



**Yobesh Kenya Ontiria v Mabururu (Commercial Appeal E080 of 2023)  
[2024] KEHC 15370 (KLR) (Commercial and Tax) (29 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15370 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E080 OF 2023  
MN MWANGI, J  
NOVEMBER 29, 2024**

**BETWEEN**

**YOBESH KENYA ONTIRIA ..... APPELLANT**

**AND**

**TOM MOGENI MABURURU ..... RESPONDENT**

*(An appeal from the ruling of Hon. S.A. Opande, Principal Magistrate,  
delivered on 27th March, 2023 in Milimani CMCC No.E1198 of 2021)*

**JUDGMENT**

1. The background of this appeal is that the Trial Court entered an interlocutory judgment against the defendant (appellant herein) on 6<sup>th</sup> September, 2022. The appellant being dissatisfied with the said judgment filed a Notice of Motion dated 15<sup>th</sup> September, 2022 anchored on the provisions of Order 10 Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, and Article 50(1) of the Constitution of Kenya, 2010. The appellant in the said application prayed for the following orders before the Trial Court –
  - i. That this application be certified urgent and service thereof be dispensed with in the first instance;
  - ii. That this Honourable Court be pleased to stay the execution of judgment entered herein on September 06, 2022 in Civil Case No. MCCC E11938 of 2021: Tom Mogeni Mabururu vs Yobesh Kenya Ontiria;
  - iii. That this Honourable Court be pleased to grant the defendant/applicant an order for leave to defend and any other order that may be issued pursuant thereto;
  - iv. That this matter be referred to court annexed mediation at first instance;



- v. That the annexed draft written statement of defence be deemed as duly filed by this Honourable Court (sic); and
  - vi. That the costs of this application be provided for.
2. The said application was supported by an affidavit sworn by the appellant herein. The application was opposed by the plaintiff (now respondent) vide a replying affidavit sworn on 5<sup>th</sup> October, 2022.
  3. The Advocates for the parties appeared before Hon. S.A. Opande, P.M. on 6<sup>th</sup> October, 2022 and she gave directions for the filing of written submissions for the application dated 15<sup>th</sup> September, 2022. The Advocates appeared again before the said Magistrate on 1<sup>st</sup> November, 2022 and confirmed having filed their written submissions. The ruling was then scheduled for delivery on 8<sup>th</sup> December, 2022.
  4. There was however no Court session until 25<sup>th</sup> January, 2023, when the Court reserved the ruling for 20<sup>th</sup> February, 2023. On the said date, Mr. Omondi Advocate held brief for Mr. Omari for the respondent, there was non-attendance by the appellant's Advocate. Mr. Omondi informed Hon. Opande that the principal amount had been settled and that what was remaining was costs. The Trial Court then scheduled the matter for mention on 24<sup>th</sup> February, 2023.
  5. Come that day Mr. Omari appeared for the plaintiff and reiterated that the principal sum had been settled. Mr. Omoke who appeared for the appellant herein addressed the Hon. Magistrate by stating that "even if there is an allegation for payment, the cost (sic) should determine whether there was property (sic) issue of interest must be heard". Mr. Omari responded by stating that "costs follow the event". The Hon. Magistrate scheduled the ruling for delivery on 1<sup>st</sup> March, 2023. The ruling was not delivered on that date as the Hon. Magistrate informed them that due to pressure of work, the matter would be mentioned on 27<sup>th</sup> March, 2023.
  6. On that day, Mr. Morara held brief for Mr. Omoke for the appellant herein, whereas and Mr. Omondi held brief for Mr. Omari for the respondent herein. Hon. Opande delivered her ruling on that day. In the said ruling, she held that the prayers for stay of execution of judgment and reference of the matter to mediation were both spent, and the only items pending were on costs and interest. She further stated that they (Advocates) had asked the said Court to determine the two items. On the issue of costs, the Hon. Magistrate held that the defendant had to pay costs of the suit since indebtedness necessitated the suit, and that costs were due. She also held that Counsel was entitled to full instruction fees the moment the suit was filed. As to what costs were payable, the Hon. Magistrate stated that either party could file a bill of costs for assessment.
  7. On the issue of interest, the Hon. Magistrate stated that the amount is a liquidated demand, and that it was advanced on 27<sup>th</sup> October, 2020, out of which Kshs.1,000,000/= out of the borrowed Kshs.2,500,000/= was paid back, and Kshs.1,500,000/= remained and was paid after the judgment therein. The Hon. Magistrate held that the interest on the balance was payable at Court rates from the date the amount was borrowed being 27<sup>th</sup> October, 2020 until payment in full. On the issue of costs, the Hon. Magistrate held that interest would be payable from the date of judgment until payment in full.
  8. Being dissatisfied with the said ruling the appellant filed the instant appeal vide a Memorandum of Appeal dated 26<sup>th</sup> April, 2023 raising the following grounds –
    1. That the Trial Court erred in law and fact by deciding an application that was not before it. The issue before the Trial Court was not whether the respondent was entitled to costs and interest. It was also for the defendant to be given an opportunity to put forth a defence. However, the



Trial Court went on to decide on the issue of interest and costs which issues were not raised by any party and were not before the Trial Court for determination. If the respondent had not effected service then he was not entitled to costs.

2. That the Trial Court erred in law and fact by finding that the appellant had to pay costs of the suit since the indebtedness necessitated the suit.
  3. That the Trial Court erred in law and fact by finding that the appellant had to pay interest at Court rates from the date the amount was borrowed, being October 27, 2020, until payment in full.
  4. That the Trial Court erred in law and fact by denying the appellant the right to a fair hearing. The appellant has been denied a right to a fair hearing because the application was to seek an opportunity to be heard before the Trial Court which he was denied as the Trial Court went to make a determination on interest and costs without hearing the parties. The fact that the appellant had already paid the money does not take away his right to a fair hearing. Even though money had been lent, parties did not agree on the issue of interest.
  5. That the Trial Court erred in law and fact by failing to set aside the interlocutory judgment entered on September 6, 2022 in favour of the respondent as it was irregularly obtained.
9. The appellant prays for-
- a. The appeal to be allowed;
  - b. The Ruling of the Hon. S.A. Opande P.M. delivered on 27<sup>th</sup> March 2023 in Civil Suit Number MCCC/E11938 of 2021 to be set aside and in lieu thereof, for this Court to make the following orders –
    - i. A declaration that the Trial Court erred in law and fact by deciding issues on an application that was not before it;
    - ii. A declaration that the Trial Court averred in law and fact by finding that the appellant had to pay interest and costs of the suit;
  - c. The costs of this Appeal and the appellant's application before the Trial Court dated September 15, 2022 be awarded to the appellant; and
  - d. Any other relief and/or order that this Honourable Court may deem fit to grant.
10. On 27<sup>th</sup> February, 2024, this Court gave directions for the filing of written submissions. On that day, Mr. Mwangi Munga held brief for Mr. Omoke for the appellant. Mr. Omondi held brief for Mr. Omari for the respondent.
11. This Court scheduled highlighting of written submissions for 13<sup>th</sup> May, 2024. On that day, Mr. Masaba held brief for Mr. Marara Omoke for the appellant but there was no appearance for the respondent. Mr. Masaba informed this Court that they had filed the Record of Appeal and written submissions dated 13<sup>th</sup> September, 2023 and list of authorities. He prayed for a date for delivery of the judgment.
12. This Court gave the respondent's Counsel the last opportunity to file and serve written submissions, failure to which the Court would proceed to write a judgment. As at the time of writing this judgment, the respondent's Advocate had not filed written submissions.



13. Mr. Omoke, learned Counsel for the appellant in his submissions filed in support of the appeal herein, stated that the issue that was before the Trial Court was whether the plaint and the summons were served on the appellant and not whether the respondent was entitled to costs and interest.
14. He submitted that it was also for the appellant to be given an opportunity to put forth a defence, but the Trial Court went on to decide on the issue of interest and costs which issues were not raised by any party and were not before the Court for determination. He contended that only after the Court had determined the issues raised by the appellant in the application before the Trial Court, could it then make a finding on who should bear the costs of the suit before it, and if the respondent had not effected service, then he was not entitled to costs.
15. Mr. Omoke submitted that a Court of law cannot base its decision on unpleaded issues. He relied on the holding in the case of *Pacific Frontier Services Ltd v Kyengo & another* (Civil Appeal 32 of 2018) [2022] KECA 396 (KLR), to support his assertion. He also relied on the case of *Kennedy Irungu Ngodi & another v Mary Waithera Njoroge & 11 others* [2021] eKLR, on the same issue that a Court of law should not base its decision on an unpleaded issue because the issues determined must flow from pleadings.
16. Mr. Omoke stated that the Trial Court invited itself in determining an issue of the costs prematurely before determining the issues in the application before it, whose determination was pegged on who would bear the costs. Counsel maintained that the appellant was never served with summons to enter appearance and as such, he could not be burdened with costs for a suit he did not know about.
17. The appellant's Counsel submitted that interlocutory judgment was entered against the appellant for failure to enter appearance yet he was not served with summons Counsel contended that the appellant became aware of the interlocutory judgment through a text message, necessitating the application for settling aside the interlocutory judgment.
18. He stated that the Trial Court did not determine issues raised in the application before it, and entered a ruling awarding costs of the suit against the appellant. He relied on the case of *Republic v National Land Commission & 2 others ex parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Musaka Catholic Church Kahawa West)* [2018] eKLR, and the case of *Republic v National Land Commission* (supra), to support the argument that natural justice demands that no party should be condemned unheard.
19. Counsel contended that by failing to determine the application before it in its entirety, the Trial Court denied the appellant the opportunity to be heard.
20. Mr. Omoke addressed the third issue of whether the Trial Court erred by apportioning interest to the balance of the principal amount borrowed by admitting that the appellant borrowed a total sum of Kshs.2,500,000/= on 27<sup>th</sup> October, 2020 and paid in instalments of Kshs.1,000,000/=, and later a balance of Kshs.1,500,000/= (which has since been paid in full) was remaining as at the time of the ruling.
21. Mr. Omoke contended that there was no written contract, and that the said money was lent orally. He submitted that nowhere in the list and bundle of documents did the appellant agree with the respondent to pay back the balance with interest. There was no such term in their oral contract and no writing whatsoever to prove the same. He stated that the Court erred by trying to vary the terms of the contract between the appellant and the respondent by awarding interest to the balance of such borrowed sum. He submitted that where parties to a contract intend to be bound by the terms of their contract, whether written or oral, a Court of law cannot try to vary those terms.



22. He relied on the holding in the case of the County Government of Migori v Hope Self Help Group [2020] eKLR, and the case of Muchira Paul Mbogo v Lincoln Muchoki Mwangi [2018] eKLR, on the same issue.
23. Mr. Omoke urged this Court to find that the appeal is merited and allow the same.

### **Analysis And Determination**

24. The issue for determination is if I should set aside the ruling of Trial Court delivered on 27<sup>th</sup> March, 2023.
25. In the case of Mbogo & another v Shah [1968] EA 93 the Court stated as follows on the duty of the first appellate Court -

“... That this court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted on because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
26. The respondent in this appeal did not file its written submissions. My position is that the respondent cannot be blamed for failure to file submissions to this appeal. I say so based on the fact that he was paid the balance of Kshs.1,500,000/= out of the loan amount of Kshs.2,500,000/=.
27. Although Mr. Omoke in his written submissions alluded to the balance of Kshs.1,500,000/= as remaining as at the time of the ruling, (see paragraph 20 of his written submissions), that is not the correct position.
28. The lower Court proceedings demonstrate that the outstanding balance of Kshs.1,500,000/= had been fully settled as at 20<sup>th</sup> February, 2023, when Mr. Omondi who was holding brief for Mr. Omari, for the respondent herein gave the said indication. The same information regarding payment of the principal amount was reiterated on 24<sup>th</sup> February, 2022.
29. It must be noted that the said information was given to the Court by the respondent’s Advocate. He was therefore speaking from a point of knowledge.
30. Having confirmed that the said amount had been paid, the Trial Magistrate was correct in not proceeding to determine issues such as whether there had been service of the summons or not, because the payment of the said amount of Kshs.1,500,000/= was a categorical admission by the appellant that he owed the respondent the said amount.
31. I therefore find it rather odd that the appellant herein, after settling the said debt would still have wanted the Court to set aside the interlocutory judgment against him. The consequence of so doing would have been to allow the appellant to file a statement of defence. The question then is, what would he be defending after paying the outstanding amount?
32. The appellant’s contention in this appeal is that he has been condemned to pay costs of the suit in the lower Court, yet he was never served with the plaint. I however agree with Hon. Opande’s finding that had the appellant paid the loan that had been advanced to him by the respondent as required, the said respondent would not have felt compelled to file suit. The respondent expended money by instructing an Advocate to file suit. He also expended time and energy in trying to recover the balance



of Kshs.1,500,000/= from the appellant. He was definitely entitled to the costs of the case before the lower Court.

33. In so far as interest is concerned the respondent's plaint dated 12<sup>th</sup> October, 2021 contained a prayer for interest on the outstanding loan at Court rates.
34. The respondent herein was denied the use of his money when the appellant failed to pay it back as required. He only settled the same after interlocutory judgment was entered against him. Having been kept away from his money, the respondent was entitled to interest. Interlocutory judgment was entered on 6<sup>th</sup> September, 2022, and since no evidence is available as to when interest would start to accrue on the loaned amount, interest at Court rates on the sum of Kshs.1,500,000/= was payable from the 6<sup>th</sup> September, 2022 when the interlocutory judgment was entered against him.
35. I therefore do not agree with the assertions made by Mr. Omoke that the Trial Magistrate considered issues that were not before her for determination. The proceedings are clear that the Advocates agreed that the outstanding issues were on costs and interest after the outstanding amount of Kshs.1,500,000/= was paid.
36. In my considered view, it would have been superfluous and a waste of the Court's time to delve into the issues that were captured in the Notice of Motion dated 15<sup>th</sup> September, 2022 after the debt was settled.
37. In order to bring the dispute to a close, the Hon. Magistrate had to address the issues of costs and the interest applicable, as those were the only outstanding issues for determination, and the said issues arose out of pleadings. Determining the said issues was a natural consequence of the debt having been settled. The issues could not have been left unaddressed. The case had to be brought to closure by the Trial Court which the Hon. Magistrate correctly did.
38. Having found that the appeal herein is without merits. I hereby dismiss it. The appellant shall bear his own costs of this appeal. The ruling dated March, 2023 by Hon. S.A. Opande is hereby upheld, save to the adjustment being made on the date of payment of interest, so as to be from 6<sup>th</sup> September, 2023.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2024.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Ms Masaba h/b for Mr. Omoke for the appellant

No appearance for the respondent

Ms B. Wokabi – Court Assistant.

