



REPUBLIC OF KENYA



**Gikera v Alfa Motors Limited (Civil Case 387 of 2013)
[2024] KEHC 9861 (KLR) (Commercial and Tax) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9861 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 387 OF 2013
JWW MONG'ARE, J
JULY 25, 2024**

BETWEEN

JOSEPH KIRICHU GIKERA PLAINTIFF

AND

ALFA MOTORS LIMITED DEFENDANT

RULING

1. Before the court is the Defendant's Notice of Motion application dated 6/11/2023 filed pursuant to section 75 of the [Civil Procedure Act](#) and order 43 of the Civil Procedure Rules.
2. The Defendant prayed for leave to file an appeal against the ruling and orders of this court dated 30/10/2023 and an order to stay proceedings of the following matters pending determination of the proposed appeal:-
 - i. Nairobi HCCC 916 OF 2009 Atieno Ouko Onyinyi vs Alfa Motors.
 - ii. Nairobi HCCC no. 914 of 2009 Daniel Githae Githinji vs Alfa Motors;
 - iii. Nairobi HCCC no. 353 of 2013 Micheal W. Mwangi vs Alfa Motors;
 - iv. Nairobi HCCC no. HCC 387 of 2013 Joseph Kirucha Gikera vs Alfa Motors;
 - v. Nairobi HCCC no. 384 of 2014 Peter Mureithi and Another vs Alfa Motors;
 - vi. Nairobi HCCC no. 155 of 2010 Charles K. Maina vs Uni-Truck Limited;
 - vii. Nairobi HCCC no. 613 of 2012 Sospeter A. Turungi vs Uni-Truck World Limited.



3. The application is based on the grounds that the Defendant is aggrieved by the ruling of this court dated 30/10/2023 and intends to appeal against the same. The Defendant stated that in order to appeal, it is required by law to obtain leave of the court pursuant to order 43 rule 2 of the Civil Procedure Rules.
4. The Plaintiff opposed the application by filing grounds of opposition dated 16/2/2024.
5. The Plaintiff argued that there are no sufficient, credible or valid reasons advanced to support the prayers sought and that the application is frivolous, vexatious, an abuse of court process and a delaying tactic.

Analysis and Determination:

6. Vide a ruling delivered on 30/10/2023, this court allowed the application by the Plaintiff that sought leave to introduce documentary evidence in form of a report titled 'Alfa Motors Mazda Swaraj Bus inspection report December 2008' by Mr. Clive Lowe without necessarily having to call Mr. Clive Lowe to testify before the court.
7. The Defendant seeks to appeal against the impugned ruling and is thus seeking leave of the court to do so.
8. Section 75 of the *Civil Procedure Act* and Order 43 rule 1 of the Civil Procedure Rules provide for orders where an appeal lies as of right and states that any other order that is not listed therein would require the leave of the court before such an appeal is lodged.
9. In this case, the appeal is against an order that permitted the Plaintiff to introduce documentary evidence in the form of a report without calling the author of the report. It is not one of the orders where an appeal would lie as of right as provided under section 75 of the *Civil Procedure Act* and Order 43 rule 1 of the Civil Procedure Rules therefore leave is a prerequisite before an appeal is filed.
10. Order 43 Rule 1(3) of the Civil Procedure Rules goes on to state:-

“An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.”
11. The order sought to be appealed against was delivered on 30/10/2023 while the instant application seeking leave to appeal is dated 6/11/2023. Leave to appeal was therefore sought within the required timeline of fourteen days.
12. In *Bandali t/a Shimoni Enterprises v Wills* [1991] e KLR, the court in the above case quoted with approval *Sango Bay Estates Ltd v Dresdner Bank AG* [1971] EA 17 which held:-

“I turn to the application itself which can, I think, be disposed of very briefly. As I understand it, leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial considerations but where, as in the present case, the order from which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made out.”
13. Guided by the authority above, the applicant has the obligation to illustrate to the court that the grounds upon which it intends to anchor its appeal on merit serious judicial considerations. The Defendant's main ground of appeal as stated in its supporting affidavit was that if the maker of the documents is not called as a witness, it would not have the opportunity to test the credibility of the witness which violates the



principles of natural justice, due process and the right to a fair trial.

14. In my view, the Defendant has raised sufficient grounds of appeal that merit consideration before the appellate court. Further the opportunity to appeal is consistent with a litigant's constitutional right to a fair trial and the principle of natural justice.
15. The Defendant prayed further for stay of proceedings in the various related matters listed in the application. It has however not stated reasons why nor submitted on why such an order ought to be granted by the court. In the absence of such grounds, the court declines to stay the proceedings in the listed matters.
16. In the end, the Defendant is granted leave to appeal against the ruling of 30/10/2023. However, an order for stay of proceedings is not granted. Subsequently, this suit and the other related suits mentioned earlier in this ruling may accordingly proceed to full trial. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JULY, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

- 1. Mr. Kabahati for the plaintiffs/Respondents.**
- 2. Mr. Otieno for the Defendant/Applicant.**
- 3. Amos - Court Assistant**

