



REPUBLIC OF KENYA



**KENYA LAW**  
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**Waza Clemence Masinde t/a C. Masinde & Company Advocates v Lewa (Civil Appeal E022 of 2023) [2023] KEHC 18283 (KLR) (26 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 18283 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E022 OF 2023  
DKN MAGARE, J  
APRIL 26, 2023**

**BETWEEN**

**WAZA CLEMENCE MASINDE T/A C. MASINDE & COMPANY  
ADVOCATES ..... APPELLANT**

**AND**

**JOSEPH LEWA ..... RESPONDENT**

**JUDGMENT**

Turning and turning in the widening gyre  
The falcon cannot hear the falconer  
Things fall apart; the centre cannot hold;  
Mere anarchy is loosed upon the world,  
The blood-dimmed tide is loosed, and everywhere  
The ceremony of innocence is drowned  
The best lack all conviction, while the worst  
Are full of passionate intensity.

© William Butler Yeats the Second Coming

1. This matter is before me once again. Appeal from the decision of the Small Claims Court – Mombasa, the Honourable Viola Muthoni dated the 26<sup>th</sup> January, 2023 in SCCCOMM E001 of 2022)
2. The Appellant filed 5 grounds of appeal against the said Ruling. It is was a Ruling delivered against a preliminary objection, that the matter should be referred to the advocates disciplinary tribunal since it is a matter on the dispute of the advocate client costs.



3. The Appeal is wordy and does not help that only one issue is in dispute. the issue is whether the court had jurisdiction to deal with a dispute between advocate and client over payment for amounts received for compensation
4. The question of the lengthy and obfuscatious grounds of appeal were raised and dealt with by the court of appeal in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR, where the learned law Lords stated as doth: -

“We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the *Court of Appeal Rules*. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal.

This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v. IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:

“We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric.....A surfeit of prolixious grounds of appeal do not in any way enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs.”

5. Rule 86 of the *Rules*, then was pari materia with order 42 rule 1 of the *civil procedure rules*, which provides as follows: -

“Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.” (emphasis mine).

6. It is the court’s considered view that such prolixious grounds should be eschewed at all times. The ground of appeal must also be clear and not circumlocutory. In the case of *Moses Kipkolum Kogo v David Malakwen* [1998] eKLR, the court of Appeal Pronounced itself quite clears as doth: -

“The second complaint raised in the memorandum of appeal is that the learned judge’s decision is against the weight of the evidence. We hardly deal with such a ground of appeal. Rule 84 of the *Rules of this Court* requires that a memorandum of appeal shall set forth concisely the ground of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided. This rule has been contravened. The proposal ground is vague and cannot be entertained. As was said in *Riano v R* 1960 EA



960 when an appellant is represented by Counsel, he will not be allowed to argue any point under a general ground of appeal.”

### Duty of the Court

7. The appeals to this court are guided by section 38 of the *Small Claims Court Act*, which states as doth: -
  - (1) A person aggrieved by the decision or an order Appeals. 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.”
8. What constitutes matters of law has been largely settled by superior courts in this country. The Supreme court, court of Appeal and this court have enunciated the meaning of matters of law. The closest to this act is the elections act. In *Peter Gichuki King'ara v 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 stated as follows: -

“... 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 demeanor – is an issue of law.”
9. In *Twaber 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 v 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 v Oxney* (1947) 1 All ER 126. See also *Khatib Abdalla Mwasbetani v 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 v David Marakaru* (1960) EA 484.”
10. In the case of *Abraham Tenoi Kimala v Job Kipsang Suter* [2002] eKLR, the Court of Appeal, had this to say: -

“This Court will not disturb the decision of a judge in the exercise of his discretion except where he has misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that he was clearly wrong in the exercise of his discretion and that as a result there has been injustice.”
11. Issues of admission of evidence is a matter of fact as seen from Section 32 of the *Small Claims Court Act*, which provides for the court may not use strict Rules of evidence.
12. The Respondent prayed for Judgment for an amount of Ksh. 155,105, being money had and received. The Appellant counterclaimed for Ksh. 70,105/=. The Appellant entered appearance and raised a



preliminary objection which I have just Ruled on dismissing the Appeal in limine. The Appellant proceeded with the hearing without testifying.

The court heard the parties and rendered a Judgment against the Appellant

### Analysis

13. The Appellant has appealed against findings of the court. The entire Appeal is based on questions of fact. I do not agree that this court has authority to decide on fact in view of section 38 of the Small Claims Court.
14. Though the Respondent prayed and proved a sum of Ksh. 155, 105/=., the Appellant counterclaimed for her fees. The Respondent proved her case as set out in the Statement of claim. the Appellant maintained that she was entitled to 30% of the damages awarded. However, there was no evidence to that effect the Appellant, wanting to benefit from her own wrong doing, had set up a counter claim for Ksh. 70,105/=. this was awarded.
15. This forced to the Court to proceed as if it is a Taxing Master. The Court was not entitled to do so. The Court fell into error in awarding 30% of the Respondent's money to the Appellant.
16. There is a Law forbidding payment of more than 25% of damages to the Advocates it provides: -

“In the case of *Rachuonyo & Rachuonyo Advocate v National Bank of Kenya Limited* [2020] eKLR, the court, M.W. Muiga, stated as follows: -

“In Misc Application 447 of 2010 *Mugambi & Co Advocates v John Okal Ogwayo & Ruth Rebecca Auma*, there was a contest to the Taxing Master's Ruling of 20<sup>th</sup> March 2011 where the Advocate's Bill of Costs was struck out by the Taxing Officer. It was argued that the Taxing Officer lacked jurisdiction to hear and determine the application on whether there was a Retainer or not. The Court held;

“The jurisdiction of a Taxing Officer is provided for in the *Advocates (Remuneration) Order*. That jurisdiction is to tax bills of costs in accordance with the applicable schedule of the remuneration Order where there is no dispute as to retainer, or where costs have been duly awarded by an order of the Court...

Where the very fundamental issue is whether or not an advocate was duly retained and thus entitled to any costs arises before a Taxing Officer, that issue ought first to be determined by the Court. Court defined by Section 2 of the *Advocates Act* Cap 16 as the High Court.....”

17. Consequently, though there is no Appeal, this Court cannot allow enforcement of an illegality. Consequently, the Judgment on the counter claim is set aside suo moto, the counter claim is dismissed with costs.
18. In *Five Forty Aviation Limited v Erwan Lanoë* [2019] eKLR, the Court of Appeal had this to say: -

“In the case of *Kenya Airways Limited versus Satwant Singh Flora (supra)*, the Court set out the following guidelines when determining rights and obligations of parties where one party



pleads alleged illegality of the contract as justification for refusal to be bound under such a contract: -

- (i) No person can claim any right or remedy whatsoever under an illegal transaction in which he/she has participated. The Court is bound to veto the enforcement of a contract once it knows that it is illegal whether that knowledge comes from the statement of the guilty party or from outside.
- (ii) If the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not.
- (iii) No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him.
- (iv) No Court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the Court is himself implicated in the illegality.
- (v) In order for the doctrine to act as a defence to the claim, there must be illegal performance of the contract by one party to the contract and knowledge that illegal performance and participation in it by the other party to the contract.”

19. That leaves the Respondent with a solid Ksh. 155,105. Costs and interest from the date of filing.

20. The last issue raised is the costs payable. The issue payable, that is ground 1 of the Appeal. The Court awarded costs. There is no scale mentioned. The costs were assessed separately and as such cannot be subject of this appeal.

21. The upshot is that the appeal lacks merit and as such, I make the following orders: -

- a. The Appeal is dismissed in limine except as slated below.
- b. The Court fell into error in adjudicating on advocates costs and as such the order on the counter claim is unlawful. The counter claim is dismissed with costs.
- c. The Respondent is entitled to the entire sum of Ksh. 155,105, costs and interest
- d. All the Amounts deposited as deposited as security be released to the Respondent.
- e. Costs of Ksh. 55,000/= to the Respondent for the Appeal.
- f. File is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 26<sup>TH</sup> DAY OF APRIL, 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:**

No appearance for parties



