



**Kahi v JM Associates LLP (Commercial Case E096 of 2023)  
[2024] KEHC 14561 (KLR) (Commercial and Tax) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14561 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E096 OF 2023  
MN MWANGI, J  
NOVEMBER 14, 2024**

**BETWEEN**

**JORDAN LWIMBULI KAHU ..... APPELLANT**

**AND**

**JM ASSOCIATES LLP ..... RESPONDENT**

*(Being an Appeal from the judgment of the Small Claims Court of Kenya at Nairobi delivered by Honourable J. W. Munene on 31st March 2023, in Commercial Suit No. E7502 of 2022)*

**JUDGMENT**

1. The claimant (now appellant) filed a claim in the lower Court vide a statement of claim dated 1<sup>st</sup> December 2022, seeking judgment against the respondent for Kshs.850,000/= with interest from the date of filing suit, and costs of the suit. The appellant claimed to have entered into a consultancy agreement with the respondent as a Lead Information Systems Auditor on 17<sup>th</sup> May 2022. The payment structure was 10% upon the signing of the agreement letter, 20% after submitting the initial Report, 50% upon the detailed draft Report submission, and 20% after submission of the Final Report with management comments and a Microsoft PowerPoint presentation. The appellant stated that although he performed his duties and received payments as agreed, the respondent failed to pay him Kshs.850,000/= after he submitted the detailed draft Report and requested for due payments.
2. In response to the claim, the respondent filed a Response to Statement of Claim dated 13<sup>th</sup> January 2023 where it acknowledged having entered into a consultancy agreement with the appellant on 17<sup>th</sup> May 2022, for ICT audit services at a consideration of Kshs.2,000,000/=, subject to applicable taxes including Withholding Tax and Value Added Tax. The respondent however claimed that the appellant was not diligent in fulfilling the assignment, as he often failed to deliver the required Reports and working papers on time, thus being in breach of the consultancy agreement. The respondent asserted



- that the appellant did not submit the necessary detailed draft Reports as claimed, and therefore, the amount sought was not owed.
3. The respondent contended that on 23<sup>rd</sup> September 2022, the appellant issued an invoice for Kshs.400,000/=, representing the 20% payment for the initial Report, along with a claim for Kshs.1,000,000/=, which was 50% for the detailed draft Report. However, because the appellant had not submitted the detailed draft Report, the respondent only paid him Kshs.400,000/=.
  4. In a judgment delivered on 31<sup>st</sup> March 2023, the Small Claims Court dismissed the appellant's claim for being premature and for the appellant's failure to prove his case on a balance of probabilities. Aggrieved by the aforesaid judgment, the appellant filed a Memorandum of Appeal dated 22<sup>nd</sup> May 2023 raising the following grounds of appeal –
    - i. The learned Trial Magistrate erred in law and fact by concluding that the claimant's claim was based on the 20% due upon submission of the final Report which he had not submitted despite the fact that the claimant's claim was based on the 50% due upon submission of a detailed draft Report as per the contract dated 17<sup>th</sup> May 2023 which the claimant submitted on 23<sup>rd</sup> of September 2022; and
    - ii. The learned Magistrate erred in law and fact by holding that the claimant had not proved his case against the overwhelming evidence produced in Court and captured in the body of the judgment.
  5. The appellant's prayer is for the appeal to be allowed with costs, for the judgment of the learned Magistrate of the Small Claims Court delivered on 31<sup>st</sup> March 2023 to be varied and/or set aside, and be substituted with orders as prayed in the appellant's Statement of Claim.
  6. The respondent filed a Notice of Preliminary Objection dated 29<sup>th</sup> June 2023 raising the following grounds –
    - i. The appeal is time barred having been filed outside the 30 days period contrary to Section 79G of the *Civil Procedure Act*, Cap 21 for filing appeals to the High Court; and
    - ii. The appeal offends Section 38(1) of the *Small Claims Court Act*, No. 2 of 2016 which requires that an appeal against an order or decree of a Subordinate Court to the High Court can only be on matters of law.
  7. The instant appeal and the Preliminary Objection were canvassed concurrently by way of written submissions. The appellant's submissions were filed by the law firm of Mudeshi Muhanda & Co. Advocates on 24<sup>th</sup> April 2024 & 5<sup>th</sup> June 2024, whereas the respondent's submissions were filed on 23<sup>rd</sup> May 2024 by the law firm of Khayesi Njambi & Khayesi Advocates.
  8. Ms. Muhanda, learned Counsel for the appellant referred to an email sent by the appellant on 23<sup>rd</sup> September 2022 and stated that the appellant submitted the detailed draft Report to the respondent as required under the consultancy agreement, to warrant being paid the 3<sup>rd</sup> instalment. Counsel relied on the case of Dormakaba Limited v Arcitectural Supplies Kenya Limited [2021] KEHC 2010 (KLR), and submitted that the aforesaid Report was acknowledged by the respondent who even made partial payment of Kshs.150,000/= out of the said Kshs.1,000,000/=, leaving a balance of Kshs.850,000/=, which is still due and owing to the appellant from the respondent.
  9. Ms. Khayesi, learned Counsel for the respondent relied on the provisions of Section 79G of the *Civil Procedure Act*, and the case of Gerald M'limbine v Joseph Kangangi [2009] eKLR, and submitted that the Small Claims Court delivered its judgment on 31<sup>st</sup> March 2023, whereas the instant appeal was



filed on 30<sup>th</sup> May 2023 after the elapse of 60 days without leave of the Court. She cited the Court of Appeal case of *Mwita v Woodventure (K) Limited & another* [2022] KECA 628 KLR, and contended that the instant appeal raises questions of fact contrary to the provisions of Section 38(1) of the *Small Claims Court Act*. Counsel further contended that the instant appeal is not only incompetent but also incurably defective.

10. Ms. Khayesi stated that in the event that the Court is inclined to determine the merits of the instant appeal, it should note that the respondent sent comments on the detailed draft Report to the appellant via email on 23<sup>rd</sup> September 2023. The appellant responded the same day, acknowledging that some comments had been included in the preliminary draft and suggested a meeting to finalize the Report. She stated that it is rather unfortunate that the appellant did not disclose the subsequent email communication between the parties herein, in that in an email sent on 5<sup>th</sup> October 2022, the appellant promised to include stakeholder comments and update the draft Report, but failed to do so. She stated that on 8<sup>th</sup> November 2022, the respondent inquired about the status of the Report, and the appellant responded with a table of contents full of errors.
11. It was submitted by Counsel that the respondent informed the appellant that the document sent was corrupted and requested for a new copy, but the appellant did not resend the same. That on 9<sup>th</sup> November 2022, the respondent followed up with the appellant asking for the updated Report with all comments and working papers, but received no response. Consequently, the respondent sent a letter to the appellant raising concerns about the lack of communication and failure to provide updates, urging him to resolve the issues, but instead of addressing them, the appellant went to Court.
12. The respondent's Counsel argued that the appellant is not entitled to the 50% payment because he had not delivered the required detailed draft Report. Additionally Counsel stated that the Kshs.150,000/= paid by one of the respondent's partners was given as a loan due to an emergency, with the understanding that it would be deducted from the Kshs.1,000,000/= payment when it became due.
13. In rejoinder, Ms. Muhanda relied on the case of *Mukisa Biscuits Manufacturing Limited v West End Distributors Ltd* [1969] EA 696, and submitted that the Preliminary Objection herein does not meet the threshold of a Preliminary Objection since this Court will be required to ascertain facts. Counsel argued that this appeal is not in violation of Section 38 of the *Small Claims Court Act*, as it is based on the claim that the Small Claims Court addressed an issue not before it by ruling that the appellant's claim was related to the final or third payment instalment, which was not yet due, whereas the appellant's claim was for the second instalment of Kshs.850,000/=, which was due. Counsel referred to the Court of Appeal case of *Mwita v Woodventure (K) Limited & another* (supra), and asserted that while appeals from the Small Claims Court to the High Court are limited to matters of law, the High Court can consider factual issues if the lower Court addressed irrelevant matters or failed to consider relevant ones, as happened in this case.
14. On the issue that the instant appeal is in contravention of the provisions of Section 38 of the *Small Claims Court Act*, Counsel contended that this appeal is grounded on the fact that the Small Claims Court in its judgment addressed itself on an issue that was not before the Court by finding that the appellant's claim was in relation to the final and/or 3<sup>rd</sup> payment instalment which was not yet due, whereas the appellant's claim was in relation to the 2<sup>nd</sup> instalment for payment of Kshs.850,000/=, which was due to the appellant.
15. Counsel referred to the Court of Appeal case of *Mwita v Woodventure (K) Limited & another* (supra), and asserted that in as much as an appeal from the decision of the Small Claims Court to the High Court is on matters of law only, the High Court has the power to consider issues of fact in the event



that the Small Claims Court considered matters that it should not have considered or failed to consider matters it should have considered such as in the case herein.

## **ANALYSIS AND DETERMINATION.**

16. I have re-examined the Record of Appeal and given due consideration to the written submissions by the parties' respective Counsel. The issues that arise for determination are –
- i. Whether the respondent's preliminary objection should be sustained; and
  - ii. Whether the instant appeal is merited.

### **Whether the respondent's Preliminary Objection should be sustained.**

17. On 18<sup>th</sup> March 2024, the respondent's Counsel informed this Court that they had filed a Notice of Preliminary Objection in opposition to the instant appeal. The Court then gave directions to the effect that the said Preliminary Objection would form part of the respondent's argument or the respondent could file a cross-appeal. From the record, it is evident that the respondent chose to have its Preliminary Objection form part of its arguments.
18. The question as to what constitutes a valid Preliminary Objection has been the subject of numerous litigation over the years. In the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (supra), the Court held as follows on what constitutes a Preliminary Objection -

So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

In the same case, Sir Charles Newbold P., stated as follows -

... the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop. (Emphasis added).

19. In this case, the respondent's Preliminary Objection is anchored on two grounds, first, that this appeal has been filed outside the prescribed timelines without leave of the Court, and second, that this appeal is in contravention of the provisions of Section 38 of the *Small Claims Court Act* which provides that appeals from the Small Claims Court to the High Court shall be on matters of law only.
20. On the first limb that the appeal has been filed outside time, I do not agree with Counsel for the appellant that in order for this Court to determine this issue, it would have to ascertain facts. This is because, the law is very clear on the time within which a party dissatisfied with a decision of the



Subordinate Court such as the Small Claims Court, can lodge an appeal at the High Court. This is provided for under Section 79G of the *Civil Procedure Act* which states that –

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order;

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

21. In this appeal, the Small Claims Court delivered its judgment on 31<sup>st</sup> March 2023, whereas the instant appeal was filed on 30<sup>th</sup> May 2023. Evidently, the appeal herein was filed outside the prescribed timelines and without leave of the Court. This Court further notes that even after the respondent filed a Notice of Preliminary Objection challenging the competency of this appeal on the said ground, the appellant still did not take any steps to rectify this position.
22. Accordingly, this Court finds that the instant appeal is not only incompetent but also fatally defective for having been filed outside the prescribed timelines and without leave of the Court.
23. In the premise, the instant appeal is hereby struck out with costs to the respondent.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF NOVEMBER 2024.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Ms Muhanda for the appellant

Ms King'ara h/b for Ms Khayesi for the respondent

Ms B. Wokabi – Court Assistant.

