



REPUBLIC OF KENYA



**Ndungu v Karanja (Civil Appeal E042 of 2022)
[2024] KEHC 15166 (KLR) (Civ) (2 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15166 (KLR)

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

CIVIL

CIVIL APPEAL E042 OF 2022

CW MEOLI, J

DECEMBER 2, 2024

BETWEEN

PETER KANYONI NDUNGU APPELLANT

AND

STEPHEN KARIUKI KARANJA RESPONDENT

(Being an appeal against the ruling and order of Honourable S.G. Gitonga (Mrs.), Adjudicator, delivered on 11.01.2022 in the Small Claims Court in Nairobi SCCC No. E267 of 2021)

JUDGMENT

1. This appeal emanates from the ruling delivered on 11.01.2022 in Nairobi SCCC No. E267 of 2021. The background facts are that pursuant to leave granted by the lower court on 12.07.2021, Peter Kanyoni Ndungu (hereafter the Appellant) lodged a suit out of time in the Small Claims Court, by way of the statement of claim dated 9.08.2021 (the claim) seeking the sum of Kshs. 206,719/-, costs of the suit and interest thereon against Stephen Kariuki Karanja (hereafter the Respondent). Being compensation for loss and/or damage in respect of the motor vehicle registration number KBK 054E as a result of alleged negligent acts/omissions on the part of the Respondent through his servant, agent and/or driver.
2. The record shows that the matter thereafter came up in court on various occasions, during which the Appellant sought for further extension of time to enable him serve the pleadings upon the Respondent. Eventually, on 22.09.2021 Hon. Gitonga (Mrs.) (the learned adjudicator) declined to grant any further extension of time and consequently dismissed the claim for want of service, prompting the Appellant to file the ex parte Notice of Motion dated 27.09.2021 (the application) that the learned adjudicator be pleased to set aside the dismissal order and upon doing so, to reinstate the claim.



3. Upon hearing the application, the learned adjudicator by way of the ruling delivered on 11.01.2022 declined to set aside her earlier order and dismissed the said application. Thus, provoking the present appeal vide the memorandum of appeal dated 3.02.2022 based on the following grounds:
 1. That the learned Adjudicator erred in law by dismissing the Claimant's Application dated 27th September 2021.
 2. That the learned Adjudicator erred in law by failing to appreciate the position in law that a Claim can only be dismissed if the claimant fails to serve the Statement of Claim within six months from the date on which it was filed.
 3. That the learned Adjudicator erred in law by failing to appreciate that the Court has the power to extend a time limit fixed under the Small Claim Rules.
 4. That the learned Adjudicator erred in law by failing to appreciate that the main objective of the Small Claims Court is to guarantee the right to access of justice through a fair process." (sic)
4. The record shows that the appeal proceeded ex parte. The Respondent did not participate in the lower court proceedings or this appeal. Despite there being an indication of service of the relevant process and notices upon him on this appeal, as per the affidavit of service sworn by process server Paul Lukendo Mafura, on 4.10.2024.
5. That said, the appeal was canvassed by way of written submissions. The Appellant's counsel anchored his submissions on Rule 7(2) of the Small Claims Court Rules 2020 (the Rules) which provides that where a statement of claim has not been served upon the respective Respondent within a period of six (6) months from the date of filing, the relevant claim shall stand dismissed. Counsel then argued that on the premise of the Rule, the learned adjudicator erred and misdirected herself by first in dismissing the claim when it was not ripe for dismissal, and secondly, by declining to reinstate the claim upon the Appellant's application.
6. Counsel further cited the decision in Biosystems Consultants v Nyali Links Arcade [2023] KEHC 21068 (KLR) where it was held that while the duty of the Small Claims Court is to facilitate the expeditious disposal of claims brought before it, it has a corresponding duty to consider the right of a party to be heard. Counsel proceeded to submit that in the present instance, the Appellant had provided a reasonable explanation for his failure to serve the Respondent with the requisite documents. To wit, that efforts to trace the Respondent proved futile at the time. That consequently, the learned adjudicator ought to have considered these reasons and granted reinstatement of the claim, as sought.
7. Counsel similarly submitted that pursuant to Rule 33(1) of the Rules, the Small Claims Court has discretionary power to extend or limit the time required for the performance of any actions under the Rules. Hence, the learned adjudicator ought to have exercised her discretion accordingly, in the interest of justice and fairness. That by declining to grant reinstatement as sought in the application, the learned adjudicator gravely erred in law. Therefore, the court was urged to allow the appeal as prayed.
8. The court has perused the original record, the record of appeal and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See Kenya Ports Authority v Kusthon (Kenya) Limited (2000) 2EA 212, Peters v Sunday Post Ltd (1958) EA 424; Selle and Anor. v Associated Motor Boat Co. Ltd and Others (1968) EA 123; William Diamonds Ltd v Brown [1970] EA 11 and Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) 1 KAR 278.



9. The Court of Appeal stated in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR that:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

10. To be determined in the present appeal is the fundamental question whether the trial court acted correctly by declining to reinstate the Appellant’s claim, or in other words whether the said court properly exercised its discretion. Thus, the court will address the four (4) grounds of appeal contemporaneously. As guided by the decision of the Court of Appeal in *Mashreq Bank P.S.C v Kuguru Food Complex Limited* [2018] eKLR where it was observed that:

“This Court ought not to interfere with the exercise of a Judges’ discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of *Mbogo v Shah*, (supra):

“A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice”.

See *United India Insurance Co. Ltd v. East African Underwriters (K) Ltd* [1985] E.A 898: -...”

11. The lower court record shows that upon filing the claim, the Appellant attended court on 18.08.2021; 26.08.2021 and 13.09.2021 for mention. On each occasion, he sought and was granted extension of time to enable him effect service of the pleadings upon the Respondent. Thereafter, when the matter yet again came up before the learned adjudicator on 22.09.2021 for mention, the Appellant’s advocate restated his previous averments that he was yet to serve the Respondent with the requisite pleadings. The advocate therefore sought additional time to effect service. However, the learned adjudicator noting that the court had indulged the Appellant on the three (3) previous occasions and the strict timelines for the disposal of matters before it, declined to grant any further extension and proceeded to dismiss the claim for want of service.
12. Subsequently, the Appellant filed the application seeking to set aside of the dismissal order of 22.09.2021 and reinstatement of the claim. The said application was supported by the grounds set out therein and the supporting affidavit of advocate D. K. Musya. Asserting inter alia that upon obtaining instructions from the Appellant and further obtaining leave of the lower court to file suit out of time, he had filed the claim on 10.08.2021 and thereafter instructed Mafupa Enterprises, a licensed process server to effect service of the claim upon the Respondent. That vide an email dated 18.08.2021 the said process server indicated that his attempts at tracing the Respondent had proved futile. That the advocate upon attending the Small Claims Court on 18.08.2021 sought and was granted timelines of seven (7) days within which to effect service.



13. The advocate then stated that further attempts at effecting service upon the Respondent bore no fruit, and when the matter came up again in court on 26.08.2021 he was granted another seven (7) days within which to comply. The advocate averred that attempts at effecting service upon the Respondent's insurer (Directline Insurance Company Limited) were unsuccessful, prompting the Appellant's advocate to issue instructions to the process server on 17.09.2021, with respect to undertaking private investigations to establish the whereabouts of the Respondent.
14. The advocate averred that from this turn of events, it was clear that the Appellant remained keen on prosecuting the claim and that in any event, the suit was not ripe for dismissal at the time of issuance of the dismissal order on 22.09.2021; that the Appellant stood to suffer grave prejudice if the orders sought in the application were denied; and that the Appellant had an arguable claim against the Respondent.
15. In dismissing the ex parte application, the learned adjudicator reasoned that:

“I have considered the application dated 27/9/2021 seeking re-instatement of the claim herein. I have also considered the affidavit in support. The claim was filed on 10/8/2021. The record will show, the matter came up 4 times the last been on 22/9/2021, when the Claimant informed the court, he is yet to serve the statement of claim. The reason advanced was that he had now instructed an investigator to locate the Respondent and he sought more time to serve. The court noted that it was over a month since the claim was filed and still the claim had not been served upon the Respondent. The small claims court works under very strict timelines. The Claimant cannot be accorded over 40 days to serve yet the claim is supposed to be concluded within 60 days. It is not enough that now the Claimant claims to have located the Respondent. The timelines already lapsed and this court rightfully dismissed the claim. I find no plausible reason to set aside my earlier dismissed orders.” sic
16. This is the outcome now challenged on this appeal. The established legal principle is that the court's power to grant or refuse an application to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, such discretion must be exercised judicially and justly. The rationale for the discretion to set aside as conferred on the court was spelt out in the case of *Shah v Mbogo and another* [1967] E.A 116:

“The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”
17. Upon re-examination of the pleadings and material forming part of the lower court record, it is not in dispute that the Appellant with leave of the court filed his statement of claim out of time on or about 9.08.2021. It is also not disputed that subsequently, the Appellant did not effect service of the statement of claim upon the Respondent despite being granted various extensions by the lower court, to enable him comply. The primary reason given for the non-compliance as seen from the record is that the Appellant encountered difficulties in tracing the Respondent.
18. It is pertinent here, as alluded to in the ruling of the lower court, that the Small Claims Court is a specialized court within the category of subordinate courts, pursuant to Article 169(1)(d) of *the Constitution*. The court is established and governed by the *Small Claims Court Act* Cap. 10A and its Rules. Section 34 of the Small Claims Act makes specific provision for the expeditious disposal of



claims before the said Court. Sub-section 1 of the cited Section sets out strict timelines within which a claim before the Court ought to be determined, thus:

1. 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 determination of the matter which shall be within sixty days from the date of filing the claim.
19. From the foregoing, it is clear that claims before the Small Claims Court ought to be determined within strict timelines of 60 days from the date of filing. This position was rightly pointed out by the learned adjudicator in the impugned ruling. Regarding the matter of service of pleadings which was at the core of the impugned order and the present appeal, Rule 7 of the Rules, provides as follows:
1. The claimant shall serve a copy of the Statement of Claim on each of the respondents named in the Statement in the manner prescribed under rule 35.
 2. If the claimant fails to serve a Statement of Claim within six months from the date on which it was filed, the claim shall be deemed as having been abandoned, whereupon it shall stand dismissed.
 3. Despite subrule (2), the claimant may apply to the Court in writing to have his or her claim reinstated giving reasons for failure to serve, and a claim dismissed under subrule (2) may be reinstated under this subrule only once.
 4. Despite subrule (3), the Court shall not reinstate any claim under this Rule in any case where—
 - a. the claim relates to an accident which took place more than three years before the date of the application; or
 - b. the claim arises from a contract entered into between the claimant and the respondent more than six years before the date of the application”.
20. In the court’s reading and understanding, the above provision seems to apply in instances where a claim stood automatically dismissed on the premise that it was abandoned upon filing, hence not served. Which echoes a similar provision in the Civil Procedure Rules providing for the automatic abatement of ordinary suits for non-service. Hence, Rule 7 above cannot therefore apply in the present instance, where the Appellant did not abandon his claim, but attended court on several occasions. Thus, his claim was active at all material times before its dismissal. The Rule cannot be interpreted and applied here as urged by the Appellant’s counsel to support the argument that the claim herein was dismissed before it was ripe for dismissal.
21. Be that as it may, Rule 33 of the Rules, expresses that the Small Claims Court may enlarge or otherwise vary the timelines fixed under the Rules or by any order of the Court, on such terms as the Court deems just.
22. Upon re-examination of the record, the court notes that upon filing the statement of claim, the Appellant sought and was granted extension of time to serve on three (3) separate occasions, but to no avail. At the time of dismissal of the claim, the Appellant had failed to effect service upon the Respondent. Already, over 30 days of the 60 days allowed for the resolution of small claims had lapsed since inception of the claim. The court concurs with the reasoning by the learned adjudicator, that she had indulged the Appellant multiple times before and given the strict timelines for disposal of claims before the Court, no proper reasons had been availed to warrant yet another extension. The court is of the view that the Appellant had every reasonable opportunity to comply with the requirement on service, but did not. The repeated explanation being that he could not trace the Respondent. No new or credible reasons were given to explain the non-compliance and/or to demonstrate any diligent



steps taken by the Appellant in an attempt at compliance, prior to the dismissal order. Similarly, the Appellant did not tender any new or credible material to warrant a reinstatement of the claim.

23. The court upon considering all the relevant facts herein in conjunction with the strict timelines for disposal of claims before the Small Claims and the principle that extension of time is a matter for the court's discretion rather than an entitlement of a party is satisfied that the learned adjudicator exercised her discretion in a reasonable manner. And having considered relevant factors, arrived at a sound decision in the circumstances. There is no demonstration that the learned adjudicator misdirected herself in any matter hence arriving at a wrong decision. The learned adjudicator's decision cannot therefore be faulted.

24. In the result, the appeal is found to be without merit and is hereby dismissed with no order as to costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 2ND DAY OF DECEMBER 2024.

C. MEOLI

JUDGE

In the presence of

Mr. Mwai holding brief for Mr. Musya for the Appellant:

N/A for the Respondent: N/A

C/A: Erick

