KENYA LAW
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Kazungu v Kazungu (Civil Appeal E878 of 2023)
[2024] KEHC 16782 (KLR) (Civ) (1 August 2024) (Judgment)

Neutral citation: [2024] KEHC 16782 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E878 OF 2023

NIO ADAGI, J

AUGUST 1, 2024

BETWEEN

GEOFFREY ALIGULA KAZUNGU .... APPELLANT

AND

DOREEN KADII KAZUNGU .... RESPONDENT

(Being an Appeal from the Judgment of Hon. Gillian Simwato (RM) in Milimani Small Claims Court in SCC No. 4492 of 2022 delivered on 4/8/2023)

JUDGMENT

1. This appeal arises from the judgment of Milimani Small Claim Court delivered on 4/8/ 2023 in which the trial court while dismissing the Appellant's Counterclaim, awarded the Respondent Kshs. 230,450/= plus interest and costs.
2. The Claimant (Respondent herein) filed a statement of claim dated 10/7/2022 which was later amended on 14/10/2022 praying for the following reliefs:
    a. Judgment in the sum of Kshs.230,450/=.
    b. Judgment for the agreed interest at the rate of 35% per month.
    c. Interest on the total award at court rates from the date of judgment until payment in full.
    d. In the alternative to payment, an Order that the Respondent surrenders Motor vehicle KAW 926M for liquidation towards realizing the award based on the above.
    e. Any other relief deemed fit and necessary and within the realms of justice by this court.

3. The Claim was in relation to monies advanced by the Claimant to the Respondent. The Claimant alleged that the funds borrowed by the Respondent were sent via various means with some being sent to his Mpesa registered contact number while other monies were sent to the Respondent's bank account numbers. She stated that only a sum of Kshs.40,000/= was paid by the Respondent leaving a total sum of Kshs. 230,450/= outstanding.

4. In response to the Claim, the Respondent (Appellant herein) filed a Response dated 22/8/2022 which was later amended on 25/10/2022. In the Response, the Appellant insisted having repaid and/or refunded the Claimant all sums due and owing to her. He maintained that he paid the Claimant Kshs.251,650/= despite having received Kshs. 220,450/= from the Claimant and as such, it is the Claimant who instead owed him monies in the sum of Kshs.31,200/=.

5. The matter came up for hearing on 27/2/2023 when the Parties agreed to proceed by way of documents under Section 30 of the Small Claims Act, 2017.

6. Parties filed submissions and the court delivered a judgement on 8/8/2023 in which the trial Adjudicator awarded the Claimant Kshs.230,450/= plus costs and interests from the date of filing the Claim and dismissed the Respondent's Counterclaim.

7. The Appellant being aggrieved by the decision filed a Memorandum of Appeal dated 24/8/2023 raising 9 grounds. The Appellant later amended the Memorandum of Appeal to include one more ground. The Amended Memorandum of Appeal is dated 24.08.2023.

8. I have perused the Record of Appeal, considered and weighed the rival submissions filed on behalf of the Parties by their respective counsels on the appeal and also taken into consideration the judicial decisions cited.

9. The duty of this court on appeals from the Small Claims Court is clearly set out in the Small Claims Act.

   An appeal from the small claims court is on issues of law only. This is pursuant to Section 38 of the *Small Claims Court Act*. It provides that:

   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."

12. What constitutes, points of law, has been settled. In the case of Peter Gichuki King'ara Vs Iebc & 2 Others, Nyeri Civil Appeal No. 31 Of 2013, (Court of Appeal) (Visram, Koome & Odek, JJA) Of 13.02.2014, the Court of Appeal stated as follows: -

> " It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanor – is an issue of law."

10. This court will consider the following issues which cut across both the Appellant's and the Respondent's submissions and raise matters of law:

i. Whether the appeal is competent.

ii. Whether the learned trial Adjudicator erred in proceeding to determine the Claim under Section 30 of the *Small Claims Court Act* (SCCA) as opposed to conducting a viva voce hearing.

iii. Whether the jurisdiction of the court had ceased at the time of delivery of the judgment thus rendering the judgment a nullity.

iv. Whether the introduction of Hon. Ayub Savule and Hellen Jekor Kemboi had any relevance to the Respondent's case.

v. Who should bear the costs of the appeal?

i. Whether the appeal is competent.

Section 38 of the SCCA provides as follows:

1. A person aggrieved by the decision or an order of the court may appeal against the 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. A perusal at the grounds of appeal reveals that the Appellant is inviting this court to re-evaluate the evidence before the trial court and to consider matters of fact rather than pure matters of law as provided for under section 38(1) of the SCCA.

The Act does not envisage the appellate court examining the judgment of the trial court on matters of fact.

12. This court will desist from venturing into matters of fact raised in the appeal as an appeal that is based on matters of fact would definitely be contrary to the provisions of Section 38(1) of the SCCC and would amount to an incompetent appeal. I will adopt the decision in the case of John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR where it was held that:

> "a court limited to matters of law is not permitted to substitute the subordinate court's decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them"

13. A look at the judgment of the lower court does not reveal any perverse circumstances under which this court should interfere with or disturb the finding of the trial court based on facts.

14. I will however proceed to consider any issues of law raised in the appeal.

ii. Whether the learned trial Adjudicator erred in proceeding to determine the claim under Section 30 of the *Small Claims Court Act* (SCCA) as opposed to conducting a viva voce hearing.

Section 30 of the SCCA provides for proceedings by production of documents only without proceeding with the hearing. It states as follows:

> "Subject to the 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."

15. I have read through the Record of Appeal and at page 307, on 30.11.2022 before Hon. Mutua, the proceedings reveal that by consent parties agreed to proceed under Section 30 and upon marking all documents as produced, both Parties filed written submissions. Mr. Wesonga held brief for Mr. Khavagali who was indisposed. The Appellant did not raise any objection to this direction by the court.

16. The matter was set for judgment on 14.04.2023 before Hon. Mutua sitting in Chambers in the absence of the Parties on 14.04.2023. Hon. Mutua was of the view that the matter cannot proceed by Section 30 of the SCCA but did not fix the matter for viva voce hearing as he was bound to go on transfer.

    Hon. Mutua was transferred. The matter was re-allocated to Hon. Simatwo. The matter came up on 11.05.2023 when Mr. Nduati was present for the Appellant. The Respondent's advocate was not aware of Hon. Mutua's position but from the submissions of the Appellant, Mr. Nduati was well aware. He, however, informed Hon. Simatwo that the matter had proceeded under Section 30 and again did not raise any objection to that direction. Hon. Simatwo then set down the matter for delivery of judgment on 4.08.2023.

17. Section 30 gives the court the discretion to proceed with the matter "Subject to agreement of all parties to proceeding as such. I agree with the Respondent that Hon. Simatwo was not bound by the direction of her brother Hon. Mutua. It was within her discretion subject to the agreement of the Parties to determine the proceedings by Section 30. Having evaluated the record and in the absence of any objection by either Party she was within her competence to opt to proceed and determine the matter under Section 30.

    I therefore find that there was no error on the part of the trial court in proceeding as it did and this ground of appeal ought to fail.

    iii. Whether the jurisdiction of the court had ceased at the time of delivery of the judgment thus rendering the judgment a nullity.

18. On this issue, I have established from the record that both Parties contributed to the delay in one way or the other. I have also established that the matter was handled by 2 different adjudicators as the initially allocated court went on transfer. I am alive to the fact that whenever a new court takes over a matter from a different court it is appropriate to allow it time to appraise itself of its status and this might take some time.

19. Section 34(1) of the SCCA provides that 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 the final determination of the matter which shall be within sixty (60) days from the date of filing the Claim.

    The provision however does not state any consequence of non-compliance.

20. It is not in dispute that the proceedings at the lower court concluded after 60 days. What is in dispute is whether, by operation of section 34 (1) of the SCCA, the trial court lacked jurisdiction to proceed to write and deliver a judgment in the matter after the lapse of the 60 days contemplated by statute.

21. The Appellant has submitted that because of non-adherence to the timelines, the resultant judgment is with no force in law. He relies on the cases of Kartar Singh Dhupar & Company Limited v ARM Cement PLC (In Liquidation) (Civil Appeal 129of 2022) [2023] KEHC 2417 (KLR) and Aprim Consultants v Parliamentary Service Commission & Another, CA. No. E039 of 2021.

22. In Kartar Singh Dhupar & Company Limited v ARM Cement PLC the High Court of Kenya held that the Jurisdiction of the Small Claims Court as provided for under Section 34 of the *Small Claims Court Act* is time-bound and limited to 60 days. In doing so, the Learned Judge, observed as follows:

> "Firstly, it is undisputed that there existed a valid contract between the two parties as evidenced by email correspondences between the parties and their admission. Secondly, the Respondent did supply the cement and the Appellant made only part payment leaving the balance of the amount claimed in the Respondent's Claim as KES.629,599.21 as found by the trial court. The High Court saw no error in law or fact the analysis as held in the judgment. Thirdly, though the Respondent did not directly contribute to the lapse of time, it acted as though oblivious of the timelines and therefore did not object to the delays and adjournments."

22. The Respondent has however distinguished the decision on the ground that the judgment in the cited case was made per incuriam for the following reasons:

    i. It sacrifices substantive justice and appraises procedural technicalities contrary to the provisions of Article 159(2) (d) of *the Constitution* of Kenya.

    ii. It defeats the very purpose of establishing the Small Claims Court, especially regarding fairness and simplicity of the process.

    iii. The Court's reliance on the Aprim Consultants Case is distinguishable. This relates to a different legal regime i.e. Public Procurement and Assets Disposal Act, which has a more direct impact on the public good/interest as opposed to the SCCA.

23. The Respondent submitted that in the case of Lumumba v Rift Gas Limited (Civil Appeal E805 of 2022) [2023] KEHC 25998(KLR), Justice Majanja differed with and departed from the decision in Kartar Singh Dhupar & Company Limited v ARM Cement PLC for what in the Respondent's view is the reason that the decision was based on a different regime of statute. Although not binding to this court, the Respondent rely on the same for to persuade this court to agree with the reasoning therein.

24. Having read the decision I am so persuaded that the case cited by the Appellant does not apply to the instant appeal.

25. Also, in the case of Lumumba v Rift Gas Limited which was an appeal from the judgment and decree of the Small Claims Court at Nairobi, Milimani in SCC Claim No. E724 of 2022 and therefore, very relevant to the instant appeal. Honourable J. Majanja noted that the Appellant had relied on the case of Aprim Consultants *v Parliamentary Service Commission & Another, CA. No. E039 of 2021* (on which the Appellant in the instant appeal has also relied) among other cases in seeking to invalidate the judgment due to the non-compliance with the 60-day timeline. The court noted that in the decisions cited by the Appellant, the Court of Appeal was dealing with the effect of section 175 of the *Public Procurement and Asset Disposal Act*, 2015 which provides that the High Court shall determine judicial review applications from the Public Procurement Administrative Review Board within 45 days after such application. In the event the court fails to make the decisions within the prescribed timeline, the decision of the Review Board takes effect.

26. Further, Justice Majanja noted that in enacting the *Public Procurement and Asset Disposal Act*, "Parliament expressly enacted a consequence to follow default or failure to file or to decide within the prescribed times: the decision of the Board would crystallize and he invested with finality."

27. That the Court of Appeal's reading of the Act in Aprim Consultants v Parliamentary Service Commission & Another was that “the High Court was under an express duty to make its determination within the time prescribed. During such time did its jurisdiction exist, but it was a time-bound jurisdiction that ran out and ceased by effluxion of time. The moment the 45 days ended; the jurisdiction also ended. Thus, any judgment returned outside time would be without jurisdiction and therefore a nullity, bereft of any force or effect in law.”

> However, SCCA falls short of expressly providing the consequences for non-compliance with the 60-day timelines. Therefore, it is our view that to invalidate the judgment will amount to appearing to re-enact the SCCA to provide what was not expressly enacted as a consequence - invalidation of the judgment. That is a usurpation of the mandate of the parliament.

28. The learned J. Majanja was of the following view as he declined to apply the reasoning in the Aprim Consultants case to the Lumumba v Rift Gas Limited case.

> “While it is true that the intention of Parliament in codifying the 60-day timeline in the SCCA was to ensure timely disposal of all proceedings before the said court, I find that the said 60-day timeline is not cast in stone and discretion of the court shut out as is with the PPAD which provides for the consequence of the failure of the High Court to decide within the prescribed timeline. The intent of the PPAD and the consequence for failure to comply with the timelines are set out bearing in mind the fact that procurement is a one-off process”

29. The court went further and applied the Guiding Principles and Objectives of the Small Claims Court. It stated:

> “Whereas these timelines are valid, it should not be lost that the SCCA grants the court flexibility to do justice to the parties and the said court has the right to impose any terms and conditions to ensure that the hearing can proceed within the time-limited. The 60-day timeline in the SCCA is 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…]”

30. The Honourable Justice Majanja dismissed the ground that the judgment delivered outside the 60 days prescribed in Section 34 of the SCCA is invalid.

    Further Section 34 (1) of the SCCA contains the phrase 'so far as is practicable in the circumstances' which means that where the circumstances render it impossible to deliver judgment within the 60 days, then the judgment of the court will still be valid.

31. In Biosystems Consultants v Nyali Links Arcade (Civil Appeal E185 of 2023) [2023] eKLR the court stated that the 60 days required for the Small Claims Court to determine a dispute were aspirational as the *Small Claims Court Act* did not provide any penal consequences for the breach of the 60 days.

32. There is no provision in the SCCA for invalidation of a decision or order made outside the 60 days timeline under Section 34(1) and therefore I decline to allowt the Appellant’s ground of appeal on declaring the trial court’s judgment a nullity.

    iv. Whether the introduction of Hon. Ayub Savule and Hellen Jekor Kemboi had any relevance to the Respondent’s case.

33. The Appellant has submitted that Hon. Ayub Savula and his wife Hellen were not privy to the written agreement made on 4/10/2017 between the Respondent and the Appellant. Neither were they party to the subsequent agreements in which the Appellant borrowed funds from the Respondent.

34. The vice versa equally applies as the Appellant was not privy to the Agreement, if any, entered between the Respondent and Hon. Ayub Savula and his wife. Therefore, the resultant remedies against Parties to this agreement cannot lie against the Appellant. He relied on the principle reiterated in the case of Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015]eKLR, cited from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110 as follows:

> " As a general rule a contract affects only the Parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

35. He submitted that the trial magistrate was wrong to conclude that payments made by the Appellant aside from Kshs.40,000/= were made on behalf of Hon. Ayub Savula. To say that the Appellant struggles financially solely based her observation that the defaulted paying the Claimant the 1st installment was highly misplaced. This was because the first payment made being Kshs.142,000/= was clearly in excess of Kshs. 67,750/=. He was to pay Kshs.74,250/= for Kshs.55,000/= advanced as per the written agreement. Additionally, no shred of evidence was produced before the trial court to show that the Respondent advanced sums to Hon. Ayub and his wife and the demand letter that was produced before the trial court dated 18th February, 2022 has no signature or stamp of Hon. Ayub Savula or his wife confirming receipt. The WhatsApp screenshot produced also do not indicate that this demand letter was in fact sent to Hon. Ayub Savula. The WhatsApp screenshots produced are also of an alleged conversation with only Hon. Ayub Savula. Interestingly, the Respondent adduced a copy of decree, auctioneer's letter dated 19th May, 2022, warrant of attachment

36. On the other hand, the Appellant has submitted on this issue and stated that Hon. Ayub Savula and his spouse Hellen were not Party to the written agreement entered on 4.10.2017 between the Respondent and the Appellant. Indeed, they were not. They were neither Parties to the subsequent agreements for the other monies.

37. That the Appellant was also not a Party to the agreements of lending between the Respondent and Hon. Savula and Hellen. That fact is not disputed.

    At the trial court via her amended Pleadings, the Respondent filed documents relating to her lending money to Hon. Savula and Hellen. These documents included a Cooperative Bank Cheque No. 000055 dated 5.02.2016 for KES 880,000/=, a post-dated cheque written by the MP to the Respondent. The Respondent also filed the Printout of WhatsApp Chats as proof that her advocates were engaged in conversations relating to the settlement of the Hon. Savula debt and that of Hellen under the Decree in SCCCOMM/E1719/2022 which was the Respondent's determined Claim for unpaid debt from Hellen. The Respondent also filed the Decree, Warrants and Proclamations in SCCCOMM/E1719/2022.

    The Respondent also filed the Demand Letter dated 18.02.2022 to the Hon. Savula for the balance of the money which had accumulated interest and remained unpaid.

38. That as stated in the witness statement of the Respondent found at page 269 of the Record Appeal and in her Submissions at the trial court found at page 294, the cheque was intended to pay for the amounts borrowed by the Hon. Savula and his Spouse but was never presented for clearance as the Hon. Savula would several times advise that the account balance was insufficient. The cheque's validity lapsed before being paid.

It became evident that from the pleadings of the Respondent, it was a fact in issue whether Hon. Savula and Hellen owed the Respondent the debt the basis of which the Appellant was instructed to send money to the Respondent or deposit to her account, and from which fact the Respondent's right to claim that the deposited monies were paid to offset Hon. Savula debt arises thereby extinguishing the Claim by the Appellant that the deposits were for his own debt account.

39. That the documents stated above were, therefore, filed as relevant in proving to the court the truth that Hon. Savula and Hellen owed the Respondent and it was on the basis of this debt that the Appellant was regularly directed to send money to the Respondent to offset the debt.

40. The Respondent has cited Section 3 of the *Evidence Act* Cap 80 Laws of Kenya which defines "fact in issue" as follows:

> "fact in issue" means any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows;

41. The Respondent submits that the relevance of the documents came about when the Appellant responded to the Claim with a false allegation that the monies sent to her including Kshs.142,000/= deposited to her account on 29.12.2017 were for his own debt account as opposed to the Respondent's position that the same was on behalf of Hon. Savula. The Respondent thus found it necessary to provide proof of Hon. Savula and Hellen's indebtedness to her.

In the witness statement of the Respondent at Page 269, the Respondent specifically stated that Hon. Savula would later call her to confirm that the money was sent to her by his Personal Assistant who was the Appellant. This position was never controverted by the Appellant. Neither did he ever deny that he was Hon. Savula Personal Assistant.

42. The Respondent submits further that at the time of taking directions to proceed via Section 30 of the SCCA, the Appellant never raised any objection to the production of the stated documents. He later as an afterthought came to raise the issue in his submissions.

Therefore, the Appellant's submission that Hon. Savula and his spouse were not privy to the agreement of lending between the Respondent and the Appellant and thus the documents filed were relevant to the suit is misconceived and incorrect as far as the relevance and admissibility of evidence in determining facts in issue is concerned.

43. Section 5 of the *Evidence Act* states as follows:

> " 5. General restriction of admissibility of evidence.
>
> Subject to the provisions of this Act and of any other law, no evidence shall be given in any suit or proceeding except evidence of the existence or non-existence of a fact in issue, and of any other fact declared by any provision of this Act to be relevant."

44. Also, Section 7 of the *Evidence Act* makes the documents filed in respect to the debt by the MP and Hellen relevant. It stated:

> " 7. Facts causing or caused by other facts".
>
> "Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened or which afforded an opportunity for their occurrence or transaction are relevant."

45. Section 11 of the *Evidence Act* provides for the relevance of facts which would otherwise be irrelevant. It states:

> " 11. Facts inconsistent with, or affecting the probability of, other facts. Facts not otherwise relevant are relevant-
>
> a. ...;or
>
> b. if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable"

46. Section 12 also makes relevant Facts affecting quantum of damages. It states that:

> " In suits in which damages are claimed, any fact which will enable the court to determine the amount of damages which ought to be awarded is relevant".

47. The Respondent submits that the Appellant's reliance on the case of Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] eKLR and the citing from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110 is not relevant to the issue and is miscited. That there was no attempt to enforce the agreement against a Party not privy to it. There is no right flowing to or from Hon. Savula and Hellen from the contract between the Appellant and the Respondent and therefore, the 2 were not made a Party to the suit. It was just about utilizing the documents to prove a fact in issue.

48. The argument of privity of contract does not make the documents irrelevant as the Respondent did not seek any remedies against Hon. Savula and Hellen in the matter as submitted by the Appellant.

49. I have considered matters of law referred to above relating to this issue and I agree with the Respondent's position that the introduction of Hon. Savula and his spouse Helen as well as the documents referring to them in the Claim was to help make the Respondent's position that two owed her more probable and hence amounts paid to her by the Appellant on behalf of Hon. Savula most believable.

50. On whether the Respondent should have joined Hon. Savula and Hellen to the suit, I find that the Respondent as submitted did not seek any remedy against them. Indeed Order 1, Rule 1 of the Civil Procedure Rules 2010 cited by the Appellant is relevant in guidance on the issue of joining parties and in this case, it would have amounted to a misjoinder.

51. With regard to the dismissal of the Appellant's Counterclaim, I find that the burden of proof of lending Ksh.67,750 to the Respondent lied with the Appellant and the trial court rightful found that the Appellant failed to discharge that burden resulting into dismissal of the Counterclaim.

52. In the result it is my finding that the trial court justly found in favour of the Respondent thus the appeal lacks merit. The same is dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 1ST DAY OF AUGUST 2024

NOEL I. ADAGI

JUDGE