



**Atancha v Mwakiwiwi (Civil Appeal 198 of 2022)
[2023] KEHC 18217 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 18217 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 198 OF 2022**

DKN MAGARE, J

APRIL 25, 2023

BETWEEN

ALBERT ATANCHA APPELLANT

AND

FRANCIA MWACHIA MWAKIWIWI RESPONDENT

JUDGMENT

1. The Appeal is set out in a repetitive 7 paragraph memorandum of appeal. It is concerned with admission of witnesses, cross examination, admission of evidence in the middle of the hearing, credibility of the witnesses and denying the Appellant the right to be heard.
2. The Appellant filed submission to an Application but did not file over the main Appeal. I issued directions on 3/4/2023 and the matter was heard on though the submissions. I did not find any. I nevertheless proceeded and delivered judgment today.
3. Each of the grounds on evidence. The Appeal herein is therefore on issues of evidence. The court is not bound by strict rules of evidence.

Analysis

4. The appeal from the small claims court to this court is governed by section 38 of the [Small Claims Court Act](#), No 2 of 2016, which provides 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.
5. On part of evidence, the small claims court adjudicator is guided by section 32 of the [Small Claims Court Act](#), No 2 of 2016, which provides as doth: -



- (1) The court shall not be bound wholly by the Exclusion of strict Rules of evidence. Rules of evidence.
 - (2) Without prejudice to the generality of subsection (1), the court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other court under the law of evidence.
 - (3) Evidence tendered to the court by or on behalf of a party to any proceedings may not be given on oath but that court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.
6. This appeal relates to admission of evidence under section 32 of the *Small Claims Court*, the adjudicator is not bound by strict Rules of evidence. The Court cannot micromanage the cases. The timelines for such matters are not an exception. Evidence before an administrator can be admitted, even without oath.
 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. Matters of law have been settled. The court of Appeal and this court have enunciated the meaning of matters of law. The closest to this act is the *Elections Act*.
 9. In *Peter Gichuki King'ara v IEBC & 2 others*, Nyeri Civil Appeal No 31 of 2013 (Court of Appeal) (Visram, Koome & Odek, JJA) of February 13, 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.”
 10. I cannot find a single point of law raised.
 11. 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 January 13, 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 Mwashetani v Gedion Mwangangi Wambua & 3 others*, Malindi Civil Appeal No 39 of 2013 (Court Of Appeal), (Okwengu, M’noti & Sichale, JJA) of January 23, 2014 following *AG v David Marakaru* (1960) EA 484.”



12. 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

13. Issues of admission of evidence is a matter of fact as seen from section 32 of the *Small Claims Court Act*.

14. The consequence is that the Appeal lacks merit. The matter shall be remitted to the Small Claims Court to enable it to conclude its proceedings. The Appeal was as such a waste of court’s precious time. I dismiss the Appeal in limine. Lift the any orders of stay hitherto issued and award costs of Kshs. 50,000/= to the respondent.

Determination

15. The Appeal was as such a waste of court’s precious time. I dismiss the Appeal in limine. Lift the any orders of stay hitherto issued and award costs of Ksh. 50,000/= to the respondent.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 25TH DAY OF APRIL, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for parties

Court Assistant - FIRDAUS

