Kimani v Kibugi (Civil Appeal E133 of 2024) [2025] KEHC 5687 (KLR) (8 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5687 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E133 OF 2024

FN MUCHEMI, J

MAY 8, 2025

BETWEEN

SIMON KIMANI ..... APPELLANT

AND

JEREMIAH KIBUGI ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. Shivega Victor (RM/Adjudicator) delivered on 21st May 2024 in Thika Small Claims Court SCCCOMM No. E2098 of 2023)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCC No. E990 of 2023 whereby the trial court entered judgment in favour of the respondent for a sum of Kshs. 31,500/- in a claim of debt incurred as the appellant supplied goods to the respondent.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 5 grounds of appeal summarized as follows:-

    a. The learned trial magistrate erred in law and in fact in arriving at a judgment that was informed by an erroneous analysis of the issues in dispute, wrong presumptions and adverse inferences leading to a perverse judgement.

    b. The learned trial magistrate erred in law by failing to appreciate that the jurisdiction of the trial court was time bound and that it ran out and ceased by effluxion of time on 22nd February 2024, being the date and day the court's time bound jurisdiction ceased to exist by dint of Section 34(1) of the *Small Claims Court Act*.

3. Parties disposed of the appeal by way of written submissions.

The Appellant's Submissions

4. The appellant submits that the respondent filed a Statement of Claim dated 22nd December 2023 for Kshs. 31,500/- owed by him. The respondent claimed that he had supplied avocados to Kenco Exporters through and in the name of the appellant who was an agent of the company. The appellant further submits that the respondent claimed that he was to be paid Kshs. 61,500/- for the avocados but he paid him half of the money in the sum of Kshs. 30,000/- and refused to pay the balance of Kshs. 31,500/-.

5. The appellant submits that he filed his Statement of Response dated 15th March 2024 and denied the allegations by the respondent putting him to strict proof. The appellant submits that it was his case that he offered to help the respondent by accepting to supply his avocados to Kenco Exporters under his name but insisted that the respondent did not supply the said avocados under his name but instead supplied them under the respondent's own name therefore never utilizing the opportunity he had offered. Therefore the payment for the avocados was not sent to him.

6. The appellant argues that the learned trial magistrate failed to understand his business practice with the respondent and to grasp the bigger picture of the workings of the business. Therefore erroneously analysed the issues in dispute and came up with the wrong presumptions and adverse inferences. The appellant further argues that one of the issues in dispute ought to be whether the respondent supplied the avocados under his name to warrant payment by the company to be made to the appellant or through the respondent.

7. The appellant submits that the respondent failed to produce any evidence to show that that he used the appellant's name in supplying the said avocados as agreed. Further from the evidence produced by the respondent and described in his cross examination as the receipt to show the quantities he supplied, issued by the company, the name that appears on the receipt is the respondent's name and not his name. the appellant argues that that is enough evidence to show that the respondent used his own name and therefore the payment for avocados could not be paid to the appellant nullifying the claim against him.

8. The appellant submits that the trial magistrate failed to grasp the fundamental principles of the supply business that he and the respondent were engaged in and that they had engaged in many times before. The appellant further submits that the respondent in cross examination stated that he used to supply under his name denoting that they had been doing similar transactions in the past. That points to a pattern and a history between the two parties working together, a fact that should have persuaded the learned magistrate to find it a custom of the parties in the business to lend/pay each other money in anticipation of payment from the company, especially if the respondent uses the appellant's name to supply the avocados, a fact that automatically puts the appellant in a position to owe the respondent money when the company pays him.

9. The appellant refers to Section 34 of the *Small Claims Court Act* and the cases of In the Matter of Advisory Opinions of the Court under Article 163 of *the Constitution* (Constitutional Application No. 2 of 2011 at para 30) and Macharia & another vs Kenya Commercial Bank Limited & 2 Others [2012] KESC 8 (KLR) and submits that the suit was filed on 22nd December 2023 and thus the jurisdiction of the trial court ran out on 22nd February 2024 when the mandatory 60 days lapsed. The appellant argues that the learned magistrate erred in law by failing to take cognizance of the legal fact that the judgment rendered and returned outside time was without jurisdiction and a nullity bereft of any force of law.

Issues for determination

10. The main issues for determination are:-

    a. Whether the failure of the Small Claims Court to render a decision within the 60 days timeline would render such a decision invalid.

    b. Whether appeal has merit.

The Law

11. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under Section 38 of the *Small Claims Court Act*, set out the duty of the second appellate court in the case of Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR as follows:-

    I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

12. In distinguishing between matters of law and fact the Court of Appeal stated in Kenya Breweries Ltd vs Godfrey Odoyo [2010] eKLR as follows:-

    I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See Selle and Another vs Associated Motor Boat Company Limited and Others (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

Whether the failure of the Small Claims Court to render a decision within the 60 day timeline would render such a decision invalid.

13. The appellant argues that the claim was filed on 22nd December 2023 and therefore by dint of Section 34 of the *Small Claims Court Act*, judgment ought to have been rendered by 22nd February 2024. Thus the court lacked jurisdiction when it delivered judgment on 21st May 2024.

14. Section 34(1) of the *Small Claims Court Act* provides:-

    All proceedings before the Court on any particular day so far as is practicable shall be heard and determined on the same day or on a day to day basis until final determination of the matter which shall be within sixty days from the date of filing the claim.

15. In Lumumba vs Rift Gas Limited (Civil Appeal E805 of 2022) [2023] KEHC 25998 (KLR) (Civ) (30 November 2023) (Judgment) Majanja J. when dealing with a similar issue held:-

    > Whereas these timelines are valid, it should not be lost that the SCCA grants the court flexibility to do justice to the parties and the said court has the right to impose any terms and conditions to ensure that the hearing can proceed with the time limited (See Rutere vs Muigai [2023]

KEHC 17345 (KLR)). The 60 day timeline in the SCCA is directory and not mandatory as it is not the intention of the SCCA to invalidate any proceedings that violate the statutory timelines. To adopt such a position would undermine the statutory objects and cause injustice to the parties as the case would have to be reheard afresh with attend costs to the parties. (See Crown Beverages Limited vs MFI Document Solutions Limited [2023] KEHC 58 KLR).

I agree with the respondent that the phrase 'so far as is practicable in the circumstances' means that where the circumstances render it impossible to deliver judgment within the 60 day period, then the judgment of the court will still be valid.

16. On perusal of the record, it was not possible to deliver judgment within the said 60 days from the date of filing the suit as the appellant himself did not file his response on time and the matter had to be adjourned on two occasions. The matter was adjourned on 17th April 2024 as counsel for the appellant was bereaved and on 7th May 2024 due to the unavailability of the respondent. Thus, the appellant having benefited from the adjudicator's discretion that allowed him to file his response to the claim late cannot now plead strict timelines when he was partly responsible for the delay in hearing the matter. Thus, this ground of appeal fails.

Whether the appeal has merit.

17. The appellant argues that he does not owe the respondent money because the respondent supplied avocados using his own name and not the name of the appellant and therefore their Kenco Exporters ought to have paid him.

18. It was the respondent's case in the trial court that he supplied avocados to a company, Kenco Exporters through the appellant who claimed to be an agent of the said company. The appellant paid him Kshs. 30,000/- leaving a balance of Kshs. 31,500/-.

19. The appellant denied those allegations and stated that the respondent approached him and requested him to supply avocados under the appellant's name. The respondent failed to supply the avocados under the appellant's name but did so under his own name. The appellant further testified that he lent Kshs. 30,000/- to the respondent which he promised to pay back once he received his payment for the avocados from the company.

20. It is clear from the record that the appellant knew the company in question, Kenco Company although he denied the same in his response. Furthermore, the appellant in his response merely denied all the averments in the claim but he did not state that the respondent supplied the avocados directly to the company and not through him. He only testified to that upon cross examination and added that he would not pay the respondent until the company paid him. Thus it is evident that the respondent supplied avocados to the company through the appellant.

21. The appellant further argues that the Kshs. 30,000/- he gave to the respondent was a loan which the respondent would pay back upon been paid by the company.

22. Upon perusal of the record, the appellant did not file a counterclaim in his response to show that the respondent owed his Kshs. 30,000/-. Furthermore, the appellant testified on cross examination that he told the respondent at the police station that he would not pay the respondent any money unless the company paid him. He further stated that he would not add any money to what he had paid the respondent. Although the appellant argued that as business practice between him and the respondent he normally would pay the respondent money on several occasions denoting that they had similar transactions in the past. It is trite law that he who alleges must prove. The appellant herein did not show any previous dealings where he gave the respondent money to be repaid back in the past. The

respondent on the other hand showed that the appellant paid him Kshs. 30,000/- through MPESA, thus it is my considered view that the respondent proved that the appellant paid him half of the sum the appellant owed him for the supply of avocados which is equivalent to Kshs. 31,500/-.

23. It is therefore my considered view that the respondent proved his case on a balance of probabilities. The judgment of the court below was based on cogent evidence and is hereby upheld.

24. In my view the appeal lacks merit and is hereby dismissed with costs.

25. It is hereby so ordered.

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

F. MUCHEMI

JUDGE