



REPUBLIC OF KENYA



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**Njogu t/a SK Traders v Grain Industries Limited (Civil Appeal
E268 of 2023) [2024] KEHC 16915 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 16915 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E268 OF 2023
F WANGARI, J
FEBRUARY 16, 2024**

BETWEEN

SAMUEL KINUTHIA NJOGU T/A SK TRADERS APPELLANT

AND

GRAIN INDUSTRIES LIMITED RESPONDENT

RULING

1. The Applicant through the Notice of Motion dated 27/9/2023 sought the following orders;
 - a. Spent
 - b. That this Honourable Court be pleased to grant an order for stay of execution of the Ruling and Orders by the Honourable Mr. G. Sogomo (PM) delivered on 15th September, 2023 together with the Orders of 25th September, 2023 pending the hearing and determination of this application.
 - c. That this Honourable Court be pleased to grant an order for stay of execution of the Ruling and Orders by the Honourable Mr. G. Sogomo (PM) delivered on 15th September, 2023 together with the Orders of 25th September, 2023 pending the hearing and determination of the appeal to this Honourable Court.
 - d. That cost of this application be provided for.
2. The Respondent opposed the application by filing a Notice of Motion dated 22/11/2023 and its supporting affidavit and a Notice of Preliminary Objection/ Grounds of Opposition dated 25/1/2024, seeking to have the Applicant's application be struck out/ dismissed for offending the provisions of section 75 (1) of the [Civil Procedure Act](#) and Order 43 rule 2 of the [Civil Procedure Rules](#).



3. Parties attempted to settle the matter out of court but the negotiations were unsuccessful. Directions were taken that the application be disposed of by way of written submissions. Only the Respondent complied by filing written submissions.

Analysis and Determination

4. I have considered the parties' pleadings, the preliminary objection, the submissions together with the authorities relied upon, as well as the law and in my view, the following issues are for determination;
 - a. Whether the preliminary objection is merited
 - b. If the above is negative, whether the Applicant's Notice of Motion has merits.
 - c. Who bears the costs?

5. On the first issue, the Respondent has raised a Preliminary Objection that the Applicant filed this appeal without leave of the court thus offending the provisions of section 75 of the [Civil Procedure Act](#) and Order 43 Rule 2 of the [Civil Procedure Rules](#).

6. Section 75 of the [Civil Procedure Act](#) provides as follows;

75. Orders from which appeal lies

- (1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the 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 a suit 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 provisions 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) any order made under rules from which an appeal is expressly allowed by rules.
- (2) No appeal shall lie from any order passed in appeal under this section.

7. Order 43 Rule 6 of the [Civil Procedure Rules](#) provides as hereunder;

Appeals from Orders [Order 43, rule 1.]

- (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.

8. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal



in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. At page 700, Law, JA stated: -

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701, Sir Charles Newbold, P added: -

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

9. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit or application.
10. I am satisfied that as per the case of *Mukisa Biscuit* (above), the issue of seeking leave of court to file an appeal is a point of law which is enough to dispose of a suit. If the court finds in favour of sustaining an objection, it is automatically stripped of jurisdiction to consider the matter further.
11. In the celebrated case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi, J.A. had the following to say: - “...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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...”
12. The Respondent contends that the appeal was filed without the leave of the court. In deciding on the issue, it is imperative to consider what the dispute in question was. I have perused the application in the lower court which is subject to this appeal. This is the Notice of Motion dated 12/7/2023 which was brought amongst other provisions of the law, Order 21 Rule 12 (2), Order 22 Rule 22, Order 51 Rule 1. It is apparent that from the reading of section 75 and Order 43 as stated above, the Applicant ought to have sought leave of court before filing this appeal. The P.O therefore has merits.
13. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. The court exercises this discretion and award no costs.
14. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
 - a. The Notice of Preliminary Objection dated 25/1/2024 has merits and the application and the entire appeal is hereby struck out.
 - b. Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF FEBRUARY, 2024.



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F. WANGARI

JUDGE

In the presence of;

M/S Mureithi Advocate for the Applicant

Nabil Advocate h/b for Said Advocate for the Respondent

M/S Salwa, Court Assistant

