



REPUBLIC OF KENYA



**Greyhound Company Limited v Globetrotter Agency Limited (Civil Appeal
E024 of 2022) [2023] KEHC 3902 (KLR) (Civ) (2 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3902 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E024 OF 2022**

JN MULWA, J

MAY 2, 2023

BETWEEN

GREYHOUND COMPANY LIMITED APPELLANT

AND

GLOBETROTTER AGENCY LIMITED RESPONDENT

RULING

1. On 7th July 2022, this court dismissed the Applicant's Application for stay of execution of the Judgment and decree delivered by the Small Claims Court in Case No. E012 of 2021. The main reason for which stay was declined was that the Appellant had not demonstrated the substantial loss it stood to suffer particularly because the terms of the aforesaid judgment and decree had not been stated and neither was the judgment annexed.
2. By a Notice of Motion Application dated 7th July 2022, the Appellant now seeks an order that the said Ruling be reviewed and/ or set aside to allow the court to consider the terms of the judgment of the Small Claims Court.
3. The main ground of the application is that the Appellant has now secured a copy of the judgment which has been annexed to the Supporting affidavit of Geoffrey Thuo, a director of the Appellant Company. The Appellant avers that the Respondent will suffer no real prejudice that cannot be compensated by an award of costs if the order sought is granted.
4. In opposition, the Respondent filed a Notice of Preliminary Objection dated 15th July 2022 contending that the application offends the rule of res judicata as the Appellant is seeking to re-litigate an issue that had already been dispensed with.



5. The Respondent also filed a Replying Affidavit sworn on 29th August 2022 by its Director Vidya Jethwa contending that the Applicant has not satisfied the conditions necessary for review of the Ruling of 7th July 2022.
6. The application and the preliminary objection were canvassed by way of written submissions which this court has duly considered. The issues that arise for determination are: whether the instant application is res judicata; and, whether the Appellant has made out a case for review and/ or setting aside of the ruling of 7th July 2022.

Whether the instant application is Res Judicata

7. The Respondent contends that the instant application is res judicata since its consideration will mean re-litigation of issues that have already been canvassed by both parties and a determination made thereon which is a waste of the courts time. On the other hand, the Appellant submits that an application for review cannot be deemed to be res judicata for the reason that there is no former suit and or a fresh suit given that such an application is filed within the same cause.
8. Section 7 of the Civil Procedure Act provides as follows regarding the doctrine of *Res Judicata*:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

9. The court in John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR expounded on the essence of the doctrine of res judicata as follows:

“The rationale behind Res Judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter, Res Judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgements by reducing the possibility of inconsistency in Judgements of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably.”

10. The instant application seeks review of this court’s ruling of 7th July 2022 which declined to grant a stay of execution pending appeal. In determining this application, the court will have to consider whether the Applicant has satisfied the conditions for review under order 45 rule 1 of the Civil Procedure Rules. The said principles are very different from the ones for stay under Order 42 Rule 6 (2) of the Rules which the court grappled with in the application subject of the ruling of 7th July 2022. This Court’s finding therefore is that the present application is not res judicata hence the Respondent’s preliminary objection is not merited.



Whether the Appellant has made out a case for review and/ or setting aside of the ruling dated 07/07/2022.

11. Section 80 of the Civil Procedure Act-(CPA) donates to courts the power to review their own decisions. It stipulates as follows:

- “ 80. Any person who considers himself aggrieved-
- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

12. Order 45 Rule 1 of the Civil Procedure Rules 2010 provides for the grounds upon which review may be granted as follows;

- “(1) Any person considering himself aggrieved—
- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

13. From the foregoing provisions, it is clear that a review may be granted by the court if there is a discovery of new and important matter or evidence; if there is a mistake or error apparent on the face of the record; or for any other sufficient reason, provided that the application is made without unreasonable delay (emphasis added).

14. In the instant case, the Appellant contends that there is sufficient reason for review of the court’s ruling of 7th July 2022 as the failure to annex the impugned judgment of the Small Claims Court to it’s earlier application was occasioned by the fact that the same had not been availed by the Court registry. It submits that in any case, that was a mere procedural requirement which is curable under Article 159(2) (d) of the Constitution. Further, the Applicant urges that the mistake of counsel to secure a copy of judgment should not be visited on it.

15. The phrase ‘any other sufficient reason’ for the purposes of review means a ground that is analogous or ejusdem generis to the other two grounds for review stipulated under Order 45 Rule 1 of the Civil Procedure Rules.

16. The court while dismissing the earlier application noted that the dismissal was due to the appellant’s failure to annex a copy of the judgment, and therefore did not substantively hear and finally determine



the application in terms of Section 7 of the Civil Procedure Act. It therefore boils to the fact that the said application having not been heard on merit and finally decided by the court, it cannot be said to be Res Judicata, nor caught up by the said d

17. Consequently, the court finds that the Applicant's application dated 7th July 2022 is merited, and is allowed as prayed.
18. The Respondent's preliminary objection dated 15th July 2022 is found to be devoid of merit and is dismissed.
19. However, the court condemns the Appellant/Applicant to pay costs of the application to the Respondent.
20. Having made the above orders, the application subject of the ruling dated 7/7/2022 shall be listed down for hearing on priority basis.

Orders accordingly.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 2ND DAY OF MAY 2023.

JANET MULWA

JUDGE

