



REPUBLIC OF KENYA



**KENYA LAW**  
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**Jadudhai and Sons Limited v Superconcrete Enterprises (Civil Appeal E102 of 2023)  
[2025] KEHC 3518 (KLR) (Commercial and Tax) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3518 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E102 OF 2023  
CJ KENDAGOR, J  
MARCH 13, 2025**

**BETWEEN**

**JADUDHAI AND SONS LIMITED ..... APPELLANT**

**AND**

**SUPERCONCRETE ENTERPRISES ..... RESPONDENT**

*(Being an appeal against the Judgment of Hon. J.W. Munene,  
Resident Magistrate and Adjudicator delivered on 14th April,  
2023 in Nairobi Small Claims Court Case No. E7942 of 2022)*

**JUDGMENT**

**Introduction**

1. The Respondent sued the Appellant at the lower Court seeking judgment in the sum of Kshs.207,752.52/= plus costs of the claim and interest. The Respondent alleged that it sold and made deliveries of construction materials to the Appellant, but the latter had refused pay for the goods. The Appellant filed a Response to statement of Claim in which it denied the Respondent's claim. It stated that it had no contractual relationship with the Respondent and that no goods were sold and delivered as claimed by the Respondent.
2. The matter proceeded for hearing under Section 30 of the *Small Claims Court Act*, and the documents filed by the parties were deemed as duly produced without calling the makers. The court delivered the judgment on 14<sup>th</sup> February 2023 in which it entered judgment in the sum of Kshs.207,752.52/= against the Appellant.
3. The Appellant was dissatisfied with the judgment and appealed to this Court vide a Memorandum of Appeal dated 30<sup>th</sup> May, 2023. It listed the following Grounds of Appeal;



- a. That the learned Magistrate erred in law by proceeding with the hearing of the case vide Section 30 of the Small Claims Act without the express agreement of the Appellant, thus clearly prejudicing the Appellant's case.
  - b. That the learned magistrate erred in law in allowing the claim through disputed documents being invoices, which invoices are subject to criminal investigations as they are fraudulent.
  - c. That the learned magistrate erred in law in declining to allow the Appellant to adduce viva voce evidence which is a guaranteed constitutional right.
  - d. That the learned magistrate erred in law in entering judgment for the Respondent against the Appellant for Kshs.207,752.52/= when in actual sense there was no sum due and owing from the Appellant to the Respondent as the Respondent denied all dealings with the Respondent including having the Respondent's phone contacts or emails.
  - e. That the learned magistrate erred in law in finding that there was a part payment of Kshs.15,948.32/= yet nowhere in the claim or in the defense was such a sum stated to have been paid by the Appellant or received by the Respondent and no proof of such payment was ever adduced by either the Appellant or the Respondent.
  - f. That the learned magistrate erred in law in disregarding the Appellant's defense and witness statement, that the Appellant had ever dealt with the Respondent at all and there was a system to ordering goods and receiving them at the Appellant's premises which the Respondent never disputed.
  - g. That the learned magistrate erred in law in departing from case law precedent binding upon the Resident Magistrate's/ Small Claims Court as regards the burden and standard of proof.
  - h. That the learned magistrate erred in law in making a finding that the Respondent had proven its case on a balance of probability yet there was absolutely no proof adduced by the Respondent in proof of its case.
  - i. That the learned magistrate erred in law in failing to find that the documents relied on by the Appellant were entirely disputed in their entirety and therefore did not amount to proof of the Respondent's claim.
4. It asked the court to set aside the judgment of the Honourable J.W. Munene (Ms.) in Small Claims Case No E7942 of 2022 and remit the case for hearing before another Magistrate/Adjudicator on viva voce evidence.
  5. The Appeal was canvassed by way of written submissions.

### **The Appellant's Written Submissions**

6. The Appellant submitted that the learned Magistrate was wrong to proceed with the hearing of the case vide Section 30 of the Small Claims Act without the express agreement of the parties. It argued that the magistrate's decision to proceed as it did prejudiced its case. In addition, it submitted that the lower Court should not have allowed the Respondent's claim because the Respondent's documents were heavily disputed and some of the documents were subject to criminal investigations. It argued that the Respondent had not proved the claim on a balance of probability.



## Respondent's Written Submissions

7. The Respondent submitted that the trial Adjudicator acted within the confines of the law by determining the case under Section 30 of the *Small Claims Court Act*. It argued that trial court was right in proceeding under Section 30 because the parties to the proceedings agreed with the Court's decision and did not object to and/or challenge the move. It argued that the parties' agreement with the order(s)/direction(s) was further collaborated by the fact that all the parties adhered to the said direction(s)/order(s) without question. It submitted that the Appellant did not raise a single objection or issue in the proceedings at the lower Court, including in their submissions at the lower Court.
8. Based on this, it submitted that this court should not allow the Appellant to mount a challenge against the trial Court's directions on proceeding with the case under Section 30. It argued that Appellant is estopped from raising the issue before this Court because it did not challenge the same at the trial Court. It also argued that the Appellant did not request the trial court to allow them adduce viva voce evidence. Further, it submitted that mounting such a challenge at this stage is not in good faith and does not meet the ends of justice. Lastly, it argued that the trial Court's judgment should be upheld because the Respondent proved its claim against the Appellant on a balance of probabilities.

## Issues for Determination

9. Have considered the Grounds of Appeal and submissions by both counsels for the parties, I am of the view that the issues for determination are;
  - a. Whether the Parties at the Trial Court agreed to proceed under Section 30 of the *Small Claims Court Act*.
  - b. Whether the Respondent proved its claim for Kshs.207,752.52/= on a balance of probabilities.
10. It is trite law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it is required to bear in mind that it had neither seen nor heard the witnesses. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

## Whether the Parties at the Trial Court agreed to proceed under Section 30 of the *Small Claims Court Act*

11. The Appellant submitted the lower Court's judgment should be set aside because the Magistrate proceeded under Section 30 of the Small Claims Act without the express agreement of the parties. On the other hand, the Respondent submitted that the lower Court had the parties' consent to proceed under Section 30 because the Appellant did not challenge the same at the trial Court. It also argued that the consent could be deduced from the fact that parties complied with the order(s)/direction(s) without question and that the Appellant did not request the trial Court to allow it adduce viva voce evidence.



12. Section 30 of the *Small Claims Court Act* provides as follows;

“Subject to the agreement of all parties to the proceedings, the court may determine any claim and give such orders as it deems fit and just on the basis of documents and written submissions, statements or other submissions presented to the Court.”

13. From the wording of the above provision, it is clear that the Small Claims Court can only proceed under Section 30 with the agreement of all the parties to the proceedings. In its submissions, the Respondent submitted that the counsels for both parties had deliberations after which (or as a result of which) the court directed the matter to proceed under Section 30. The Appellant disputes that there were such deliberations. Thus, court is being invited to relook at the proceedings at the lower court with a view to ascertaining with the whether the parties at the trial court agreed to proceed under Section 30 of the *Small Claims Court Act*, as required by the said provision.

14. I have seen the record of the lower court. The most relevant part for the purposes of determining this issue is the record of 30<sup>th</sup> January, 2023 when the Court ordered that the matter was to proceed for hearing under Section 30 of the *Small Claims Court Act*. The record reads as follows;

30/1/2023

Before Hon.J.W.Munene, RM

Court assistant: Benjamin

S.M.Nganga for the Claimant

Korir holding brief for Thumba for the Respondent

Korir: I need 5 days.

Court: The Claimant to ensure that all their supporting documents and witness statements are duly served. The Respondent has 3 days from today to file their response to claim, witness statement and list of documents. The matter to proceed for hearing under section 30 of the *Small Claims Court Act*. The documents filed by the parties to be deemed as duly produced without calling the makers. The Claimant to file and serve written submissions on the claim within 7 days from 1/2/2023. The Respondent to respond within 7 days of service. Judgment on 1/3/2023.

Hon.J.W.Munene

Resident Magistrate/Adjudicator

Small Claims Court, Milimani

30/01/2023

15. In my view, the above record does not show whether the parties agreed to have the hearing proceed under Section 30 of the *Small Claims Court Act*. In addition, the record does not show whether the parties deliberated the issue before the Court made the decision, as alleged by the Respondent. Based on these facts, it is very hard for this Court to determine with certainty whether the parties actually agreed to have the matter proceed under Section 30 of the *Small Claims Court Act*. It would have been prudent for the trial magistrate to record the fact that parties had agreed/consented to proceed in the said manner.

16. In the absence of such record, this Court is inclined to agree with the Appellant that the Magistrate proceeded with the hearing of the case vide Section 30 of the Small Claims Act without the express



agreement of the parties. In my view, the agreement/consent of the parties to proceed with the hearing under the said section cannot be dispensed with. On this ground alone, the Appeal succeeds and the matter is remitted to the lower Court for hearing before another Magistrate/Adjudicator. The second issue for determination therefore becomes unavailable for this court to determine.

### **Disposition**

17. The Appeal Succeeds and the judgment of the Honourable J.W. Munene (Ms.) in Small Claims Case No E7942 of 2022 is hereby set aside.
18. The file is hereby remitted for hearing before another Magistrate/Adjudicator.
19. No order as to costs.
20. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 13<sup>TH</sup> DAY OF MARCH, 2025.**

.....

**C. KENDAGOR**

**JUDGE**

In the presence of:

Court Assistant: Beryl

Mr. Odek Advocate for the Respondent

No attendance for Appellant

