

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA NAIROBI
CIVIL APPELLATE DIVISION
HCCA E1218 OF 2024

**ASILI SACCO SOCIETY LIMITED
APPELLANT**

VERSUS

**MAURICE ONYANGO ODUOR.....
RESPONDENT**

JUDGMENT

1. This appeal emanates from the decision of a tribunal which declined the Appellant’s prayers to admit amended defence and other documents. The history of this matter is that the matter proceeded on the 8th day of February 2024 where both the claimant and the respondent testified and closed their cases. The Appellant herein filed an application to have its amended defence admitted on the basis that he was not served with the amended claim thus the proceedings of the 8th day of February 2024 should be set aside as he was not aware of the amended claim which was relied on the said date. Alternatively, the Appellant prayed that the amended claim be struck out. The Appellant contended that had he seen the amended claim, he would have amended his

defence. This was opposed by the respondent who said that it effected service of the amended claim via e mail. The matter proceeded before the tribunal which declined to grant the orders as it was of the opinion that the case proceeded on merit on the 8th day of February 2026 prompting this appeal. I have considered the documents on record and wish to make the following observations;

2. The respondents submitted that the amended claim was served via email to the Appellant and alluded to a document attached to the affidavit an e mail print out showing that the document was served via email of the Appellant counsel. This is denied by the Appellant although there is no assertion that the Respondent sent the documents to a wrong e mail address. Service through e mail address is acceptable by Courts generally although courts must be satisfied that the other party received the e mail and conducted the trial with knowledge of documents allegedly served through email. This is important because sometimes advocates have more than one e mail addresses or fail to check their e mails regularly. For the Courts to be satisfied that there was proper service, it must consider several other factors that follow the date of the service.

Proceedings of the 8th day of February 2024.

3. This matter proceeded on this date with both parties testifying and closing their case. The most important issues

that occurred on that day is that the Claimant confirmed that there was an amended claim in his testimony and the Appellant advocate proceeded with cross examination. This significantly implies that the Respondent's advocate was aware of the amended Claim and must have had it in his file otherwise he would not have had the capacity to cross examine the Claimant if he only had the original claim. If indeed the Respondent advocate did not have the amended claim then, he would have raised the issue or sought for an adjournment and so by proceeding with cross examination, he exhibited the knowledge that he had the amended claim.

4. The amended claim introduced Ksh 33,6000 which formed part of cross examination on the material date. First the members of the tribunal cross examined the Claimant and quoted this figure and then the advocate for the Responded did the same with the Respondent. This figure is not in the original claim meaning that the Court proceeded with the amended claim without objection from the Appellant's advocate. The tribunal correctly noted that the issue of the claimant's items not being returned and the fact that no evidence of how much was disbursed could only emanate from proceeding on an amended claim clearly proving further that the Appellant's advocate was well aware of the amended claim.

5. The issue as to whether the Court allowed the amendment or not can be inferred from the proceedings of the 8th day of February 2026 where parties as I have said above were all aware of the amendments and proceeded on the basis of the amended claim. The amended Claim was part of the pleadings having been filed and served and so a party who proceed to cross- examine or with knowledge of such document cannot turn around and say “yes I proceeded with the matter but since the court had not allowed the application, I want the proceedings to be set aside”. By the court relying on the amended claim and even cross examining on it and the advocates also relying on it, there is indication by consensus that the amended claim is admitted. This will guard the courts against parties who deliberately proceed with a matter knowing of a certain misstep of a small procedure only to raise a technical objection in a process they submitted to and participated in. The yardstick to apply is whether the proceedings of the 8th day of February 2024 were credible or not - and I think it was as both advocates were involved and the case closed. I have seen the proceedings before the tribunal on the 23rd day of January 2023 and noted that none of the parties appeared in court and so the court issued a mention notice for the 12th June 2026 and on that date, only the Respondents advocate appeared and prayed that the application to amend the claim be allowed. The tribunal took cognizance of the affidavit of

service dated the 26th day of May 2023 and allowed the Application and gave the Appellant 14 days to file amended defence. When the matter came on 2nd day of October 2023, both advocates agreed to have the matter proceed for hearing meaning that all applications were marked as spent to pave way for the main hearing. This therefore means that indeed the application to amend the claim was properly dealt with by the tribunal and the Appellant failed to file its amended defence as directed by the Court.

6. The conclusion of the above is that the tribunal was correct in declining to grant the Appellant orders and to this extent, I dismiss this appeal with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 19TH DAY OF MARCH 2026.



**HON L P KASSAN
JUDGE**

**In the presence of;
Getane for Appellant
Mboya for Respondent
Carol - Court Assistant**