Oruuko c/o Vinny Hardware v Rudra Digital Enterprise (Civil Appeal E033 of 2023) [2025] KEHC 3070 (KLR) (5 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3070 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL E033 OF 2023

AC BETT, J

MARCH 5, 2025

BETWEEN

VINCENT BWANGA ORUUKO C/O VINNY HARDWARE ..... APPELLANT

AND

RUDRA DIGITAL ENTERPRISE ..... RESPONDENT

(Being an appeal from the Ruling of the Small Claims Court by the Honourable C.J Cheruiyot (Adjudicator) in Kakamega SCC Case No. 115 of 2022 delivered on 22nd day of February 2023)

JUDGMENT

1. This appeal arises from a Ruling delivered in Kakamega SCC Case No. 115 of 2022 on 22nd February 2023 where the Claimant/Respondent had filed a claim seeking judgement for the sum of Kshs. 308,347/= for the goods he had sold and delivered to the Appellant.

2. The Appellant had initially failed to enter appearance and the claim proceeded exparte where judgement was entered in favour of the Claimant on 7th October, 2022. Later on the Respondent successfully filed an application to set aside the exparte judgement. Subsequently, both parties were heard and judgement delivered in which the Respondent's claim was dismissed.

3. The learned Adjudicator in her judgement dated 13th January 2023 evaluated the evidence by the Respondent on a balance of probabilities. She found that the Respondent had a duty to prove that the Mpesa statement adduced by the Appellant for the period running from 1st November 2022 to 14th April 2022 formed part of the claim which they failed to do. She further held that there seemed to have been an overpayment on the part of the Appellant as the evidence of the inventory produced did not tally with the Mpesa statement since the Respondent had not produced the full inventory or copies of the invoices to support their claim. She also held that the respondent ought to have produced the entire inventory to show the balance carried forward of Ksh. 412,147 that the Respondent averred existed.

4. Being dissatisfied with the decision, the Respondent filed an application for a review of the judgement. They averred that they had discovered new evidence because at the time of filing the claim, they had submitted their annual financial records to the head office in Punjab, India and the Western Region Manager had only access to a few pages of the extracts of the disputed supplies and payments.

5. They produced copies of what they termed as the remaining inventory records as evidence whereupon the court allowed their prayer and reviewed its earlier decision and entered judgement for Kshs. 308,347/= in their favour.

6. The Appellant was dissatisfied with the decision of the trial court and filed this appeal on the following grounds:-

    1. That the learned magistrate erred in law and fact by failing to appreciate the fact that the defence did not avail any invoices to prove that the goods worth Kshs. 308,347/= were delivered and amount was due.

    2. That the learned magistrate erred in law and fact in considering handwritten inventories and not subjecting them to scrutiny when they had been produced after judgment that had dismissed the claim on 13th January 2023.

    3. That the learned magistrate erred in law and fact by relying only on the handwritten inventories and not comparing them to Mpesa statements produced by the Appellant during trial.

    4. That the learned magistrate could not ascertain that the Respondent filed the apparent inventory after judgment as an afterthought to justify the figure and could not prove it with invoices and delivery notices or MPESA statements.

    5. That the learned magistrate totally went against the *Evidence Act* Cap 80 laws of Kenya.

    6. The findings are contrary to the law rules of natural justice and have resulted into a miscarriage of justice.

Appellant's Submissions

7. The Appellant filed his submissions in which he submitted that the inventories produced in court by the Respondent failed to ascertain the accurate amount to rebut the claim that the Appellant had settled the debt.

8. He submitted that the Respondent filed an application for review claiming that their annual financial records were submitted to their head office in Punjab, India but only produced extracts instead of the whole inventory.

9. He further submitted that the trial court relied on the hand written extracts and the exact period the extraction was done was never addressed and that the application for review was an afterthought and meant to justify the claim after the judgment that was delivered on 13th January 2023.

10. He finally submitted the Respondent submitted only extracts of the inventories which there were not authenticated before being presented to court as provided under section 107 and 108 of the *Evidence Act*.

Respondent's Submissions

11. They submitted that the appeal offended the provisions of section 32 and 38 of the *small Claims Court Act* and stated that the small claims court had the mandate to entertain all manners of adducing

evidence and further that the ruling was made after the Respondent applied for review and the court re-evaluated the evidence presented by the parties.

12. They further submitted that appeals to the High Court from the Small Claims Court was only on matters of law as provided for under section 38. They quoted the case of Otieno, Ragot & Company Advocates vs. National Bank of Kenya Limited (2020) eKLR and Mwita vs. Wood venture (K) Limited & another (Civil Appeal 58 of 2017) (2022) KECA 628 (KLR) where the Court of Appeal addressed the Jurisdiction of the court in hearing appeals as a second appeal which was limited to consider matters of law only.

13. They submitted that the grounds raised by the Appellant in their Memorandum of Appeal was based on questions of facts and no issue of law was raised and the trial court cannot be faulted if the decision was based on no evidence.

14. They quoted the case of Mbogo vs. Shah [1968] EA 93 on the discretion of the appellate court not to interfere with the discretion of the trial court unless a wrong principle was applied.

15. They submitted that the decision of the lower court was proper and as such the appeal should be dismissed with costs.

Analysis and Determination

16. Being a first Appeal, the court relies on a number of principles as set out in Selle and Another vs. Associated Motor Boat Company Ltd & Others [1968] 1EA 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 into account of particular circumstances or probabilities materially to estimate the evidence."

17. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that: -

> " An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that 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."

18. The duty of this court in dealing with an appeal from the Small Claims Court is to deal with an appeal that raises only points of law. The issue is whether the Grounds of Appeal set out by the Appellant are points of law or points of fact.

19. According to Section 38 of the Small Claims Court, appeals from the Small Claims Court is on issues of law only. It provides as follows"-

> " 38.
>
> (1) 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. (2) An appeal from any decision or order referred to in subsection (1) shall be final."

20. It is not lost to the court that the appeal is against an order reviewing a judgement. The power to review a judgement is discretionary and it has been held that the exercise of discretion is a point of law.

21. In the case of Peter Gichuki King'ara Vs Iebc & 2 Others, Nyeri Civil Appeal No. 31 Of 2013, (Court of Appeal) (Visram, Koome & Odek, JJA) of 13th February 2014, the Court of Appeal settled on what constitutes points of law as follows:-

> "It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanour – is an issue of law."

22. On analysing the grounds of appeal, I find that notwithstanding the manner it is couched, the Appellant faults the learned Adjudicator for wrong exercise of discretion.

23. The Appellant further faults the Adjudicator for exercising wrong principles in admitting evidence after a judgement as well as for making her decision based on lack of evidence and or evidence that was not subjected to scrutiny as it was produced after dismissal of the Respondent's claim.

24. A judgement based on no evidence or unauthenticated evidence is a matter of law as it constitutes an error on the face of the record and notwithstanding the provisions of Section 32 of the *Small Claims Court Act*, a Claimant has the onus of proving his case before the Adjudicator.

25. In the case of Francis Mburu Ngugi v. Trident Insurance Company Ltd [2024] KEHC 13948 (KLR), the court held as follows:-

> "The fact that the small claims court is not bound by strict rules of evidence does not give that court a carte blanche to decide without any evidence. The burden of proof still remains on the person alleging. If a party alleges that there is a judgment, at the very least, evidence of that judgment should be produced to show parties who were parties in that case. In another life, I pointed out the poignancy of such matters in the lower court, given the nature of proof required."

26. The earlier judgement delivered on 13th January 2023 focused on the Mpesa statement and the inventory that had been availed by the Respondent at that time and held that there was indeed an overpayment on the part of the Appellant. The Respondent applied for review of the said judgement. It is undisputed that the Small Claims Court has the power to review.

27. Section 41 of the *Small Claims Court Act* provides as follows:-

> "(1) An Adjudicator may, on application by any aggrieved party or on his or her own motion, review any order of the Court on the ground that—
>
> (a) the order was made ex-parte without notice to the applicant;
>
> (b) the claim or order was outside the jurisdiction of the Court;

(c) the order was obtained fraudulently;

(d) there was an error of law on the face of the record; or

(e) new facts previously not before the Court have been discovered by either of the parties.

(2) The application referred to under subsection (1) shall be made within thirty days of the order or award sought to be reviewed or such other period as the court may allow."

28. The Respondent's prayer was founded on Section 41 Rule 1 (e) of the Small Claims Act and which borrows heavily from Order 45 Rule 1(b) of the Civil Procedure Rules provides as follows:-

"(1) Any person considering himself aggrieved—

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

29. The crux of the Respondent's prayer during review was that their inventory records for the year 2021-2022 had been purportedly sent to the head office in Punjab, India at the time of filling the claim and they had only extracts of the inventory.

30. They produced a handwritten inventory whose authenticity was never proven. The purported inventory records relied by the Respondent was a general summation of the payment to the Appellant. The four copies of the invoices relied upon by the Respondent do not tally with the amount that the Respondent claims is owed to them by the Appellant.

31. In my view, the trial court was wrong in allowing the application for review and entering judgement as prayed in the claim as allowing it amounted to re-opening the case afresh and as such the Appellant should have been given an opportunity to cross-examine the Respondent on the new evidence. The failure to allow the Appellant challenge the new evidence led to an injustice as submitted by the Appellant. In the premises, I find and hold that the Adjudicator exercised the wrong principles in admitting the evidence and allowing the claim.

32. In the case of Citec International Estate Ltd & Others v. Francis & Others [2014] LPELR-22314(SC), the Nigerian Supreme Court held as follows:-

"An application for review, is not meant to afford the losing party, an opportunity to re-litigate or re-open a matter merely because such party is unhappy with the outcome..."

33. In Raila Odinga and 5 Others Versus I.E.B.C. and 3 Others [2013] eKLR, the Supreme Court added its voice on reception of additional evidence in the context of Presidential election and stated:-

"The other issue the Court must consider when exercising its discretion to allow a further affidavit, is the nature, context and extent of the new material intended to be produced and

relied upon. If it is small and limited so that the other Party is able to respond to it, than the Court ought to be considerate, taking into account all aspects of the matter. However, if the evidence is such as to make it difficult or impossible for the other Party to respond effectively the Court must act with abundant caution and care. In the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of addition evidence ..."

34. The general principle is that parties must present all the facts, documents and evidence in Court at the appropriate time before the Court retires to write its Judgment. Time and time again Courts have advised litigants that they are bound by their pleadings and that they do not prosecute their case in piecemeal.

35. The Adjudicator exercised her discretion and allowed the application for review. Having done so, it is my considered view that she should have then proceeded to re-open the case so as to afford the Appellant an opportunity to challenge the new evidence. Failure to do so resulted in a miscarriage of justice.

36. The upshot then is that the appeal is allowed and the decision of the Small Claims Court is hereby set aside.

37. The file is hereby remitted to the Adjudicator for purposes of re-hearing the case afresh so as to accord the Appellant the opportunity to cross-examine the Respondent.

38. The Appellant shall have the costs of the appeal.

39. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 5TH DAY OF MARCH 2025.

A. C. BETT

JUDGE

In the presence of:

No appearance for the Appellant

Mr. Okali for the Respondent

Court Assistant: Polycap