KENYA LAW
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Mukemba v Nyaga & another (Civil Appeal E042 of 2023)
[2025] KEHC 4304 (KLR) (20 March 2025) (Judgment)

Neutral citation: [2025] KEHC 4304 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E042 OF 2023

DKN MAGARE, J

MARCH 20, 2025

BETWEEN

ANN W MUKEMBA .... APPELLANT

AND

TERESA N NYAGA .... 1ST RESPONDENT

ROSE W NDORIA .... 2ND RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of the Honourable E M Gaituma given on 18.5.2023 Nyeri SCCCOmM E039 0F 2023. The Appellant was the Respondent in the Small Claims Court.
2. The Respondents filed a claim dated 08.02.2021 against the Appellant claiming a sum of Ksh. 263,500/=, money received from a women's group known as Nyeri Unique Women Group. The group had 21 members who carried out table banking and paid some interest on loans taken.
3. The members returned and allowed others to borrow again. The r appellant disappeared for 2 years after getting money. The Appellant accepted twice, but it went missing. On 25.08.2022, the Appellant promised to pay Ksh 263,500/= by December. At the tail end of December, that is on 28.12.2022, she promised again to repay 263,500/= before 30.1.2023.
4. On being sued she appointed an advocate and defended the case. She admitted to owing some money but indicated that she did not know the actual amount. She stated that she was ill and could not repay. She intended to repay the loan. She prayed for dismissal of the suit nonetheless.
5. The Appellant on the other side, appointed an advocate to proceed on the matter. She filed a further it of documents. Parties filed submissions. The court then entered judgment on 18.5.2023 for Ksh. 263, 500/= and costs.

Evidence

6. Teresa N Nyaga, the first Respondent, testified on the debt owed by the Appellant. She produced the documents in support. She stated that she met the Appellant, who promised to pay in December 2022 in vain. On cross-examination, she stated that the Appellant took a loan of 37,500/= for Purity Wambui.

7. The Appellant testified that she took a loan of Ksh 122,000/= in 2021 and admitted to writing the agreement to pay in December 2022. On cross-examination, she stated that she was in a civil jail for another debt. She also took Ksh 122,000/=. She admitted to writing both agreements.

8. The Appellant Appealed and set forth the following grounds: -

    i. That the trial Magistrate erred in Law and fact that the Amount deemed by the respondents were not proved.

    ii. miscalculation on the part of the Respondents, and no books of account were produced during the hearing.

    iii. That the aforesaid Group by the Respondent never produced their registration certificate during the hearing.

    iv. That the trial Magistrate failed to appreciate that the 2nd Respondent never adduced her evidence during the Hearing.

    v. That the trial Magistrate failed to appreciate the Appellant's shares were never deducted from the amount claimed.

    vi. That the trial Magistrate failed in his proceedings that the Agreement which Chairlady who coerced the Appellant to sign in front of CID from Karatina, who were known to the Appellant and no witnesses was testified to that effect during the hearing.

    vii. That my Appeal has good grounds for success.

9. The matter proceeded by way of submissions. The Appellant filed submissions on 11.12.2024. The Appellant stated that the judgment was erroneous as she had adduced water tight evidence. The Respondent filed submissions and supported the decision. They also prayed for costs.

Analysis

10. 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 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.

11. However, an Appeal of this nature is on matter 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 Appeal was set out in the case of M/s 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)."

12. Then what constitutes a matter 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'inoti & Sichale, JJA) of 23.01.2014 following AG vs David Marakaru (1960) EA 484."

13. 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."

14. A matter 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.

15. The timelines for small claims are punishing. It is therefore imperative that the case facing Parties be clear and succinct. Mere allegations will not count. Parties must know that it is a court of law, not a kangaroo or baraza. Pleadings are therefore paramount. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, A C Mrima stated as follows: -

> " It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence

adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

> " .....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded......
>
> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

16. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings......'"

17. The court was duty-bound to read the documents and interpret them as such. The documents filed by the Appellant support the Respondent's case. The Appellant wrote agreements admitting she. 265,000/=. There was no basis for impeaching such admissions. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, 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 document's meaning should be derived from the document itself, without reference to anything outside of the document, extrinsically reversed..."

18. All the grounds filed are questions or matters of fact. The limit on appeals to questions of law, is telling. Only questions of law are entertained. On the other hand, a party must stick to the case before the court. The case was for money had and received. The same was admitted. There were no elements of fraud or other breaches related to the agreement pleaded. The Small Claims Court is bound by section 32 of the *evidence act* on aspects of the case.

    (1) The Court shall not be bound wholly by the 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.

(4) The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.

(5) All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.

(6) For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.

(7) An Adjudicator may require any written evidence given in the proceedings before the Court to be verified by statutory declaration.

19. Given that there is no question of law raised, there is no Appeal before the court.

20. The matters raised do not rise to the status of matters of law. Whether witnesses testified or not is neither here nor there. Duress was not pleaded, and the court could not deal with an unpleaded issue.

21. The consequence of not having a point of law is that the appeal has no merit, it is consequently dismissed.

22. 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.

23. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously

meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

24. Since costs follow the event, the Appellants are entitled to the costs of the Appeal. A sum of Ksh 45,000/= will be right and just.

Determination

25. In the upshot, I make the following Orders:

i. The Appeal is dismissed.

ii. The Respondent shall have the cost of this Appeal of Ksh. 45,000/=.

iii. 30 days stay of execution.

iv. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF MARCH, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Muthui for the Respondent

No appearance for the Appellant

M.D. KIZITO, J.