

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E233 OF 2024

DAVID NGUGI MBURU..... APPELLANT

-VERSUS-

MERCY
GAKURU.....RESPONDENT

NJOKI

(Being an appeal from ruling and Orders of the Small Claims Court at Thika (Hon. A.Z. Ogange Adjudicator/RM) in claim number E006 of 2024 dated 21st August 2024)

JUDGMENT

The appellant filed a claim in the lower court for Kshs 119,205.00 being special damages arising from an accident that occurred on 1st July 2023 involving his motor vehicle registration number KCR 281S and the respondent's motor vehicle registration number KCY 673D. The respondent filed a response to the claim dated 19th February 2024 denying the appellant's claim. The claim was dismissed due to non-attendance of the parties on 5-06-2024 and reinstated on 26-06-2024 following the appellant's application dated 10-06-2024. The appellant failed to attend again on 8-07-2024 consequence of which the claim was dismissed for the second time.

Vide notice of motion dated 9-07-2024, the appellant file applied that the court sets aside the second order for dismissal and reinstates the claim for hearing which application was dismissed on 1-08-2024. The appellant returned to court for a fourth bite asking the trial court to review its orders of 1-08-2024 citing grounds

that, there was a new matter which had come to his knowledge which was that, the parties had reached a consent and wished to have the matter settled.

The respondent did not oppose the application despite having opposed the second one for reinstatement. Through her advocate, the respondent told the court on 14-08-2024 that the application was not opposed. In her ruling which is the subject of this appeal, the Honourable Adjudicator held that she had no jurisdiction to sit on appeal against her own ruling other than what is contemplated in Section 41 of the Small Claims Courts Act. She held further that the application had no merits for review as it had not been demonstrated that the ruling was obtained by fraud, or deceit, was a nullity or that the court was misled into giving its ruling or on any other grounds contemplated in the said Section.

Despite service, the respondent did not file any submissions in opposition to the appeal which is understandable as she did not oppose the application from which the appeal emanated. The appellant on the other hand filed submissions dated 25-03-2025 which I have carefully read.

It is not disputable that a court cannot sit on appeal of its own decision. From the record of appeal and the submissions of the appellant, it is clear to me that the bone of contention is whether the application dated 1-08-2024 fitted under Section 41 of the Small Claims Courts Act which provides as follows;

‘An Adjudicator may, on application by any aggrieved party or on his or her own motion, review any order of the Court on the ground that-

(a) the order was made ex-parte without notice to the applicant;

(b) the claim or order was outside the jurisdiction of the Court;

(c) the order was obtained fraudulently;

(d) there was an error of law on the face of the record; or

(e) new facts previously not before the Court have been discovered by either of the parties.'

It is the submissions of the appellant that the consent which was set to settle the matter was the new fact which was not in the knowledge of either of the parties and this where he has leveraged his case. According to the proceedings, the claim was dismissed for non-attendance for the 2nd time on 8-07-2024 while the consent is shown to have been dated 1-08-2024. The respondent opposed the second application and indeed there was no indication that parties were negotiating before the ruling of 1-08-2024 was delivered.

In my understanding, for the application for review under Section 41(e) which the appellant is relying on to succeed, the new fact must have been discovered after the ruling and should have been in existence as at the time the suit was alive and not what comes to exist after the events leading to the decision being sought to be reviewed. In my opinion, the law did not intend to give parties the widow to go on making or initiating existence of facts which would justify a review after the ruling or decision is made. If that would be the case, it will amount to abuse of the court process as it would allow parties to revive cases by drawing new documents as in this case which would in my view lead to opening of a pandoras box.

In taking the above position, I am persuaded by the holding of the Court in ***Re Estate of Kwasila Luharo (Deceased) [2020] KEHC 7765 (KLR)*** where it was held that;

'In an application for review based on discovery of new and important evidence, the court must exercise caution to prevent a party against whom a

decision has been entered from procuring new evidence so as to strengthen or change the complexion of the case.'

The consent which was the basis of the application was reached on 1-08-2024 after the court had dismissed the application to reinstate the claim. Based on what I have stated above, I do not believe that the appellant's application fitted under matters which were not in the knowledge of the parties at the time the order was made. Parties cannot fail to attend court then go out there, negotiate then come back and ask the court to reinstate the suit to enable them file a consent. There are many procedural and lawful avenues the parties can use in getting their consent into the court system but review of order of dismissal cannot be one of them.

The appellant claims that the Adjudicator denied him the right to fair hearing by failing to allow the application. A fair hearing denotes giving parties opportunity to be heard in support or opposition to their cases but does not extend to a blanket opportunity for parties to squander time given to them to ventilate their matters. The appellant had failed to attend court twice and the court was gracious to reinstate the suit once. It is my finding therefore that the trial court did not deny the appellant his right to fair hearing.

I am inclined the same way as Justice C. Meoli in ***South Sioux Farms Limited v Rasmi Commodities Limited [2024] KEHC 15201 (KLR)*** where she had the following to say in respect of the appellant who had delayed in progressing his appeal;

'While the Applicant is entitled to be heard on its appeal, the right is not absolute and cannot be stretched to accommodate the Applicant indefinitely. To the detriment of the Respondent which was dragged to court and has a

judgment in its favour. The Applicant is the author of its own misfortune, having squandered various opportunities to progress the appeal. Litigation must come to a just and cost-effective end.'

The upshot of the above is that this appeal lacks merits and the same is hereby dismissed. I make no orders as to costs since the appeal was not opposed.

Dated, signed and delivered at Nairobi this **17th** day of **April** 2026.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Judgment delivered in absence of the parties.