



REPUBLIC OF KENYA



**Mbongo v Karani (Civil Appeal E049 of 2024)
[2025] KEHC 6270 (KLR) (28 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 6270 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E049 OF 2024
WM MUSYOKA, J
APRIL 28, 2025**

BETWEEN

MATHIAS MUGENI MBONGO APPELLANT

AND

DISMAS OJIAMBO KARANI RESPONDENT

*(An appeal arising from the judgment of Hon. Kassim Akida, Adjudicator,
delivered on 19th August 2024, in Busia SCCC No. E075 of 2024)*

JUDGMENT

1. The primary court dismissed the claim before it, on 4th July 2024, for being vexatious, frivolous and abuse of the process of the court. The respondent herein, who was the claimant in that cause, sought review of that judgement, by an application, dated 8th July 2024, and, after considering that application, the trial court reviewed its judgement on 19th August 2024, by entering judgement in favour of the respondent, for Kshs. 730,000.00, with costs.
2. That aggrieved the appellant, hence the instant appeal, through the memorandum of appeal, dated 6th September 2024, on grounds around the trial court treating the evidence and submissions superficially; the judgement being against the weight of the evidence; evidence being admitted in a manner that offended the *Evidence Act*, Cap 80, Laws of Kenya; denying the appellant a right to be heard; the typed proceedings being at variance with the actual court proceedings; the ruling offending sections 67, 68 and 107 of the *Evidence Act*; and shifting the burden of proof to the respondent.
3. Directions, on the disposal of the appeal, were given on 10th February 2025, for canvassing of the appeal by way of written submissions. I have only seen written submissions by the appellant.
4. The appellant has argued 5 grounds. On the first ground, he submits that the review application, before the trial court, did not meet the threshold in Order 45 rule 1 of the Civil Procedure Rules, for failing to



demonstrate that there was new evidence or error. On the second ground, it is submitted that the trial court became *functus officio*, after it dismissed the claim, and it had no jurisdiction to reconsider the matter. On the third ground, he argues that he was condemned unheard, for he was not served with the review application, and it was determined without input from his side. On the fourth ground, it is averred that the typed record is inconsistent with what transpired in court, raising doubts about the integrity of the judicial record. Finally, it is submitted that the ruling offends Order 45 rule 1 of the Civil Procedure Rules as it was unsigned, and relied on secondary evidence.

5. Order 45 rule 1 of the Civil Procedure Rules, sections 67, 68 and 107 of the [Evidence Act](#) and Articles 15(2)(d) and 50(1)(2) of [the Constitution](#) of Kenya are cited. The decisions, in *Benjoh Amalgamated Limited & another vs. Kenya Commercial Bank Limited* [2014] eKLR [2014] KECA 872 (KLR) (GBM Kariuki, Musinga & Ouko, JJA), *Telkom Kenya Limited vs. John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR [2014] KECA 600 (KLR) Githinji, Karanja & Kiage, JJA), *National Bank of Kenya Limited vs. Ndung'u Njau* [1997] eKLR [1997] KECA 71 (KLR) (Kwach, Akiwumi & Pall, JJA), *Vurache vs. Republic* [2024] KEHC 1782 (KLR)(Mrima, J), *Kenneth Nyaga Mwige vs. Austin Kiguta & 2 others* [2015] eKLR [2015] KECA 334 (KLR) (Visram, Mwilu, & Otieno-Odek, JJA) and *Timsales Limited vs. Harun Thuo Ndung'u* [2010] eKLR (Emukule, J), are relied upon.
6. The respondent supports the decision by the trial court, and submits that the appeal was not well grounded, as it challenges a ruling or judgement, yet no appeal lies against a decision on a review application.
7. The only issue for me to consider is whether the trial court properly handled the review application.
8. Both sides agree on the jurisdiction of a trial court to review its own orders and decrees. I note that the appellant emphasises the 2 principal grounds, discovery of new evidence and an error on the face of the record, to argue that the impugned decision of the trial court could not be reviewed on any of the 2 grounds.
9. Was there discovery of new and important evidence? I do not think so. The issue was not about introducing new evidence, but about evidence that was already on record being considered. The material had been filed in court, before the hearing was conducted, and before judgement was delivered, and was part of the record, but the trial court did not take it into account in the judgement. So, it was not an issue of discovery of new and important evidence.
10. Was it an error on the face of the record? It would appear to have been so. The respondent had lodged into the court file additional evidence, vide a document filed on 13th May 2024, to wit, a handwritten agreement, acknowledging the sum claimed in the suit, and a bank statement to demonstrate withdrawal of that amount from the bank account of the respondent prior to execution of that acknowledgement. Those documents were lodged into the record on 16th May 2024, going by the invoice, from the court, that I see in the trial record. The notice referred only to the undated agreement, and not the bank statement. Consequently, the bank statement was improperly filed. However, the undated agreement was a clear acknowledgement of receipt of the suit amount by the appellant.
11. The error element comes in on the basis that the said document was in the court file as at 16th May 2024. The matter was thereafter mentioned on 21st May 2024, when it was fixed for hearing on 11th June 2024, the hearing did take place, and the respondent testified. In the judgement the trial court did not make any reference to that document, despite the same being on record, and there could be a sense that there was an error on the face of the record. It would have been otherwise if the trial court had referred to it, and dismissed it for one reason or other.



12. The appellant has not discussed the third reason for review, set out in Order 45 rule 1 of the Civil Procedure Rules, but the respondent has, that is any other sufficient reason. It has been held, in several decisions, some of which the respondent cited at the trial court, that the other sufficient reason need not be analogous to discovery of new evidence or error on the face of the record. See *Pancras T. Sawi vs. Kenya Breweries Limited* [2014] eKLR [2014] KECA 883 (KLR) (GBM Kariuki, Kiage & J. Mohammed, JJA) and *Sardar Mohamed vs. Charan Singh and another* [1959] EA 793 (Farrell, J). The decision, by the trial court, upon the filing of the review application, to consider evidence in documentary form, which is on record, could fall under that rubric.
13. The bulk of the grounds of appeal raise issues around the judgement and not the review. The judgement was delivered on 4th July 2024. The ruling, on the review application, was delivered on 19th August 2024. The appeal is on the ruling. The ruling was on review, and what the court was considering was whether it could review its judgement, to the extent of considering the documents in the further list of documents, dated 13th May 2024. The same had been produced as evidence.
14. The one thing that the parties did not appear to be alive to, because they did not advert to it at all, was the fact that the proceedings were under the *Small Claims Court Act*, Cap. 10A, Laws of Kenya. The Small Claims Court has its own rules of procedure, the Small Claims Court Rules. The *Small Claims Court Act* establishes the Small Claims Court, “to provide for the jurisdiction and procedures of that court and for connected purposes.” The said court is a subordinate court, but it is not a court under the Magistrates Court Act, Cap 10, Laws of Kenya. As the *Small Claims Court Act* provides for the jurisdiction and procedures of that court, the same is not wholly dependent on the *Civil Procedure Act* and the Civil Procedure Rules. The *Small Claims Court Act* is a comprehensive piece of legislation, with respect to the jurisdiction and processes of that court. It is self-contained. Its rules of procedure are in the Small Claims Court Rules, and not the Civil Procedure Rules, and its processes are exclusively governed by the Small Claims Court Rules, except where and to the extent that those refer to or adopt the procedures in the *Civil Procedure Act* and the Civil Procedure Rules.
15. The *Small Claims Court Act* provides for appeals, at section 38 of the Act, from “the decision or an order of the Court,” and an aggrieved party may appeal against that decision or order to the High Court on matters of law. The *Small Claims Court Act* does not provide for review of “the decision or an order of the Court.” Review is provided for in the *Small Claims Court Act*, but not under Part IV, where appeals are provided for, and which covers procedure before the *Small Claims Court Act*. Review falls under Part V, which is on execution of the decree of the Small Claims Court, and, under section 41, an order may be reviewed where it was made ex-parte, without notice to the applicant; the claim or order was outside the jurisdiction of the court; the order was obtained fraudulently; there was an error of law on the face of the record; or new facts previously not before the court have been discovered by either of the parties.
16. Review is also provided for in the Small Claims Court Rules, at Rule 29, which is on the power to review a decree or order of the court. Review should be premised on only 2 grounds, under that Rule, “an error apparent on the face of the record; or ... a clerical or arithmetical mistake.” Whereas section 41 appears to limit review to orders only, Rule 29 covers both decrees and orders. Does it make a difference? Ideally, it should, for a decree and an order are different. There could be a drafting error, with respect to section 41 and Rule 29, for both ought to be in sync, for it would be untidy, for the Act to suggest that review is available only with respect to orders, and the Rules to expand that to include decrees.



17. Whatever the case, the principles would be the same. The omission to consider evidence, that was on record, amounted to an error on the face of the record, which the trial court had power to remedy, under Rule 29 of the Small Claims Court Rules.
18. Was the evidence admitted against the provisions of the *Evidence Act*? The appellant has not sought to demonstrate how the evidence that the trial court considered offended the *Evidence Act*. The trial, on 21st May 2024, proceeded ex parte. Which meant that the testimony of the respondent was uncontroverted. The documents that he produced, at that trial, which included those in the further list dated 13th May 2024, were produced unopposed.
19. The hearing date, of 11th June 2024, was given in court, in the presence of the Advocates for both sides. At the hearing, on 11th June 2024, both the appellant and his Advocate were absent. The matter proceeded largely as a formal proof, on that account. The appellant had a chance to challenge that evidence at that trial, but he passed it up, and lost the chance to raise the issues that he is now raising on appeal. The documents, that the court considered at review, had been produced as exhibits at the formal hearing on 11th June 2024.
20. The appellant argues that he was not given a chance to be heard. As discussed above, the hearing date of 11th June 2024 was fixed before the adjudicator, in the presence of both parties. One party attended court, and presented its case, the other party did not attend court, and cannot complain that it was denied an opportunity to present its case.
21. Regarding the review application, which led up to the impugned ruling, I note that the appellant filed grounds of opposition to that application. The said grounds were dated 22nd July 2024. That application was canvassed by way of written submissions, and the appellant filed written submissions, dated 31st July 2024. The ruling expresses that the grounds of opposition were considered. The appellant, in the circumstances, has no ground upon which he can assert that he was not heard on the application.
22. On there being a variance between the typed proceedings, and the actual court proceedings, I note that the appellant has not pointed at the variances that he has in mind, in his written submissions. I have compared the handwritten record with the typescript, and I have not noted any variations. In any event, both records are before the appellate court. The handwritten record is superior to the typed record, as the handwritten record is the record made by the adjudicator himself. The transcript is the work of the typist or secretary or office administrator, who reduced the handwritten record into typing, and the adjudicator cannot be held accountable for any errors made in it. In any case, the appellant has not demonstrated how the undisclosed variances impacted on the final decision of the adjudicator.
23. He cites sections 67, 68 and 107 of the *Evidence Act*, and argues that the ruling on review offended them. Section 67 is about documents being proved by primary evidence. The appellant cites Kenneth Nyaga Mwigie vs. Austin Kiguta & 2 others [2015] eKLR [2015] KECA 334 (KLR) (Visram, Mwilu, & Otieno-Odek, JJA), to support that. I reiterate, that the appellant did not attend the trial. The issues that he flags on appeal ought to have been addressed then. At the trial, the appellant would have opposed production of any document by the respondent, which he thought required production by way of direct evidence. He did not avail himself of that opportunity. Kenneth Nyaga Mwigie vs. Austin Kiguta & 2 others [2015] eKLR [2015] KECA 334 (KLR) (Visram, Mwilu, & Otieno-Odek, JJA) turned on documents marked for identification. The respondent did not mark any of the documents, that he relied on, for identification.
24. Section 68 is on secondary evidence. I reiterate that these are issues that should have arisen at the trial. The appellant absented himself from it, and lost the opportunity to raise issues on documents that



required primary evidence, and those that could be produced as secondary evidence. Section 107 of the *Evidence Act* is on burdens of proof. The respondent proceeded with his case, for all practical purposes, ex parte. His testimony was unchallenged. The documents he relied on were uncontested. In the face of that, it should be easy to see why the court was satisfied that the case had been established to the required standard.

25. On the burden of proof being shifted to the appellant, I will say this, that the appellant stayed away from the trial on 11th June 2024. He did not participate at the trial. He offered no evidence. The trial court decided only on the evidence adduced by the respondent, and had nothing to compare with. In any case, in civil trials, the standard of proof is on a balance of probability, or on the preponderance of the evidence, and the burden of proof always shifts, depending on the weight of the case presented by either side. But that did not arise here, as the appellant was not at the trial, and there was no one upon whom burden of proof could be shifted.
26. There is the issue of the impugned ruling not being signed by the adjudicator. The ruling was delivered digitally or online. It bears a digital signature, in barcode mode.
27. Overall, I do not find any material upon which I can hold that the appeal herein is merited. I, accordingly, dismiss it. The respondent shall have the costs. The trial court records shall be returned to the relevant registry, while the appeal file shall be closed. Orders accordingly.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 28TH DAY OF APRIL 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Azenga Alenga, Legal Researcher.

Advocates

Mr. Jack Oronga, instructed by Odhiambo Oronga & Company, Advocates for the appellant.

Mr. Erick Jumba, instructed by Balongo & Company, Advocates for the respondent.

