



**Njoroge v Xplico Insurance Company Ltd; Nabwire (Interested Party) (Civil Appeal E526 of 2024) [2024] KEHC 13122 (KLR) (Civ) (14 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13122 (KLR)

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

**CIVIL  
CIVIL APPEAL E526 OF 2024**

**AM MUTETI, J  
OCTOBER 14, 2024**

**BETWEEN**

**SARAH WANJIKU NJOROGE ..... APPELLANT**

**AND**

**XPLICO INSURANCE COMPANY LTD ..... RESPONDENT**

**AND**

**DOREEN BARAZA NABWIRE ..... INTERESTED PARTY**

*(Being an appeal from the ruling delivered by the Hon. V.K Momanyi via email on 16th April 2024 in Milimani SCCC NO. E6146 OF 2023)*

**JUDGMENT**

**Introduction**

1. The appellant in the matter is aggrieved by the Learned Honourable Magistrate’s dismissal of his application for stay of execution of a judgment and decree delivered on 19<sup>th</sup> May 2023 in the Small Claims Court.
2. The notice of motion by the appellant was dated the 20<sup>th</sup> March 2024 in Milimani SCCC No. E424 of 2023 Doreen Baraza Nabwire Vs Peter Njoroge & Sarah Wanjiku Njoroge.
3. The Learned adjudicator had directed parties to have the matter disposed off by way of affidavits and written submissions.
4. The appellant contends that on 4<sup>th</sup> April 2023 the adjudicator directed the interested party in this appeal to file her response to the application within two days with leave to the appellant to file a response thereof within 2 days together with written submissions.



5. The parties were to return to Court on the 12<sup>th</sup> April 2024 for a ruling.
6. According to the appellant the interested party failed to abide by the Court's directions forcing the appellant to put in his written submissions on 9<sup>th</sup> April 2024.
7. The position taken by the appellant is that the matter stood unopposed as at that date thus the appellant was hopeful that the same would be allowed.
8. The appellant states further that on 12<sup>th</sup> April 2024 when parties appeared virtually and were informed that the ruling would be emailed to them, the interested party had not filed responses to the application.
9. The appellant further states that on 16<sup>th</sup> April 2024 the Ruling was emailed to them and the adjudicator in dismissing the application made reference to the interested party's affidavit and written submissions filed on the 12<sup>th</sup> April 2024.
10. The appellant contends that the adjudicator by doing so , denied the appellant the right to respond to the replying affidavit as per the Court's directions on 4<sup>th</sup> April 2024.
11. The appellant aggrieved by the Learned Adjudicator's decision has moved to this Court on appeal raising the following grounds:-
  1. That the Judgement by the Hon. C. W Ndumia delivered on the 19<sup>th</sup> May 2023 in Milimani SCCC No. E428 of 2023; Doreen Baraza Nabwire vs Peter Njoroge & Sarah Wanjiku Njoroge leading to the filing of the Declaratory suit SCCC No. E6146 of 2023; Sarah Wanjiku Njoroge versus Xplico Insurance Company Limited and Doreen Baraza Nabwire is incurably defective for lack of jurisdiction to handle personal Injury cases.
  2. That the Interested Party is barred by law from executing a decree emanating from a judgement that the small Claims Court lacked jurisdiction to hear and determine.
  3. That the Learned Trial Magistrate/Adjudicator erred in law and in fact in wholly disregarding the grounds adduced in the Appellant's Application and Supporting Affidavit dated 26th March 2024.
  4. That the Learned Trial Magistrate/Adjudicator erred in law and in fact by misconstruing the Appellant's Application as one seeking review and went ahead to dismiss the Application on the said grounds despite the Appellant seeking no such orders.
  5. That the Learned Trial Magistrate/Adjudicator erred in law and in fact by taking into account irrelevant factors, using wrong principles and provisions of the law, misapprehending wholly the evidence adduced by the Appellant and in the process reaching an erroneous conclusion and in breach of the rule of natural justice.
  6. That the Learned Trial Magistrate/Adjudicator erred in law and in fact in failing to consider the pecuniary circumstances highlighted by the Appellant being mistakes made by her previous Counsel that led to the errors made at the time of filing and pendency of the Suit.
  7. That the Learned Trial Magistrate/Adjudicator erred in law and in fact in failing to consider the Appellant's uncontroverted evidence that her Motor Vehicle Registration No. KCD 076L was indeed insured by the Respondent at the time of the Accident leading to the filing of Milimani SCCC NO. E428 of 2023.
  8. That the Learned Trial Magistrate/Adjudicator erred in law and in fact in failing to consider the Appellant's uncontroverted evidence showing that the Respondent had already settled part



of the decretal sum owing to the Interested Party and ought to have been enjoined to settle the balance.

9. That the Learned Trial Magistrate/Adjudicator erred in law and in fact in failing to make a finding that it is the Respondent who is by law enjoined to satisfy the judgment and decree emanating from Milimani SCCC No. E428 of 2023.
  10. That the Learned Trial Magistrate/Adjudicator erred in law and in fact in declining to set aside the Judgement and allowing the Appellant to amend her Statement of Claim.
  11. That the Learned Trial Magistrate/Adjudicator erred in law and in fact in condemning the Appellant without giving her a chance to present her evidence upon realization of the mistakes made by her former Counsel.
  12. That the Learned Trial Magistrate/Adjudicator erred in law and in fact by considering the Interested Party's unsworn and unexecuted Replying Affidavit dated 11th April 2024 and Written Submissions filed on the date of the Ruling being the 12th April 2024 thereby denying the Appellant an opportunity to Respond to the same; in utter breach of the rules of natural justice.
  13. That the Learned Trial Magistrate/Adjudicator erred in law and in fact in failing to strike out the Interested Party's unsworn, undated Replying Affidavit and Written Submissions filed on the dated of the Ruling and not served upon the Appellant.
12. Upon close scrutiny of the grounds and the submissions in support of the appeal, the following issues emerge;
- i. Whether the adjudicator had jurisdiction to entertain and hear a personal injury claim.
  - ii. Whether the appellant was denied a fair hearing by the learned adjudicator in determining the application by considering an affidavit filed by the interested party out of time without giving the appellant an opportunity to respond to the same.

### **Analysis**

13. The duty of this Court as a first appellate Court is review the material placed before the learned adjudicator who heard and determined the application by the appellant. The application as per the directions of the adjudicator was to be disposed off by way of affidavits and written submissions.
14. The appellant in the said application sought the following orders;-
  - i. That the application be certified as urgent and heard Ex parte in the first instance and service be dispensed with.
  - ii. That the Honorable Court be pleased allow the law firm of S.K Oloo & Co. Advocates to take over the conduct of this matter on behalf of the Claimant instead of the Law firm of TMM Advocates.
  - iii. That pending hearing and determination of this Application, the Honorable Court be pleased to order stay of execution of the judgment and decree of the Hon. C. W Ndumia delivered on the 19th May 2023 in Milimani SCCC No. E428 of 2023; Doreen Baraza Nabwire vs Peter Njoroge & Sarah Wanjiku Njoroge.
  - iv. That this Honorable Court be pleased to set aside its Judgement and Decree delivered via email on the 15th March 2024.



- v. That upon setting the Judgement and Decree, the Honorable Court be pleased to allow the Claimant to amend the statement of Claim out of time and file additional evidence in support of the Suit against the Respondent.
  - vi. That upon setting the Judgement and Decree, the Honorable Court be pleased to allow the Claimant to enjoin the names of Peter Njoroge and Sarah Wanjiku Njoroge as Claimants in the Amended Statement of Claim.
  - vii. That upon prayers 5 and 6 being granted, the Honorable Court be pleased to deem the draft Amended Statement of Claim attached as duly filed.
  - viii. That upon consideration of the Amended Statement of Claim and Additional Evidence adduced, the Honorable Court be pleased to direct the Respondent to satisfy the judgment and decree in Milimani SCCC No. E428 of 2023; Doreen Baraza Nabwire vs Peter Njoroge & Sarah Wanjiku Njoroge for the decretal sum of Kshs 756, 449.16/= and any other incidental costs arising therefrom.
  - ix. That the Honorable Court do issue such other orders as it may deem fit and necessary in the circumstances.
  - x. That the costs of this application be provided for.
15. It is clear from the orders set out on the face of the application the adjudicator was not only expected to grant stay of the judgment delivered in Milimani SCCC No. E428 of 2023 but was also expected to consider the setting aside of the judgment and decree.
  16. The appellant also prayed that he be allowed to amend the statement of claim out of time and file additional evidence in support of the suit against the Respondent.
  17. A perusal of the application reveals that the adjudicator was leargely expected to exercise discretion in favor of the appellant on the multiple issues of stay of the judgment and decree, the setting aside, amendment of statement of claim and the prayer for leave to adduce additional evidence.
  18. As an appellate Court , the interference with exercise of judicial discretion is a matter that must be done in the clearest of cases where the Lower Court is proved to have either erred in the application of principles of Law or in cases where the Court apparently took into consideration irrelevant matters or failed to take into account relevant matters in arriving at its decision. The Court will also not hesitate to interfere with exercise of discretion where a party is able to demonstrate that there was an error apparent on the face of the record. In doing so this Court is guided by the decision in Mbogo vs. Shah 1968 E.A 93.
  19. The instant appeal presents an interesting scenario where the adjudicator is alleged to have acted on an unsigned affidavit in reply which was filed out of time according to the appellant.
  20. I have perused the record of appeal and at page 10 of the record there appears an affidavit by one Nancy Ouko who identifies herself as an advocate of the High Court of Kenya acting for the interested party.
  21. The affidavit is dated 11<sup>th</sup> April 2024 but is not signed by the deponent nor commissioned by the commissioner for oaths.
  22. The question that immediately arises therefore is this; Does the document qualify to be christened as an affidavit capable of being acted upon.



23. The *Oaths and Statutory Declarations Act* Cap is of the Laws of Kenya is the principle Law on affidavit in this country.
24. Section 5 of the Act requires every commissioner before whom an affidavit is sworn to truly state in the jural or attestation at what place and on what date the oath or affidavit is taken or made.
25. It is therefore mandatory for the jural of an affidavit to be properly executed.
26. What appears at pages 10 & 11 of this record of appeal is not an affidavit by whatever standard. It is not duly signed by the deponent nor is it commissioned by a commissioner for oaths. the jurat is thus incurably defective rendering the document worthless.
27. Apparently, this is the document that the learned adjudicator considered in his Ruling of 12<sup>th</sup> April 2024. The adjudicator at page 2 of his ruling paragraph 3 states; “The interested party opposed the application through a Replying affidavit sworn on 11<sup>th</sup> April 2024.”
28. The adjudicator apparently did not address his mind to the competency of the replying affidavit. The omission to do so was grave in this Court’s considered view.
29. It amounted to an error apparent on the face of the record which the Court could not ignore without disastrous effect to its eventual decision.
30. Firstly, it was wrong for counsel to purport to depone the affidavit on behalf of the interested party. The application by its very nature was by laden with its own complexities by virtue of orders sought by the appellant. That should by itself have put counsel on notice that whatever she was about to enter into as an advocate was an arena of potentially explosive issues of facts that could lead to her taking the stand for to be cross-examined.
31. The Courts have time without number addressed the issue of advocates descending into the arena of litigation on behalf of their clients. It is never in the best interest of an advocate to swear affidavits in support of his client’s case unless the same is restricted to the advocates role as an advocate in a matter should an issue arise in proceedings directly touching on their role as such.
32. Needless to say it is a grave embarrassment to an advocate to purport to swear an affidavit in support of his or her client only to end up with the kind of document appearing at page 10 of the record of appeal which is unsigned and not commissioned.
33. Advocates must refrain from swearing affidavits because it could very easily result to counsel being pursued for professional negligence by clients where their cases fail on account of defective or incompetent affidavits such as the one filed by the respondent.
34. The affidavit in reply does not meet the requirements of an affidavit in law thus the adjudicator was wrong in relying on the same to determine the matter.
35. Having said what I have said on the competency of the affidavit in reply, it is my finding that the learned adjudicator erred in law by placing reliance on that affidavit in reaching his decision.
36. The Court failed to order the same to be from the record thus erred in law.
37. The adjudicator in his ruling does not also state any reasons why he did not give the appellant an opportunity to respond to the “affidavit in reply” yet the previous directions by the Court were clear.
38. The failure to do so occasioned a failure of justice in that the appellant did not have an opportunity to rebut the statements of the fact alluded to by the interested party in his impugned “affidavit”.



39. The action by the adjudicator failed to meet the dictates of Article 50 (1) and 159 of *the constitution* on fairness to parties in resolution of disputes.
40. Turning to the question as to whether the adjudicator had jurisdiction to deal with personal injury claim, I do not share the view of my brother the learned Honourable Kizito Magare in *Ogwari Vs. Hersi [Civil appeal No. 223 of 2022]* (2023) KEHC 20111 (KLR).
41. It is the view of this Court that Section 12 [1] [d] makes it abundantly clear that the Small Claims Court has jurisdiction to determine any civil claim relating to compensation for personal injuries. The Act does not delve into the specific nature of such personal injuries must be accorded their plain interpretation.
42. The provision has no ambiguity in it inviting any other canon of interpretation other than the literal rule of interpretation.
43. The issue of the complexity of the matter is a matter that should be left to the discretion of the adjudicator in determining the number of witnesses and the nature of documents to be produced by any of the parties in the proceedings.
44. The Act under section 19 gives a very wide latitude to the Court to inquire into any matter that may arise in proceedings before it.
45. In arriving at the conclusion that the Small Claims Court have jurisdiction over personal injuries, this Court has also considered the provisions of section 24 of the Act as to the form of a Statement of Claim.
46. Section 24 [e] states;-  
“other particulars of the claim as are reasonably sufficient to inform the respondent of the ground for the claim and the manner in which the amount claimed by each claimant or person represented has been calculated.”
47. The particulars of claims in a personal injury claim could as well include the particulars of negligence that would sufficiently inform the respondent of the case facing him.
48. The statement of claim just like a plaint would not be sufficient to establish the case against the respondent thus evidence would still have to be called to support the particulars. It is therefore wrong in my view to suggest that since in personal injury claims one would require to establish negligence then such claims ought to be moved to the Chief Magistrate Court.
49. To advance such a proposition is to render the Small Claims Court redundant because majority of the claims in our Small Claims Courts today are of the nature of the matter before this court and to adopt such an interpretation regarding the jurisdiction of small claims courts thus defeating the purpose of setting up the Courts.
50. In dealing with the issue of jurisdiction of the Small Claims Court this Court has also addressed its mind to the purpose of the setting up the Courts. The Bill leading up to the enactment of the Act made it clear in its statement of purpose. The Courts were for claims up to but not exceeding the monetary jurisdiction of the Court. It went further to state that the claims were to be adjudicated upon informally and inexpensively.
51. The focus here seems to me to have been to set up courts disputes in the categories identified under Section 12 of the Act limited to pecuniary jurisdiction of Kshs. 1million.



52. It is important to reflect on the stated purpose of the Courts because it would be a setback to the noble initiative of setting up the Courts if Courts were to introduce other parameters to check jurisdiction of the Courts. The court would by doing so introduce undesired fetters to jurisdiction of those courts.
53. The legislative history of any statute cannot be ignored for its aids the Court in determining the legislative intent of the Act and give effect to it. See Fritz Snyder, legislative History and Statutory Interpretation: “The supreme Court and Tenth Circuit” 49 Okla L Rev 573,576-634.
54. The mischief that was sought to be cured by establishing the courts was to weed out all small claims from our magistrates’ courts that contribute to the insurmountable backlog of cases in those courts. The High court cannot therefore lose sight of that noble goal in the setting up of the small claims courts. The importance of the mischief rule in the interpretation of statutes need not be overemphasized see Heydons case (1584) 76 ER 637.
55. The court in determining what is within the ambit of the claims under section 12 of the Act must give effect to predominant purpose of those courts.
56. The appellant in this appeal has thus not persuaded me to set aside the ruling and by extension the judgment of the Small Claim on the basis of want of jurisdiction.
57. The respondent to this appeal did not file submissions although the interested party did.
58. The appeal thus is not opposed by the respondent who is the primary party to the proceedings.
59. The affidavit of Sunday Oloo sworn in the 13<sup>th</sup> June 2024 leaves no doubt that the respondent is under statutory management and service was effected on the policy holder compensation fund offices. It is not clear to me why they elected not to defend the Appeal.
60. The interested parties submissions have been considered.

### **Determination**

61. The appeal succeeds on the ground that the appellant was not afforded a fair hearing by the administrator.
62. The appellant should have been invited to respondent to the impugned affidavit which the learned adjudicator considered.
63. The adjudicator was wrong in law declaring that the only issue raised in the application was one for review of the judgment.
64. It is clear from the record that there were multiple prayers that were not addressed thus the narrow view taken by the Court prejudiced the appellant.
65. It is on the basis of the a foregoing that I allow the appeal and set aside the ruling of the adjudicator.
66. Consequently, the application dated 26<sup>th</sup> March 2024 is to be placed before another adjudicator for consideration on merit taking into account that the replying affidavit to the application is hereby declared incompetent and accordingly exchanged from the record for the reasons advanced in this judgment.
67. It is so ordered.

**DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 14<sup>TH</sup> DAY OF OCTOBER 2024.**



**A. M. MUTETI**

**JUDGE**

In the presence of:

Kiptoo: Court Assistant

Oloo for the Appellant

Ms Ouko for the Respondent

No appearance for the Interested Party

