



REPUBLIC OF KENYA



**Sunstone Building Material Co. Limited v Odungo & another (Civil Appeal E153 of 2023) [2023] KEHC 22469 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22469 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E153 OF 2023  
RE ABURILI, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**SUNSTONE BUILDING MATERIAL CO. LIMITED ..... APPELLANT**

**AND**

**VITALIS ODUOR DAN ODUNGO ..... 1<sup>ST</sup> RESPONDENT**

**ADEL ABDUL HAMID ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgment of t Small Claims Court at Kisumu by Hon. G. C. Serem (RM) delivered on the 31st July 2023 in SCCC No. 182 of 2023)*

**RULING**

1. Section 38 of the *Small Claims Court Act* 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.
2. Under Rule 30 of the *Small Claims Court Rules*, a person aggrieved by the judgment or order of the court may, pursuant to section 38 of the Act, appeal to the High Court in accordance with Order 42 of the *Civil Procedure Rules*, 2010.
3. The Act and Rules made thereunder do not provide for timeless for appeals to the High Court. However, Section 41 of the Act provides for review of the decisions of the court by any aggrieved party or on adjudicator's own motion which application for review shall be made within thirty days of the order or award sought to be reviewed or such other period as the court may allow.



4. In this appeal, the decision/award appealed from was rendered on July 31, 2023. This appeal was filed on September 5, 2023. The Appellant then filed an application for stay of execution of decree of the Small Claims Court adjudicator pending the hearing and determination of this appeal.
5. In response, the respondent filed a preliminary objection seeking that the appeal be struck out because it ought to have been filed before the court making the orders sought to be appealed from, either informally at the time when the order is made, or within 14 days from the date of such order. That no leave of the court was sought by the Appellant; that this court lacks jurisdiction over the matter, that the application is baseless, unmeritorious and lacking in any or any sufficient grounds for an appeal; and that the suit and the application dated September 5, 2023 are frivolous, vexatious and an abuse of court process.
6. From the onset, I must preliminarily dismiss the Respondent's counsel's contention that the provisions of order 45 of the Civil Procedure Act exist and neither are they applicable to this case. Those relevant provisions under Order 45 of the Civil Procedure Rules relate to Review of orders and not appeals. This is an appeal, and the application before this court dated September 5, 2023 is for stay of execution of judgment of the adjudicator pending this appeal. There is no prayer for review of the orders of the Judgment of the Small Claims Court.
7. Review of orders in Civil Claims is governed by Order 45 of the Civil Procedure Rules and not of the Civil Procedure Act. In the case of Small Claims Court, section 41 of the Act provides for Review and the grounds for review are set out therein. Such review application must be made within 30 days of the date of the decision or award of the adjudicator.
8. As the issue before me is not for review, I shall not say more save to dismiss ground 1 of the Preliminary Objection.
9. On lack of jurisdiction, albeit no serious elaboration was made by the Respondent's counsel, the Appellant's counsel alluded to it and submitted that the appeal was filed within reasonable time and that as the Small Claims Court Act does not give the timeframe within which an appeal to the High Court should be filed, then the Civil Procedure Act and Rules do not apply since the Small Claims Court Act has its own procedures under the Rules. As a consequence, counsel submitted that what was applicable was that the appeal should be filed within a reasonable period of time. I will revert to this argument later.
10. On the ground that the application is baseless, unmeritorious and lacking in any sufficient grounds for appeal or that it is frivolous, vexatious and an abuse of court process, those are matters which this court can only determine after hearing the application on its merit and arguments for and against.
11. However, because the issue of jurisdiction has emerged, the law is clear that a court of law must at all times be conscious that it can only exercise jurisdiction if it has such jurisdiction. This is because jurisdiction is everything without which a court of law acts in vain and the moment the court concludes that it has no jurisdiction in a matter, it must down its tools and say no more.
12. The filing of an appeal to this court is a jurisdictional issue and as submitted by counsel for the applicant, section 38 of the Small Claims Court Act allows an aggrieved party to file an appeal to the High Court and that as the Act and Rules do not stipulate the timelines for filing of an appeal from the Small Claims Court Act to this court, then an appeal should be filed within reasonable time.
13. According to counsel, two months in this case is reasonable time hence the appeal is competently before this court.



14. The respondent's counsel was incomprehensible of his Preliminary Objection hence he was of little assistance to the court on this point. And what I must determine therefore is that, the legislature having established very short and strict timelines for hearing and determination of cases filed before the Small Claims Court and even prescribed 30 days within which Review of the decisions/awards of the court could be made, could it have allowed or given parties who are aggrieved by the decisions/awards, an open-ended timeline within which to file an appeal to the High Court.
15. My answer is a quick no. Albeit the timeline is not given and whereas Rule 30 of the Rules of the court only mentions Order 42 of the Civil Procedure Rules as the procedure applicable in appeals from the Small Claims Court and does not mention section 79 of the Civil Procedure Act on time for filing of Appeals in civil cases, it is clear to me that where such timeline is not given, this court must look at the Act as a whole and its Rules and make a finding.
16. My finding is that in view of the provision under Section 30 of the Act prescribing for time for lodging application for review of the decision of the court, then that is the reasonable time within which an appeal from the Small Claims Court to the High Court ought to be filed. Anything outside that period is incompetently filed and this court would therefore have no jurisdiction to hear and determine the appeal, unless leave of court to appeal out of time is sought and granted on its merits.
17. I have perused various pieces of legislation world over and the time allowable for appeal from Small Claims Court decisions is a maximum of 30 days from the date of entry of judgment.
18. For the above reasons, I find that this appeal and the application for stay are fatally incompetent and the same are hereby struck out with an order that each party shall bear their own costs of the appeal and the application for stay.
19. This file is closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023**

**R.E. ABURILI**

**JUDGE**

