



**Theevan Enterprises Limited v Barasa & 2 others (Civil Appeal  
E397 of 2022) [2024] KEHC 9052 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9052 (KLR)

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

**CIVIL APPEAL E397 OF 2022**

**HI ONG'UDI, J**

**JULY 26, 2024**

**BETWEEN**

**THEEVAN ENTERPRISES LIMITED ..... APPELLANT**

**AND**

**HENRY BARASA ..... 1<sup>ST</sup> RESPONDENT**

**DIAKYO JAPAN MOTORS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUBILEE INSURANCE COMPANY LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Ruling of Small Claims Court at Nairobi Hon. J. W. Munene Resident Magistrate in Nairobi SCC Case No. E282 of 2022, delivered on 31st May 2022)*

**JUDGMENT**

1. This appeal arises from the Ruling issued in Nairobi Small Claims Court Case No. E282 of 2022. In the said suit, the appellant (who was the claimant) vide a statement of claim dated 10<sup>th</sup> February 2022, sued the respondents for payment of Kshs. 147,000/= and costs of the claim. The claimant sought compensation for damage caused on motor vehicle registration KCN 820Q as a result of the road traffic accident.
2. The small claims court in its ruling delivered on 31<sup>st</sup> May 2022, struck out the claim for want of prosecution and costs awarded to the respondent.
3. The appellant being aggrieved by the said orders lodged this appeal on 28<sup>th</sup> June, 2022 setting out the following grounds:
  - i. That the learned trial Magistrate erred in law and fact in employing extraneous considerations in arriving at her said Judgement/ Order.



- ii. That the learned trial Magistrate misdirected herself when she failed to consider the appellant's submissions on both law and facts.
  - iii. That the learned trial Magistrate erred in law and fact in finding that the appellant's claim be dismissed /struck-out for Want of Prosecution.
  - iv. That the learned trial Magistrate erred in awarding costs of the appellant's claim to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
  - v. That the learned trial Magistrate erred in law and fact in failing to find that the road accident between motor vehicle registration number KCZ 625H controlled by the 1<sup>st</sup> respondent and motor vehicle registration number KCN 8200 controlled by the appellant had already been admitted by the 1<sup>st</sup> respondent in his witness statement dated 22<sup>nd</sup> March 2022.
  - vi. That the learned trial Magistrate erred in law and fact by failing to grant the appellant's request for a judgement on admission against the 1<sup>st</sup> respondent on his admission of an accident between motor vehicle registration number KCZ 625H controlled by him and motor vehicle registration number KCN 820Q controlled by the appellant as admitted by the 1<sup>st</sup> respondent's witness statement dated 22<sup>nd</sup> March 2022.
  - vii. That the learned trial Magistrate erred in law in failing and/or refusing to uphold the rule(s) of admission against the 1<sup>st</sup> respondent and in favour of the appellant.
  - viii. That the learned trial Magistrate erred in law and fact when she declined to record the witness testimony from the appellant's witness.
  - ix. That the learned Magistrate erred in both law and fact in conducting the Claim beyond the statutory 60-day period permitted by the *Small Claims Court Act*.
  - x. That the learned Magistrate erred in both law and fact by failing to conduct herself properly on the 2<sup>nd</sup> respondent's 3<sup>rd</sup> party application dated 18<sup>th</sup> March 2022.
  - xi. That the learned Magistrate erred in both law and fact in failing to find that the 2<sup>nd</sup> respondent's 3<sup>rd</sup> party application dated 18<sup>th</sup> March 2022 was/is an abuse of due Court process.
  - xii. That the learned magistrate misdirected herself and applied the wrong principles of law and misguided points of fact when she declared misconduct on the part of the appellant's advocates.
  - xiii. That the learned trial Magistrate's judgement was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
  - xiv. That in law and fact in disregarding the appellants Claim.
4. The Appeal was canvassed by way of written submissions

#### **Appellant's submissions**

5. The appellant's undated submissions were filed by the firm of Biko Adera Advocates. Counsel identified six issues for determination.
6. The first issue is whether the honourable Magistrate /adjudicator employed extraneous considerations in arriving at her said Judgment/order dated 31<sup>st</sup> May 2023. Counsel submitted that the trial court



failed to apply correct principles, consider unpleaded issues, failed to apply statutory law and guidance properly hence arbitrarily and exercising its discretion wrongfully.

7. Counsel submitted further that section 36 (d) of the *Small Claims Court Act* provides for an order dismissing the claim and not striking out of a claim for want of prosecution. That there were reasons indicated on the court record by the appellant as to the whereabouts of the other witnesses on the day of hearing and one witness was available to proceed.
8. He added that the court misled itself into believing that the appellant was one individual and living persona as opposed to a juristic being upon which every detail of the witness account would hinge. He placed reliance on the case of Michael Were & Another v Joel Sibusiso Naebel N.O & 4 Others, High court at Natal Case No. 8337/06.
9. The second issue is whether the court erred in law and fact in determining that the appellants claim be struck out for want of prosecution. Counsel submitted that under order 17 rule 2 (1) of the Civil Procedure Rules a suit qualified to be dismissed for want of prosecution if no application had been made or no step taken in the suit by either party for at least one year. The court may issue in writing a notice to show cause why the suit should not be dismissed.
10. He placed reliance on the case of Wekesa Okumu vs Dima Colle: e Limited & 2 others 2015 eKLR where the court considered the principles for dismissal of a suit for want of prosecution and stated as follows:

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3<sup>rd</sup> Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff’s case for want of prosecution see the case of Ivita -vs-Kyumbu (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

11. The third issue is whether the honourable Magistrate erred in declaring the misconduct of the counsel in the absence of his client who had allegedly travelled. Counsel submitted that the court acted ultra vires in limiting the adjournments afforded by law contrary to section 34 of the *Small Claims Court Act* which provides conditions for granting the same. Further, that the trial Magistrate failed to consider the reasons affecting the appearance of the appellant’s other witnesses under section 34(3) and (4) (f) by not permitting a further adjournment as permitted by law despite acknowledging and recording the explanation which was unopposed.
12. The fourth issue is whether the trial Magistrate erred in fact and in law by failing to uphold the rule(s) of admission. Counsel submitted that the court failed to record the admission by the 1<sup>st</sup> respondent and issue an order in favour of the claimant. Further, that she failed to apply statutory law and guidance properly and exercised its discretion wrongfully by not determining the issues denied by the respondent.



13. He placed reliance on section 26 of the Small Claim's Court Act, Order 13 rule 2 of the Civil Procedure Rules and the case of Synergy Industrial Credit v Oxyplus International limited & 2 Others [2021] eKLR, where the court held as follows:
 

“ where a claim is admitted the court has jurisdiction to enter judgment for the plaintiff and to pass a decree on the admitted claim. The object of the rule is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to the admission of the defendant, the Plaintiff is entitled. There is a need not to unduly narrow down the meaning of this Rule because its object is to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed. The rule should apply wherever there is a clear admission of facts in the face of which, it is impossible for the party making such admission to succeed. The admission should be clear and unambiguous.”
14. The fifth issue is whether the trial Magistrate erred by conducting the matter beyond the statutory period. Counsel submitted that the claim was filed on the 10<sup>th</sup> February 2022 and order delivered on 31<sup>st</sup> May 2022 when 60 days had lapsed. That the order by the trial court was outside the statutory timelines set out under section 34 of the *Small Claims Court Act*. He placed reliance on the case of *Kartar Singh Dhupar & Company Limited v ARM Cement PLC (In liquidated (Civil Appeal 129 of 2022))* [2023] KEHC 2417(KLR) (Commercial and Tax) (23 March 2023).
15. Lastly, on whether the trial Magistrate erred in fact and in law by failing to record the testimony of the appellants' witness. He submitted that the trial court neither examined the assessor who had attended court on 31<sup>st</sup> May 2022 (at page 141 to 142) nor recorded the evidence from the said witness. He made reference to Order 18 Rule 3 & 4 of the Civil Procedure Rules.
16. In conclusion, counsel submitted that the trial court's decision ought not to be upheld for being unsound in law, not supported by evidence and adequate proof of the appellants' case. He urged the court to allow the appeal.

### **1<sup>st</sup> Respondents' submissions**

17. The 1<sup>st</sup> respondent's submissions were filed by Calistus & Company advocates and are dated 5<sup>th</sup> December, 2023. Counsel identified two issues for determination by this court.
18. The first issue is whether this appeal has any merit. He submitted that the appellant was under the duty to assist the court in furthering the overriding objective of the Small Claims Court. Further, that he failed to prosecute his claim by delaying the matter beyond the statutory limits within which matters in the Small Claims Court must be heard and determined.
19. The court's attention was drawn to the case of *Thathini Development Company Limited v Mombasa Water & Sewerage Company & Another* [2022] eKLR, the court held that:

“The Legal substratum for dismissal of suits for want of prosecution is founded on the Principles that litigation must be expedited, and concluded by parties who come to court for seeking justice. To assist in clearing backlogs in court and the ever increasing overloads restoring bad public confidence and trust on the judiciary. In all cases parties should efficiently and effectively be seen to fast track their hearing and determination. There should be no delay at all based on legal maxim Justice delayed is justice denied” Nonetheless, should there be any delay arising from one substantive and justifiable logistical cause or reason, the same should not be inordinate, unreasonable and inexcusable I say so, as that would be doing



grave injustice to one side or the other or both and in such circumstance, the honourable may in its discretion dismiss the action straight away,”

20. On the allegation of admission of the claim by the 1<sup>st</sup> respondent, counsel urged the court to be guided by the decision in *Endebess Development Company Limited v Coast Development Authority* [2018] eKLR where the court relied on the finding in *Cassam vs Sachania* [1982] KLR 191 where it was held that:

“Granting judgment on admission of facts is a discretionary power which must be exercised sparingly in only plain cases where the admission is clear and unequivocal”.

21. Lastly, on who should bear the costs of the appeal, counsel placed reliance on section 27 of the *Civil Procedure Act* and the case of *Orix (Kenya) Limited v Paul Kabeu & 2 others* [2014] eKLR. He urged the court to dismiss the appeal and award the 1<sup>st</sup> respondent costs.

### **Analysis and determination**

22. This being a first appeal this court has a duty to re-evaluate and re-consider the evidence afresh and arrive at its own conclusion. This was the holding in *Selle & another v Associated Motor Boat Co. Ltd & Others* [1968] E.A 123 and *Peters v Sunday Post Limited* [1968] EA 123.

23. similarly, in *Abok James Odera t/a A. J. Odera & Associates v Patricl Machira t/a Machira & Co Advocates* [2019] eKLR the court stated as follows:

“This being a first appeal, we are reminded of our primary role as a fist appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

24. Having considered the grounds of appeal, the parties’ submissions and the entire record, it is my opinion that the issue for determination is whether the learned trial Magistrate erred in law and fact in finding that the appellant’s claim be dismissed /struck-out for want of prosecution.

25. It is the appellant’s case that the trial court failed to apply correct principles, consider unpleaded issues, failed to apply statutory law and guidance properly hence arbitrarily and exercising its discretion wrongfully. Further, that section 36 (d) of the *Small Claims Court Act* provides for an order dismissing the claim and not striking out of a claim for want of prosecution.

26. The 1<sup>st</sup> respondent on his part argued that the appellant was under the duty to assist the court in furthering the overriding objective but failed to do so. Further, that it failed to prosecute its claim by delaying the matter beyond the statutory limits within which matters in the Small Claims Court must be heard and determined.

27. In addressing the issue before this court, it is important to understand the chronology of events before the subordinate court. The appellant on 10<sup>th</sup> February 2022 filed its claim and on 23<sup>rd</sup> February 2022 the matter was first mentioned in court where it was ordered that the respondents be served. Thereafter, the matter came up in court for mention on various dates to confirm compliance of court directions in regard to service of pleadings amongst the parties.

28. Finally, on 27<sup>th</sup> April 2022 the matter came up for hearing but parties could not proceed since the court observed that there was no proof that the 3<sup>rd</sup> respondent had been served. On the 5<sup>th</sup> May 2022 the matter came up for mention, but there was no appearance for the claimant and 2<sup>nd</sup> respondent. The



court observed that 15 days had lapsed since the 3<sup>rd</sup> respondent had been served and therefore it set the matter for mention for 19<sup>th</sup> May 2022 to confirm filing of a response by the 3<sup>rd</sup> respondent and on that date, hearing was rescheduled to the 23<sup>rd</sup> of May 2022. Come the further hearing date, the appellant's counsel requested for an adjournment because one of the witnesses had travelled and the other one was bereaved. The court reluctantly granted the adjournment since the other parties were ready to proceed. Another hearing date for 31<sup>st</sup> of May 2022 was given and on that date the court dismissed the appellant's suit for want of prosecution.

29. The guiding principles and objective of the *Small Claims Court Act* as set out in section 3 are as follows;

(1) In exercise of its jurisdiction under this Act, the Court shall be guided by the principles of judicial authority prescribed under Article 159(2) of *the Constitution*.

(2) The parties and their duly authorized representatives, as the case may be, shall assist the Court to facilitate the observance of the guiding principles set out in this section, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of that Court.

(3) Without prejudice to the generality of subsection (1) the Court shall adopt such procedures as the Court deems appropriate to ensure—

(a) the timely disposal of all proceedings before the Court using the least expensive method;

(b) equal opportunity to access judicial services under this Act;

(c) fairness of process; and

(d) simplicity of procedure.

30. Further, the procedure for the small claims court is also exclusive. Under section 17 of the said Act, the law requires that the court exercises its own procedure, having regard to principles of natural justice. The said section states as follows: -

“Procedure of Small Claims Court Subject to this Act and Rules, the court shall have control of its own procedure in the determination of claims before it and, in the exercise of that control, the court shall have regard to the principles of natural justice.

31. Additionally, section 34 of the said Act on expeditious disposal of the matters and in particular sec 34(1) provides that;

“All proceedings before the court on any particular day so far as is practicable shall be heard and determined on the same day or on a day to day basis until final determination of the matter which shall be within sixty days from the date of filing the claim.”

32. There is no dispute that the claim herein was filed on 10<sup>th</sup> February, 2022. The same was struck out on 31<sup>st</sup> May, 2022 for want of prosecution. It is clear that the 60 days provided for under section 34(1) of the *Small Claims Court Act* (SCCA) 2016 as the period for completion of the suit from the date of filing lapsed on 10<sup>th</sup> April, 2022. The question then is, should the ruling and proceedings be declared a nullity due to the fact that they went beyond the timeline set by the law?



33. Section 38(1) of the SCCA Act 2016 the right of Appeal to this court provides thus:

“ A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law”

The appellant is therefore properly before this court since it is challenging the lower court order striking out its case for want of prosecution.

34. The appellant’s argument is that the trial court lacked jurisdiction to handle the case on 31<sup>st</sup> May, 2022 since the matter had been in court beyond the 60 days allowed by statute. Secondly that there is no provision for striking out a suit in the SCCA 2016. What is provided for is a dismissal of the suit under section 36(d), he urged.
35. On the first point a perusal of the record of the proceedings before the trial court shows that just before the expiry of the 60 days the matter was mentioned on 7<sup>th</sup> April, 2022 when it was fixed for hearing for 27<sup>th</sup> April 2022 (well outside the 60 days allowed). It did not proceed for the reason that the 2<sup>nd</sup> respondent was not ready and there was no proof of service on the 3<sup>rd</sup> party.
36. The matter was further mentioned on 5<sup>th</sup> May, 2022 and 19<sup>th</sup> May 2022 before being fixed for hearing on 23<sup>rd</sup> May, 2022.
37. On 23<sup>rd</sup> May 2022 the matter did not proceed because the appellant was not ready but the 1<sup>st</sup> and 2<sup>nd</sup> respondents were however ready to proceed. The matter was again adjourned to 31<sup>st</sup> May 2022 for hearing with a warning to the appellant’s counsel over the delay.
38. On the 31<sup>st</sup> May 2022 the 1<sup>st</sup> and 2<sup>nd</sup> respondents were ready for hearing. The appellant was still not ready since it only had one out of the two witnesses. Counsel indicated that their 2<sup>nd</sup> witness was on his way from Amsterdam and would be in Kenya on 31<sup>st</sup> May, 2022 at 10.00pm.
39. It was at this point that the trial Magistrate/Adjudicator, struck out the claim for want of prosecution with costs to the respondents.
40. I have deliberately given a background of what transpired in the trial Magistrate’s court for one to appreciate where the court the trial Magistrate was coming from before issuing the orders she gave. Section 3 of the SCCA 2016 sets out the guiding principles and objective of the said Act.
41. It provides that all parties and their duly authorized representatives (advocates included) SHALL assist the court, to facilitate the observance of the guiding principles. Timelines are set for purposes of expediting the finalization of cases. The court went out of its way despite the lapse of the timelines to accommodate the appellant which appeared not ready to have the matter heard and concluded.
42. The record shows that the trial Magistrate on 23<sup>rd</sup> May, 2022 pointed out to the parties that the matter ought to have been finalized on 27<sup>th</sup> April 2022. The appellant’s counsel ought to have picked the warning from there. This was his client’s case and its him who had brought the respondents to court, and should have taken the lead in ensuring that the matter was heard expeditiously.
43. The appellant submitted that the trial Magistrate should not have issued the orders she did since she lacked jurisdiction due to lapse of the 60 days. Who then could have dealt with the matter to close the file? The suit was not personal to the trial Magistrate.
44. I do not agree with learned counsel when he urges that the trial court lacked jurisdiction to issue the orders it did. Did she only become dysfunctional when she issued the orders of 31<sup>st</sup> May 2022? What of those issued on 27/4/2022, 5/5/2022, 19/5/2022 and 23/5/2022 in his favour when the 60 days



period had lapsed? As long as the orders favoured the appellant, it was quite in order operating outside the 60 days. That does not amount to justice for all. My finding is that the trial court had jurisdiction to issue the orders she did.

45. On the second point I agree that the SCCA 2016 does not provide for the striking out of a suit for want of prosecution. It however under section 36(d) of the SCCA 2016 provides that the court may dismiss a claim for want of prosecution. The trial Magistrate erred in using the word “struck out” instead of dismissed as what she meant is very clear. I therefore correct the error by setting aside the word “stuck out” and substituting it with the word “dismissed”.
46. The upshot is that the appeal lacks merit and is dismissed with costs to the 1<sup>st</sup> respondent only. The lower court case stands dismissed with costs to the respondents for want of prosecution.
47. Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 26TH DAY OF JULY, 2024 IN OPEN COURT IN NAKURU.**

**H. I. ONG’UDI**

**JUDGE**

