Shikami v Magati (Civil Appeal E184 of 2023) [2024] KEHC 16710 (KLR) (Commercial and Tax) (22 November 2024) (Judgment)

Neutral citation: [2024] KEHC 16710 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E184 OF 2023

BM MUSYOKI, J

NOVEMBER 22, 2024

BETWEEN

ALEXANDER WALTER SHIKAMI ..... APPELLANT

AND

PATIENCE NYANSARORA MAGATI ..... RESPONDENT

(Being an appeal from the judgment of Honourable Caroline Ndumia (SRM) dated 14-07-2023 and delivered on 16-07-2023 in Milimani Small Claims Court Commercial Cause No. E1683 od 2023)

JUDGMENT

1. The respondent sued the appellant in the Milimani Small Claims Court for recovery of a sum of Kshs 1,000,000.00 which she claimed to be loan advanced to the appellant between 31-05-2021 and 1-12-2021 and value of a laptop the appellant received from the respondent plus interest of Kshs 338,350.00. According to the respondent, the appellant had surrendered title deed for his land parcel number Kakamega/Block/IV/545 to secure repayment of the loan.

2. In his response to the claim, the appellant acknowledged receipt of the money as indicated in the claim but averred that the sums were given out of love and affection during the period the two were in a romantic relationship and not as a loan. The appellant maintained that the money was not recoverable because the same was used for benefit of both parties in advancement of their relationship. The appellant added that the title deed for his aforesaid property was in the custody of the respondent but not as a security for any loan. The appellant claimed that the parties had agreed to develop the property as their joint investment and those were the circumstances under which he gave out the title deed to the respondent. He however admitted a sum of Kshs 160,000.00 was advanced to him as a loan. He also counterclaimed for the return of the title deed.

3. After hearing the parties, the trial court found as a matter of fact that the money was advanced as a loan and not as argued by the appellant. She however dismissed the claim for interest as there was no evidence of any agreement on the same. She consequently entered judgement against the appellant for a sum of Kshs 691,000.00 plus costs and interest at court rates from the date of filing of the claim until payment in full. The court did not make any finding on the counterclaim.

4. The appellant was dissatisfied with the judgment of the lower court and filed this appeal in which he raised four grounds as follows;

    1. That the learned magistrate/adjudicator erred in law by delivering a decision that was time barred by operation of law as the trial court's time-bound jurisdiction of sixty (60) days had already lapsed by dint of Section 34(1) of the *Small Claims Court Act* No. 2 of 2016.

    2. That the learned trial magistrate/adjudicator erred in law by failing to take into account that the claim was filed on 9th March 2023 and the small claims court is under express duty to make its determination within the time prescribed by law as its jurisdiction is time-bound and ceases by effluxion of time after the lapse of sixty (60) days from the date of filing the claim.

    3. That the leaned magistrate/adjudicator having heard the parties' viva voce evidence on 21st June 2023 erred in law by delivering a decision that was in contravention of Section 34(2) of the *Small Claims Court Act* No. 2 of 2017 which expressly stipulates that judgment given in determination of any claim shall be delivered on the same day of hearing and in any event, not later than three days from the date of the hearing.

    4. That the learned trial magistrate/adjudicator erred in law by failing to exercise the jurisdiction vested in the Small Claims Court to determine the appellant's counterclaim by her failure to render judgment on the appellant's counterclaim in her decision.

5. From the above grounds, I understand the appellant to be faulting the trial court for delivering judgment beyond the statutory period and failing to make a finding on his counterclaim. It is clear to me that the appellant has not appealed against the trial court's factual finding that the money advanced to the appellant was a repayable loan. That notwithstanding, this is a matter of facts which in any case is not appealable pursuant to Section 38(1) of the Small Claims Courts Act.

6. According to the appellant, the trial court had no jurisdiction to deliver judgment after the statutory 60 days. Section 34(1) and (2) of the Small Claims Act provides that;

    1. All proceedings before the Court on any particular day so far as is practical 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.

    2. Judgment given in determination of any claim shall be delivered on the same day and in any event, not later than three (3) days from the date of the hearing.

7. It is instructive that the section of the law does not make provision for the consequences of failing to deliver the judgement in sixty days or within three days upon conclusion of the hearing. The appellant suggests that once this period is over, the court seized of the matter should down its tools but does not make proposal of what should become of the matter. It is important to note that statues must be interpretated purposively and in a manner to give effect to the objective of the Act. This is also imperative of Article 259 of the *Constitution*. Although the Article talks of interpretation of the *Constitution*, it is my view that the same principle should be applied in interpretation of Statutes. Indeed, the enactment of the *Small Claims Court Act* was informed by the need to decongest the courts

of the heavy backlog and need to give parties who had small claims quick access to justice through delivery of timely decisions. It should not be lost to us that laws are not and should not be meant to close or drive parties out of the seat of justice unless the reasons for any such impediments are deliberate or out of ignorance attributable to the parties.

8. I can't agree more with the holding of my brother Justice Kizito Magare in Biosystems Consultants v Nyali Links Arcade (2023) KEHC 21068 (KLR) where he held as follows;

> The purpose of the Small Claims Courts Act is to facilitate expeditious disposal of the disputes while at the same time respecting the right to be heard. The net result is that balancing the two may result at times to overshooting the 60 days. The 60 days do not have the penal consequences for good reasons. They are aspirational. This is part of having access to justice over amounts that need not be in the normal system. Allowing the application will open floodgates that will eventually defeat the purpose of the Act.
>
> It is my take that the non-compliance goes to the court's performance and is answerable internally. It cannot affect parties who are in court and ready to be heard. I have seen defendants use various gimmicks to have matters adjourned and thereafter turn around to say, 60 days are over.'

9. Article 48 of the *Constitution* entrenches the right to access to justice. In my opinion, this right precedes filing of a suit and transcends delivery of judgment. Any interpretation or application of law which has the effect of unreasonably limiting this right should be avoided. The appellant has not faulted the respondent for the delay in prosecution of the case. Going by the proceedings in the lower court file, the respondent prosecuted her case expeditiously as would have been expected. Taking position that a party who has approached the court in the right way and prosecuted their case within the confines of the law should be punished for failure by the court to deliver judgment within the stipulated time would, in my opinion be a travesty of justice and unconstitutional.

10. The appellant's second limp of appeal is that the adjudicator failed to address his counterclaim. The respondent claims that the court dealt with and considered the counterclaim when it found that there was a contract between the parties. In my opinion, the court did not properly address itself to the counterclaim and was silent on the issue of whether the respondent was holding the title deed for the appellant's property as security. It did not pronounce itself on that fact. It is the position in law that a court must make decision on all issues placed before it, subject of course to any jurisdictional limitations and even where the court holds opinion that it lacks the necessary jurisdiction, it must expressly state so. Order 21 Rule 5 of the Civil Procedure Rules provides that;

> In suits in which issues have been framed, the court shall state its finding or decision, with reasons therefor, upon each separate issue.'

11. In my opinion, whether there is express statement of issues or not, the court must make a decision on every matter in dispute. The appellant had pleaded a counterclaim and the respondent had replied to the same which means that the status and position of the title deed was an issue. A judgment of the court should not leave parties or consumers of the judgment to make assumptions or fill gaps in order to understand it. Where a court fails to pronounce itself on all the issues, the judgment should to that extent be interfered with.

12. In view of my finding in the above paragraphs, I would have proceeded to analyse the merits of the counterclaim but there is an issue of jurisdiction I must address. Article 162 (2)(b) Constitution and Section 13(2)(b) of the *Environment and Land Court Act* grants exclusive jurisdiction on matters related to use, occupation, tenure and other disputes on environment and land to an Environment

and Land Court. This court is not an environment and land court and as such I cannot delve into determination of the terms under which the respondent is holding the title deed to the appellant's property.

13. I have looked at the counterclaim which asked the court to order that the respondent return the aforesaid title deed to the appellant. I have formed opinion that the counterclaim fell under the jurisdiction conferred upon a land and environment court. Section 12 of the *Small Claims Court Act* which confers jurisdiction does not empower the said court to preside over disputes related to right to use, occupation, tenure and ownership of land. It is clear from the pleadings that the counterclaim raised issues surrounding the appellant's right to use and ownership of the land. In that regard, the small claims court had no jurisdiction to hear and determine the counterclaim as much as it did not say so. This ground of appeal is therefore defeated by the reasons of lack of jurisdiction. In any event, none of the prayers in the memorandum of appeal invites this court to make a decision on the issue of the title deed.

14. What flows from my above analysis is the conclusion that, this appeal lacks merits and it is hereby dismissed with costs to the respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered online in presence of:

Mr. Kariuki holding brief for Mr. Gachuhi for the appellant; and

absence of Counsel for the respondent.