

## **FREQUENTLY ASKED QUESTIONS AND ANSWERS**

### **1. Does the Small Claims Court have the jurisdiction to hear my claim?**

#### **1.1. Monetary:**

The Small Claims Court can hear claims that do not exceed KES. 1,000, 000.00 in value. If the claim is more than KES. 1, 000, 000.00 you can still institute a claim in the Small Claims but will have to abandon the part of the claim exceeding KES. 1, 000,000.00 which means that, that part of the claim will be extinguished completely. You cannot split a single claim into two or more separate claims so that each one does not exceed KES. 1,000, 000.00.

#### **1.2. Persons:**

A claim may be instituted against anyone, including companies, corporations or other entities within the area of jurisdiction of the court.

However, you may not institute an action against the State in the Small Claims Court. The State includes all three spheres of government, namely national, and county.

#### **1.3. Causes of action (types of claim):**

Only certain causes of action may be instituted in the Small Claims Court. These include:

- (a) actions for the delivery or transfer of any property, movable or immovable, not exceeding KES. 1,000, 000.00 in value;
- (b) actions for ejectment against the occupier of any premises or land within the area of jurisdiction of the court: Provided that where the right of occupation of the premises or land is in dispute between the parties, that right does not exceed in clear value to the occupier the amount of KES. 1,000,000.00;
- (c) actions based on or arising out of a liquid document or a mortgage bond, where the claim does not exceed the amount of KES. 1,000, 000.00. Examples of liquid documents include an acknowledgement of debt, a promissory note or a cheque;
- (e) actions other than those already mentioned above where the claim or the value of the matter in dispute does not exceed the amount KES.1,000, 000.00;
- (f) counterclaims not exceeding the amount of KES.1,000, 000.00, in respect of any cause of action mentioned in paragraphs (a) to (e) above.

Certain matters are specifically excluded from the jurisdiction of the Small Claims Court. These are:

- (a) actions for divorce or annulment of marriage;
- (b) matters concerning the validity or interpretation of wills;
- (c) matters concerning the mental capacity of a person;
- (d) matters in which is sought specific performance without an alternative claim for payment of damages, except in the case of-
  - (i) the rendering of an account in respect of which the claim does not exceed the amount of KES.5, 000.00;

(ii) the delivery or transfer of any property, movable or immovable, not exceeding in value the amount of KES. 1,000, 000.00;

(e) matters in which a decree of perpetual silence is sought;

(f) matters in which is sought damages in respect of-

(i) defamation;

(ii) malicious prosecution;

(iii) wrongful imprisonment;

(iv) wrongful arrest;

(v) seduction;

(vi) breach of promise to marry;

(g) matters in which an interdict is sought.

**2. Do I have to institute my claim in the Small Claims Court if it is less than KES. 1,000, 000.00?**

No, you can choose to institute your claim in the Small Claims Court or any other competent court having jurisdiction.

**3. Can the Small Claims Court hear a claim that my close corporation or company has against a Defendant?**

Juristic persons such as companies, close corporations or voluntary associations may not institute a claim in the Small Claims Court.

**4. How do I know which Small Claims Court I should go to in order to institute my claim?**

Generally you will need to institute your claim in the Small Claims Court that has jurisdiction over the area where the defendant resides, carries on business or is employed. You can also institute a claim in a court if the whole cause of action arose within the area of that court's jurisdiction. If your claim is in respect of immovable property owned by the defendant, or a mortgage bond over that property, you can institute the claim in the court in whose area of jurisdiction the immoveable property is situated.

Check with the clerk of the Small Claims Court if you are unsure.

**5. Do I need an attorney to represent me at the Small Claims Court?**

No. Representation by attorneys and advocates is not allowed at the Small Claims Court. You may obtain advice on the merits of your claim from an attorney beforehand. The legal assistants and clerks of the Small Claims Court will be able to assist you free of charge.

**6. Can I sue more than one Defendant at the same time?**

Yes. You may sue two or more defendants in one action. You can sue the defendants jointly or in the alternative if you are uncertain which of the defendants is liable. One or more defendants may however apply to have the trials held separately.

**7. How do I institute my claim?**

A claim is instituted by serving a summons on the defendant. You can either serve the summons yourself or have the Sheriff serve it. The clerk of the court will assist you in preparing the summons.

**8. Do I need to send a letter of demand to the Defendant before issuing the summons?**

Yes. Before issuing the summons at court you will first have to address a written demand (setting out the particulars of the facts on which the claim is based, and the amount of the claim) to the defendant, giving them a minimum of 14 days from the date of receipt of your written demand to satisfy your claim. This written demand can be delivered by hand or by registered post to the defendant. Only after 14 days have elapsed can you issue the summons.

**9. Does the letter of demand need to comply with any formalities?**

The letter of demand must set out the particulars of the facts on which the claim is based, and the amount of the claim.

**10. How must I send the letter of demand to the Defendant?**

The letter of demand can be delivered by hand or by registered post to the defendant.

**11. How do I prove that the Defendant received the letter of demand?**

You will need to prove by affidavit that you delivered the letter of demand to the defendant or produce the registered post receipt as proof that the letter of demand was delivered to the defendant.

**12. What if the Defendant refuses to accept the letter of demand?**

You will need to explain in your affidavit that you tried to deliver the letter of demand to the defendant but that he or she refused to accept it. You should also inform the defendant that if he or she does not accept the letter of demand, you will place it in the letter box or leave it at reception as the case may be. You can then explain this in your affidavit as well.

**13. How long must I give the Defendant to pay my claim before I issue the summons?**

You must give the defendant at least 14 days to satisfy your claim before you can issue the summons.

**14. How do I inform the Defendant that I have instituted a claim against him/her?**

You must either serve (deliver a copy of) the summons on the defendant yourself (showing him or her the original) or you must have the Sheriff serve the summons on the defendant. If you serve the summons yourself, you should try to get the defendant to sign an acknowledgement of receipt. You will also have to sign an affidavit giving details of the service.

Once this is done, the original summons together with the return of service or your affidavit must be delivered to the clerk of the court as soon as possible

**15. What if the Defendant is avoiding service of the summons on him or her?**

Possibly the easiest way to deal with this is to accompany the Sheriff and point the defendant out (assuming that you are able to identify the defendant).

You could also ask the Sheriff to request the person to produce proof of identity (assuming that the defendant is telling the Sheriff that he or she is not the person referred to in the summons).

**16. How will I know if the Defendant is going to defend my claim against him/her?**

The defendant does not need to give notice of his or her intention to defend. The defendant is also not obliged to file a statement of his or her defence, so you may only find out at the hearing whether the defendant is going to defend your claim.

The defendant may however decide to file a written statement setting out the nature of his or her defence and the particulars of the grounds on which it is based. In this case, the defendant is required to provide you with a copy.

**17. Can the Defendant raise a counter-claim against me?**

Yes. The defendant may in the written statement of his or her defence, set out the particulars of any counterclaim (also referred to as a „claim in reconvention“) against you, even if that defendant is a company or close corporation that would not otherwise be able to claim in the Small Claims Court.

**18. When will my claim be heard at the Small Claims Court?**

Once you have satisfied the clerk of the court that you have sent the letter of demand to the defendant, the clerk will set a date and time for the hearing of your claim and issue the summons so that it can be served on the defendant. The Small Claims Court usually sits in the late afternoon and evening.

**19. Who are the Commissioners who will hear my claim?**

The Commissioners are mostly either admitted advocates or attorneys, who have practised as such for an uninterrupted period of at least five years.

**20. What does the procedure at the hearing involve?**

The court procedures are informal and simple and no advocate or attorney may appear on your behalf. The Commissioner will request you to state your case and you should state the facts as concisely as

possible. The Commissioner may ask you some questions which you should answer. You must also submit your exhibits or documents you wish to rely upon.

You may not cross-examine the other party or their witnesses. However with the Commissioner's permission you may put a few questions to the opposing party.

Listen attentively to the opposing party's explanations and once they have finished talking, bring to the attention of the Commissioner any facts which in your opinion they have not presented correctly.

The Commissioner will ask all persons giving evidence to take the oath to speak truthfully.

After the Commissioner has heard you, your opposing party and any witnesses that may be present, the court can give judgment. (The Commissioner may also indicate that he/she will notify you of his/her judgment in writing at a later stage).

**21. What happens if the Defendant does not arrive on the date of the hearing?**

If the defendant does not arrive at the hearing, you may ask for default judgment and the Commissioner may grant judgment in your favour insofar as you have proved the defendant's liability and the amount of your claim against the defendant, to the satisfaction of the Commissioner.

**22. What happens if the Defendant admits my claim against him or her?**

If the defendant pays or otherwise settles your claim before the date of the hearing, you should issue the defendant with a receipt and advise the clerk of the court as soon as possible that you will no longer be proceeding with the action, because your claim has been satisfied.

If the defendant admits his or her liability and consents in writing to judgment being granted in your favour, then you should take that written consent with you to the hearing and apply for judgment by consent. The Commissioner may grant judgment in your favour insofar as you have proved the defendant's liability and the amount of your claim against the defendant, to the satisfaction of the Commissioner

**23. What do I need to do to prepare for the hearing?**

You should make copies of all the documents which you wish to rely on as proof of your claim and bring the copies and originals with you to the hearing. You should also make sure any witnesses that you wish to call to give evidence on your behalf, know of the date of the hearing and attend the court to give that evidence.

**24. What do I need to bring with me in order to prove my claim?**

You must bring all the documents you wish to rely on to prove your claim. It is a good idea to make copies of these.

**25. Do I need to bring witnesses to the hearing of my claim?**

Yes. Any witnesses you wish to call to give evidence must be present at the hearing.

**26. If the Commissioner finds in my favour, what do I do next in order to enforce the Commissioner's judgment against the Defendant?**

If the Commissioner grants judgment in your favour he or she will usually ask the defendant how the debt will be settled. The Commissioner can make an order for payment by instalments. If no such order is made and the defendant does not pay or settle the judgment within two weeks, you can enforce this judgment by execution in the Magistrates' Court. The clerk of the court will assist you with this. You can also do this if the defendant does not pay any instalments that the Commissioner has ordered.

**27. Can the Defendant appeal against the Commissioner's judgment?**

No. The Commissioner's judgment is final and there are no appeals.

**28. Can I appeal the Commissioner's judgment if it goes against me?**

No. The Commissioner's judgment is final and no appeal lies against it.

**29. The Commissioner's decision may be taken on review in the High Court in certain limited circumstances, namely:**

- i) if the Court did not actually have jurisdiction to hear your claim;
- ii) if the Commissioner was biased or had an interest in the matter; or
- iii) if there was a gross irregularity in the proceedings.

**30. What can I do if I receive a summons?**

If you do not wish to defend the claim, you can either satisfy the plaintiff's claim or admit liability and sign a written consent to judgment.

If you do wish to defend the claim, you may file a written statement of your defence, and the particulars of any counterclaim you may have, with the clerk of the court. If you do so, you must provide the defendant with a copy of this written statement. It is better to do this, so that the Commissioner (and the Plaintiff) know why you say that you are not liable.

You will then have to appear in person at the hearing of the action. You must bring all the documents you wish to rely on to prove your defence or counterclaim, and make sure that any witnesses you wish

to call to give evidence on your behalf are present at the hearing.

### **31. Specific types of claim:**

#### **31.1. Goods bought and sold**

##### **31.1.1. If I bought something from the Defendant that doesn't work can I claim my money back from him/her?**

Provided that it was an express or implied term of the sale agreement that the item purchased would be in working order, the seller (defendant) has breached a material term of the agreement. As the purchaser you would be entitled to cancel the agreement, return the item and demand the return of your money.

##### **31.1.2. If I agreed to pay the Defendant to make something for me (eg: a table or a dress) but it is not what I asked for, do I still have to pay for it? Can I pay him/her less for the item?**

If the item made by the defendant is substantially what you requested and can still be used, you will be entitled to a reduction in the purchase price. This will be in the discretion of the court but is usually measured by the amount that it would cost to fix the defect in the item you ordered.

##### **31.1.3. If I ordered some goods from the Defendant (eg: some invitations or flyers for an event) and the Defendant delivers them late, do I still need to pay him/her?**

If it was made clear to the defendant that you required the invitations by a certain date (i.e. that time was of the essence) and he or she failed to deliver them by this date, you would be entitled to cancel the agreement and would not have to pay the defendant.

#### **31.2. Contracts to render a service**

##### **31.2.1. If I hired a builder/ plumber/ electrician / painter to do a job and the job was not done properly, do I still need to pay for the work?**

Provided the job was substantially completed properly and you are able to „use“ the result of the work, you will be entitled to a reduction in the contract price. This will be in the discretion of the court, but is usually measured by the costs of fixing the defects in the contractor's work.

##### **31.2.2. If I pay a builder to do a job and it turns out that the job was not done properly, can I claim the costs of getting someone else to fix the defects in the work done by the builder?**

Yes. The builder would have breached a term of the agreement to do the work properly. You would be

entitled to claim the fair and reasonable costs of fixing the defects. It would however be a good idea to allow the builder an opportunity of remedying the defects himself, as you have an obligation to limit your losses.

### **31.3. Motor vehicle accidents**

#### **31.3.1. Can I claim the costs of repairing my vehicle if I was involved in an accident that was caused by someone else?**

Yes, provided the accident was caused by that other person's negligence and the damages to your vehicle were caused by the accident. You will only be able to claim the fair and reasonable costs of repairing your vehicle.

#### **31.3.2. What if the accident was caused partly by someone else and partly by me?**

The court will reduce the amount of damages you may claim from the defendant on a just and equitable basis by having regard to the degree to which the accident was caused by your fault.

#### **31.3.3. What will I need to prove in order to have a valid claim?**

First, you will need to prove that the accident was caused by the defendant's negligence. You should try to contact any witnesses to the accident.

Secondly, you will need to prove what the fair and reasonable costs of repairing the damage to your vehicle are. You should try to get at least two or preferably three different quotations for repairing the damage as proof that the amount you are claiming is the fair and reasonable cost of repairing the car.

### **31.4. Leases and rental disputes**

#### **31.4.1. What are my rights if I have agreed to a lease via email but had a change of heart? I didn't sign a written lease.**

A lease agreement does not have to be in writing, and agreeing verbally or via email to rent premises is as valid and binding on you as if it were in the form of a written contract. Once you have such an agreement – whether in the form of a written contract, verbal or via email – the law does not allow you to have a "change of heart".

The owner of the property is within his rights to hold you liable for the rent, but has an obligation to try and find another tenant to take your place if you do not take occupation.

Thus, until he has found another tenant to take your place, you will be liable for the rent.



**31.4.2. If I paid a deposit at the beginning of the lease agreement and there was nothing wrong with the premises when I moved out, can I claim the deposit back from the landlord if he or she refuses to pay it?**

It may depend on the terms of the lease agreement, but generally you would be able to claim back the deposit provided the premises were left in the same state you received them, fair wear and tear expected. Prior to leaving the premises there should be a formal inspection of the premises by the property owner, in your presence, when any damage should be pointed out to you.

**31.4.3. If I added improvements to the leased premises, can I claim the cost of these from the landlord when the lease ends?**

This may depend on the terms of the lease agreement. In some circumstances you would be able to claim comp