



REPUBLIC OF KENYA



KENYA LAW
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**Kuria v Mwangi (Civil Appeal E204 of 2024)
[2025] KEHC 2516 (KLR) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2516 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E204 OF 2024
FN MUCHEMI, J
FEBRUARY 6, 2025**

BETWEEN

JOSEPH WANYOIKE KURIA APPELLANT

AND

PATRICK KINYUANJUI MWANGI RESPONDENT

RULING

Brief facts

1. Coming up for determination is the respondent's Notice of Preliminary Objection dated 15th August 2024 based on the grounds that the Honourable court lacks jurisdiction to hear and determine the appeal and that the appeal offends Section 38(1) of the *Small Claims Court Act*.
2. Parties put in written submissions.

The Respondent's Submissions.

3. The respondent submits that the appellant herein filed a claim under the law of torts claiming among other things special damages and costs under the doctrine of subrogation. However, the respondent argues that the statement of claim failed to outline any specific grounds of negligence on its part as required by law. The honourable adjudicator rendered her judgment and dismissed the appellant's claim on the premise that he did not discharge the burden of proof.
4. Pursuant to Section 38(1) of the *Small Claims Court Act*, an appeal to this court can only be entertained on matters of law and therefore the instant appeal ought to be dismissed as the Memorandum of Appeal dated 12th August 2024 pleads matters of law and not of facts. The respondent further relies on the case of Mbogo & Another vs Shah [1968] EA 93 and submits that the duty of the court is to put aside the findings of fact by the adjudicator and analyse the matter on issues of law. The issues of law either relate to the subject matter or to the finding on issues of law by the court below. To support



his contentions, the respondent relies on the case of Twaher Abdulkarim Mohammed vs Independent Electoral and Boundaries Commission (IEBC) & 2 Others (2014) eKLR.

5. The respondent argues that the adjudicator dismissed the suit in the trial court based on the failure to prove negligence by the appellant in his case. In other words, the appellant failed to prove liability on the part of the respondent. As such, there is no question of law involved on liability. To support his contentions, the respondent relies on the case of Ogwari vs Hersi (Civil Appeal 223 of 2022) [2023] KEHC 20111 (KLR) (3 July 2023) (Judgment) and submits that the honourable adjudicator was right based on the facts before her, as the appellant did not plead any negligence on the part of the respondent. Considering that negligence was never proved before the court below, the claim of the appellant is bound to fail. As such, the respondent submits that the appeal be struck out as it is an abuse of the court process and a waste of the court's precious time.

The Appellant's Submissions

6. The appellant submits that the preliminary objection was triggered by his Memorandum of Appeal filed in court on 12th August 2024 being an appeal from the judgment and decree of Ruiru Small Claim Case SCCCE258 of 2024 delivered on 31st July 2024. The appellant submits that an accident occurred on 7th March 2024 between his motor vehicle registration number KCQ 668A and that of the respondent registration number KCA 211H which was to blame for the said accident. The appellant submits that he specifically pleaded the particulars of special damages and proved the sum of Kshs. 176,500/- which amount the lower court found to amount to Kshs. 172,500/-. Thus, the appellant argues that the failure by the court below to set off the special damages and adjust the same to Kshs. 172,500/- amounted to a greater error on the face of the record and to travesty of justice.
7. The appellant relies on the cases of Clement De Lestang VP Duffus and Law JJA and Selle & Another vs Associated Motor Boat Company Limited & Others (1968) EA 123 and submits that the duty of the first appellant court is to re-evaluate and assess the evidence and make its own conclusion keeping in mind that unlike the trial court, this court does not have the advantage of observing demeanours of the witnesses and hearing their evidence first hand.
8. The appellant submits that the failure by the trial court to admit assessment and re-inspection reports leading to the said court failing to apportion liability made the judgment one sided and ought to be set aside entirely.
9. The appellant relies on the case of Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors (1960) EA 696 and submits that the respondent's preliminary objection does not meet the test as set out under the law and violates the provision of Article 159 of *the Constitution*.

The Law

Whether the preliminary objection is sustainable.

10. The case of Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.



11. Sir Charles Newbold P. stated:-

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.

12. Similarly the Supreme Court in the case of Hassan Ali Joho & Another vs Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR held that:-

A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

13. Further in the case of Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others, [2014] eKLR the court held that:-

Thus a preliminary objection may only be raised on a 'pure question of law.' To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

14. Evidently, a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.

15. The respondent argues that the instant court lacks jurisdiction to entertain the appeal as the appeal is based on questions of fact which is contrary to Section 38(1) of the *Small Claims Court Act*.

16. Section 38(1) of the *Small Claims Court Act* provides:-

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.

The question is whether an appeal premised on Section 38(1) of the *Small Claims Court Act* is likened to a second appeal as provided in the *Civil Procedure Act*.

18. The Court of Appeal set out the duty of the second appellate court in the case of Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR as follows:-

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 that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

19. In distinguishing between matters of law and fact the Court of Appeal stated in Kenya Breweries Ltd vs Godfrey Oduyo [2010] eKLR as follows:-

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come



to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See *Selle and Another vs Associated Motor Boat Company Limited and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two 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.

20. Upon perusal of the trial court's judgment dated 31st July 2024, the court dismissed the claim on the premise that the claimant did not list the particulars of negligence and therefore it rendered the claim fatally defective and untenable in law. On review of the memorandum of appeal, the main contention of the appeal is whether the failure to plead particulars of negligence was fatal thus rendering the claim untenable in law leading to the dismissal of the suit which in turn lead to the failure to award special damages which he applicant argues were specifically pleaded and proved.
 6. In my considered view, the issues raised in this appeal are questions of law which fall within the ambit of Section 38(1) of the Act and which fall within the jurisdiction of this court for determination. I reach a conclusion that the preliminary objection dated 15th August 2024 lacks merit and is hereby dismissed with costs to the appellant.
 7. The costs shall abide in the appeal.

RULING DEIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 6TH DAY OF FEBRUARY 2025.

**F. MUCHEMI
JUDGE**

