



REPUBLIC OF KENYA



**Insurance Regulatory Authority v Muinde & 3 others (Civil Application
E364 of 2022) [2023] KECA 422 (KLR) (14 April 2023) (Ruling)**

Neutral citation: [2023] KECA 422 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E364 OF 2022
HM OKWENGU, JM MATIVO & PM GACHOKA, JJA
APRIL 14, 2023**

BETWEEN

INSURANCE REGULATORY AUTHORITY APPLICANT

AND

PETER MWAU MUINDE 1ST RESPONDENT

INTERCOUNTY EXPRESS LTD 2ND RESPONDENT

INVESCO ASSURANCE COMPANY LTD 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

*(Being an application for stay of execution from the judgment and orders
of the High Court of Kenya at Machakos (G. V. Odunga, J., as he then
was) delivered on 7th June 2022 in High Court Petition No. 20 of 2018)*

RULING

1. Before us is a Notice of Motion dated October 3, 2022 and made under sections 3, 3A and 3B of the [Appellate Jurisdiction Act](#), and rule 5 (2) (b) of the [Court of Appeal Rules](#), 2010 the following orders:
 - a. Spent
 - b. That pending the hearing and determination of this application, this Honourable Court be pleased to grant an order of stay of execution of the judgment and orders of the High Court (G. V. Odunga, J., as he then was) in Machakos High Court Petition No. 20 of 2018 delivered on June 7, 2022.
 - c. That pending the hearing and determination of the intended appeal, this Honourable Court be pleased to grant an order of stay of execution of the



judgment and orders of the High Court (G. V. Odunga, J., as he then was) in Machakos High Court Petition No. 20 of 2018 delivered on June 7, 2022.

- d. That costs of the application be in the cause.
2. By way of background and in order to contextualize the dispute, it is necessary to give a brief summary of the issues in the trial Court. The 1st and 2nd respondents sued the applicant in an amended petition dated November 3, 2018 at the High Court Machakos. The 1st and 2nd respondents' claim was that the applicant is the body in charge of regulatory functions in the insurance industry; that despite the powers under section 67C of the *Insurance Act*, the applicant failed to ensure that the 1st respondent obtained quality insurance services resulting in the 1st respondent's properties being attached and businesses being severely inconvenienced; that as a result of that default, the 3rd respondent had abdicated its duty to compensate them for damages incurred in a road accident and thus violated their fundamental rights.
3. Upon hearing the petition, the High Court Judge G. V. Odunga, J, as he then was) ruled in favour of the 1st and 2nd respondents. The relevant part of his ruling is as follows:

“

“(26) In my view where it is apparent to the court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of, would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the latter ought to prevail over the former.

[50] In my view, where it is alleged that as a result of the failure by a state organ to carry out its statutory mandate, a person's rights are threatened with violation or have been violated, the matter transcends the contractual arena and enters the constitutional arena. In this case, it cannot be said that the matter is contractual since there is not contract between the petitioners and the 1st and 2nd respondents, yet they are being blamed for exposing the petitioners to a risk of losing their rights to properties as a result of their inaction.

(56) Therefore, where the state fails to protect the insured against unscrupulous insurers yet ensure that the insured take out insurance covers at the costs, it is only just that the state takes responsibility for its failure to regulate the players in the industry otherwise it would be assisting those insurers who use statutes as instruments of fraud. Insurance companies do not just collapse. Before they do so, there are usually tell-tale signs or indicators which can easily be discerned by hawk eyed officers of the 1st respondent if keen enough instead of waiting until the insurer cannot meet its statutory obligations before moving into perform the last rights.”



4. Aggrieved by the judgment, the applicant lodged a notice of appeal on June 9, 2022 and annexed a memorandum of appeal raising 9 grounds. We need not recite the grounds in full, but take the liberty to summarize them as

follows: that there was no evidence that the 1st and 2nd respondents owned or had any insurable interest in the motor vehicles; that the petition though framed as a constitutional one was a commercial and contractual dispute between the 1st and 2nd respondents; that the Judge erred in holding that state owned entities can be liable for matters which are private contractual obligations; the Judge erred by holding that the applicant was in breach of its contractual duties; and that the mandatory sections 167 and 168 of the [Insurance Act](#) that insulates the applicant from liability were ignored by the trial Court.

5. When the matter was called out for hearing, counsel for the applicant adopted the written submissions dated November 8, 2022. Relying on its submissions, supporting affidavit and legal authorities, the applicant submitted that it has an arguable appeal which will be rendered nugatory unless the order for stay is granted.
6. On their part, the 1st and 2nd respondents, relying on the replying affidavit sworn on November 22, 2022 by the 1st respondent and the written submissions dated November 22, 2022, submitted that the intended appeal is not arguable. On the nugatory aspect, it argued that the intended appeal will only be rendered nugatory in the event that the 1st and 2nd respondent proceeded to execute the decree prior to the determination of the appeal but they had given express assurance to the applicant that would only execute the decree against the 3rd respondent in a letter by its advocate Guandaru Thuita & Co. Advocates dated June 14, 2022. The 1st and 2nd respondents further argued that the learned Judge was specific that the judgement only applied to the 1st and 2nd respondents and therefore the argument that the applicant was facing a multiplicity of suits was not material.
7. On its part, the 3rd respondent in a sworn affidavit by its legal manager, Ruth Ojiambo filed a replying affidavit sworn on October 12, 2022 and written submissions dated November 24, 2022. It argued that it had already filed a Civil Appeal No. E523 of 2022 against the impugned judgment. It also stated that it was paying the decretal sum in installments and that it had recently emerged out of statutory management thus was not in a position to pay the decretal amount in full at once but is ready to pay by installments. Finally, it supported the argument that stay of execution should be granted in favour of the applicant.
8. The principles applicable to an application brought under rule 5(2) (b) of this [Court's Rules](#) are now well settled. Firstly, the applicant must demonstrate that they have an arguable appeal, and it is sufficient if a single bonafide arguable ground is raised (see [University of Nairobi v Ricatti Business of East Africa](#) [2020] eKLR where the court held:

“We remind ourselves that on whether the appeal is arguable, the applicant need not establish a multiplicity of grounds and it is sufficient if a single bona fide arguable ground of appeal is raised.”

9. Further, the arguable appeal is not one which must necessarily succeed, but one which ought to be fully argued before the court (see [Joseph Gitabi Gachau & another v Pioneer Holdings \(A\) Limited & 2 others](#) [2009] eKLR and [Nicholas Ombija v Kenya Commercial Bank](#) [2009] eKLR).
10. Regarding the question whether or not the appeal is arguable, our perusal of the draft memorandum of appeal reveals that there exist several arguable grounds to be urged in the intended appeal. For instance, it is arguable whether the learned judge erred in law and in fact in failing to find that the petition lacked any legal foundation. It is also arguable whether the 1st and 2nd Respondents proved



that they had any legal or insurable interest in the motor vehicles in respect of which they alleged to be policyholders. It is also arguable whether the applicant failed to perform its statutory ordained regulatory mandate. Further the issue whether the applicant is insulated under the law from being sued in the circumstances of this case is also an arguable ground. Lastly, it is also arguable whether the orders granted were merited.

11. We are careful not to delve into the merits of the intended appeal as this will be the preserve of the bench that will hear and determine the appeal. As was held by this court in *Damji Pragji Mandavia v Sara Lee Household & Bodycare (K) Ltd*, Civil Application No. NAI 345 of 2004:

“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.”

12. As we have stated on numerous occasions, an arguable appeal is not one that must necessarily succeed, but it is simply one that is deserving of the Court’s consideration. Therefore, a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable. It is our finding that the grounds in the draft memorandum of appeal raise arguable issues.

13. The second limb is that the appeal, if successful, will be rendered nugatory unless the order for stay is granted. The term “nugatory” does not only mean worthless, futile or invalid, it also means trifling (See *George Otieno Gache & another v Judith Akinyi Bonyo & 5 others* [2017] eKLR where the court held:

“[20] Thus in determining whether an appeal will be rendered nugatory or not, the Court must consider what is sought to be stayed and whether if allowed to happen the situation is reversible; or if it is not reversible whether damages will reasonably compensate the aggrieved party.”

14. In determining whether an appeal will be rendered nugatory unless an order for stay is granted, the court has to consider the conflicting claims of both parties. In *Mbembe v Kamere* [2021] KECA 266 (KLR) (3 December 2021), this Court expressed itself as follows:

SUBPARA 15.

On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others* (*supra*) this court stated that: “ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

SUBPARA 16.

In determining whether or not an appeal will be rendered nugatory, the court has to consider the conflicting claims of both parties and each case has to be determined on its merits.”

15. In determining this question on whether the appeal will be rendered nugatory, we note that in addition to the threat of execution, the applicant states that it is facing a multiplicity of suits, where the impugned judgment is being cited by advocates as an authority before other courts where similar suits have been filed. The applicant has cited at least 6 cases filed in the High Court and Magistrate Courts in paragraph 9 of the supporting affidavit. We note that the impugned judgment is a judgment in rem



and therefore, it is a persuasive authority in courts of equal jurisdiction and binding on lower courts. So, its impact goes beyond the parties that are before us.

16. The applicant further states that the orders of the High Court will paralyze or gravely disrupt the functioning of the applicant, if it was to shoulder private insurance (motor vehicle third party) liabilities. It is a fact that the applicant is a body that is funded by public funds and the risk that it would be exposed to if the judgement is used as a precedent is a matter of public interest as any amount that may be paid to the respondent may not be recoverable as the status of the claimants is not known. As already noted, each case has to be determined on its own circumstances. Looking at the facts in this application in totality, this is a proper case for the maintenance of the status quo pending the hearing and determination of the appeal.
17. Accordingly, we grant the application and issue the orders of stay of execution as sought by the applicant, and order that costs shall abide the outcome of the appeal.
18. For avoidance of doubt, the order for stay does not extend to the 3rd respondent as it has not sought for any order for stay and has indicated its willingness to continue paying the decretal sum to the 1st and 2nd respondents in installments.
19. Finally, we note that the appeal, should be heard on priority basis as it raises issues of public interest that transcend the parties before us.
20. Accordingly, we direct that the applicant shall file its appeal, if it has not done so already, within the next 30 days. Thereafter, the file shall be placed before the President of this court, so that he can allocate a hearing date on priority basis. In the event the applicant does not file the appeal within the next 30 days, the order for stay shall lapse automatically.
21. Those shall be the orders of the court.

Dated and delivered at Nairobi this 14th day of April, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

