



REPUBLIC OF KENYA



KENYA LAW
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**Asachi Works Limited v Kathenge (Civil Appeal E441 of 2022)
[2024] KEHC 13167 (KLR) (Civ) (15 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13167 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E441 OF 2022

AM MUTETI, J

OCTOBER 15, 2024

BETWEEN

ASACHI WORKS LIMITED APPELLANT

AND

JUSTUS MWENDWA KATHENGE RESPONDENT

(Being an appeal from the judgment of Hon. C.A Okumu delivered on the 27th day of May 2022 in Milimani Commercial Courts SCCC No. E841 of 2021)

JUDGMENT

Introduction

1. The instant appeal arises out of a matter that was filed in the small claims Court in Milimani, Nairobi being Milimani Commercial Courts Small Claims Court Case E441 of 2021. Justus Mwendwa Kathenge Vs. Asachi Works Ltd.
2. The judgment of the Adjudicator in the matter was delivered on 27th May 2022.
3. The claim in the Small Claims Court was filed on a date that is not indicated in the statement of claim filed in the record of appeal . However, the statement of claim dated 25th November 2021.
4. The proceedings show that the matter first went before the learned Adjudicator on 10th January 2022 when the respondent sought time to enter appearance and file a response to the claim.
5. The learned adjudicator allowed the respondent 14days within which to file the response.
6. On 25th January 2022 the matter was mentioned and counsel for the respondent sought 7 days within which to file their witness statement.



7. The adjudicator granted the request for 7 days and set the matter for hearing on 7th February 2022.
8. The Court did not sit on 7th Feb 2022 since the adjudicator was away attending to an emergency. The nature of that emergency was not disclosed as per the record.
9. A new hearing date was set for the 11th Feb 2022.
10. The record does not indicate what happened on 11th February 2022 since there is no record.
11. The matter was however mentioned on 7th March 2022.
12. The Court fixed the matter for a further mention on 11th March 2022 and on that date when all counsel for the parties appeared a new hearing date was set for 22nd March 2023.
13. On the 22nd March 2022 Ms. Kahiu for the claimant appeared together with Ms. Muya who was holding brief for Mr. Rimui. Ms. Kahiu indicated that she was ready to proceed with 5 witnesses. However, she indicated to the Court that she was expecting an additional two witnesses who were yet to appear in Court.
14. Ms. Mulwa indicated to the Court that she was ready with her 1 (one) witness but would be strenuously opposed to having the matter partly heard since according to her the claimant was basically seeking for adjournment through craft.
15. Ms. Mulwa strongly urged the Court that the claimants had indicated they would only be calling one witness previously.
16. Ms. Mulwa pointed out to the Court that the claimant ought to have known that the matter had expired for 60 days period allowed under the Small Claims Courts Act had lapsed.
17. The Court directed that the hearing commences at 1:00pm that day and indeed the hearing commenced and proceeded to full hearing on various dates culminating into it being reserved for judgment on the 24th May 2022.
18. On 24th May 2022 the Adjudicator indicated that the judgment was not ready and rescheduled it to 27th May 2022.
19. The record shows that on the 27th May 2022 the matter went before the Adjudicator but although the record does not indicate that the judgment was delivered, the record does reveal that Ms. Muya who was holding brief for the respondent applied for 30 days stay and requested for proceedings for purposes of Appeal.
20. The Adjudicator granted the stay for 30 days and made an order for the typing of proceedings.
21. It does also appear that on 5th Sep 2022 the matter went back to the Adjudicator for an application for stay. The application was settled by way of consent of parties on the 21st September 2022 and the appellant deposited the decretal sum of Kshs. 282,540 plus cost and interest pending appeal.

The Appeal

22. The appellant by way of memorandum of appeal moved to this Court on 23rd June 2023.
23. The memorandum of Appeal raises 9 grounds of appeal particularized as here under:-
 - i. That the Learned Adjudicator erred in law in failing to consider the evidence before the Court, the testimony adduced in Court, more so the Respondent's testimony, the parties' submissions



and the law when deciding the matter thereby basing her finding on erroneous principles of law.

- ii. That the Learned Adjudicator erred in law by failing to take the Respondent's testimony into account wherein the Respondent testified that the Appellant's driver stopped in obedience of a direct order by a police officer in order to give right of way to a passing motorcade and thereby basing her judgement on erroneous principles of law.
 - iii. That the learned trial Adjudicator erred in law by failing to make a finding that the Respondent had failed to prove his case for negligence against the Appellant on a balance of probability as required by law thereby basing her judgement on erroneous principles of law.
 - iv. That the learned trial Adjudicator erred in law by failing to make a finding that the Appellant adhered to a direct order by a uniformed police officer and in accordance with the law thereby basing her judgement on erroneous principles of law
 - v. That the learned trial Adjudicator erred in law by failing to appreciate and make a finding that the Respondent's driver discharged his duty of care as encapsulated in the [Traffic Act](#), Cap 408 Laws of Kenya thereby basing her judgement on erroneous principles of law.
 - vi. That the Learned Adjudicator erred in law by finding that it was not clear who was to blame for the accident on account of there being evidence indicating that there was a breakdown that was in between KCM 238V and KBK 377] yet the evidence clearly indicated the point of impact and thereby basing her judgement on erroneous principles of law.
 - vii. That the Learned Adjudicator erred in law by failing to appreciate that the Respondent failed to prove the existence of a prima facie case against the Appellant and thereby basing her judgement on erroneous principles of law.
 - viii. That the Learned Adjudicator erred in law by finding that the Appellant is liable to satisfy the Respondent's claim on a 50:50 liability basis whereas it was clear that the Respondent failed to prove his case on a balance of probability as required and thereby basing her judgement on erroneous principles of law.
 - ix. That the Learned Adjudicator erred in law by awarding the Respondent the full costs of the suit and interest thereon whereas she entered judgement on a 50:50 liability basis and thereby basing her judgement on erroneous principles of law.
24. The grounds of appeal basically challenge the Adjudicators decision based on his appreciation of evidence, and the Law.
25. The appellant by way of submissions dated the 24th May 2024 raises several issues key among them being the issue of jurisdiction of the small claims Court.
26. The appellants submissions can be summarized as raising the following key issues for determination;-
- a. Whether the learned Honourable Adjudicator had the jurisdiction to entertain the claim after 60 days had lapsed since its failing.
 - b. Whether the judgment having been rendered after the statutory period of 60 days was valid.
 - c. Whether in the alternative the Respondent had discharged the burden of proof at the trial.
 - d. Whether the finding of liability against the Appellant was sustainable in Law.



- e. Whether the learned Honourable adjudicator had relied on the erroneous principles of Law in making her judgment.
 - f. Whether the award of costs to the Respondents was proper in law.
27. In determining this appeal, I am inclined to deal with the first issue of jurisdiction of the small claims Court as urged by the appellant.

Jurisdiction of the Small Claims Court

27. The appellant did not raise this issue in the Lower Court for determination nor have they raised it in the memorandum of appeal.
28. The issue of jurisdiction can however be taken up at any stage of the proceedings including on appeal thus since the appellant has raised the matter in their submissions, this Court will give it consideration as a matter of priority. In any event the Court is duty bound to satisfy itself as to the jurisdiction of the Court whose decision is the subject of an appeal even without prompting by counsel.
29. It is however good practice for counsel appearing for parties to raise the issue of jurisdiction at the earliest opportunity to avoid the waste of precious judicial time and resources by parties only for the decisions resulting from such proceedings to be nullified much later for want of jurisdiction.
30. It would be in furtherance of counsel's duty to Court to promote such practice especially considering the status of our courts in terms of backlog of cases.
31. In this appeal, I have noted that MS. KAHIU Advocate acting for the respondent in the small claims Court did indicate to the Court on the 22nd March 2022 that:

“... The last time were in Court counsel instructed to the Court that they would be calling one witness. Therefore, we will be objecting to a part heard hearing, the 60 days period has expired and ought to have organized all witnesses for it to close its case today.”

27. It would have been proper at the point in time for the respondent counsel to move the Court appropriately and have it pronounce itself on the issue of jurisdiction.
28. However, counsel let the opportunity to slide away but since the issue has now been raised, I shall proceed and deal the same.
29. The appellant has taken up the issue of jurisdiction on the strength of the developing jurisprudence on the jurisdiction of small claims Courts in our Courts today.
30. The appellant has cited the decision rendered by the Hon. Justice P.N Gichochi in *Karter Singh Dhupar & Co. Ltd Vs. ARM Cement PLC (in liquidation) Civil Appeal No. 129 of 2022 [2023] KEHC 2417 (KLR)* in which the learned Honourable Judge held:-

“guided by these authorities this Court is satisfied that the Judgment delivered by Hon. C.A 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. The decision by the Hon. P.N Gichochi , J though persuasive deals with the question of the judgement being delivered outside the stipulated period of 60 days a provided for under section 34 of the Small Claims Courts Act.



28. The appeal before me raises not only the issue of delivery of judgment past the 60 days allowed in law but also the question as to whether the hearing giving rise to the judgment could be said to have been conducted in line with the law.
29. The interpretation of Section 34 of the *Small Claims Court Act* by this Court is that once a claim under the Act is lodged with the Court, the jurisdiction of the Court is invoked and the 60 days start running from the date of filing to the date of final determination.
30. The Section 34 of the Small Court Claims provides: -
 - a. 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 13 CAP. 10A Small Claims Court [Rev. 2022] determination of the matter which shall be within sixty days from the date of filing the claim.
 - b. 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
27. The language of the statute is clear and unambiguous. It needs no interpretation. The letter and spirit of the Act is that all proceedings commence and terminate within 60 days.
28. The Adjudicator in this matter first mentioned the matter on the 10th January 2022 when Ms. Njuguna counsel for the respondent appeared and sought time to enter appearance and file a response.
29. The statement of claim is dated 25th November 2021 but the part for the date of filing is blank in the Court filed in the record.
30. It is therefore hard to tell when the same was received by the Court.
31. The fact of the date of reception in Court notwithstanding the first mention being on 10th January 2022 sixty days would in any event lapsed by the 10th March 2022.
32. It therefore follows from the submission made by counsel for the appellant, as of 22nd March 2022 the claim had “expired” in the words of counsel.
33. The Act is silent as to what should happen to claims that remain in Court without prosecution for more than 60 days.
34. It is the duty of the Court seized of such claims to ensure that the statutory timelines are observed since Section 34 of the Act specifically speaks to expeditious disposal of cases.
35. The Spirit of the Act stems from the provisions of Article 159 of *the Constitution* calling upon Courts to ensure that Justice is expeditiously dispensed.
36. The Adjudicator in this matter failed in her duty by entertaining proceedings after the 60 days allowed in law.
37. The Court should have taken notice of the fact that since the filing of the claim 60 days had lapsed and as a consequence the jurisdiction of the adjudicator was extinguished by operation of the law.
38. The legislature in enacting the Small Claims Courts must have been motivated by the desire to ensure there is established a forum that persons with claims of less than 1 Million shillings can access justice speedily and without being subjected to long drawn litigation.



39. It is why the adjudicators charged with the responsibility of ensuring the objects of the Act are achieved that can robustly apply the provisions of section 34 of the Act and ensure that litigants do not file claims and let them lie in Court.
40. Having said so, I have also considered the decision of my brother Justice Kizito Magare in *Ogwari Vs. Hersi (Civil Appeal No. 223 of 2022)* [2023] KEHC 20111 (KLR) which the appellant was also cited.
41. It is my considered view that whereas the Small Claims Courts were not designed to hear complex matters, they have the jurisdiction to hear personal injury claims that do not attract damages that exceed Kshs. 1 Million shillings being the pecuniary jurisdiction of the Court under section 12 (3) of the Act.
42. Section 12(1) gives the Court the power to determine any civil claim relating to the compensation for personal injuries.
43. The legislature did not distinguish the categories of personal injury claims. It would defeat the very purpose of the act if Courts were to embark on a categorization of the nature of personal injury claims.
44. The complexity of a matter is determined by several factors which may include but not limited to :-
- i. The nature of documents to be relied on at the hearing.
 - ii. The number of witnesses to be called at the hearing .
 - iii. The length of call of the witnesses.
 - iv. The parties to the suit.
 - v. The number of counsel appearing and the extent of participation of those counsel.
 - vi. The need to call experts evidence among other considerations.
59. It cannot possibly be argued that the mere fact of road accident cases requiring proof of negligence by that reason alone such cases are complex and thus outside the purview of the jurisdiction of the Small Claims Court.
60. The appellant has urged this Court to be persuaded that the nature of the claim in this matter should not have been entertained by the Small Claims Court since it required proof of negligence. I decline that invitation.
61. To accede to such argument would mean that mere fact of pleading negligence ousts the jurisdiction of the Small Claims Courts. That would be retrogressive in my view since all personal injury claims would have to be transferred to the Chief Magistrate Court including those that attract damages not exceeding Ksh.1million.
62. The Small Claims Court under Section 17 of the Act is permitted to control its own procedure subject to the Act and the rules.
63. In order to do justice, the court is permitted under Section 19 to summon witnesses and make inquiry on any matter which it may consider relevant to a claim. It is through this window that this Court persuaded that an adjudicator can order the calling any witnesses he deems necessary to prove a certain aspect of the case including particulars of negligence.,
64. In my view, material damage claims are not complex and thus the Small Claims Court properly seized of them can exercise jurisdiction under Section 12 (1) (c). The argument by the appellant on this point fails.



65. Turning back to the issue of jurisdiction this Court finds that as at the time the Court embarked on hearing the matter the statutory period of 60 days had lapsed thus it was acting without jurisdiction. The judgment that followed was therefore a nullity and of no legal effect.
66. In owners of Motor Vessel, “Lillian S” Vs. Caltex Oil (Kenya) Ltd [1989] eKLR the Court of appeal held that jurisdiction is everything and without it a court should down its tools.
The adjudicator upon being informed by counsel for the appellant at the commencement of the hearing that 60 days had lapsed, the court should not have taken one more step.
67. The Court engaged in a wasteful use of precious judicial time.
68. The other issues raised by the appellant are thus rendered redundant by my finding on jurisdiction. The judgement being a product of a flawed process is a nullity and thus it would be pointless for the Court to interrogate the rest of the issues otherwise I would be falling into the same trap the adjudicator fell into by entertaining further proceedings.

Determination

67. The upshot of the above is that the appeal by the appellant is allowed with costs.
68. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 15TH DAY OF OCTOBER 2024.

A. M. MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant

Munene holding brief Rimui for the Appellant

Iruki & Kahika Advocates Absent for Respondent

