



Greyhound Company Ltd v Globetrotter Agency Limited (Civil Appeal E024 of 2022) [2024] KEHC 313 (KLR) (Civ) (25 January 2024) (Ruling)

Neutral citation: [2024] KEHC 313 (KLR)

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

**CIVIL
CIVIL APPEAL E024 OF 2022**

**JN MULWA, J
JANUARY 25, 2024**

BETWEEN

GREYHOUND COMPANY LTD APPLICANT

AND

GLOBETROTTER AGENCY LIMITED RESPONDENT

RULING

1. For consideration is a motion dated 25/03/2022. The Applicant/Appellant seeks the following orders:
 - 1. Spent
 - 2. Spent
 - 3. That there be stay of execution of the judgment/decree of the small claims court judgment delivered on 2/12/2021 pending hearing and determination of the Appeal.
2. The grounds for the Application are stated at its face and upon averments at the Supporting Affidavit sworn on 25/03/2022 by Geoffrey Thuo, a Director of the Appellant. The Application was opposed by a Replying Affidavit sworn on 22/04/2022 by one Vidya Jethwa.
3. A perusal of the court proceedings show that on the 7/07/2022, the court dismissed an application seeking similar orders of stay of execution pending Appeal.
4. Additionally, on the same date, the Appellant moved the court for orders of review of the orders denying it stay orders. It was duly argued by counsel for both parties and a ruling delivered on 2/05/2023 allowing the Appellant's Application for review on grounds that the said Application



having not been heard on merit, due to procedural technicalities the Application was not *Res Judicata*; and directed that it should be heard on priority basis.

5. By the above earlier pronouncements by the court in the ruling dated 7/07/2022, the only prayer for determination is prayer no. 2 whether an order of stay of execution of the small claims court judgment should be granted pending hearing and determination of the appeal which is already filed.
6. The Appellant's submissions on the Notice of Motion dated 25/03/2022 are dated 31/08/2023, and deals with compliance with Provisions of Order 42 Rule (6) of the [Civil Procedure Rules](#) (CPR), on;
 - i. Whether the Application was made without undue delay.
 - ii. Whether the Applicant has demonstrated that it would suffer substantial loss if the stay is denied.
 - iii. Whether the Appeal would be rendered nugatory if an order of stay is denied
7. On the part of the Respondent, its submissions are dated 19/09/2023 and flagged two issues for consideration: -
 - i. Whether the Applicant's appeal raises points of law facts or both.
 - ii. Whether the Appellant has provided Security for costs.
8. I have considered the issues raised by both parties in their submissions, the law and the cited authorities.
9. I shall start with the respondents first issue:
Whether the Applicants Appeal raises points of Law or facts.
The court is well aware of Provisions of Section 38(1) of the [Small Claims Court Act](#) that provides: -

“A person aggrieved by the decision or an order of the court may appeal against that decision or order to the High Court on matter of Law”.
10. I have also perused the grounds of Appeal stated in the Memorandum of Appeal all stated to be points of law by the Appellant.
In [Blacks' Law Dictionary](#) 4th Edition
 - i. a matter of fact is defined as: -

“A matter involving judicial inquiry into the truth of alleged facts.
 - ii. A matter of law: as a matter involving a judicial inquiry into the applicable law”
11. In the case *A. G. vs. David Murakaru* [1960] EA 484, (Chief Justice Ronald Sinclair adverted to the factual foundations of legal questions by stating that: -

“An appellate Court is restricted to determine questions of law may yet quite properly interfere with the conclusion of a lower court if the same is erroneous in point of law. This is the case where the lower court arrives at a conclusion on the primary facts that it could not reasonably come to such a conclusion of decision becomes an error in point of law”.
12. By the above decision, it is not easy for a court and parties to clearly determine whether the grounds of appeal are on questions of law or fact, or both. It is not straight forward. Numerous English Decisions



Support that observation, and I believe this is the position in our jurisdiction. Indeed, often in our jurisdiction, parties couch their grounds of appeal as “erred in law and fact”

13. In *M’riungu and others vs. R.* [1982-88] IKAR 360, Chesoni AJA observed: -

“ We would agree with the views expressed in the English case of *Martin V. Glyneed Distributors Ltd (T/A MBS Fastening)*[1983] ICR 511 that where a right of appeal is confined to a question of Law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or on fixed findings of fact and law and it should not interfere with the decisions of the trial of first appellate court unless it is apparent that; on the evidence, no reasonable tribunal court have reached that conclusion, which would be the same as holding the decision is bad law”

14. Here at home, in *Kenya Breweries LTD vs. Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & Another V. Benard Munene Ithiga* [2016] eKLR, the court stated: -

“The court confines itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse”.

See also Court of Appeal decision in *Mwangi v. Wambugu* [1984] KLR 453 for similar proposition.

15. Looking at the grounds of appeal, without attempting to go into their merits, but only to find out if they raise triable issues during the hearing of the appeal, several of them are evidently “matters of law” – see grounds no. 2, 3.

Upon the above analysis, I am persuaded that the Appeal filed herein substantively raises matters of law for consideration by the appellate court and therefore arriving at the conclusion that the Appeal is arguable.

16. In my earlier Ruling dated 7/07/2023 on Application dated 25/03/2022, I rendered myself sufficiently in my view, on the stay of execution and other conditions that a party must meet pursuant to Order 42 Rule 6(1) *CPR*.

17. On the matter of security for due performance of the decree and costs, a party to be granted stay orders, it must provide security.

The Applicants submits that it is willing to provide reasonable security, citing the case *Focin Motorcycle CO. Ltd v. Ann Wambui Wangui & Another* [2018] eKLR where the court held that a party proposing to offer security is a sign of good faith. The court has the final discretion as to what security would be sufficient in the circumstances of each case.

18. The Court notes that the Small Claims Judgment delivered on 2/12/2021 against the Appellant was for Kshs. 999,999/= . It is a monetary decree. It has not been alleged that the Appellant may not be able to pay should the Appeal fail.

19. The purpose of security needed under Order 42 *CPR* is to guarantee the due performance of the decree which the court may ultimately deliver and binding on the Applicant so as not to render the Appeal nugatory for inability of the Appellant to pay should the appeal not be successful.

It therefore must offer sufficient security that would cover that risk. The Appellant has offered a Bank guarantee, but not by any specific bank.



20. I am therefore satisfied that the Applicant/Appellant has met the conditions for grant of stay orders of the decree pending hearing of the Appeal
21. Consequently, the court grants to the Appellant an order of stay of execution pending hearing and determination of the Appeal upon the Appellant providing a Bank Guarantee for the full decretal Sum Kshs. 999,999/=, from Kenya Commercial Bank Limited (any branch within Nairobi County) within 30 days. In default, the stay orders shall lapse automatically.
22. By the order of 7/07/2022, the Appellant was directed to file the Record of Appeal within 60 days. Directions on the Appeal shall be taken before the Deputy Registrar of this court on 5/03/2024.
23. Cost of this Application shall be borne by the Appellant.

Orders accordingly.

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

J. N. MULWA

JUDGE

