

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E356 OF 2024

DAVID MWANGI GICHIMU.....APPELLANT

-VERSUS-

NELSON
MWANGI.....RESPONDENT

NJOROGE

*(Being an appeal from orders in the Small Claims Court at Ruiru (Hon J.K. Tawai RM)
claim number E605 of 2024 dated 4th December 2024)*

JUDGMENT

The appellant filed a claim before the trial court praying for judgement against the respondent for Kshs 310,711.00 plus cost and interest. The claim was for special damages arising from an accident involving the respondent's motor vehicle registration number KWE 066 and the appellant's motor vehicle registration number KCG 892N.

It is pleaded that the appellant served the claim documents through WhatsApp electronic service and applied for entry of default judgment after the respondent failed to appear or file a response. When the matter came for mention on 29-10-2024, the trial court declined to enter the judgment and directed the appellant to file WhatsApp messages as proof of service and fixed another mention for 30-10-2024.

Come 30-10-2024, Mr. Omagwa for the claimant told the court that the messages had been filed but the court held that the same were not in the court system and should be filed and it adjourned the matter for further mention on 14-11-2024. There are no records for 14-11-2024 as the next appearance is indicated to have been on 15-11-2024 when there was no appearance of the parties and the court fixed a mention date of 4-12-2024. The appellant says that the court did not sit on 14-11-2024 and I have no reason to doubt that. When the matter came for mention on 4-12-2024, the court held that the appellant had failed to comply with its order as the messages had not been filed and proceeded to strike out the claim.

It is the order striking out the claim that is the subject of this appeal in which the appellant has raised the following grounds;

- 1. The learned Magistrate erred in law and fact in striking out the appellant's claim despite the fact that the respondent was effectively served with the court documents.*
- 2. The learned Magistrate erred in law and fact in failing to appreciate that the respondent was effectively served through electronic media by way of WhatsApp and proof of service properly placed on record to attest as much.*
- 3. The learned Magistrate erred in law and fact in failing to appreciate that the respondent was effectively served with various mention notices to appear in court after service of the first mention but he still failed to defend the suit.*
- 4. The learned Magistrate erred in law and fact in delivering her judgment striking out the appellant's claim without proper consideration of the*

certificate/affidavit of service on record to establish that proper service was effected upon the respondent.

Section 38(1) of the Small Claims Court Act provides that;

‘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.’

Honourable Justice Kizito Magare addressed this position in ***Wachira v Mwai (2024) KEHC 3173 (KLR)*** when he held that;

‘The jurisdiction of the Small Claims Court is set out in the Small Claims Court Act. Ipso facto, there is only one chance of appeal to this court. It is an Appeal on points of law.’

Going by the above clear provisions, this court has no jurisdiction to entertain an appeal which is based on issues of facts. The memorandum of appeal pleads that the adjudicator erred in law and facts. The fact that a memorandum of appeal complains of errors of law or facts does not make it so. The appellate court must examine the grounds of appeal as pleaded against the decision being appealed and make its own conclusion on whether the same raise issues of facts or law.

The finding of the Adjudicator herein was based on the fact that the appellant had not uploaded the WhatsApp messages as directed by the court. For the court to ascertain whether the messages were uploaded, it was an exercise of fact finding and, in my view, it is not an issue of law. As such and pursuant to the aforesaid Section, this court has no jurisdiction to entertain this appeal.

But in case I am wrong on the above finding, I do not see merits of the appeal. The appellant avers that he had uploaded the WhatsApp messages and it's the Adjudicator who failed to see them. The WhatsApp messages appearing on pages 84, 87, 88 and 91 of the record of appeal have nothing to show that they were uploaded in the case tracking system or filed physically. They do not have the electronic endorsement or rubberstamp of when they were uploaded or filed. I have no way of ascertaining whether the Adjudicator was wrong but it is clear from the proceedings of the day the claim was struck out that Mr. Nyakara for the claimant told the court as follows;

'Claim is for default judgment. Pray court's directions. WhatsApp messages have not been filed. Pray for 2 days to file the same.'

The above being the words of the appellant's counsel attest to the fact that the messages had not been uploaded.

Consequence to the above, I find no reason to disturb the decision of the Adjudicator and this appeal is dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this **14th** day of **November** 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Gesare for the appellant and absence of the respondent.