



REPUBLIC OF KENYA



KENYA LAW
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**Ndung'u v Muigai (Commercial Appeal E003 of 2023)
[2025] KEHC 10376 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10376 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
COMMERCIAL APPEAL E003 OF 2023**

BK NJOROGE, J

JULY 17, 2025

BETWEEN

JOSEPH MUGURO NDUNG'U APPELLANT

AND

MARK MBUGUA MUIGAI RESPONDENT

JUDGMENT

1. This is an Appeal against the Judgement delivered on 30/6/2023 by the learned Adjudicator Hon. O.J. Muthoni. This is in (Thika) SCCCOM E934 of 2022.
2. The Small Claims Court entered Judgement for the Claimant as against the Respondent for a Sum of Kshs.570,000/- plus costs and interest until payment in full.

Background facts

3. The Appellant was the Original 1st Respondent before the Small Claims Court. The Respondent herein was the Claimant.
4. The Appellant entered into a verbal agreement with the 1st Respondent for the drilling of two boreholes on the Respondent's properties. The Respondent maintained that the agreed cost for drilling was Kshs.5,000/- per meter. The Appellant contended that the drilling costs agreed upon were kshs.9,500/- per meter. There was consensus that there was indeed a verbal drilling agreement.
5. The Appellant admitted to being paid Kshs.900,000/- and a further Kshs.450,000/- for drilling and associated costs of gravel pack, water flushing and pump testing. Further payments of Kshs.100,000/- for excavation of cotton soil and Kshs.20,000 for site visits were also admitted by the Appellant. He also admits to refunding a sum of Kshs.100,000/- out of the amount of Khss.120,000/- paid to him. This was towards the excavation and site visits.



6. The Respondent sued for a refund of Kshs.570,000/-. This is on account of costs associated with excavation, water testing, installation of water pumps and backfilling of the cotton soil. The Respondent had paid to the Appellant a total sum of Kshs.570,000/-. Since the works were not done, he claimed the refund of the monies paid and services not rendered.
7. The Appellant filed a Counter-claim for Kshs.565,000/- on account of monies that the Respondent did not pay for services rendered.
8. It is the Judgment of the Learned Adjudicator, allowing the Respondent's claim for Kshs.570,000/- that has triggered this Appeal.

Issues for determination

9. The Court has read the Memorandum of Appeal, the Record of Appeal as well as the Written Submissions filed by the parties. The Court frames two (2) issues for determination.
 - a. Whether the Appeal relates to the Judgment delivered on 30/6/2023 or the Ruling delivered on 25/10/2022 in respect of the Notice of Motion dated 10/7/2022.
 - b. Whether the Learned Adjudicator considered the Counter-claim by the Appellant.

Analysis

10. An Appeal for the decision of the Small Claim Court is pursuant to Section 38 of the Act, which states as follows;

Appeal:

1. A person aggrieved by the decision or an order of the court may appeal against that decision or order to the High Court on matters of law.
 2. An appeal from any decision or order referred to in subsection (1) shall be final.
11. An Appeal to this Court can only lie on matters of law. Put in another way, the questions to be posed to this Court by the Appellant should be questions on matters of law. What should vex this Court's mind on an Appeal should be matters or issues or questions revolving around the issues of law. On matters of fact, the learned Adjudicator sitting at the Small Claim Court has the final say.
 12. The Court relies on the decision of Wachira -vs- Mwai [2024] KEHC 3173 (KLR) where the Court said the following regarding its appellate jurisdiction.

“I have not seen a single issue of law being raised by the Appellant. It is not enough to cite very complicated Latin terms. They must be a fair and correct issue of law. The court cannot be faulted that it reached a decision on no evidence. The Small Claims Court is the queen when it comes to evidence. I have evaluated the same and noted that the court exercised its discretion correctly. In Mbogo vs Shah 1968 EA 93 the court held thus: -

“The duty of this court in an appeal against the exercise of that discretion is not to interfere unless the Judge has exercised his or her discretion wrongly in principle or perversely on the facts of the case.”



a) Whether the Appeal relates to the Judgment delivered on 30/6/2023 or the Ruling delivered on 25/10/2023. In respect of the Notice of Motion dated 10/7/2023.

13. The Court notes that the Appeal to the Court from the Small Claims Court is initiated by way of filing a Memorandum of Appeal. This is in accordance with Order 42 Rule 1 of the Civil Procedure Rules, which states as follows;
1. Form of appeal [Order 42, rule 1.]
 - (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.
14. Rule 30 of the Small Claims Court Rules also specify that Appeals lie to this Court in the manner specified by the Civil Procedure Rules, specifically Order 42 thereof.
30. Appeals
- A person aggrieved by the judgment or order of the Court may, pursuant to section 38 of the Act Appeal to the the High Court in accordance with Order 42 of the Civil Procedure Rules.
15. The Court notes that the sole Memorandum of Appeal filed in the case is dated 20/11/2023. It challenges the determination by way of Judgment of a decision by the Learned Adjudicator O.J. Muthoni on 30/6/2023.
16. The Court does not see a Memorandum of Appeal filed against the Ruling delivered dated 25/10/2023.
17. The Court therefore declines to consider an Appeal against the Ruling made on 25/10/2023, in absence of a Memorandum of Appeal to this Court. This is for the reason that it is the filing of the Memorandum that triggers this Appeal process.
18. The Court follows the decision in Wycliffe Sikuku Walusaka v Philip Kaita Wekesa [2020] KEELC 1855 (KLR).

b. Whether the Learned Adjudicator considered the Counter-claim by the Appellant.

19. The Court has perused the decision by the Learned Adjudicator. It is clear that the Trial Court framed a single issue for determination as follows;
- “The main issue for determination is whether the Respondent owes the Claimant the amount pleaded herein.”
20. That issue does not take into consideration that the Appellant had a Counter-claim of Kshs.565,200/- against the Respondent herein. It was also pleaded as a set off.
21. Even the summary of the facts of the case leaves out the Counter-claim completely.
22. The Appellant is justified in stating that he was locked out of the seat of justice. This is because he filed a case before the Court, this was by way of a Counter-claim. However, in the end, he was sent away without a determination on this Counter-claim.



23. Rules 10, 13, 14 and 15 of the Small Claims Court Rules state as follow;

10. Admission of claim, set-off, or counterclaim, etc

- (1) Where a respondent admits in writing the whole or any part of the claim or by indicating admission in the Response, with or without any proposed settlement, the Court shall enter judgment in favour of the claimant to the extent of the respondent's admission.
- (2) Subrule (1) applies, with necessary modifications, to admission by the claimant of any set-off or counterclaim in favour of the respondent.
- (3) An admission of a claim or counterclaim made in accordance with the Act shall be made in writing or orally before the Court.
- (4) Where a party admits a claim, whether wholly or partially, but fails to propose the mode of settlement, the Court may, on hearing the parties—
 - (a) direct the manner in which the claim shall be settled; and
 - (b) order execution to enforce its decree.
- (5) Where the corresponding party admits only part of the claimant's claim or respondent's counterclaim, the Court shall proceed to hear and determine that part of the claim or counterclaim which is denied.

13. Form of counterclaim and set-off

- (1) In addition to his or her response to the claimant's claim, a respondent may make a counterclaim or set-off against a claimant in Form SCC 3 as set out in the First Schedule hereto.
- (2) A respondent shall serve his or her Response containing the counterclaim or set-off on the claimant, and on every other party named in the statement of claim in accordance with rule 35

14. Respondent may abandon part of counterclaim

- (1) A respondent who has a counterclaim exceeding two hundred thousand shillings may —
 - (a) abandon that part of the counterclaim exceeding two hundred thousand shillings;
 - (b) pursue his or her counterclaim in the proceedings and recover an amount not exceeding two hundred thousand shillings; or
 - (c) file a separate claim in the Magistrates' Court to recover the whole of the amount counterclaimed.
- (2) A respondent who abandons that part of the counterclaim exceeding two hundred thousand shilling shall state in his or her response that the amount in question is abandoned.



- (3) A respondent who abandons any part of a counterclaim or set-off in accordance with this rule shall not be entitled to file a subsequent claim in any court to recover the amount stated as abandoned.
15. Claimant to respond to counterclaim or set-off
- (1) A claimant who is served with a Response to Claim and Counterclaim may take one or more of the following actions—
- (a) settle the amount counterclaimed in full by making payment directly to the respondent or by depositing the amount counterclaimed in court, whereupon the respondent shall withdraw the counterclaim;
- (b) admit the whole or part of the amount counterclaimed with or without making a proposal on the mode of payment on such terms as the parties may agree or, failing agreement, as the Court may direct; or
- (c) deny the whole or part of the counterclaim, giving reasons for the denial.
- (2) A claimant who has taken any of the actions specified in subrule (1) (b) and (c) shall file their response in Form SCC 3 as set out in the First Schedule hereto in the proceedings —
- (a) within fourteen days of service upon him or her of the response and counterclaim; or
- (b) within such time as the Court may direct
24. To this Court once a Trial Court is faced with a Claim and a Counter-claim, the Court should proceed to give a decision on both, if the Counter-claim is denied. This is more so when the Court hears both parties and reserves the matter for its determination.
25. In *Ngugi v Nduta* [2024] KEELC 540 (KLR) the High Court sitting on an Appeal was of the view, that failure to consider a Counter-claim constituted a fundamental error. Such an error would lead to the overturning of the decision of the Trial Court.
- “66. Nevertheless, the gravamen of the Appellant’s complaints relates to the contention that the learned trial magistrate fails to appreciate and comprehend the substance of the counterclaim, which evidently impleaded fraud, and thereafter supplied the requisite particulars thereof.
67. Quiet clearly, the learned trial magistrate did not appear to understand the operative pleadings that were filed by and on behalf of the Parties; and more particularly, the Appellant herein.
68. To my mind, the finding by the learned trial magistrate that the Appellant had neither pleaded nor particularized fraud, [despite the Amended Statement of Defence and Counter-claim], was misconceived and erroneous.
69. Consequently, and in this regard, I am in total agreement with the Appellant and his Learned Counsel that the learned trial magistrate did not appreciate the totality of the pleadings filed and hence arrived at an erroneous conclusion.”



26. As matters now stand, there is no determination on the Counter-claim and the set off. This renders the proceedings a mistrial as it prejudices the Appellant.
27. A determination of the main Claim would have had an effect on the determination of the Counter-claim which is in essence a cross suit. If the set off was allowed, the Appellant's liability to the Respondent would have been reduced or extinguished to the extent of the set off allowed. This Court is persuaded by that line of submission. This Court has restated that a Counter-claim is a cross suit that can exist independently. This is in the case of *Crossbridge Kenya Limited v Emerge Developments Limited* [2025] KEHC 4355 (KLR).
- “A Counter-claim is a separate suit and once filed can exist distinctively apart from the initial Claim. Such that if the Claimant withdraws his Claim, the Respondent would be free to pursue the Counter-claim.”
28. The Court is persuaded that the Appeal is merited. The matter is remitted back to the Small Claims Court for a retrial on both the Claim and the Counter-claim. Thereafter the Learned Adjudicator can give a considered decision on both.
29. If the parties are able to agree on the evidence already recorded to be adopted at the fresh trial, the Learned Adjudicator may proceed to write a judgment. Otherwise, the Trial Court may proceed to take evidence afresh. Had this been a matter that proceeded by way of documents only under Section 30 of the Small Claims Act, a further hearing by way of taking fresh evidence would not have been necessary.
30. As to costs, ordinarily costs follow the event. The Court has discretion when it comes to awarding of costs. Looking at all the circumstances herein, the fair order in view of the reasons adduced above is let each party bear his own costs of the Appeal.

Determination

31. The Appeal is allowed in its entirety in the following terms.
- a. The Judgment and Decree of the Learned Adjudicator dated 30th June, 2023 is quashed and is hereby set aside in its entirety.
 - b. This matter is remitted back to the Small Claims Court for a retrial so that the Learned Adjudicator can hear, consider and determine the original Claim and the Counter-claim/set off.
 - c. The matter be heard by any other learned Adjudicator other than Hon. O.J. Muthoni.
32. Each party to bear his own costs of the Appeal.
33. It is so ordered.

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

NJOROGE BENJAMIN. K.

JUDGE

In the presence of: -

Mr Nduati for the Appellant

Miss Ndichu for the Respondent

Court Assistant Mr. Luyai.

