



REPUBLIC OF KENYA



**Mwasya v Githinji (Civil Appeal E1233 of 2023)
[2025] KEHC 8295 (KLR) (13 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8295 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E1233 OF 2023
WM MUSYOKA, J
JUNE 13, 2025**

BETWEEN

GRACE NGUNO MWASYA APPELLANT

AND

GEORGE MURIITHI GITHINJI RESPONDENT

(Appeal from judgement and decree of Hon. Wamae EM Muindi, Resident Magistrate/Adjudicator, in Nairobi SCCC No. E2200 of 2022, of 16th October 2023)

JUDGMENT

1. I have gone through the record herein, and the impression I get is that the trial court disposed of the matter without affording the parties a hearing. The record reflects that there were only four appearances, before the Adjudicator, on 9th June 2023, 4th July 2023, 16th August 2023, and 16th October 2023. The first three appearances were before Hon. BJ Ofisi (Mrs), Senior Resident Magistrate/Adjudicator, while the last was before Hon. EM Muindi (Mrs), RM/Adjudicator, who delivered the impugned judgment.
2. On 9th June 2023, there was a mention for directions. The court then fixed the matter for further mention on 4th July 2023 to fix it for hearing. At the mention, on 4th July 2023, leave was sought for filing of a witness statement, which was granted, and hearing was scheduled for 16th August 2023. On 16th August 2023, no hearing was conducted, as Hon. Ofisi (Mrs), Adjudicator, indicated that she was on transfer. No date was allocated for further mention, or for hearing before another Adjudicator. Then on 16th October 2023, a judgement was delivered in open court. It is not clear whether any proceedings were conducted between 16th August 2023 and 16th October 2023. It is not clear whether there was any appearance before Hon. Wamae (Mrs), Adjudicator, when she took over the matter. It is not clear whether she heard the claim, before she delivered the judgment of 16th October 2023, or whether she chose to proceed based on the documents filed.



3. Several issues arise, with respect to how the matter was handled, and on whether the judgement of 16th October 2023 was valid.
4. Let me start with the hearing. Under section 28 of the Small Claims Act, Cap 10A, Laws of Kenya, upon the response of the respondent being received, the court is required to fix the matter for hearing. The first court appearance, on 9th June 2023, was for directions. There is no requirement for directions. Once pleadings close, under section 28, parties are expected to fix the matter for hearing. Another date was given, for mention, on 4th July 2023, to fix a date for hearing. On 4th July 2023, 16th August 2023 was fixed as the hearing date, but on that date, no hearing happened as the Adjudicator seized of it was on transfer. She left the matter without a date, and the next action was that a judgement was delivered on 16th October 2023.
5. Proceedings under the Small Claims Act, are time-bound. Under section 34 of that Act, they must be concluded within sixty days. That would explain why the procedure requires that the matters be fixed for hearing, at the close of pleadings, rather than for directions, to avoid the spectre of time running out. In this case, time was lost on unnecessary mentions. Secondly, given the time limitations, the Adjudicator seized of the matter should have heard it on 16th August 2023, when it was fixed for hearing. The excuse that there was a transfer was not good enough. The strict timelines meant that she should have heard the matter instead of leaving it hanging, without a date, yet time was still running. In any event, the fact that one had received a letter of transfer does not take away jurisdiction to sit and hear the matters pending. The transfer only becomes effective from the date when one is expected to report at the next station. No effort was made to fast-track the matter.
6. Given the way Hon. Ofisi handled the matter, squandering so much time in between, explains why Hon. Muindi delivered a judgement summarily, without hearing the parties.
7. Let me talk about that. Section 28 envisages a physical hearing of the parties, and section 29 an electronic hearing, where necessary. Rule 19 of the Small Claims Court Rules envisages an oral hearing, where testimony is given on oath. So, the ideal under the *Small Claims Court Act* and the Rules is an oral hearing. The determination by the court ought to be based on a hearing of the parties. Section 30 provides an exception, where the court may determine the matter based on the pleadings, documents, and written submissions. However, that is “Subject to agreement of all parties to the proceedings.” The court must obtain the concurrence of the parties, before proceeding in that manner.
8. No hearing was conducted in this matter, going by the trial record before me, in the record of appeal lodged here. No witnesses testified, whether physically or electronically. The judgement of 16th October 2023 was delivered without the benefit of a hearing. Hon. Muindi, because of time constraints, opted to proceed under section 30 of the *Small Claims Court Act*, it would appear, and delivered the judgement without hearing the parties, based on whatever the parties had placed on record. That was commendable. It was an effort to save time, and to dispose of the matter expeditiously. The challenge with that approach, however, was that the trial court did not obtain the “agreement of all parties to the proceedings,” contrary to section 30 of the *Small Claims Court Act*. I see no minute, in the record, of the parties agreeing to proceed under section 30 of the *Small Claims Court Act*.
9. What I find even more fundamental is whether Hon. Muindi still had jurisdiction over the matter. Under the *Small Claims Court Act*, proceedings should be disposed of within sixty days of the filing of the cause, according to section 34(1) of the Act. It is not clear when the suit, in Nairobi SCCC No. E2200 of 2022, was filed. The statement of claim on record does not bear a date stamp when it was received or lodged at the registry. The filing was sometime in May 2023, given that the statement of claim was dated 6th May 2023 and the response dated 31st May 2023. The time of filing was, therefore,



sometime in May 2023. That meant that the sixty days were to expire within the month of July 2023. Hon. Ofisi did not appear to have been sensitive to that, when the matter was mentioned, on 9th June 2023. Time was fast running out. Yet, despite that, she did not fix the matter for hearing, instead she fixed it for mention on 4th July 2023. On 4th July 2023, the date fixed for hearing, 16th August 2023, was already outside the sixty days. Any decisions by the court around those dates would have been without authority, in view of section 34(1) of the *Small Claims Court Act*.

10. I am alive to the fact that the High Court has taken inconsistent positions on whether a Small Claims Court can hear and determine a claim after expiration of the sixty days. In *Kartar Singh Dhupar & Company Limited vs. ARM Cement PLC (In Liquidation)* [2023] KEHC 2417 (Gichohi, J) took the position that section 34(1) of the *Small Claims Court Act* was in mandatory terms, and any action taken by a court after the sixty days have expired, would be without jurisdiction and invalid. In *Biosystems Consultants vs. Nyalı Links Arcade* [2023] KEHC 21068 (Magare, J) and *Lumumba vs. Gift Gas Limited* [2023] KEHC 25998 (Majanja, J), took a different position, that the time stipulation, of sixty days, in the *Small Claims Court Act*, was not strict, and proceedings conducted outside it would not be without jurisdiction.
11. I agree with *Kartar Singh Dhupar & Company Limited vs. ARM Cement PLC (In Liquidation)* [2023] KEHC 2417 (Gichohi, J). The courts, in *Martha Wangari Karua vs. Independent Electoral and Boundaries Commission & 3 others* [2019] eKLR and *Aprim Consultant vs. Parliamentary Service Commission & 2 others CACA No. E039 of 2021* (unreported), were confronted with proceedings conducted after expiry of timelines set by the statutes, the subject of the respective proceedings, being section 75 of the *Elections Act*, Cap 7, Laws of Kenya, and section 175 of the *Public Procurement and Asset Disposal Act*, Cap 412C, Laws of Kenya. It was held, in both matters, that the provisions were in mandatory terms, and once the time expired, the court lacked jurisdiction, and whatever determinations it came to were null and invalid. I see no difference, in character and substance, between the time stipulations in section 34(1) of the *Small Claims Court Act*, and those in section 75 of the *Elections Act* and section 175 of the *Public Procurement and Asset Disposal Act*.
12. Why do I say so? Section 34(1) of the Small Claims Act does not just set a time limitation of sixty days, within which these claims should be heard and determined. It goes on to direct that the suits are to be heard and determined on the same day, so far as that would be practicable, and, if not, on a day-to-day basis, without adjournment, with the objective that the proceedings, inclusive of the determination, are concluded before sixty days expire. If the sixty day limitation stipulation was not meant to be strict, the drafters of that provision would, no doubt, have not taken the trouble to point out that the claims should be heard and determined the same day, and, if that cannot work, on a day-to-day basis, without adjournment, until completion and conclusion.
13. To achieve the objective of concluding the matter within sixty days, section 34(3) outlaws or bars adjournments, save for “exceptional and unforeseen circumstances.” Section 34(4) then outlines what these “exceptional and unforeseen circumstances” would be. The objective, of outlawing adjournments, is so that the court is able to hear and determine the matter within the strict timeline of sixty days.
14. I am alive to the argument, about the clause in section 34(1), “so far as is practicable.” That is that it makes section 34(1) permissive rather than mandatory. I disagree. The clause, “so far as is practicable,” does not apply to the entire provision, section 34(1). It is limited to the portion of the provision that provides for hearing and determination of the claim on the same day. It says, “on any particular day so far as is practicable shall be heard and determined on the same day.” It does not extend to the portions on the day-to-day basis or the sixty-day limitation.



15. The claim, in Nairobi SCCC No. E2200 of 2022, was filed sometime in May 2023, and, under section 34(1) of the *Small Claims Court Act*, it should have been disposed of within sixty days. The sixty days expired sometime in July 2023. The judgement was delivered in October 2023, way outside the sixty days limitation period set by section 34(1) of the *Small Claims Court Act*. The trial court had no jurisdiction in October 2023, when it determined the matter, and the judgement of 16th October 2023 was, therefore, a nullity. The decree, passed in it, was so passed without jurisdiction. The same is invalid.
16. Jurisdiction is at the heart of any judicial proceedings, and any act done outside of jurisdiction is invalid. There is ample caselaw on this, in such cases as *The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited* [1989] KLR 1653 [1989] eKLR (Nyarangi, Masime & Kwach, JJA), *Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA) and *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* [2019] eKLR (Karanja, Gatembu & Sichale, JJA). The issue of jurisdiction can be raised at any stage of the proceedings, and the court need not be moved by the parties, it can address the issue suo moto. See *Kenya Ports Authority vs. Modern Holdings (EA) Limited* [2017] eKLR [2017] KECA 293 (KLR) (Makhandia, Ouko & M'Inoti, JJA).
17. Consequently, I do allow the appeal herein. The judgement and decree, passed in Nairobi SCCC No. E2200 of 2022, are hereby vacated, for being invalid and null. The respondent shall have the costs. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 13TH DAY OF JUNE 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Carolyne Oyuse, Court Assistant, Milimani, Nairobi.

Advocates

Ms. Abiero, instructed by KMK Advocates LLP, Advocates for the appellant.

Ms. Ambaka, instructed by Mugo Githinji & Company, Advocates for the respondent.

