Premium Hydro Solve Limited v Oluoch (Civil Appeal E465 of 2023)
[2025] KEHC 8161 (KLR) (Civ) (11 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8161 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E465 OF 2023

DKN MAGARE, J

JUNE 11, 2025

BETWEEN

PREMIUM HYDRO SOLVE LIMITED ..... APPELLANT

AND

RACHAEL AKINYI OLUOCH ..... RESPONDENT

(An appeal from the ruling and order given by D.S. Aswani (RM) on 4.05.2023 in Milimani SCC No. E1668 of 2022.)

JUDGMENT

1. This is an appeal from the ruling and order given by D.S. Aswani (RM) on 4.05.2023 in Milimani SCC No. E1668 of 2022. The Appellant was the Respondent in the Small Claims Court. The nature of delays in conclusion of the small claims appeals, erodes the gains gotten, and is anathema to the very objectives of the Small Claims Act.

2. The guiding principles are set out in Section 3(3) of the Small Claims Act as follows:

   (3) Without prejudice to the generality of subsection (1) the Court shall adopt such procedures as the Court deems appropriate to ensure-

      a. The timely disposal of all proceedings before the Court using the least expensive method;

      b. Equal opportunity to access judicial services under this Act;

      c. Fairness of process; and

      d. Simplicity of procedure.

3. The appellant was aggrieved by the said decision and filed a humongous 9-paragraph argumentative memorandum of appeal. The grounds are argumentative, unseemly and do not please the eye. Order 42 Rule 1 requires that the memorandum of appeal be concise. The same provides as doth:

    1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

    2. The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

4. The appeal raises three issues for determination obscured in the mammoth memorandum of appeal, that is:

    a. Whether the court erred in upholding that there was service.

    b. Whether the court erred in failing to set aside ex parte judgment.

    c. Whether the court erred in entering judgment in the sum of Ksh. 1,190,000/=.

5. A brief background of the case is that a contract was entered into in December 2021 for drilling a borehole in Maseno on Land Parcel Number Kisumu/Karateng/2254. A sum of Ksh. 1,058,000/= was paid.

6. There appears to have been issues regarding the building of the borehole and it collapsed. This resulted in it becoming unusable. A sum of Ksh. 1,058,000/= was sought.

7. Judgment in default was entered into. The Appellant sought to set the same aside. They filed a draft response. It was their defence that they did their part of the bargain and were not responsible for the collapse of the borehole. The court upon hearing the parties, dismissed the application. The court did not find whether or not the appellant had a good defence.

Submissions

8. The Appellant filed submissions dated 19.6.2024 and urged me to allow the appeal, while the Respondent filed submissions dated 29.7.2024. They urged the court to dismiss the appeal as proper service had been done. They relied on Order 5 Rule 22B of the Civil Procedure Rules and some sections of the *Civil Procedure Act*. The Act is not applicable to the Small Claims Court.

9. They stated that the appellant did the work incompetently resulting in extra costs, thus urging me to dismiss the appeal. I have analyzed the respective submissions and I am satisfied with the arguments posed by either party. I shall subsume them in the judgment.

Analysis

10. The Court of Appeal had this to say in regard to Rule 86 [now Rule 88] of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> "We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel

to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:

> " "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

11. The court abhors repetitiveness of grounds of appeal which tend to cloud the key issues in dispute for determination by the court. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that:

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross (Legal personal Representative of Elijah C.A. Koross) v Hezekiah Kiptoo Komen & 4 others [2015] eKLR, the court of appeal of appeal [G.B.M. Kariuki, Kiage & Murgor JJA] posited as follows:
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> The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.

12. This matter raises a fundamental question on the efficacy of the *Small Claims Court Act* and its capacity to render justice to the parties in complex matters of this nature. The court in setting aside must consider that the right to be heard is sacrosanct and can only be taken away if a party refuses to be heard and has nothing useful to say from the draft response. There are mainly two considerations in law for setting aside. The first one is whether there was service. The second one is whether, the respondent has a triable defence. In the case of Yooshin Engineering Corporation v Aia Architects Limited (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR) (7 July 2023) (Judgment), the Court of Appeal restated the position as follows:

> Even where the judgment is regular, the court still retains the wide discretion to set the same aside though if the Court decides to set aside the judgment, depending on the circumstances, it may do so on conditions that are just. That discretion, being wide, the main concern is for the court to do justice to the parties, and in so doing the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. It has however to ask itself under what conditions, if any, it ought to set aside the judgment and such conditions, if appropriate, must be just to both the Plaintiff and the Defendant.

13. Discretion is at all material times judicious. It cannot be capricious or arbitrary. An improper exercise of discretion is a question of law and not fact. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

14. The first question was whether there was in law, service of the process. This is a question of law and not fact. Service is provided under Rules 7 and 35 of the Small Claims Rules. Rule 7 of the said rules provide as follows:

(1) The claimant shall serve a copy of the Statement of Claim on each of the respondents named in the Statement in the manner prescribed under rule 35.

(2) If the claimant fails to serve a Statement of Claim within six months from the date on which it was filed, the claim shall be deemed as having been abandoned, whereupon it shall stand dismissed.

(3) Despite subrule (2), the claimant may apply to the Court in writing to have his or her claim reinstated giving reasons for failure to serve, and a claim dismissed under subrule (2) may be reinstated under this subrule only once.

(4) Despite subrule (3), the Court shall not reinstate any claim under this Rule in any case where-

(a) the claim relates to an accident which took place more than three years before the date of the application; or

(b) the claim arises from a contract entered into between the claimant and the respondent more than six years before the date of the application.

15. On the other hand Rule 35 provides as follows regarding service:

(1) Service of any document under these Rules shall be made by delivering a copy thereof personally to the party upon whom it is to be served and, where there are more than one party to be served, on each of them.

(2) Wherever it is practicable, service shall be made on each party in person unless they have an agent authorised to accept service, in which case service on the agent personally shall be sufficient.

(3) The person served under this rule is required to endorse an acknowledgment of service on the original document:

> Provided that, if the Court is satisfied that the party or such agent or other person has refused so to endorse, the Court may declare the document to have been duly served, and a Certificate of Service shall be sufficient proof of service.

(4) Where it is not practicable to effect personal service of a document on a party in accordance with this rule, service may be effected by mail addressed to the party's last known postal address, and a certificate of posting in that regard shall be attached to the Certificate of Service.

(5) Where the respondent is a corporation, the claimant may—

(a) send by registered mail a copy of the document to the registered office of the corporation, and obtain a certificate of posting; or

(b) deliver a copy of the document—

(i) at the registered office of the corporation;

(ii) at the principal place of business of the corporation; or

(iii) to a director, chief officer, manager, Receiver or Liquidator, or Receiver Manager, of the corporation.

(6) The person served pursuant to subrule (6) (b) is required to sign and affix a stamp or seal of the corporation on the original document in acknowledgment of service.

(7) This rule applies with necessary modifications, subject to section 13 of the *Government Proceedings Act*, to service of documents on the Government for the purpose of, or in connection with, civil proceedings against the Government

16. Though the Small Claims Act and the small claims court rules are more recent, there has been no introduction of the equivalent of Order 5 rule 22 B, which provides as follows:

(1) Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used Email address.

(2) Service shall be deemed to have been effected when the Sender receives a delivery receipt.

(3) Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.

(4) An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.

17. Even if the above were the case, there must not only be sending of the emails but also Electronic Mail Service delivery receipt confirming service. The court did not find it necessary to address the absence of Electronic Mail Service delivery receipt confirming service.

18. Nevertheless, the extent of the application of the Civil Procedure Rules is confined to execution pursuant to Rule which provides as follows:

(1) Any order or decree of the Court shall be enforceable in accordance with the Civil Procedure Rules.

19. In as much as it is tempting to rely on the Civil Procedure Rules, the same are not applicable in the small claims court except at execution stage. Ipso facto, there was no service. Indeed, the rules provide that the alternate service is to be effected in case there is inability to serve in compliance with Rule 35(1) of the Civil Procedure Rules.

20. Even if the court were to rely on the Civil Procedure Rules, the same require evidence of delivery by way of Electronic Mail Service delivery receipt confirming service.The certificate of service indicate that they refused to sign which is not tenable.

21. Having found that by law, there was no service, the entry of judgment was erroneous and ought to have been set aside ex debito justiceae. The raison d'être for personal service is the limited nature of the time for entry of appearance and filing of defence. Having found that no service was attempted, the Appellant was entitled as of right to be served and to enter appearance.

22. Though this is enough, the second aspect is whether there were triable issues in the defence. In the draft defence the appellant had indicated that the appellant carried out its duty. This aspect is admitted by the Respondent save that they claim for shoddy work. The Respondent's claim is not that the work was not carried out but that the work of drilling a borehole was not done to the standard required. It is not that the work was not carried out. This then raises the question whether, this was a claim in contract for drilling a borehole or liability for defects.

23. Further, the most curious aspect is that the contract was carried out in a parcel of land in Kisumu but the suit is filed in this court. It was doubtful whether, the case fell under the jurisdiction of the Small Claims Court in Nairobi by dint of Section 11 of the Small Claims Act. The same provides as follows:

    (1) The Chief Justice shall determine and publish a notice in the Gazette designating the local limits of the jurisdiction of Small Claims Court.

    (2) When determining the local limits of the jurisdiction of the Court, the Chief Justice shall ensure that such Courts are accessible in every sub-county and progressively in other decentralized units of judicial service delivery.

24. Performance of a contract is a good defence to a claim of this nature. It is irrelevant that there was delay in entry of appearance, when service was not effected. The net effect is that the Appellant satisfied both limbs for grant of orders sought.

25. Before I depart, I need to address the orders that ought to be given. The suit in the court below was filed in June 2022, a period of over 3 years. There is no stretch of imagination that the period is outside 60 days. The time for completing small claim matters has been misunderstood from my decision in Biosystems Consultants v Nyali Links Arcade (Civil Appeal E185 of 2023) [2023] KEHC 21068 (KLR) (31 July 2023) (Ruling), where I stated as follows:

> My take is that we look at the provisions purposively. The timelines did not create proprietary rights. In the cases referred to earlier, there are consequences given for non-compliance.
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> 54. I don't think the legislative intent of section 34 of the Small Claims Act is to impose unnecessary bottlenecks. Even tax statutes have timelines for paying or declaring taxes. It is never that non-payment makes those taxes void. There should be consequences. In the *Income Tax Act*, the non-compliance with deadlines does not vitiate the taxes. It attracts known penalties. What are the consequences under section 34 of the Small Claims Court?
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> 55. A court is not entitled to impose a penalty that was not hitherto anticipated. The parties must know, a priori, the consequences of their actions. Any act, especially one promoting certain aspects of *the constitution* cannot be read mechanically.
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> The purpose of the *Small Claims Court Act* is to facilitate expeditious disposal of the disputes while at the same time respecting the right to be heard. The net result is that balancing the two may result at times to overshooting the 60 days. The 60 days do not have penal consequences for good reason. They are

aspirational. This is part of having access to justice over amounts that need not be in the normal system. Allowing the application will open floodgates that will eventually defeat the purpose of the Act.

57. It is my take that the non- compliance goes to the court's performance and is answerable internally. It cannot affect parties who are in court and ready to be heard. I have seen defendants use various gimmicks to have matters adjourned and thereafter turn around to say, 60 days are over. The parties have wasted a full month arguing in this court and with preliminary objections that are much ado about nothing.

26. This was compared with the decision of Gichohi J in the Case of Kartar Singh Dhupar & Company Limited v ARM Cement PLC (In Liquidation) (Civil Appeal 129 of 2022) [2023] KEHC 2417 (KLR) (Commercial and Tax) (23 March 2023) (Judgment), where she stated as doth;

> Guided by these authorities, this court is satisfied that the judgment delivered by Hon CA Okumu (Ms.)/Adjudicator on August 23, 2022 was done outside the statutory timelines set under section 34 of the *Small Claims Court Act* and hence made without jurisdiction. It is therefore a nullity, bereft of any force or effect in law.

27. Looking at both decisions, it is clear that Section 34 of the Small Claims Act is aspirational but is not repealed. Courts must strive to adhere to the days and each case turning on its own facts. Given the provisions of the said section 34, it is not possible to return the matter for rehearing. The claim is still within time. The best option is to file a fresh suit in the area where the transaction arose, that is in the Chief Magistrates Court in Kisumu or the local limits where land parcel number Kisumu/Karateng/2254 is situate.

28. The consequence of the foregoing is that the appeal is merited and is allowed. The next question is who is to bear the costs? The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

29. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

30. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

31. The Appellant was successful in this appeal. They are entitled to costs. A sum of Ksh 45,000/= will suffice. Costs in the small claims court are governed by section 33 of the Small Claims Act as follows:

    (1) The Court may award costs to the successful party in any proceedings.

    (2) In any other case parties shall bear their respective costs of the proceedings.

    (3) Without prejudice to subsections (1) and (2), the Court may award to a successful party disbursements incurred on account of the proceedings.

    (4) Except as provided in subsection (2), costs other than disbursements, shall not be granted to or awarded against any party to any proceedings before a Court.

32. None of the parties are successful in the small claims court. The effect is that each party will bear their costs in the Small Claims Court.

Determination

33. In the upshot, the court makes the following Orders:

    a. The appeal is allowed. The judgment and decree of the Small Claims Court in Milimani Small Claims Case Number E1668 of 2022 is set aside. In lieu thereof, I substitute with an order striking out the claim in the Small Claims Court.

    b. Each party to bear their costs in the lower court.

    c. The Respondent be at liberty to file suit within the local limits of land parcel number Kisumu/Karateng/2254.

    d. Costs of 45,000/= to the appellant in this appeal.

    e. 30 days stay of execution.

    f. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JUNE, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Malenyo for the Appellant

Mr. Ometo for the Respondent

Court Assistant – Jedidah