



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Musyoka v Kinyua (Civil Appeal 180 of 2023)
[2024] KEHC 16916 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16916 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 180 OF 2023
F WANGARI, J
DECEMBER 19, 2024**

BETWEEN

URBANUS KIOKO MUSYOKA APPELLANT

AND

DAVID GATHANGA KINYUA RESPONDENT

(An Appeal from the Judgment of the Honourable Gatambia Ndungu (RM)- Adjudicator delivered on 13/06/2024 in Mombasa Small Claims Court Commercial Case No. E347 of 2024.)

JUDGMENT

1. This is an Appeal from the Judgment of the Honourable Gatambia Ndungu (RM)- Adjudicator delivered on 13/06/2024 in Mombasa Small Claims Court Commercial Case No. E347 of 2024.
2. The Appellant is substantially on the grounds that the learned Trial Court erred in law and fact:
 - a. By holding that the Claimant ought to have filed a response to the Statement of Response.
 - b. By failing to consider that there was no Reply to Statement of Response filed hence joinder of issue on the Respondent's Statement of Response.
 - c. By directing that the case proceeds vide documents only; and
 - d. By dismissing the Statement of Claim.
3. The Appellant as such prayed for reliefs that the Judgement be set aside and replaced with an Order allowing the Claim with costs.

Pleadings

4. In the Statement of Claim dated 19/04/2024, it was pleaded that the Claimant was a fruit vendor at Kongowea market while the Respondent was his customer. To begin with, the parties transacted on



payment-on-delivery basis, but over time due to the good business relationship, the parties agreed to incorporate purchase on credit, where the Respondent would collect fruits and pay thereafter on the agreed price.

5. The Claimant state that he would also lend to the Respondent friendly loans. Kshs 255,510 was advanced to the Respondent as a friendly loan. The Respondent had a total debt of Kshs. 640,000 being the friendly loan and debt taken on fruits.
6. Kshs. 450,000 was paid in form of cheques with 9 cheques of Kshs 50,000 each. 8 cheques were cleared and one cheque bounced. The Claimant stated that the Respondent has a balance of Kshs. 240,000 which he now claims. He prays that the claim be allowed as prayed.
7. The Respondent filed a Response to Statement of Claim dated 06/05/2024. He denied owing the money as claimed by the Claimant. He however admitted that he owed Kshs. 450,000 and he paid the amount in cheques of Kshs. 50,000 each. One cheque of Kshs. 50,000 was not cleared. He was reported to the police. He stated that he paid the Kongowea Kshs. 50,000 for onward transmission to the Claimant. He says that he does not owe the Claimant any more money.
8. On 21/05/2024, the matter came up for hearing. Both parties were ready to proceed with one witness each, the court invoked section 17,30 and 34 of the *Small Claims Court Act* and directed that the matter proceed with one witness each. Parties were directed to file their submissions and the same was complied with, and matter fixed for judgment.
9. Judgment was delivered on 13/06/2024. The trial adjudicator in dismissing the Claimant's claim stated that by failing to put in a rejoinder to the Respondent's Response to the Statement of Claim, the assertion by the Respondent remained uncontroverted and the court agreed with it.
10. The Claimant having been dissatisfied with the said judgment lodged this appeal on grounds as listed in paragraph 2 above. It was directed that the appeal be disposed of by way of written submissions. Both parties complied by filing their rival submissions with authorities thereto.

Analysis

11. I have considered the appeal as well as submissions and authorities filed in court. The issues are as follows;
 - a. Whether the Trial court erred in its determination on joinder of issues due to failure of filing a Reply to Statement of Defence by the Claimant.
 - b. Whether the Trial Court erred by proceeding by way of documents without consent of the parties
12. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
13. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

“...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 or because it failed to



take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

14. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanour and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
15. The Trial Court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.
16. On the first issue, I make reference to Section 23 & 24 (Filing of claims and Form of statement of claim), Section 25 (Response to claim) of the *Small Claims Court Act*, and Rule 15 Claimant to respond to counterclaim or set-off) of the Small Claims Court Rules, 2019.
17. From the above, it is not a requirement that the Claimant must file a Reply to Response to Statement of Claim unless it is a reply to Counter-Claim or Set-off.
18. On the issue of matter proceeding by way of document, section 30 of the Small Claims Act provides as follows;

Proceeding by documents only

Subject to agreement of all parties to the proceedings, the Court may determine any claim and give such orders as it considers fit and just on the basis of documents and written submissions, statements or other submissions presented to the Court.
19. From the proceedings, the court on its own motion having been guided by the provisions of Section 17, 30 and 34 of the *Small Claims Court Act* directed that the matter proceed by way of documents. I do acknowledge and appreciate the volume of work in the Small Claims Court and the statutory timelines involves, hence the reliance of the above sections of the law for expeditious dispensation of justice.
20. However, according to Section 30 of the Act, the parties ought to have given their consent or agree to have the matter proceed by way of documents. I have perused through the documents relied on by the parties, and more specifically the handwritten notes by the Plaintiff.
21. Even if this court was to analyze the evidence contained in the said documents, I would have had difficulties in coming up with a well informed decision as there was need to have oral evidence explaining to the court what the figures therein were all about, considering that the claim was based on the contents of the handbook. I find there is need to take the oral evidence by the parties.
22. Based on the above, I need not delve into the merits of the matter in the lower court as it would be premature at this state. I find merits in the appeal only to the extent that there is need to have re-trial in the matter, but limited only to taking the evidence of the parties and making the final determination on the same.

Determination

23. In the circumstances, I make the following Orders:
 - a. The Appeal has merits and is allowed on the following terms



- i. That matter be referred for re-trial before any other adjudicator other than Hon. Gatambia Ndung’u for purposes of taking viva voce evidence of the parties and final determination.
 - ii. Considering the timelines set out under the *Small Claims Court Act* and the Regulations thereto, and bearing in mind that this is a holiday season, file be placed before the In-charge Small Claims Court for mention on 07/01/2025.
 - iii. That matter be concluded within 30 days after the 1st mention date, as the re-trial is only limited to taking viva voce evidence and final determination.
- b. Each party to bear the cost of this Appeal.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19TH DAY OF DECEMBER, 2024.

.....

F. WANGARI

JUDGE

In the presence of:

Mr. Masore Advocate for the Appellant

M/S Gitau h/b for Mr. Gakuo Advocate for the Respondent.

Brian, Court Assistant

