



REPUBLIC OF KENYA



KENYA LAW
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**Musita v Mutai (Tribunal Case E004 of 2021)
[2022] KEMSET 229 (KLR) (Civ) (22 April 2022) (Judgment)**

Neutral citation: [2022] KEMSET 229 (KLR)

**REPUBLIC OF KENYA
IN THE MICRO AND SMALL ENTERPRISES TRIBUNAL
CIVIL**

TRIBUNAL CASE E004 OF 2021

J.BETT, CHAIR, R.KATINA, VICE CHAIR, JWERE, A GIKUYA & A KIBET, MEMBERS

APRIL 22, 2022

BETWEEN

MATHEW OTENYO MUSITA CLAIMANT

AND

TONY MUTAI RESPONDENT

JUDGMENT

Introduction

1. This claim dated 28th October 2021, was registered/filed through the e filing platform on 28th October 2021. The Claimant, Mathew Otenyo Musita was represented by the MS Wandolo Advocate. The Claim was for recovery of Ksh40,000/= plus costs and interest being the amount due from the Respondent for the supply of goods. The Claim has been pending since April 2020.
2. Upon the filing of this Cause on 29th October 2021, the Tribunal issued directions on 1st December 2021 and set the Cause for a mention on 7th January 2022 to confirm compliance. On 7th January 2022, the Tribunal was informed by the Claimant that he was not aware that the Tribunal had issued directions as it did on 1st December 2021. The Tribunal set the Cause for further mention on 28th January 2021 so as to allow the parties to comply with the further directions issued. The Tribunal established during the mention on 28th January and 11th February that the claimant had not effected service as earlier directed. On 18th February, the Claimant informed the Tribunal that service had been effected upon the Respondent on 14th February in terms of Order 5 Rule 22 of the Civil Procedure Rules (Legal Notice No. 22/2020). The Claimant affirmed compliance. However, the Respondent was absent. The Tribunal confirmed that the Claimant had indeed filed the affidavit of service of the Claim. The Cause was slated for hearing on 11th march 2022 but it couldn't take off as both parties were not present. The Cause was adjourned to 24th March 2022. The Tribunal was informed on 24th



March that the hearing Notice was served and that the affidavit of service had been filed. It was further informed that the formal proof notice had been served and that a request for Judgment in default was filed on 8th March 2022.

3. The matter had to proceed by way of formal proof as Tribunal was convinced that it was proper in the circumstances to allow the matter to proceed since the claimant had sufficiently demonstrated to the Tribunal that it had made every effort to duly serve the Respondent at every stage of the proceedings.

The Claimant's Case

4. The Claimant, testifying from Sweden through a video link informed the Tribunal that that the Respondent was his Rugby sport acquaintance and that in April 2020, the Respondent contacted him and asked to be supplied with clothes worth Ksh. 35,000/= from Sweden on the promise that payment would be made upon delivery.
5. That he sent the goods to the Respondent residing in Kenya through DHL. The delivery charges was Ksh. 5,000/=. He further stated that the Respondent promised to pay within a period of 1 month.
6. That after the lapse of the period he contacted the Respondent who neglected and or refused to pay. That in January 2022, the Respondent paid Ksh. 13,000/= in two instalments of Ksh. 8,000/= and 5,000/=. The balance of Ksh. 27,000/= is still outstanding. Demand notice was issued in vain. The claimant now avers that the outstanding claim is for Ksh. 27,000/= plus costs and interest.
7. The Claimant sought to rely on the Claim dated 28th October 2021, Claimant's statement dated 28th October 2021 and the Demand letter dated 21st April 2021.
8. He further stated that upon service of the Claim and all supporting documents, the Respondent did not make any response to the Claim and therefore prayed for judgment in his favour.

Issues for Determination

9. Arising from the claim and the oral evidence at the formal proof hearing on 24th March 2022, the following issues presented themselves for the determination by this Tribunal;
 - a. Whether the Respondent was served with the claim.
 - b. Whether the Respondent has an outstanding debt of Ksh 27,000/= being the outstanding purchase price for the goods received from the Claimant.
 - c. Who bears the cost of this claim?

Determination and Final Orders

The right to be heard

10. The first issue is whether the Respondent was granted the right to be heard. The Tribunal grappled with this issue as it is a Constitutional right for the Respondent to be accorded the right to be heard.
11. The Tribunal notes that the Claim was served upon the Respondent. Further, the mention as well as the hearing notice was also served upon the Claimant. The Respondent however did not file the Response nor attended the hearing of the suit. No explanation was given for failure to file the Response. Further, no explanation was given for failure to attend the hearing of this suit by the Respondent or his Representative.



12. The Tribunal heard from the Claimant that all the documents were served upon the Respondent. Corresponding affidavit of service were filed by the Claimant.
13. The Tribunal underscores the right to be heard as was held by the Supreme Court of India in *Sangram Singh v Election Tribunal Koteb* 1955 AIR 425 thus:-

“ [T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.”
14. Every party in a case has a right to be heard and subsequently, that right should not be denied unless there are very good reasons for doing so. The Tribunal having considered the facts and prevailing circumstances set the suit for formal proof on 24th March 2022. The Tribunal was convinced that Respondent was served with the Claim and was accorded reasonable time to file and serve the Response. It cannot therefore be said that the Respondent was denied the Constitutional right to be heard.
15. In allowing this suit to proceed to formal proof, the Tribunal was also guided by the Constitutional principles of the right to be heard and the reasoning of the appellate court in *James Kanyita Nderitu & Another* [2016] eKLR, where the Court of Appeal stated as follows:

“ From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment.
16. This point is further emphasised by Ojwang, J (as he then was) in *Mungai -vs- Gachubi and Another* [2005] eKLR cited with approval in the case of *Signature Tours & Travel Limited -V- National Bank of Kenya Limited* [2017] eKLR when he stated as follows:

“ a court decision stands as a final decision only when a proper hearing has taken place and the parties and those who ought to be enjoined as parties have been fully heard and their representations concluded, unless they elect to forgo the opportunity.”
17. The Tribunal is guided by the Constitutional principles of the right of a party to be heard while noting that this right should not create injustice and prejudice to others. Having found that there was proper service and that there was no justification for the failure to file the Response and attend the hearing of the suit, the Tribunal was convinced that it was proper and justifiable in the circumstances to allow the matter to proceed to formal proof on 24th March 2022.

Goods Delivered

18. As to whether the Respondent obtained the goods from the Claimant, the Claimant stated in his testimony that he delivered the goods through DHL upon the Respondent in April 2021. No evidence was presented to the contrary.



Outstanding debt

19. Having considered the evidence tendered by the Claimant in its totality, the Tribunal finds that the relevant law that will govern it in coming up with its judgment is found under the provisions of Order 10 Rule 4 (1) of the [Civil Procedure Rules, 2010](#) which provide as follows:

“4(1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

20. The Claimant testified that the total value of the goods was Ksh. 35,000/= and Ksh. 5,000/= for delivery charges. He also testified that the Respondent had paid a total of Ksh. 13,000/=. No evidence was presented to the contrary. We therefore find that in the absence of evidence to the contrary, the Respondent owes the Claimant Ksh. 27,000/= being the outstanding amount of the purchase price.

Costs

21. On the issue of costs, the Tribunal notes that the Claimant has encountered considerable cost in sustaining this claim. The Claimant specifically pleaded to be awarded costs of this suit. We find that it is fair and just to award costs to the Claimant.

Orders

22. Flowing from the findings, we find that in the interest of justice, the Respondent should pay the Claimant:-
- a. The outstanding Purchase price of Ksh. 27,000/=
 - b. Costs of the Claim of Ksh 20,000/=
 - c. Interest on (a) and (b) above at prevailing court rates.

Those then are the Orders of the Tribunal.

DATED DELIVERED AND SIGNED ON THIS 22ND DAY OF APRIL 2022

Dr. J. BETT.....[CHAIRMAN]

R. KATINA.....[VICE-CHAIR]

J. WERE.....[MEMBER]

A. GIKUYA.....[MEMBER]

A. KIBET.....[MEMBER]

Judgement delivered virtually in the presence of:

1. Ms Wandolo for Claimant
2. Tony Mutai, Respondent
3. Mr. Isaac Kapalikinei – Tribunal Assistant
4. Ms Joy Kendi – Tribunal Assistant



5. Ms Zulekha Abdullahi –Tribunal Assistant

