Hussein v Kimiti (Civil Appeal E1399 of 2023)
[2025] KEHC 13495 (KLR) (Civ) (30 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13495 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1399 OF 2023

AC MRIMA, J

SEPTEMBER 30, 2025

BETWEEN

FATUMA HUSSEIN ..... APPELLANT

AND

IRENE WANJIRU KIMITI ..... RESPONDENT

(Being an appeal from the Ruling and Order of Hon. V.M. Mochache (Adjudicator) in Nairobi [Milimani] Small Claims Court Civil Case No. E2424 of 2023 delivered on 15th November 2023)

JUDGMENT

Background:

1. In its ruling delivered on the15th November 2023 [hereinafter referred to as 'the impugned ruling'], the Small Claims Court, in Nairobi [Milimani] Small Claims Court Civil Case No. E2424 of 2023 [hereinafter referred to as 'the suit'] set aside its judgment which had found the Respondent herein liable for causing an accident.

2. The suit was instituted by Fatuma Hussein, the Appellant herein, against Irene Wanjiru Kimiti, the Respondent. It was the Respondent who filed an application by way of a Notice of Motion dated 31st August 2023 which sought to set aside the judgment. That was the application which was allowed thereby prompting the filing of the appeal which is now the subject of this judgment.

Appeal:

3. Aggrieved, the Appellant lodged a Memorandum of Appeal dated 14th December 2023 seeking to set aside the impugned ruling on the following grounds: -

1. That the Honourable Adjudicator erred in law and in fact in failing to find that the Respondent's Application dated 31st August 2023 was incompetent, unmerited and fatally defective having been filed and or brought by a stranger who was not a party to the claim.

2. That the Honourable Adjudicator erred in law and in fact in failing to find that the Respondent's Application dated 31st August 2023 was incompetent, unmerited and fatally defective having been filed by the Respondent's insurer before the Respondent's insurer settled the decretal sum and as such the Respondent's right under the doctrine of subrogation was yet to crystallize.

3. That the learned Adjudicator erred in law and in fact in failing to consider the submissions and the authorities relied upon by the Appellant in support of her argument that the Appellant's Notice of Motion Application dated 31st August 2023 was incompetent, unmerited and fatally defective.

4. That the Honourable Adjudicator erred in law and in fact by allowing the Respondent's Notice of Motion Application dated 31st August 2023.

4. The Appellant urged her case further through written submissions dated 18th February 2025. To bolster the position that a stranger to the suit could not seek to set aside the judgment, the Appellant submitted that the Affidavit in support of the application was incompetent since it was sworn by one Kenneth MwitiMuriithi, and not the Respondent. According to the Appellant, the said Kenneth MwitiMuriithi was an Advocate employed by Britam General Insurance Company Limited which company had insured the Respondent's motor vehicle. Therefore, to the Appellant, the said insurer was not a party in the suit and the said Advocate could not swear an affidavit in support of the application. The Appellant further submitted that the said Kenneth Muriithi neither deposed to have any authority to plead on behalf of the Respondent nor did he file any other form of authorization and as such there was no nexus between the deponent and the Respondent. The decision in *Kenya Power and Lighting Company - v- Julius Wambale & Another* [2019] eKLR was referred to where it was observed that affidavits sworn by a person who is not a party to the proceedings before the court in incompetent.

5. Further to the foregoing, the Appellant submitted that an insurer could not institute an application in a claim or a suit before it settled the decretal since its right under the doctrine of subrogation had not crystallized. The Appellant further relied in the case of *Jonathan Kyangu Kisilu and Mary Nzioki Kyalu (suing as the legal representative of the estate of Kyaluma Kyangu (Deceased) - v- Mombasa Fresh Company & 2 Others* (2021) eKLR where it was observed: -

> .....it is important to note that the delay has not been explained by the applicants in this matter. It has been explained by a person who was not a party to these proceedings in the trial court and is still not a party to this suit. Even though the deponent has stated that he is duly authorized to swear the affidavit and make averments by dint of his rights under the doctrine of subrogation, his reliance on that doctrine is misplaced.

6. In conclusion, the Appellant argued that since the affidavit in support of the application was incompetent, then the trial Court ought to have instead struck out the application. To that end, she sought the appeal be allowed with costs.

The Respondent's case:

7. Irene Wanjiru Kimiti opposed the appeal through written submissions dated 22nd February 2022. From the outset, it was her case that the Appellant did not raise the issue of the Advocate swearing the affidavit before the trial Court and instead only raised it in her written submissions. To that end, she cited the decision of the Supreme Court of Malawi in the case of *Railways Ltd. - v- Nyasulu* (1998) MWSC where it was observed that parties are bound by their pleadings and as such, the Adjudicator could not decide on issue which the parties had not presented as an issue for determination.

8. The Respondent further submitted that the Appellant, under the doctrine of estoppel was restrained from raising the issue of the affidavit since she received throw away costs which induced the Respondent to believe that the Appellant had buried the hatchet in so far as the issue of the supporting affidavit was concerned.

9. The Respondent sourced support from the case of *Titus Muiruri Doge - v- Kenya Canners Ltd*. (1988) eKLR where the Court observed: -

> .... that if a party is made to believe in a certain state of facts and that party acts on those facts, to his detriment, and the other party stands by and does not stop him from so acting, that other part is estopped from changing his stand.

10. Based on the foregoing submissions, the Respondent prayed that the appeal be dismissed with costs.

Analysis:

11. The single issue for determination in this appeal is whether the trial Court correctly allowed the application. The jurisdiction of this Court on an appeal from the Small Claims Court is spelt out in Section 38(1) of the *Small Claims Court Act* to be only on matters of law and that such an appeal is final. Since the appeal herein seeks to interrogate the manner in which the Court exercised its discretion in allowing the application, the issue comprises of a matter of law and as such this Court has the requisite jurisdiction over this appeal.

12. One of the issues raised by the Respondent was preliminary in nature. It was whether the challenge on the affidavit sworn by the said Advocate was raised during the hearing of the application. Given its nature, this Court will first deal with the issue. It is imperative to note that an appeal to this Court from the trial Court is limited in two fronts; one, to matters of law only and, two, as a final Court on appeal. Therefore, even without dissecting the settled legal position that parties are bound by their pleadings, care must be taken to accord parties the liberty to, in the first instance, interrogate matters before they land on the appellate bench. In this case, it was only appropriate that such a serious factual issue was raised during the hearing of the application so as to accord the said Advocate the opportunity to demonstrate his locus standi in the suit. Canvassing the issue at this stage and condemning the said Advocate without according him an opportunity to be heard will be committing an unforgivable transgression to the fair trial rights guaranteed under Article 50[1] of the *Constitution*.

13. As such, this Court finds favour on the objection raised by the Respondent. Further, it was not disputed that the application was allowed with throw away costs to the Appellant and which costs were duly paid and received. Section 120 of the *Evidence Act*, Cap. 80 of the Laws of Kenya provides for the doctrine of estoppel. The said section states as follows: -

> 120. General estoppel.

> When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

14. Therefore, by receiving the throw away costs, the Appellant was estopped in law from challenging the manner in which the application was allowed. The doctrine, hence, applies in favour of the Respondent in this instance.

15. As the appeal was mainly centred on the competency of the affidavit sworn by Counsel, and, given the foregoing discussion, the appeal can be safely ended. There is no doubt that the Appellant's attempt to challenge the impugned ruling has failed.

Disposition:

16. Drawing from the above, the following final orders hereby issue: -

    (a) The appeal is hereby dismissed.

    (b) The Appellant shall bear the costs of this appeal assessed at Kshs. 20,000/= [Read: Kenya Shillings Twenty Thousand Only].

    It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Michael/Amina – Court Assistants.

No appearance for parties.