



**Wambugu & 3 others v Ngunjiri (Civil Appeal E054 of 2024)
[2024] KEHC 13309 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13309 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E054 OF 2024
DKN MAGARE, J
OCTOBER 31, 2024**

BETWEEN

**EDWARD WAMBUGU 1ST APPELLANT
CYRUS RUIJI 2ND APPELLANT
LAWRENCE THEURI 3RD APPELLANT
GEORGE KIRAGU ALIAS MUREITHI 4TH APPELLANT**

AND

FRANCIS MUTURI NGUNJIRI RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and Decree of the Honourable Evelyn Gaithuma made on 20/8/2024 in Nyeri SCCC E073 of 2024. The Appellants were the Respondents in the Small Claims Court.
2. This matter reminds me of the Hobellian philosophy wherein the state of nature was like an existence where each man lives for himself, characterized by extreme competition and where no one looks out for the other. Life outside the society was solitary, poor, nasty, brutish and short. In such a society self-help was self-evident, and survival for the fittest. A later Darwinian Theory will posit.
3. The matter started as a rent dispute between the Appellants and the Respondent. The Respondent appears to have been dispossessed of tyres, rims and other princely possessions, as security for rent that he could not pay and wouldn't pay. As soon as the Landlord's agents were away, if the Appellants were to be believed, the tenant who is the Respondent herein, reported theft at Ruring'u Police Station. This resulted in the arrest of the 1st and 2nd Appellants, being charged with the offence of theft of the items, that is, three tyres, three rims, and a car battery from motor vehicle Registration number KBQ 874M Suzuki Escudo, all valued at Kshs. 80,000/=, property of the Respondent.



4. In a scorched earth policy, and probably to teach the Appellants a lesson they shall never forget, the Respondent filed a claim that the Appellants maliciously destroyed motor vehicle Registration Number KBQ 874 M by stealing three tyres, three tyre rims, battery, one car jack and a wheel spanner from motor vehicle Registration number KBQ 874M Suzuki Escudo, all valued at Ksh. 260,000/=. It should be noted that the only addition from the charge sheet is a wheel spanner and jack. These should be said to be worth 180,000/=:, since the others have already been stated to be valued at Kshs. 80,000/=.
5. The value assigned to the jack and spanner is almost the same price of the Suzuki Escudo. They sought for compensation for KSh 628,000/=. The Applicant attached a quotation from CFAO. If indeed he was to get the value, then valuation was to be done on the remaining wheel to apply mutatis mutandis.
6. The Respondent prayed for loss of user for 37 days.
7. The Respondents filed a response dated 15/7/2024 stating that: -
 - a. The value of the property is Ksh. 80,000/=.
 - b. The said property was taken as part of rent arrears and that were taken in the Respondent's presence.
 - c. A claim for theft had been lodged and is in court and as such the goods are held as security for rent arrears.
 - d. The Plaintiff was present when the parts were removed.
 - e. The claim was in a wrong court and the claim should be dismissed.
8. In their response, the Appellant denied liability. They stated that the issue of taps were part of the Respondent's duty as a tenant. The Respondent was under duty from the lease not to waste or misuse water and keep the interior in a state of repair. These are presumptions and rights appertaining to tenants and landlords.
9. Disclosed in the response was that there was a dispute of rent arrears for which the Rent Restriction Tribunal ordered that rent arrears of Ksh. 80,500/=: as at March 2024 be paid within 30 days. The plaintiffs who were the landlords were granted leave to levy distress.
10. There is no doubt that the Respondent was in rent arrears. There is equally no doubt that the motor vehicle parts were taken in the presence of the Respondent in an attempt to levy distress for rent arrears. It is also not in dispute that this happened in a plot owned by Isaac Reuben Macharia a landlord for whom the Appellants are agents. Equally there is no dispute that the rent restriction tribunal ordered levying of distress. If there were any irregularities, only the Rent Restriction Tribunal could address the same.
11. Damages arising from levying distress cannot be a basis for founding a small claim. There is no evidence that theft occurred. Indeed, the claim was raising in the rent restriction tribunal vide the Applicant's application dated 13./6/2024.
12. I note that the Respondent is skirting around the issue of rent arrears as ordered by the Rent Restriction Tribunal. Having been a lawful order, the Respondent was wasting the court's time instituting this claim. It is baseless. I do not know how the Respondent intends to prove theft in the criminal court, when there is an order to that effect. Further the matter was for the tribunal to deal.
13. This then brings me to the crux of the matter; was the court clothed with jurisdiction to deal with the matter in issue? The dispute was for the landlord and tenant. The landlord was armed with an order



- from the Rent Restriction Tribunal and this court or the criminal court as such could not intervene. The criminal case is however not before me.
14. The nature of the claim was said to be criminal in nature, that is malicious damage to property. This is the same property allegedly stolen and which is subject to both the Rent Restriction Tribunal and the criminal court. The *Small Claims Court Act* forbids the court from dealing with issues of rent and criminal matters. Section 12 of the Act provides as follows: -
- (a) a contract for sale and supply of goods or services;
 - (b) a contract relating to money held and received;
 - (c) liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
 - (d) compensation for personal injuries; and
 - (e) set-off and counterclaim under any contract
- (2) Without prejudice to the generality of subsection (1), the Court may exercise any other civil jurisdiction as may be conferred under any other written law.
15. Section 13 of the Act provides for the exclusion of jurisdiction of the small claims court as follows: -
- (1) If a claim has been lodged with the Court, no proceedings relating to the same course of action shall be brought before any other Court except where the-
 - (a) proceedings before that other Court were commenced before the claim was lodged with the Small Claims Court; or
 - (b) claim before the other Court has been withdrawn.
 - (2) A claim shall not be brought before the Court if proceedings relating to that claim are pending in or have been heard and determined by any other Court.
 - (3) Subject to section 12(3), a higher court may transfer a claim to a Small Claims Court
 - (4) For the purposes of this section, a claim is deemed to have been lodged with the Court in any case where section 23 has been complied with.
 - (5) A claim shall not be brought before the Court if the cause of action is founded upon defamation, libel, slander, malicious prosecution or is upon a dispute over a title to or possession of land, or employment and labour relations.
16. There was already a dispute over the matter in the Rent Restriction Tribunal. The court had no jurisdiction to proceed with a matter being dealt with by the tribunal. Indeed, there is prohibition against division of claims to have them pursued in parts for the sole purpose of bringing the sum claimed in each of such proceedings within the jurisdiction of the Court.
17. This being an appeal from the Small Claims Court, the duty of the court is circumscribed under 38 of the *Small Claims Court Act* which provides as doth:
- (1) 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.
 - (2) An appeal from any decision or order referred to in subsection (1) shall be final.



18. However, an Appeal of this nature is on points of law. It can be pure points of law or mixed points of law but points of law it is. An appeal on points of law is akin to a second appeal to the Court of Appeal. The duty of a second appellate court was set out in the case of Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR: -

“This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below-considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR).”

19. Then what constitutes a point of law? In Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others, (2014) eKLR, the court stated as doth: -

“4. Although the phrase ‘a matter of law’ has not been defined by the [Elections Act](#), it has been held in Timamy Issa Abdalla Vs Swaleh Salim Swaleh Imu & 3 Others, Malindi Civil Appeal No. 39 Of 2013 (Court of Appeal), (Okwengu, Makhandia & Sichale, JJA) of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing Bracegirdle vs Oxney (1947) 1 All ER 126. See also [Khatib Abdalla Mwashetani Vs Gedion Mwangangi Wambua & 3 Others, Malindi Civil Appeal No. 39 of 2013](#) (Court Of Appeal), (Okwengu, M’noti & Sichale, JJA) of 23.01.2014 following AG vs David Marakaru (1960) EA 484.”

20. In Peter Gichuki King’ara Vs Iebc & 2 Others, Nyeri Civil Appeal No. 31 Of 2013 (Court Of Appeal) (Visram, Koome & Odek, JJA) Of 13.02.2014, the Court of Appeal held as follows: -

“It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanour – is an issue of law.”

21. A point of law is similar to a preliminary point of law but has a broader meaning. Justice Prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of Oraro vs Mbaja [2005] eKLR:

“I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.



22. The case arose out of an order by the Rent Restriction Tribunal. The Respondent could not split the claim against the landlord and his agents for purpose of multiple claims. There were no losses incurred as the Appellants' actions were pursuant to a court order. Since the court has no jurisdiction to hear malicious prosecution case, it also has no jurisdiction arising from losses arising from evidence retained in a prosecution case. In other words, both the accused and complainant cannot approach the court in respect of a prosecution. Secondly, the court has no jurisdiction to deal with criminal matters as in this case. Parties cannot by craft confer on the court jurisdiction it does not have. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

23. The court must therefore assume jurisdiction where it has and eschew usurping jurisdiction where none exists. A rose by any other name smells sweet, the Bard in Romeo and Juliet. The court was duty bound to read the relationship and interpret it as such. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKL, the Court of Appeal, (Ouko, Kiage and Murgor JJA) held as doth;-

“Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”

24. The dispute was between a tenant and landlord, pursuant to a court order, and as such the court ought to have downed its tools. Immediately the word stealing turned up, the court ought to have known that it was entering uncharted waters. In Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR, Justice Nyarangi JA, as he then was stated as doth;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: “By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the



jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.”

25. Therefore, I find merit in the Appeal. On costs, there are 2 aspects; costs in the lower court and costs for the appeal herein. Section 33 of the Small Claims Court provides that the court may award costs to a successful party. The Appellants are the successful party. There is nothing stopping the court from awarding them costs.
26. Award of costs in this court are governed by Section 27 of the *Civil Procedure Act*. They are discretionally. The Supreme Court has set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -
- “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.
27. Since costs follow the event, the Appellants are entitled to costs of the Appeal. A sum of Ksh 75,000/= will be right and just.

Determination

28. In the upshot, I make the following orders:
- a. Judgment and Decree of the Honourable Evelyn Gaithuma made on 20/8/2024 in Nyeri SCCC E073 of 2024 is hereby set aside. In lieu thereof, I substitute with an order dismissing the suit in the Small Claims Court.
 - b. The Appellants shall have costs of this appeal of Kshs. 75,000/=.
 - c. The Appellants shall have the costs of the Small Claims Court to be assessed.
 - d. 30 days stay of execution.
 - e. A refund of Kshs. 340,000/= be made to the depositor.
 - f. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 31ST DAY OF OCTOBER, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.



KIZITO MAGARE

JUDGE

In the presence of:

Mrs. Lucy Mwai for the Appellant

Respondent – present

Court Assistant – Jedidah

