Ammah Service Station Limited v Boss Cutomz Limited & 2 others (Civil Appeal E256 of 2024) [2025] KEHC 5792 (KLR) (Commercial and Tax) (8 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5792 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E256 OF 2024

PM MULWA, J

MAY 8, 2025

BETWEEN

AMMAH SERVICE STATION LIMITED ..... APPELLANT

AND

BOSS CUTOMZ LIMITED ..... 1ST RESPONDENT

FLORENCE WANJIRU MACHARIA ..... 2ND RESPONDENT

JOHN NG'ANG'A MWANGI ..... 3RD RESPONDENT

(Being an appeal from the Judgment of Hon. Kiongo Kagenyo (RM) - Adjudicator, Small Claims Court vide Milimani SCCCOM/E4048/2024 delivered on 6th August 2024)

JUDGMENT

1. This appeal emanates from a judgment by the Small Claims Court on the main ground of entering a final judgment under the auspices of a request for judgment dated 9th May 2024.

2. By the judgments dated 6th August 2024, (the judgment), the Small Claims Court having satisfied itself that the Respondents were duly served, granted judgment in favour of the Appellant as against the 1st Respondent for the sum of Kshs. 238,800/= with an interest rate of 12% per annum from 19th April 2024 until payment in full. The Court dismissed the case against the 2nd and 3rd Respondents on the grounds of their status as agents of the 1st Respondent. The Appellant was further awarded costs of Kshs 18,000/=.

3. Aggrieved by the judgment, the Appellant filed this appeal via the Memorandum of Appeal dated 15th August 2024, citing the following grounds:

a. That the learned adjudicator erred in law by delivering a final judgment under the auspices of a request for default judgment;

b. The learned Adjudicator erred in law by failing to enter judgment against the Respondents as laid in the Request for Default Judgment dated 9th May 2024;

c. The learned Adjudicator erred in law by denying the Appellant the right to be heard vide formal proof with regards to the non-liquidated aspects of its claim against the Respondents;

d. The learned Adjudicator erred in law by denying the Appellant Kshs. 650,000/= on account of loss of business;

e. The learned Adjudicator erred in law by failing to disclose what aspects of the liquidated claim(s) were allowed to come up with the total award of Kshs. 238,000/=; and

f. The learned Adjudicator erred in law by failing to accord liability to the 2nd and 3rd Respondents.

4. The Appellant proposes that the appeal be allowed, the Small Claims Court's judgment be set aside, and an order entering default judgment for the liquidated demand of Kshs. 883,000/= against the Respondents jointly and severally be issued. Additionally, the Appellant seeks to have a date fixed for formal proof as pleaded in the statement of claim dated 18th April 2024.

5. The appeal was heard by way of written submissions. The Appellant submissions are dated 17th December 2024. The Respondents, despite being duly served, did not participate in the appeal.

6. The Appellant contends that the adjudicator failed to enter judgment according to the Request for Default Judgment, improperly assessing the merits of the case contrary to the provisions of Section 27(1) of the Small Claims Act.

7. Having considered the memorandum of appeal, the record of appeal, as well as the Appellant's submissions, the following issues come up for determination:

a. Whether the Learned Adjudicator erred in entering final judgment under a request for default judgment without directing the matter to formal proof;

b. Whether the dismissal of the claims against the 2nd and 3rd Respondents was proper;

c. Whether the Appellant was denied the right to be heard on the unliquidated claim.

8. In determining whether this appeal is properly before the court, it is imperative to examine whether it raises issues of law as contemplated under Section 38(1) of the *Small Claims Court Act*.

9. A matter of law includes, but is not limited to, misinterpretation or misapplication of the law, failure to consider relevant legal principles, or a decision that is unsupported by the applicable legal framework.

10. The appellant must therefore demonstrate that the decision appealed against involved an erroneous interpretation or application of the law, or that the court acted outside its jurisdiction or failed to adhere to due process as prescribed by law.

11. This court will now proceed to consider the issues raised in the appeal to determine whether they disclose matters of law as required under the Act.

12. In respect of the first issue, Section 27(1) of the *Small Claims Court Act*, 2016 provides as follows:

> "If the respondent fails to respond to the claim within the prescribed period, the Court may, either on its own motion or on the claimant's application, enter judgment for the claimant and order the relief sought in the statement of claim."

13. This provision permits the court to enter default judgment where a party fails to respond but does not necessitate a final judgment on non-liquidated claims without formal proof. Judicial practice dictates that claims involving both liquidated and unliquidated aspects require that the liquidated claim be conclusively resolved, while the unliquidated claim necessitates formal proof.

14. Further guidance is found in Order 10 Rule 4 of the Civil Procedure Rules which provides that:

> "Where the plaint makes a liquidated demand only, and there is default of appearance, the court shall, on request in Form No. 13 of Appendix A, enter judgment...Conversely, where the claim includes non-liquidated damages, formal proof must be undertaken."

15. In the present case, the Appellant sought a liquidated sum of Kshs. 883,000/=. The judgment, awarding Kshs. 238,800/=, lacks clarity regarding the basis for this amount. As the claim was framed as liquidated, and no opposition or contrary evidence was presented, the court should have entered default judgment for the full amount unless any component was ambiguous or unsupported.

16. However, loss of business is not a liquidated claim and requires proof by way of evidence. According to principles of natural justice and the right to a fair hearing, a party is entitled to present evidence on unliquidated claims. The claim for loss of business amounting to Kshs. 650,000/= is inherently unliquidated and necessitates evidence. The absence of a formal proof hearing for this claim means the Appellant was denied an opportunity to substantiate this aspect of the claim.

17. In the case of Samson S. Maitai & Another v African Safari Club Ltd & Another [2010] eKLR, Emukule, J gave a definition of formal proof and observed that:

> "I have not seen judicial definition of the phrase "formal proof". Formal in its ordinary dictionary meaning refers to being 'methodical' according to rules (of evidence). On the other hand, according to Halsbury's Laws of England, Vol. 15, para, 260, proof is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact..."

18. By not allowing formal proof on the unliquidated claims, this court is persuaded that the trial court erred in denying the Appellant the opportunity to establish this part of the claim effectively.

19. With respect to the dismissal of the case against the 2nd and 3rd Respondents, the Learned Adjudicator held that they were agents of the 1st Respondent and thus bore no liability. While agency may shield an agent acting within authority, that is a factual matter requiring evidence. In a default judgment setting where no defence or response was filed, the court lacked a factual basis to reach such a conclusion without hearing evidence.

20. In view of the foregoing analysis, I am satisfied that the trial court erred in entering a final judgment without directing formal proof on the unliquidated claim, and in prematurely dismissing the case against the 2nd and 3rd Respondents without the benefit of evidence.

21. Consequently, I find that the appeal herein is merited and is partly allowed. The judgment of the Small Claims Court dated 6th August 2024, is hereby set aside and substituted as follows:

a. Judgment is entered in default for the liquidated sum of Kshs. 238,800/= in favour of the Appellant against the Respondents jointly and severally.

b. The matter is remitted back to the Small Claims Court for formal proof on the unliquidated claim for loss of business claimed at Kshs. 650,000/=.

c. Costs of the appeal are awarded to the Appellant.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF MAY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Mureithi h/b for Mr. Masore for Appellant

N/A for Respondents

Court Assistant: Carlos