



**Hamisi v Gitau (Miscellaneous Application 189 of 2022)
[2023] KEHC 17436 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 17436 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION 189 OF 2022**

DKN MAGARE, J

APRIL 25, 2023

BETWEEN

KHADIJA HAMISI APPELLANT

AND

PATRICK MUTURI GITAU RESPONDENT

JUDGMENT

1. The dispute herein raises two issues: -
 - a. Whether the dishonour of the cheques revived original claim.
 - b. Whether the parties are bound by their pleadings.
2. The jurisdiction of the Small Claims Court is limited by dint of Section 38 of the Small Claims act. The said section provides that 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, whose decision shall be final.
3. The duty of this court is on points of law. This is the same duty the court of Appeal has on a second appeal in the case of *Charles Kipkoech Leting v Express (K) Ltd & another* [2018] eKLR, the court of Appeal stated as doth: -

“This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See *Maina versus Mugiria* [1983] KLR 78, *Kenya Breweries Ltd versus Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to 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 also the English case of *Martin versus Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 where in, it was held



inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

4. The hearing took place on 11/10/2022. The Appellant was trying to limit the claim to dates in 2021 to the date of suit while Respondent was of the view that the matter arose all the way back between 2017 and 2021.
5. I am well aware that the Court below is not bound by strict rules of evidence pursuant to section 32 of the Small claims Act. This does not mean they have a carte blanche to proceed with no evidence.
6. Upon hearing the evidence, the court chose and rightly so to believe the Respondent. It came out that the Appellant concealed bank statements that could have shown the payment from the Respondent. The respondent is the account holder and has special knowledge on the contents of her account. The Court in exercise of its discretion, found for the Respondent, truthful.
7. He had effectively shifted the burden of proof to the Appellant. Under section 112 of the [evidence Act](#), the burden was on the Appellant as the account holder. Failure to produce documents she had in possession, ought to and must be construed against her. The art of selectively tendering evidence borders fraud.
8. The exercise of discretion is a matter of law. The discretion is to be exercised judiciously. Therefore, if the Court errs in Exercise of discretion it is a matter of law.
9. The issues raised are issues of law. In dealing with issues of law, the court deals with the Appeal on points of law. In [Otieno, Ragot & Company Advocates v 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 v Bernard Munene Ithiga* [2016] eKLR).
10. This matter, I am convinced that the Court did not err in exercise of discretion.
11. In the cases of *Peters v Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
12. In the matter the Court analyzed the evidence and came to a conclusion that a sum of Ksh. 56,162 was due to the respondent on the counter claim.
13. The Appellant attempted to explain away the payments that were evidently paid to her.
14. The court below, by dint of Section 32 of the Small Claims Court by strict Rules of evidence. It is not the same as saying that the Court decides on no evidence. It is what, the court, in exercise of its discretion, believes to be. As a Rule of evidence, the Court must find one way or another.



15. In *Bwire v Wayo & Sailoki* (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) (24 January 2022) (Judgment),

“Talking about the legal burden and evidential burden of proof placed upon the Plaintiff by the law, I find it useful to recall *Mbutia Macharia v Annah Mutua Ndwiga & another*²⁵ in which the Court of Appeal when dealing with the issue of burden of proof observed: -²⁵Civil Appeal No. 297 of 2015 {2017} eKLR. “The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift” to the party who would fail without further evidence?”

16. The Court analyzed the requisite requirements set out in Sections 107, 108 and 109 of the *Evidence Act*. The court did not err in so doing.
17. The court relied on the authority *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another* [1980] eKLR. I need not say more.
18. The Court correctly exercised its discretion on who to believe. The initial burden of proof on interest was on the Appellant. She failed to discharge the same. This Court cannot interfere with discretion in The High Court, pronounced itself succulently on these principles in *Kemfro Africa Ltd vs Meru Express Servcie vs. A.M Lubia & Another* 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

19. In the circumstances I do not find any issue of law involved. I therefore dismiss the Appeal with costs of Kshs. 30,000/= payable within 30 days.
20. Dismiss the Appeal with 30,000/=.

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

KIZITO MAGARE

JUDGE

In the presence of:

Miss Gatimu for the Appellant

No appearance for the Respondent

Court Assistant – Firdaus

