Mwanyoha v Mombasa Maize Millers Limited (Civil Appeal E315 of 2023) [2025] KEHC 12083 (KLR) (10 July 2025) (Judgment)

Neutral citation: [2025] KEHC 12083 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E315 OF 2023

F WANGARI, J

JULY 10, 2025

BETWEEN

HASSAN MOHAMED MWANYOHA .... APPELLANT

AND

MOMBASA MAIZE MILLERS LIMITED .... RESPONDENT

(Being an appeal against the Judgment of Hon. Gatambia Ndungu (RM) delivered on 31st October 2023 in Mombasa SCCC No. E221 of 2023)

JUDGMENT

1. The appeal herein arises from a Statement of Claim dated 02/05/2023 where the Claimant/ Respondent was seeking for compensation for loss or damage to property which occurred on or about the 26/05/2020 valued at Kshs. 403,610/-.
2. The Claimant stated that on 26/05/2020, the Claimant's authorized driver was driving the Claimant's motor vehicle registration number KCG 856P along the Likoni Ferry area and as he was ascending to the ferry ramp, the Respondent's motor vehicle registration number KCA 858N which was being carelessly driven suddenly rammed onto the Claimant's motor vehicle from behind. That as a result of the accident, the Claimant's motor vehicle registration number KCG 856P was extensively damaged.
3. The Claimant stated that they reported the accident at Likoni Police Station where upon investigation the Respondent's motor vehicle registration number KCA 858N was found to blame. The Claimant therefore blamed the Respondent for the accident. That in turn, the Claimant reported the accident to its insurers Fidelity Insurance Co. Ltd who then paid for all the repairs and related costs of Kshs. 403,610/-.
4. The Claimant/Respondent prayed for compensation for material damage to motor vehicle registration number KCG 856P of Kshs. 403,610/- being repair costs of Kshs. 363,500/-, assessor's fees of Kshs.

11,400/-, and tracing fees of Kshs. 28,710/- together with costs of the claim (to be assessed by the court), other appropriate relief, and interest on judgment at court rate.

5. The Respondent filed a Response to the Statement of Claim dated 12/06/2023 where he denied averments therein save for admitting jurisdiction of the court and stating that without prejudice and if it is established that an accident occurred, the same was caused solely by the Claimant, and/or his authorized driver, agent and/or servants. The Respondent further averred that the statement of claim as drawn discloses no cause of action and is thus bad in law.

6. This suit was heard in the Small Claims Court and judgment delivered on 31st October 2023 where the court found that the Respondent was to be wholly held liable for the accident. Costs of the suit were awarded to the Claimant.

7. Being dissatisfied, the Appellant appealed the judgment through the Memorandum of Appeal dated 01/11/2023. The Trial Magistrate faulted inter-alia for holding that the Defendant was liable in negligence without the particulars of negligence pleaded and proved, in holding that the Plaintiff had proved their case on a balance of probability, in holding that the court had jurisdiction in the matter after 60 days and further in issuing a Judgment after 26 days from date of filing submissions hence the judgment is a nullity ab-initio and in failing to consider and take into account the Appellant's defence.

8. The Appellant prayed for orders that the Judgment dated 31/10/2023 be set aside and replaced with an order dismissing the suit with costs, and that the Appellant do have costs of the appeal herein.

9. The appeal was canvassed by way of written submissions. The Appellant in their submissions dated 08/05/2024 argued that for a cause of action in negligence to be sustained, particulars of the same must be pleaded and the courts stated as such in Mount Elgon Hardware v United Millers Ltd (1996) eKLR, Paul Gakunu Mwinga v Nakuru Industries Ltd (2009) eKLR and Jerusha Auma Ogwari v Ibrahim Aisha Hersi alias Aisha Hersi Ibrahim, Mombasa HCCA No. 223 of 2022.

10. The Appellant submitted that the police did not blame the Appellant and that evidence of police officers who did not witness the accident is of zero probative value particularly when the police investigation diary is not produced in evidence. According to the Appellant, the police evidence cannot completely prove negligence, a position reiterated in Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021) (2022) KEHC 7 (KLR) (24 January 2022) (Judgment). Further, that evidence of a police officer who was not at the scene of the accident at the time of the accident cannot be used to prove how an accident happened as set out in David Kajogi M'mugaa v Francis Muthoni (2012) eKLR, which position was reiterated in the case of Kennedy Nyangoya v Bash Hauliers (2016) eKLR.

11. The Appellant submitted that there was no evaluation of evidence at all. That it was alleged the Appellant was liable because the defence was a bare denial. That however, a look at the defence filed showed that the Appellant pleaded particulars of negligence while the Respondent did not attribute any particulars of negligence against the Appellant. That if the defence and claims by the Respondent were to be considered, only the Appellant's pleadings disclosed the cause of action.

12. The Appellant argued that the case of Margaret Njeri Mbugua v Kirk Mweya Nyaga (2016) eKLR applied by the court was not an appropriate caselaw in the circumstances as the case was on a summary decision made under Order 2 Rule 15 of the Civil Procedure Rules. That it is apparent the Respondent not only had the duty of pleading negligence with particulars but proving it with evidence which they did not.

13. The Appellant relied on the case of Morris Njagi v Beatrice Wanjiku Kuria (2019) eKLR. That further, in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi (2014) eKLR, it was held that

even where a party does not file a defence, the Claimant still has a duty to prove its case on a balance of probabilities.

14. The Appellant stated that a case of negligence where parties have different versions of the accident cannot be urged on the basis of documents. That the magistrate was wrong on hearing the matter under Section 30 of the *Small Claims Court Act* and only cross examination of witnesses could have helped the court make a determination.

15. On whether the court had jurisdiction to listen to the matter at the lapse of 60 days from date of filing and issue a judgment 26 days from the date of the close of pleadings, the Appellant cited Section 34 of the *Small Claims Court Act* which states that the claim should be decided within 60 days of filing and that judgment should be delivered at most 3 days from the date of filing pleadings.

16. That the wording of Section 34 (1) and (2) of the *Small Claims Court Act* was made mandatory for the sole reason of expediting proceedings before the court and the prescribed timelines subsume jurisdiction as held in the case of Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 Others (2018) eKLR, Joint Venture of Lex Oilfield Solutions Ltd & CFAO Kenya Ltd v Public Procurement Administrative Review Board & 4 Others (Civil Appeal 022 of 2022) [2022] KECA 424 (KLR) (4 March 2022) (Judgment) and Kartar Singh Dhupar & Company Limited v ARM Cement PLC (in liquidation) (Civil Appeal 129 of 2022) [2023] KEHC 2417 (KLR).

17. The Appellant stated that according to the position in Phoenix of E. A. Assurance Company Limited v S. M. Thiga T/A Newspaper Service (2019) eKLR, a court acting without jurisdiction is acting in vain and engages in a nullity. Further, discretion must be exercised according to law as was held in Patriotic Guards Ltd v James Kipchirchir Sambu (2018) eKLR. That the Small Claims Court cannot purport to exercise its discretion in a manner that is in direct conflict with the express provisions of the Act that creates it. The Appellant prayed that the appeal be allowed, judgment set aside and the suit dismissed with costs.

18. The Respondent in their submissions dated 20/01/2025 argued on whether the court erred in finding the Appellant 100% liable by placing reliance on the witness statement of the Appellant's driver dated 02/05/2023. The Respondent submitted that admission by the Appellant's driver that his brakes failed is a clear indication of negligence for allowing himself to drive a faulty car. That the braking system of a vehicle does not just fail and that they did so because the vehicle was not in a good mechanical condition.

19. The Respondent relied on the finding of the court in Titus Kamau Gachanga v Wahogo Edward & Another (2019) eKLR and Chinga Tea Factory Company Ltd v Miugu General Transport Co. Ltd (1987) KLR 590. According to the Respondent, evidential burden clearly shifted to the Appellant to prove that in the circumstances failure in the braking system was unavoidable. That the Appellant failed to show any steps it had made in maintaining the vehicle and having failed to do so, the trial court was right in finding him 100% liable.

20. On jurisdiction of the Small Claims Court to determine a dispute past the statutory 60-day time limit, the Respondent submitted that it is now trite law that the court has jurisdiction to hear matters past the 60 days' timeline as it has been held in various judgments and that the said timeline is discretionary and not mandatory.

21. The Respondent relied on the case of Lumumba v Rift Gas Limited (Civil Appeal E805 of 2022) [2023] KEHC 25998 (KLR) (Civ) (30 November 2023) (Judgment). The Respondent added that the small claims court had jurisdiction to render judgment past the 60 days' timeline and urged this court

to dismiss the ground that judgment delivered outside the 60-day period prescribed in Section 34 of the *Small Claims Court Act* is invalid. The Respondent prayed that the appeal be dismissed with costs.

Analysis

22. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in Selle v Associated Motor Boat Co. (1968) E.A 123 as follows: -

> " ... Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ..."

23. I have considered the Record of Appeal and submissions by the parties. The issues for determination are: -

    a. Whether the Small Claims Court had jurisdiction pursuant to Section 34 of the *Small Claims Court Act*

    b. Whether the small claims court misapplied the ratio decidendi in the case of Margaret Njeri Mbugua v Kirk Mweya Nyaga (2016) eKLR

    c. Whether the small claims court erred in holding the Appellant 100% liable

    d. Who should bear costs.

24. On the first issue, the Appellant maintained that the wording of Section 34 (1) and (2) of the *Small Claims Court Act* was made mandatory for purposes of expediting proceedings and the timelines include jurisdiction. That a court acting without jurisdiction is acting in vain and engages in a nullity. That the Small Claims Court cannot purport to exercise its discretion in a manner that is in direct conflict with express provisions of the Act that creates it.

25. The Respondent argued that the court has jurisdiction to hear matters past the 60 days' timeline as it has been held in various judgments and that the timeline is discretionary and not mandatory. The Respondent therefore urged this court to dismiss the ground that judgment delivered outside the 60-day period prescribed in Section 34 of the *Small Claims Court Act* is invalid.

26. Section 34 of the *Small Claims Court Act* provides: -

    1. 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.

    2. Judgment given in determination of any claim shall be delivered on the same day and in any event, not later than three (3) days from the date of the hearing.

    3. The Court may only adjourn the hearing of any matter under exceptional and unforeseen circumstances which shall be recorded and be limited to a maximum of three adjournments.

27. This court is however of the view that the purpose of timelines set under Section 34 of the *Small Claims Court Act* was to ensure timely disposal of suits and not to cause injustice to the parties.

28. Hon. Majanja, J. in Crown Beverages Limited v MFI Document Solutions Limited (Civil Appeal E833 of 2021) [2023] KEHC 58 (KLR) (Civ) (17 January 2023) (Judgment) stated as follows: -

> "Although section 34(2) of the SCCA is couched in mandatory terms, the court must look at the context of the provision in light of the guiding principles which include, inter alia, the timely disposal of all proceedings before the court using the least expensive method. The provision as to delivery of judgment is meant to be 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.
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> 10. The issue of breach of timelines for delivery of judgment is not a novel issue and has been dealt with by our courts in reference to order 21 rule 1 of the Civil Procedure Rules which provides that judgments must be delivered within 60 days upon conclusion of the hearing. In Nyagwoka Ogora alias Kennedy Kemoni Bwogora v Francis Osoro Maiko Civil Appeal No 271 of 2000 (UR) the Court of Appeal observed as follows: The real question is what is the consequence of non-compliance therewith? no doubt that rule is an important one in the expeditious dispensation of justice. And it is made to be obeyed. However, if non-compliance with the rule were to have the effect contended for by the appellant, we think the overall result would be more injustice than justice to the parties. A lot of time and resources spent in litigation would come to naught if judgments delivered after the expiry of 42 days were to be voided or declared void ipso facto. The rule cannot and in our view could not have been intended to deprive a trial judge of his jurisdiction to write and pronounce judgment in a case he has heard. In our considered view, while non-compliance with the rule and particularly persistent non-compliance or inordinate delay in compliance should call for censure of the judicial officer concerned from those in-charge of judicial administration, it should not be a ground for vitiating a duly delivered judgment. Being of that persuasion we would reject ground 1 of appeal.
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> 11. There may be instances where the delay is inordinate and such delay prejudicial to the parties. In such cases, the court may set aside the judgment as was held by the Court of Appeal in Manchester Outfitters Services Limited and Another v Standard Chartered Financial Services Limited and Another [2002] eKLR. The appellant does not contend that the failure to deliver the judgment within the stipulated timelines was prejudicial or that the delay was inordinate. I therefore reject the appellant's contention that the judgment is null and void."

29. In light of the above, this court finds that failure to comply with the timelines does not invalidate the judgment. This ground therefore falls.

30. On the second issue, it was the position of the Appellant that the case of Margaret Njeri Mbugua v Kirk Mweya Nyaga (2016) eKLR as applied by the court was not an appropriate case law in the circumstances. That the said case was on a summary decision made under Order 2 Rule 15 of the Civil Procedure Rules.

31. The Trial Court held as follows;

> " 10. On the question of liability, the Claimant's evidence showed that it was the driver of the Respondent's motor vehicle who was to blame for the accident. This was controverted by a mere denial. Upon interrogating the denial, the Court did also consider the holding in Margaret Njeri Mbugua v Kirk Mweya Nyaga (2016) eKLR where it was held as follows: -
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> > "A mere denial is not a sufficient defence and a defendant has to show either by affidavit, oral evidence, or otherwise, that there is a good defence ...
> >
> > ... When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance."
>
> 11. This court agrees with the superior court on the defence of a denial"

32. Upon perusal of the pleadings, this court has established that the Appellant in the case, Margaret Njeri Mbugua, filed a chamber summons application under Order VI Rule 13 (1) (a) & (b) praying that the defence be struck out and Judgment entered in her favour as prayed in the plaint. The Court of Appeal was of the view that a mere denial or general traverse was not sufficient as it did not provide reasonable defence. It was therefore of the view that the trial court was right in striking out the defence.

33. This court has also had the opportunity of analyzing other decisions that have applied the case and established that it has been used in the context of defences of mere denials, which defences are candidates for striking out. I therefore hold a contrary position to that of the Appellant herein that the case as applied by the court was not appropriate in the circumstances.

34. On the third issue, the Appellant in their submissions stated that for a cause of action in negligence to be sustained, particulars must be pleaded and proved. The Appellant also stated that evidence of the police cannot completely prove negligence and that evidence of a police officer who was not at the scene of the accident at the time of the accident cannot be used to prove how the accident happened.

35. That pleadings by the Respondent neither failed to disclose the cause of action nor attribute particulars of negligence against the Appellant. That even where a party does not file a defence, the Claimant still has a duty to prove its case on a balance of probabilities. That the court was wrong in hearing the matter under Section 30 of the *Small Claims Court Act* and only cross examination of the witnesses could have helped the court make a determination.

36. The Respondent argued that admission by the Appellant's driver in their witness statement that his brakes failed is a clear indication of negligence for allowing himself drive a faulty car. That evidential burden shifted to the Appellant to prove that in the circumstances failure in the braking system was unavoidable. The trial court was therefore right in finding him 100% liable.

37. First, on the mode of drafting pleadings in the Small Claims Court and hearing the matter under Section 30 of the *Small Claims Court Act*, this court placed reliance on the holding in the case of Elrons Limited v Basil (Civil Appeal E890 of 2022) [2024] KEHC 6614 (KLR) (6 June 2024) (Judgment) which is self-explanatory and stated: -

> " In terms of procedure, section 17 of the Small Claims Act provides that the Small Claims Court shall have control of its own procedure, in the determination of claims before it. Part

of that procedure is that set out in section 30 of the Act, of proceeding by documents only, where, subject to agreement of all parties to the proceedings, the court may determine any claim, and give such orders as it considers fit and just, on the basis of documents and written submissions, statements or other submissions presented to the court. Regarding the framing of pleadings, the applicable provision is section 24 of the Act, which does not require that allegations of negligence must be particularised."

38. This court further looked at the pleadings and evidence on record for both parties. The Claimant/Respondent on the one hand pleaded and sufficiently proved particulars of negligence. The Appellant on the other hand despite mere denials in the Response to the Statement of Claim admitted in their witness statement as follows: -

> " I am a qualified driver since 1992 ...I was transporting sand ... We were moving at a very low speed as we headed towards entering the ferry at a steep slope. Due to the steep slope, the motor vehicle speed went up suddenly yet my foot was on the brake. I tried to push, pull and pump the brake but it did not respond. On my right side there were people who were leaving the ferry and on the left side there was a ten wheeler trailer carrying flour. Due to the failure of the break and the steep slope, my car was moving at a relative speed than what I wished despite all my efforts at controlling it. I saw that I was heading into the ocean and fearing death, I tried to save myself so I drifted to the left where the trailer that carried floor was in the agony/spur of the moment. I crushed into the maize flour lorry. The maize flour lorry then stopped my further movement as I crushed into it ..."

39. It is the opinion of this court that the loss suffered by the Respondent was established to the required standard. The Small Claims Court in their determination considered the evidence and pleadings of both parties and was right in holding that the Appellant was wholly liable for the accident. I find no reason to interfere with the said finding.

40. On costs, the same follows the event. However, the court retains discretion whether to award the same or not. The Respondent being the successful party is awarded costs.

Determination

41. Following the foregone discourse, the upshot is that the following orders do hereby issue;

    a. The appeal lacks merits and is hereby dismissed.

    b. Costs awarded to the Respondent.

    It is so ordered

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10TH DAY OF JULY, 2025

....

HON. F. WANGARI

JUDGE

In the presence of: -

Mr. Kioko Advocate for the Appellant

Ms. Wekesa Advocate for the Respondent

Ms. Getrude, Court Assistant