

Kartar Singh Dhupar & Company Limited v ARM Cement PLC (In Liquidation) (Civil Appeal 129 of 2022) [2023] KEHC 2417 (KLR) (Commercial and Tax) (23 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2417 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI
COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
COMMERCIAL AND TAX
CIVIL APPEAL 129 OF 2022
PN GICHOHI, J
MARCH 23, 2023

BETWEEN

KARTAR SINGH DHUPAR & COMPANY LIMITED APPELLANT

AND

ARM CEMENT PLC (IN LIQUIDATION) RESPONDENT

(Being an appeal from the judgment and order of Honourable C. A. Okumu(Ms), Adjudicator, delivered on the 23rd day of August, 2022 in SCCOMM No. 3459 of 2022- ARM Cement PLC (In Liquidation) V Kartar Singh Dhupar & Company Limited)

JUDGMENT

1. The background of this matter is that through the firm of Atim Apum & Co. Advocates, the Respondent (ARM Cement PLC (In Liquidation)), who was Claimant, filed a claim dated 6th June 2022 in the Small Claims Court against the Appellant (Kartar Singh Dhupar & Company Limited who was the Respondent, for payment of the sum of Ksh. 629, 599. 21 for goods supplied and delivered to the Appellant on or about 18th February 2015.
2. The Appellant filed his statement of response dated 6th July 2022 through the firm of Waruhiu & Co. Advocates denying the claim on the grounds that there was no Local Service Order (LPO) from the Respondent requesting for the said goods from the Respondent and that any delivery made to the Appellant ought to have been received and stamped but this was not done.
3. Further, the Appellant stated that the invoices attached by the Respondent only showed to have been dispatched to the Appellant but the Appellant never received the goods. That the alleged debt was null, void and unenforceable against the Appellant for lack of a consent, and/or approval, as there was no acknowledgment bearing the Appellant's sign and or mark to receive the goods.
4. The claim was canvassed by way of written submissions and the Court finally delivered its judgment on 23rd August 2022 where it found that the Respondent had established on a balance of probability that



there was supply and delivery of the goods to the Appellant and that the amount remained unpaid. Therefore, the Court entered judgment in favour of the Respondent as against the Appellant in the sum of Ksh. 629, 599.21 plus costs and interest.

5. The Appellant was aggrieved by this decision and filed a Memorandum of Appeal dated 20th September 2022 listing four grounds of appeal as follows;
 1. That the learned trial Magistrate/Adjudicator misdirected herself on several matters of law.
 2. That the learned trial Magistrate/Adjudicator erred in law by failing to appreciate that the jurisdiction of the trial court was time bound that ran out and ceased by effluxion of time on the 6th day of August ,2022 being the date and day the court's time-bound jurisdiction ceased to exist by dint of Section 34(1) of the *Small Claims Court Act* No. 2 of 2016.
 3. That the learned trial Magistrate/Adjudicator erred in law by failing to take into account legal and fact that the moment the sixty (60) days ended, the jurisdiction of the court also ended.
 4. That the learned trial Magistrate/Adjudicator erred in law by failing to take cognisance of the legal fact that the judgment rendered and returned outside time was without jurisdiction ergo a nullity bereft of any force of law.
6. The Appellant therefore seeks that this Court sets aside the judgment by the Adjudicator, Hon. C.A. Okumu (Ms), quash the orders of 23rd August 2022 and allow the Appeal with costs of both the appeal and the trial court proceedings.
7. The Respondent filed Amended Notice of Preliminary Objection dated 13th January 2023 against the Memorandum of Appeal and an affidavit in support sworn on 13th January 2023 by Joan A. Atim Advocate in the firm of Atim Apuun & Co. Advocates for the Respondent.
8. Counsel states that the Appellant misdirected itself on the purport , intent and application of Sec. 34 (1) of the *Small Claims Court Act* No. 2 of 2016 and terms the Memorandum of Appeal vexatious as it does not raise any point of law on the case and/or judgement of the honourable Magistrate. Further, counsel states that the Memorandum of Appeal does not operate as a stay and that the appeal has not been secured. The Respondent contends that the Memorandum of Appeal is defective, a waste of the Court's time and a delaying tactic meant to deny the Respondent the fruits of the judgment.
9. Giving the background and chronology of the flow said case before the Small Claims Court, counsel depones that the Court had jurisdiction by dint of Sec. 12 of the Small Claims Act, 2016 to hear and determine the Claim instituted by the Respondent on 9th June 2022 against the Appellant for the recovery of the debt. Further, she depones that the Court endeavoured and determined the matter within the Sixty (60) days period set in Section 34 of the Act and that there was no inordinate delay and the Appellant did not take into account non- working days in adding time.
10. That despite the Court's endeavours, one adjournment was caused by the Appellant on 30th June 2022 who requested for more time to file a response to the claim and the other by the Court at the time of delivery of judgment on 19th August 2022 when the court stated that judgment was not ready and deferred it to 23rd of August 2022. She therefore depones that the extension of time was not occasioned by the Respondent/Claimant.



11. Counsel depones that immediately after delivery of judgment, the Appellant was granted Thirty (30) days stay of execution which has since lapsed. Lastly , counsel urges the Court to strike out the Memorandum of Appeal with costs and uphold the lower Court judgment .

SUBMISSIONS

12. Filed together with the Preliminary Objection were submissions by the Respondent dated 13th January 2023. Citing the case of Kivanga Estates Ltd v National Bank of Kenya Limited [2017] eKLR, counsel submits that this court has discretion to strike out pleadings at any stage if the same is scandalous , frivolous or vexatious.
13. While citing Rule 30 of the Small Claims Court (Amendment) Rules 2020, counsel submits that that a party aggrieved by the judgment or order of the Court may appeal pursuant to Section 38 of the Act, appeal to High Court in accordance with Order 42 of the Civil Procedure Rules 2020. However, the Appellant was given the thirty days stay after delivery of the judgment, it never took time to file a formal application upon lapse of the time but instead opted to file this Memorandum of Appeal and no security for costs has been filed to secure the appeal.
14. The Appellant did not file submissions and did not attend court for directions on this matter.

DETERMINATION

15. This being a first Appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions while bearing in mind that unlike the trial court, this court has neither seen nor heard the witnesses when they testified as stated in *Selle & Another v. Associated Motor Boat Co. LTD & Others* (1968) EA 123 where it was stated;

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

16. However, it is clear from the Memorandum of Appeal that the Appellant is attacking the judgment on point of law only and which is on jurisdiction regarding timelines for hearing and concluding a matter before the Small Claims Court. Further, a perusal of the lower court original record shows that the parties therein had canvassed the Claim by way of written submissions and therefore, no witness testified. I have already highlighted the pleadings by parties in the lower court. The broad issues for determination before this court therefore , are :-

1. Whether this appeal is incompetent.
2. Whether the error in law and fact in arriving at the judgment by the trial court.
3. Whether jurisdiction of the court had ceased at the time of delivery of the judgment thus rendering the judgment a nullity.

17. As to the competence of the Appeal, Section 38 of the Act that ;

- a. 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.



- b. An appeal from any decision or order referred to in subsection (1) shall be final.
18. The grounds of appeal herein clearly fall within the provisions of Section 38 of the Act. In the circumstances stated herein, this Court is not persuaded that the appeal herein is scandalous or vexatious for not raising a fundamental point of law as submitted by the Respondent's counsel. The Court of Appeal decision in *Kivanga Estates Limited v National Bank of Kenya Limited* [2017] eKLR cited by counsel does not support the Respondent.
19. Further, it is factual that the Appellant sought and was granted Thirty (30) days of execution when the judgment was delivered but did not file any formal application for stay pending appeal. The issue as to deposit of security for costs would not arise in the circumstances as what is before court is an appeal not application for leave to appeal.
20. On whether there is an error in law and fact in arriving at the judgment by the trial court, it is clear from the lower court record that there was a contractual relationship between the Appellant and the Respondent for the purchase and supply of cement.
21. Various correspondences between the parties in regard to the payment of the said sum by the Appellant reveal a confirmation of that contract between the two parties. In light of the delivery notes, the statements of account and emails between the parties as attached to the statement of claim, the Appellant's argument that if the goods were delivered then it was without order by the Appellant, does not therefore stand.
22. Indeed, that is well captured in paragraph 4 and 5 of the judgment as follows:
- “The Respondent submitted that there existed a valid contract between themselves and the Claimant for the supply of bags of cement to the Respondent's warehouse.
- It is undisputed that there existed a valid contract between the two parties as evidenced by email correspondences between the parties and their admission.”
23. The Respondent did supply the cement and the Appellant made only part payment leaving the balance of the amount claimed in the Respondent's Claim as Ksh. 629,599.21 as found by the trial court. I see no error in law or fact in the analysis by the said court in arriving at that judgment.
24. There is no dispute on jurisdiction of the honourable Magistrate/ Adjudicator in starting to hear this case. From the lower court record, it is clear that the Respondent's Claim was filed on 6th June 2022 and served on the Appellant on 16th June 2022. The matter was first listed before the honourable Magistrate/Adjudicator on 20th June 2022 and both parties were present. However, the Appellant had not filed a response despite the provisions of Section 34 of the Act on expiations disposal of the matter and in particular Sec. 34 (1) that;
- “All proceedings before the Court on any particular day so far as is practicable shall be heard and determined on the same day or on a day to day basis until final determination of the matter which shall be within sixty days from the date of filing the claim.”
25. The reason for not filing the response was explained to court. Adjournment of the matter is within the discretion of the Court as provided for under Section 34 (3) and (4) of the Act that;



3. “The Court may only adjourn the hearing of any matter under exceptional and unforeseen circumstances which shall be recorded and be limited to a maximum of three adjournments.
 4. When considering whether to allow an adjournment on the grounds of exceptional and unforeseen circumstances referred to in subsection (3), the court may in particular take into consideration where appropriate any of the following exceptional and unforeseen circumstances—
 - a. the absence of the parties concerned or their advocate or other participants to the proceedings required to appear in court for justified personal reasons which may include sickness, death, accident or other calamities;
 - b. ..;
 - c. ...;
 - d.;
 - e. ...and;
 - f. any other exceptional and unforeseen circumstances which in the opinion of the court justifies or warrants an adjournment.”
 1. The Court granted the Appellant Seven (7) days to file the response and the matter to be mentioned on 30th June 2022. Surprisingly, the Appellant had not yet filed the response by the time the matter came for mention on that date as scheduled. The grounds were that the Appellant was away for two weeks. The Appellant sought more time and was ordered to file the same by close of business on 7th July 2022. That was the second adjournment on the matter. The Court granted the adjournment and the matter was scheduled for further mention on 19th July 2022.
 2. The Appellant had filed his response by then and the matter was certified ready for hearing. Parties agreed to dispose of the matter by way of written submissions. Both had complied by the date set that is, 2nd August 2022. Section 34 (2) of the Act provides that; “Judgment given in determination of any claim shall be delivered on the same day and in any event, not later than three (3) days from the date of the hearing.”
 3. On 2nd August, 2022 when the court set a date for judgment, only three days remained to the expiry of the timelines. The Court should have delivered its judgment on or before the 5th August 2022 which was the day the Sixty (60) days lapsed. The court however set set judgement date as 19th August 2022.
 4. There is nothing indicated on record as to why the Court deferred the judgment to 23rd August 2022 but it is indicated that the Claimant was absent. The judgment was delivered on 23rd August 2022 as scheduled. That was well over the Sixty (60) days allowed by the law, and to be precise, Seventeen (17) days after the lapse. The question therefore is, should the judgment and



proceedings be declared a nullity due to the fact that they went beyond the timelines set by the law?

5. While dealing with timelines in an election petition, it was argued in Supreme Court Petition 3 of 2019 Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 others [2019]eKLR, that the High Court proceedings that occurred after the lapse of Six (6) months were a nullity as well as the judgment delivered by that court. The Supreme Court held:

“As already stated, all election petitions must be resolved within the provided timeframes without qualifications. In this case, we have noted that High Court determined the petition before it after lapse of the 6 months from the date of filing. That was an affront to *the Constitution* and enabling electoral laws. As such, we agree with the Court of Appeal that the said High Court proceedings were a nullity...we restate that upon lapse of time, the High Court had no jurisdiction to determine the petition... As such, no remedy was available to any party.”

31. On the issue as to who should bear the costs, the Supreme Court went on “...We sympathise with the petitioner who , without any fault of her own , has been locked out of the seat of justice...yet...the proceedings have been declared a nullity, no party can claim success...Each party should bear its own costs.”
32. That is in regard to election petitions and the reasoning behind introduction of those strict timelines in electoral laws was peculiar including huge financial resources spent in that cycle. Previously, a petition would remain pending in court for a long period of time, deliberately or otherwise. At times , an election petition would be determined after the Respondent served his/her full time in the position the subject of the petition or, just a few months before such term ended. That made the whole process a mockery of justice. The petitioners therein , and the public at large, lost faith in the judicial system. That is why those timelines must strictly be complied with.
33. What about the Small Claims Court? Some of the reasons for introducing that Court were to enhance ease of doing business in this country, reduce backlog of cases by having disputes resolved through simple, inexpensive and expeditious procedures, thus enhancing access to justice. The guiding principles in handling those cases are found in Section 3 of the Small Claims Act 2016 as follows;
 1. In exercise of its jurisdiction under this Act, the Court shall be guided by the principles of judicial authority prescribed under Article 159(2) of *the Constitution*.
 2. The parties and their duly authorized representatives, as the case may be, shall assist the Court to facilitate the observance of the guiding principles set out in this section, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of that Court.
 3. Without prejudice to the generality of subsection (1) the Court shall adopt such procedures as the Court deems appropriate to ensure—
 - a. the timely disposal of all proceedings before the Court using the least expensive method;



- b. equal opportunity to access judicial services under this Act;
- c. fairness of process; and
- d. simplicity of procedure. [Emphasis added]

34. The Respondent therefore approached the Court in quest for justice intended by the Act. The Appellant and his Advocate were well aware of timelines set for such a case. They caused the delay by failing to file the response and abide by the directions given by the court towards expeditious disposal of the matter. Those delays were eating onto the timelines set for hearing and determination of the case.
35. Though the Respondent herein does not appear to have directly contributed to the lapse of time, it acted as though oblivious of the timelines and therefore raised no objection to the delays and adjournments, which is very unfortunate.
36. Considering the purpose and purport of the Small Claims Court, it sounds unfair and unjust that the Appellant who violated the timelines now wishes to benefit from the violation by citing Sec. 34 of the Act in this appeal. Unfortunately, jurisdiction is everything and therefore, there is no room for sympathy and emotions in looking at a matter that is thrown out of the jurisdiction of the court by effluxion of time.
37. That was the reasoning by the three-judge bench in the Court of Appeal Civil Appeal Case No. E039 of 2021 *Aprim Consultant v Parliamentary Service Commission & 2 others* (unreported). In that case the Judicial Review application was filed on 2nd June 2020 and should have been determined on or before 17th July 2020. However, judgment by Nyamweya J was delivered on 18th January 2021 which was 185 days outside and beyond the 45 days set by section 175 of the Public Procurement and Assets Disposal Act for the determination of the Judicial Review application.
38. The Court held;
- “Our reading of the Act is that the High Court was under an express duty to make its determination within the time prescribed. During such time did its jurisdiction exist, but it was a time-bound jurisdiction that ran out and ceased by effluxion of time. The moment the 45 days ended, the jurisdiction also ended. Thus, any judgment returned outside time would be without jurisdiction and therefore a nullity, bereft of any force or effect in law. That legal conclusion remains irrespective of the avowed reasons, no matter how logical, sound, reasonable or persuasive they may be. No amount of policy, wisdom or practicality can invest a decision made without jurisdiction with any legal authority.”
39. Guided by these authorities, this court is satisfied that the judgment delivered by Hon. Hon. C.A. Okumu (Ms)/ Adjudicator on 23rd August 2022 was done outside the statutory timelines set under Section 34 of the *Small Claims Court Act* and hence made without jurisdiction. It is therefore a nullity, bereft of any force or effect in law.
40. In the upshot, the appeal is upheld. The judgment delivered on 23rd August 2022 is hereby quashed. Due to the nature of the matter, each party is directed to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 23RD DAY OF MARCH, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:



N/A for Appellant

Mr. Kiprotich for Respondent

Kevin Isindu, Court Assistant

