



**Salene Credit Limited v Wilfred (Commercial Appeal E098 of 2024)
[2025] KEHC 3232 (KLR) (Commercial and Tax) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3232 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E098 OF 2024
BM MUSYOKI, J
FEBRUARY 14, 2025**

BETWEEN

SALENE CREDIT LIMITED APPELLANT

AND

MWENDA WILFRED RESPONDENT

*(Being an appeal from the judgment of the Small Claims Court at Milimani
(Hon. J.W Nasimiyu) dated 18th March 2024 in its claim number E8692 of 2023)*

JUDGMENT

1. In Milimani Small Claims Court claim number E8692 of 2023, the appellant herein prayed for judgement against the respondent for a sum of Kshs 673,914.00 and interest at 10% per month until payment in full. The amount was said to be the balance of loan of Kshs 280,000.00 advanced to the respondent vide an agreement dated 4th June 2021 plus interest and penalties for defaults. The appellant claimed that as per the said agreement, the respondent undertook to repay the loan at an interest rate of 8% per month for twelve months. According to the agreement, any default would attract a penalty of 10% per month on the principal.
2. The adjudicator in her judgment delivered on 18th March 2024 found that the appellant had not kept proper records and directing her mind to her opinion that the cumulative amount the respondent would have paid within the year was Kshs 548,808.00 and noting that the respondent had so far paid Kshs 487,000.00 inclusive of Kshs 130,000.00 realised from the sale of the respondent's motor vehicle in recovery of the loan, entered judgment for the appellant for a sum of Kshs 61,808.00 with each party bearing their own costs.
3. It is the above stated judgment that triggered this appeal where the appellant has raised the following grounds;



1. The learned honourable magistrate erred in law and fact by failing to enter judgment in favour of the appellant against the respondent as prayed for in the memorandum of claim when on the contrary the trial court misapprehended and failed to properly evaluate submissions by the appellant and evidence on record.
 2. The learned honourable magistrate erred in failing to take cognisance of the fact that the appellant is a mere micro lending institution and not a financial institution.
 3. The learned honourable magistrate erred in law and in fact by awarding the appellant Kshs 61,808.00 only.
 4. The learned honourable magistrate erred in law and in fact in failing to sufficiently appreciate that the respondent's evidence was purely based on falsehoods, gaps and hypothesis with no basis at all.
 5. The honourable magistrate erred in law and fact by making conclusions that are not supported by evidence on record.
4. This appeal was canvassed by way of written submissions. I have read the submissions by the appellant dated 9-10-2024 and those of the respondent dated 8-11-2024. The respondent's submissions raise preliminary issues of law that speak to this court's jurisdiction to entertain and determine this appeal and I do believe that I should deal with the said issues first. It is trite law that whenever an issue of jurisdiction is raised in a matter, the court should consider and make decision on that issue first before delving into the merits of the matter because without jurisdiction, the court should not proceed an inch into issues of merits. The Supreme Court of Kenya held in *Odinga v Independent Electoral & Boundaries Commission & 3 Others* (2013) KESC 8 (KLR that;
- It is well recognised in our law that a court of law shall down its tools in respect of a matter before it, the moment it holds that it lacks jurisdiction.'
5. The respondent has raised the following preliminary issues;
 - a. The appeal is incompetent as it was filed out of time.
 - b. That the appellant had filed an application for review which was dismissed hence the appeal should not be allowed to stand.
 - c. The appeal does not lie in view of Section 38(1) of the *Small Claims Court Act*.
 6. Starting with the first point, I have noted that the judgement being appealed was delivered on 18-03-2024. From this date to the date the appeal was filed which is 18th April 2024, it is a period of 31 days going by Section 57(a) of the *Interpretation and General Provisions Act* Chapter 2 of the Laws of Kenya, which dictates the first day of the relevant act should be excluded while computing time.
 7. This matter having emanated from the Small Claims Court, the right of appeal is derived from Section 38(1) of the Small Claims Courts Act which provides that;

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.'



8. The above Section does not give timelines within which the appeal should be filed. The same position obtains in the Small Claims Court Rules where Rule 30 states that;

A person aggrieved by the judgment or order of the Court may, pursuant to section 38 of the Act, appeal to the High Court in accordance with Order 42 of the Civil Procedure Rules.’

9. However, absence of the timelines in these provisions does not mean that an aggrieved party can bring an appeal anytime irrespective of when the judgement or decision was delivered. The law does not operate in a vacuum and where a statute has a gap, it must be interpreted conjunctively and in tandem with other provisions of other statutes and *the Constitution*. Section 4 (1) of the *Small Claims Court Act* provides that;

There is established a court to be known as the Small Claims Court which shall be a subordinate Court pursuant to Article 169(1)(d) of *the Constitution*.’

10. The above provision is very clear that the Small Claims Courts are in the category of subordinate courts. At the same time, the *Civil Procedure Act* states at Section 1(2) that;

This Act applies to proceedings in the High Court and, subject to the Magistrates’ Courts Act (Cap. 10), to proceedings in subordinate courts.’

11. This Section brings matters before the Small Claims Court under the operation and purview of the *Civil Procedure Act*. In that case, since the *Small Claims Court Act* and Rules do not make provision for the timelines within which an appeal from the said courts should be filed, Section 79G of the *Civil Procedure Act* comes in to cover that. The said Section provides;

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. ’

12. Flowing from the above, it is obvious that this appeal was filed out of time. I am alive to the fact that the appellant was late by one day but the law must be followed. The appellant did not find it fit to make an application for the appeal to be admitted out of time. Where a cause is filed out of time and without the leave of the court, the same is incompetent and the court lacks jurisdiction to hear and determine it. Jurisdiction is derived from statutes or *the Constitution* and where the timelines given in the enabling statute are not adhered to, the court’s jurisdiction becomes lacking and unless the court is invoked by way of an application to extend time, it must down its tools. In *Taib & Another v Wekesa & Another* (Suing as the legal representative of the Estate of George Ellam Wekesa) (2022) KECA 444 (KLR), the Court of Appeal had the following to say on appeals filed out of time;

This appeal was filed outside the requisite time, and without leave of the court. The 2nd Respondent’s counsel urged us not to strike out the appeal but grant the Respondents an extension of time to file a proper Notice of Appeal and Record of Appeal.

13. What should this court do? This court has also pronounced itself as to the consequences of an appeal filed out of time without leave. In *Ali K. Ahmed T/A Sky Club Restaurant vs. Kabundu Holdings Limited* [2009] eKLR; and *Kenya Industrial Estates Limited vs. Anne Chepsiror & 4 Others* [2018] eKLR; including that cited by the Respondent of *Daniel Nkirimpa Morina*, (supra) this court held



that an appeal filed out of time without leave is a proper candidate for striking out. In *Ramji Davji Vekaria Vs Joseph Oyula* [2011] eKLR this court held that lodging an appeal out of time is not a procedural technicality which can be cured by the court invoking the overriding principle. The issue is a substantive one that goes to the core of ensuring that an intended respondent or interested/affected party is accorded reasonable time to prepare for an appeal.

14. The court can invoke the overriding principle only in well deserving cases, depending on its own peculiar circumstances, as the overriding principle is not a panacea for all ills and in every situation. Proper basis must be laid before the court, and the court giving effect to that principle must do so judiciously and with proper and explicable foundation. That was the holding in this court's case of *Murandula Suresh Kantaria Vs Suresh Nanalal Kantaria Civil Appeal No. 277 of 2005.*'
15. The same issue of the fate of appeals filed out of time came up in *Patrick Kiruja Kithinji v Victor Mugira Marete* (2015) KECA 872 (KLR) which is also quoted in the above authority and the court went on to hold as follows;

In our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159.'

16. It is therefore my finding that this appeal was filed out of time and without the leave of the court and as such, it is incompetent. Having found that the appeal is incompetent, I do not need to go into the merits of the same or the other points of law raised by the respondent. Consequently, the appeal is hereby struck out with costs to the respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF FEBRUARY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Tuwei for the appellant and Mr. Kurauka for the respondent.

