



**Njaria v Ziro (Commercial Appeal E013 of 2024)  
[2025] KEHC 12160 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 12160 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
COMMERCIAL APPEAL E013 OF 2024**

**F WANGARI, J**

**MAY 15, 2025**

**BETWEEN**

**STEPHEN MUCHIRI NJARIA ..... APPELLANT**

**AND**

**JULIUS FIKIRI ZIRO ..... RESPONDENT**

*(Being an Appeal from the Ruling of Honourable Gatambia Samuel Ndungu delivered 14/08/2024 in Mombasa Small Claims Court Case No. E354 of 2023)*

**JUDGMENT**

1. This is an appeal from the ruling of the Learned Adjudicator Hon. Gatambia as stated herein above. The Appellants being dissatisfied with the said ruling preferred the present appeal by filing the Memorandum of Appeal dated 28/08/2024.
2. It was stated that the trial magistrate erred in law by entertaining an application for review of judgment dated 12/06/2024, which was filed out of time and which ruling dated 14/08/2024 is the subject of this appeal. Further, the court was functus officio having struck out the suit on 22/02/2024, prior to entertaining the above mentioned application.
3. Appellants thus prayed that the Honourable Court be pleased to set aside the Ruling of the Trial Court, allow the appeal and the order striking out the suit be reinstated.
4. The appeal was canvassed by way of written submissions and both parties complied by filing the rival submissions and supporting authorities.

**Analysis and Determination**

5. I have considered the appeal lodged, the submissions for and against, the authorities cited as well as the law and I discern the following issues for determination: -



- a. Whether the application for review dated 12/06/2024 was filed out of time.
  - b. Whether the Trial Magistrate was functus officio in entertaining the application for review.
  - c. Who bears the cost?
6. This being a first appeal, this court is under a duty to re-evaluate and re-assess the evidence and make its own conclusions. In *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters v Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -
- “It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
7. On the first issue, Section 41 of the [Small Claims Court Act](#) provides for review of orders or award of the court. It provides as follows;
- 41 (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.
8. Though it is in mandatory terms that the application for review in the court should be filed within 30 days of the order, the court is empowered to enlarge time within which the application for review should be filed. No leave was sought to have the application heard and determined out of time, and considering that the application was filed 6 months after the court delivered the judgment that was subject to review, the application ought to have been struck out for being filed out of time.
9. It is important to note that even if this court would have found that the court exercised its discretion under section 41 (2) of the Act, the application would not have met the threshold for review under section 41 (1) (e) of the Act. The Quantity Surveyor’s Report dated 16/1/2024 was prepared 3 months after the delivery of the judgment. I do agree with the Appellant that the said report was meant to introduce additional evidence to fill up the omissions in his case. (See *Mohamed Abdi Mohamud v Ahmed Abdulahi Mohamad & 3 others* [2018] eKLR.
10. On whether the trial court was functus officio when hearing the application for review, it is a fact that the court had struck out the suit on 22/02/2024. The court became functus official in the matter hence no jurisdiction to hear the application.



11. I have perused through the proceedings in the lower court and more specifically the proceedings dated 22/02/2023 when the claim was dismissed under Order 2 Rule 15, after the mediation process became unsuccessful. Reasons given for striking out the claim was due to the fact that the court had already rendered its judgment in the matter referring the parties to mediation, hence it was functus officio, and that the parties to explore suitable modes of amicable settlement.
12. As stated herein above, this court is under a duty to re-evaluate and re-assess the evidence and make its own conclusions. I have perused through the pleadings filed by each party. The Claimant in the Statement of Claim states that there was a construction agreement between him and the Respondent to build 3 story building at a cost of Kshs. 1,600,000 per floor. Total amount was Kshs. 4,800,000/= . Kshs. 911,000/= remained unpaid after completion of the building.
13. I have perused through the documents relied on by the Claimant. In page 32 of the Record of Appeal (R.O.A), is the contract agreement. The agreed amount for the contract is Kshs. 70,000, which the Respondent claims that he has settled and there is no money due to the Claimant. Further, in page 16 of R.O.A, the Environmental Impact Assessment Licence from NEMA indicates the project to be carried on is the construction of one story building.
14. Further, at page 31 of the R.O.A, is a letter purported to be from the Respondent admitting that he owes the Claimant the amount as claimed. It is not dated, it is not signed and it is not indicated to whom the said letter is addressed to. The matter proceeded by way of documents. The documents filed in support of the claim, leaves more questions than answers, and these questions turn into doubt.
15. In the absence of any other contract on record, or evidence in support of the oral contract purported to have been made by the parties, the contract on record shall be deemed to be the valid contract between the parties. The Court of Appeal decreed in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR when it held as follows: -

“...A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved...”
16. From the above, I find that the Claimant did not prove his case on a balance of probabilities, hence the claim is dismissed.
17. On the issue of costs, a careful reading of Section 27 indicates that it is trite law that they follow the cause or event as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540. It is, that costs must follow the event unless the court, for some good reasons, orders otherwise.
18. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exist some other good reasons and or cause for not awarding costs to the successful party. The court exercises its discretion by directing that the costs shall be borne by each party so as to bring litigation to an end.
19. Flowing from the above, I proceed to make the following orders and/or directions: -
  - a. The appeal is hereby allowed on terms that the Trial Court’s ruling dated 14/08/2024 is hereby set aside, and substituted with orders of this court dismissing the claim.
  - b. Each party to bear his own costs.

It is so ordered.



DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 15<sup>TH</sup> DAY OF MAY, 2025.

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**F. WANGARI**

**JUDGE**

In the presence of:

Mr. Mwai Advocate for the Appellant

N/A by the Respondent

M/S Norah, Court Assistant

