit dated 8th February 2023 before the High Court.
- b. The application is frivolous, mischievous, lacking in merit, an afterthought, incompetent, and brought in bad faith.
- c. The draft memorandum of appeal does not demonstrate that the intended appeal is arguable, or that the appeal will be rendered nugatory if the orders sought are not granted.
- d. The jurisdiction of this court under Section 39(3) of the *Arbitration Act* can only be invoked when determining questions of law arising from arbitration proceedings.
- e. The intended appeal raises questions of fact.
- f. The orders sought amount to the reopening of an issue which was determined by the High Court in the ruling dated 29th June 2023.
- g. The applicant has not demonstrated that the High Court went beyond the grounds set out in Section 35 of the *Arbitration Act*.
- h. The applicant is using internal issues to justify the delay to seek orders of stay of execution.
- i. The applicant should demonstrate that it is financially solvent.
- j. The issue of proper service was determined by the High Court.
- k. The applicant has failed to pay arbitration fees leading to a delay in delivery of the award.
- l. The applicant has failed to demonstrate how the loss it is likely to suffer will render the intended appeal nugatory as the amount in question is liquidated.”

5. When the application came up for hearing on 11th October 2023, Mr. Nyaundi, Ms. Wataka, and Ms. Odiero, learned counsel appeared for the applicant whereas Mr. Kipkoech, learned counsel appeared for the respondents. Counsel relied on their respective written submissions which they opted to briefly highlight as follows:

6. Mr. Nyaundi argued that there is a valid appeal, citing *Nyutu Agrovat Limited v Airtel Networks Kenya Limited & Another*, Supreme Court Petition No. 12 of 2016 to support his claim that this court has jurisdiction to hear appeals of decisions on arbitral awards. Counsel argued that the award exceeded the arbitrator's jurisdiction and violated public policy. The accident that gave rise to the case took place in South Sudan, a country not covered by the insurance policy. Counsel also highlighted that the COMESA cover was a third-party policy that did not benefit the respondents.

7. Counsel argued that the respondents are unlikely to be able to refund over Kshs. 50 million should the appeal succeed after they have made payments to honor the decree. Counsel referred to Section 35 of the *Arbitration Act* in citing the grounds for setting aside arbitral awards. Counsel submitted that the award was against the *Insurance Act*, and the finding was contrary to the contract.



8. The applicant argued that the test for granting a stay of execution was established in the case of *Charterhouse Bank Limited v Central Bank of Kenya & 2 Others* [2017] eKLR. In this case, the court established two conditions that must be met before a stay of execution can be granted. Firstly, the appeal or intended appeal must have arguable grounds. Secondly, unless the stay is granted, the result of the appeal, if successful, would be rendered useless.
9. The applicant submitted that the intended appeal is arguable on the basis that the award given violates Section 37(1)(b)(ii) of the *Arbitration Act*. In support of this argument, the applicant relied on the case of *National Bank of Kenya Limited & Another v Geoffrey Wabome Muotia* [2016] eKLR.
10. The applicant is apprehensive that paying the substantial amount stated in the award would greatly prejudice them in paying insurance claims as an insurer.
11. The applicant is apprehensive that the respondents may not be able to return the award amount in case the intended appeal succeeds. In support of the argument, reliance was placed on the case of *National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another* [2006] eKLR, where this Court observed that when an applicant expresses a reasonable fear that the respondent would be unable to pay back the decretal sum, the evidential burden shifts to the respondent to show the resources they have, as it is a matter that is peculiarly within their knowledge.
12. The applicant submits that the respondents have previously tried to execute the award by attaching the applicant's property, as evidenced by the proclamation notices in the supporting affidavit. Further, that the respondents are in possession of some of their office equipment from their Eldoret branch. Therefore, if the stay is not granted, the respondents may proceed with execution.
13. The applicant argued that the respondents failed to adhere to Rule 6 of the *Arbitration Rules*, and they did not obtain a decree from the High Court. Moreover, the order that the respondents rely on does not specify the amount of the judgment debt.
14. In opposition to the application, Mr. Kipkoech argued that there is no valid basis for appeal. He claimed that the grounds stated in the draft Memorandum of Appeal were too general and did not pertain to any matter of public importance that would require Section 39 of the *Arbitration Act* to come into effect.
15. Counsel supposed that the appeal would not be invalidated simply because it involved a large sum of money, and it has not been demonstrated by the applicant that the respondents would be unable to refund the decretal amount if the appeal was successful.
16. Counsel argued that the applicant was unworthy of the court's discretion because they had not paid the arbitration fees.
17. The respondent argued that the draft memorandum of appeal raises questions of fact that have been competently determined by the High Court, hence the intended appeal is not arguable.
18. The respondents supposed that stating potential customer losses without evidence is insufficient ground for a stay.
19. The respondents argued that the applicant failed to prove that the High Court exceeded the grounds stated in Section 35 of the *Arbitration Act*. They relied on the case of *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR to support their position.
20. We have thoroughly reviewed the application, along with the supporting documents, affidavits, counsel's submissions, relevant case law, and legal provisions. We acknowledge that our jurisdiction



under Rule 5(2)(b) is original, independent, and discretionary. However, we must exercise this discretion judiciously and rationally, and not out of impulsiveness or sympathy.

21. Rule 5(2)(b) is a procedural provision that allows the court to protect the subject matter of an appeal when it has already been filed. In the case of *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR, the court held that:

- i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 Others v Nderitu & Another* (1989) KLR 459.
- ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
- iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365.
- iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No. Nai 189 of 2001.
- v. An applicant must satisfy the court on both of the twin principles.
- vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
- vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
- viii. In considering an application brought under Rule 5 (2)(b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. *Damji Pragji (supra)*.
- ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
- x. Whether or not an appeal will be rendered nugatory depends on whether or not what is

22. To succeed in an application for a stay of execution, the applicant must show that its intended appeal has a strong legal basis. Once this has been established, the applicant must also demonstrate that if its appeal were to be successful, it would be meaningless if execution had not been stayed. This principle was demonstrated in the case of *Trust Bank Limited & Another v Investech Bank Limited & 3 Others* [2000] eKLR.



23. In the case of *Dennis Mogambi Mang'are v Attorney General & 3 Others* [2012] eKLR, this Court held that when determining the arguability of an appeal, it must consider whether there are grounds of appeal that can be supported by the law or the evidence. The court stated that:

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”

24. On whether or not the applicant has established a valid basis for an arguable appeal, we have considered the applicant’s draft memorandum of appeal. One of the main issues raised by the applicant is that the award violates the provisions of Section 37(1)(b)(ii) of the *Arbitration Act*.

25. The respondents, however, have expressed their concern that the applicant has not been able to demonstrate that the High Court went beyond the grounds mentioned in Section 35 of the *Arbitration Act*. Furthermore, they contend that the applicant has included factual claims in their draft memorandum of appeal.

26. To our minds, these are matters that fall under the jurisdiction of the law and require a full hearing to reach a satisfactory resolution.

27. The applicant is concerned that the respondents will proceed with the execution of the award, as they have already partially executed it by attaching the applicant’s property in its Eldoret branch. The applicant fears that the appeal will be rendered nugatory if the impugned award is not stayed. We find this to be a valid concern as the applicant’s property is at risk of being attached.

28. The applicant expressed concern over the granted amount exceeding Kshs. 50 million, and fears that if they pay the amount and the appeal succeeds, the respondents might not have the means to refund it. The respondents have not provided evidence of their financial capability, and their counsel argued that it was the applicant’s responsibility to demonstrate the respondents’ inability to refund. However, it is well settled that the burden of proving that they were capable of refunding the award money lay with the respondents. In the case of *International Laboratory for Research on Animal Diseases v Kinyua*, (*supra*), the court held that:

“In this application it has been deposed that there was a reasonable and justifiable apprehension of it being unlikely to recover the money from the respondent who may have squandered the whole sum. This allegation in our view called for rebuttal evidence from the respondent which was not forthcoming. Indeed nowhere in the 12 paragraphs constituting the replying affidavit sworn by Mr. Sehmi on 17th April, 1990, and the replying affidavit sworn by him on 7th February, 1990, in the Superior Court which forms an annexure is there evidence of the respondent’s means. Mr. Sampson’s affidavit in support of the application has in fact been deposed to that effect. In the case of Kenya Shell Ltd the respondent produced evidence of his financial means and position which evidence was accepted by the court.”

29. In *Britam General Insurance Company Kenya Limited v Abigail Khasoa Simiyu* [2020] eKLR, this Court ruled that:

As to whether the intended appeal will be rendered nugatory if successful unless we grant the orders sought, the judgment amount is substantial. The applicant asserted that it does not know “the respondent’s means of reimbursing event of the intended appeal succeeding.” As the Court stated in *International Laboratory for Research on Animal Diseases vs. Kinyua*, [1990] KLR 403 where it is alleged by the applicant that an appeal will be rendered nugatory



on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. In that regard, beyond stating the applicant has substantial means and that by its standard the amount involved is paltry, the respondent does not claim or demonstrate that she has the ability to reimburse the decretal amount in the event of the appeal succeeding, should we decline to stay the judgment in the meanwhile."

30. In this instance, the respondents have not demonstrated their ability to refund the award money if the intended appeal is successful.
31. The applicant has demonstrated that if execution is not stayed, the appeal may be rendered moot.
32. Accordingly, the application dated 5th July 2023 is allowed, and the order given by the High Court (Hon. Justice Mumbua T. Matheka) on 12th October 2022 and issued on 30th November 2022 is hereby stayed pending the hearing and determination of the intended appeal by the Applicant. Costs shall abide the outcome of the intended appeal.
33. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 2ND DAY OF FEBRUARY, 2024.

P. NYAMWEYA

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

