Ambani v Akatinda (Civil Appeal E140 of 2023)
[2025] KEHC 10228 (KLR) (17 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10228 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL E140 OF 2023

AC BETT, J

JULY 17, 2025

BETWEEN

DAVID MWOMBE AMBANI ..... APPELLANT

AND

SYLVESTER AKATINDA ..... RESPONDENT

(Being an appeal from the Judgement and Decree of the Honourable S.O Wayodi, R.M/Adjudicator in the Small Claims Court at Kakamega in SCCC No. E087 of 2023 delivered on the 2nd June 2023)

JUDGMENT

Introduction

1. Before me is the Appellant's appeal against the ruling of the Small Claims Court in Kakamega SCCC No. E087 of 2023.

2. The impugned ruling was on the Applicant's application for review of the court's judgment delivered on 23rd June, 2023 which the court dismissed on grounds inter-alia that, the Appellant had not proved discovery of new evidence to warrant review.

3. In a nutshell, the Appellant contends that the court misdirected itself on the legal threshold required to review its judgment in view of the provisions of Section 30 of the *Small Claims Court Act* and the pleadings filed in court.

Issues for Determination

4. Having reviewed the parties' submissions and pleadings on the matter, this court construes the following singular issue for determination:

Whether the Learned Trial Adjudicator erred in dismissing the Appellant's application for review.

5. The following provisions of Section 41 of the *Small Claims Court Act* are instructive in addressing this issue:

> 41. Review of orders or awards of the Court
>
> (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—
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> (a) the order was made ex-parte without notice to the applicant;
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> (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. (emphasis added)

6. A cursory look at the application dated 14th August, 2023 reveals that the main ground canvassed by the Appellant was discovery of new and important evidence namely, a Settlement Agreement dated 15th February, 2023.

7. The Appellant contended that the Settlement Agreement was not available to be adduced in court as he was not privy to this suit having proceeded in court. That his former advocates did not receive proper instructions from him but rather got them from his Insurer.

8. In her analysis, the Learned Adjudicator dismissed this argument on grounds that the Appellant had been duly served, hence the reason why the Learned Counsel Mr. Imbugwa informed the court on 3rd May, 2023, that he had been instructed and sought time to file a response.

9. On my part, I also note that there are several returns of service on record including but not limited to, the Affidavits of Service sworn on 15th day of April, 2023, 24th day of April, 2023 and 15th day of May, 2023; all speaking to service of various court processes upon the Appellant.

10. The Appellant's contention that he was not privy to the court's proceedings cannot therefore lie. Accordingly, this court cannot fault the Learned Adjudicator's finding that the Appellant had been properly served.

11. The only question for consideration, therefore, is whether the Settlement Agreement dated 15th February,2023, could have been considered new and important evidence not previously available but subsequently discovered after Judgment was entered.

12. In this regard, the Appellant asserted that his former Advocates never took proper instructions from him but rather from his Insurer and that had they received instructions from him, it could have formed part of his response. With utmost respect to the Appellant, this argument rings hollow.

13. For the Insurer to issue instructions to its Advocates, it must have first taken instructions from the Appellant, who was under a legal obligation to promptly hand over summons to enter appearance and

relevant information and/or documents to enable the Insurer take up his defence. The Appellant was also expected to cooperate with his Insurer and its legal team to facilitate the preparation of a defence and respond to the claim. Consequently, the Appellant ought to have furnished his Insurer with the Settlement Agreement dated 15th February 2023 at the earliest opportunity.

14. In view of the fact that the Appellant admits to having had the Settlement Agreement all along until Judgment was entered, the said Agreement cannot for all intents and purposes, be considered to be new and important evidence. This was the position taken by the court in Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR where the court faced with a similar application, albeit premised on the provisions of Order 45 of the Civil Procedure Rules which provisions are somewhat analogous to those expressed under Section 41 of the Small Claims Act, held as follows:-

> " For material to qualify to be new and important evidence or matter, it must be of such a nature that it could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court."

15. In London Distillers (K) Ltd v Cabinet Secretary, Ministry of Education & 4 others [2022] eKLR, it was held:-

> " To summarise them, firstly, the applicant must also establish that the new and important matter or evidence was not within its knowledge after the exercise of the normal diligence required of any conscientious litigant; secondly, the new and important matter and evidence must be something which existed at the date of the decree, hence the section does not authorise the review of a decree which was right when it was made on the ground of the happening of some subsequent event; thirdly the Court would decline to grant the application where the applicant is not seeking to give effect to its intention at the time the decision was made but to open the doors to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made; Fourthly, such new and important matter or evidence is of such nature that it would lead any court of law applying its mind to the facts and the law applicable to the case reach a determination that if the court which heard the original application had the advantage of the new evidence, it would have reached a different decision other than the one that was rendered; and lastly, it must be proved that the applicant had acted with due diligence and the existence of the evidence was not within his knowledge and the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."

16. The decision of the Court of Appeal in Samuel Amugune & 4 others v. Attorney General [2018] eKLR cited by the Appellant, is distinguishable in that, the court found that new and additional evidence that was not before the trial court 8th October, 2004 being Deeds of Settlement dated 28th September, 2006 had since been disclosed.

17. The court also notes that the application for review was filed on 28th August, 2023, whereas the impugned Judgment was delivered on the 2nd day of June, 2023. This filing was done, without leave, after the thirty-day deadline imposed under Section 41(2) of the Act, which is couched in mandatory terms.

18. The court also finds that the Appellant's contention that the Learned Adjudicator overlooked the provisions of Section 30 misconceived, as the said Section clearly provides that claims may be canvassed by way of documentary evidence.

19. In any event, it is evident from the proceedings that directions to proceed as per the provisions of Section 30 of the Act were taken by consent on 15th May, 2023 after the Respondent (now Appellant) had been granted leave, twice before; to file his response.

20. The Appellant cannot thus be heard claiming that the court overlooked the provisions of Section 30 and/or otherwise misdirected itself while he failed to take advantage of the opportunities extended to him to present his case by filing a response to the claim.

21. In the circumstances, this court finds no merit in the present appeal and hereby dismisses it with costs to the Respondent.

22. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 17TH DAY OF JULY 2025.

A. C. BETT

JUDGE

In the presence of:

No appearance for the Appellant

No appearance for the Respondent

Court Assistant: Polycap