



**Mogonchi v Ombiro (Civil Appeal E130 of 2024)
[2025] KEHC 4096 (KLR) (10 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4096 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E130 OF 2024
DKN MAGARE, J
MARCH 10, 2025**

BETWEEN

NAHSHON KEMBERO MOGONCHI APPELLANT

AND

EVANS ONDIEKI OMBIRO RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. C.C. Rono (RM) given on 4.7.2024, in Kisii SCCC No. E087 of 2024. The Appellant was a claimant in the Small Claims Court. The Appellant filed a claim dated 6.6.2024, claiming Ksh. 682,982/= for trespass and allied losses. The Respondent was said to have destroyed 11,000 bricks belonging to the Appellant on 16.3.2021. The Appellant claimed for mesne profits. A private prosecution was commenced and disallowed. An application dated 6.6.2024 was also filed contemporaneously with the suit in the court below.
2. The court struck out the suit for being time-barred by dint of section 4(2) of the *Limitation of Actions Act*. The Appellant sought to overturn the results and have the suit determined on merit. The three aspects this court will deal with in this appeal are:
 - a. Whether there was a proper preliminary objection
 - b. Whether the court had jurisdiction
 - c. Whether the claim was time-barred

Pleadings

3. The Appellant prayed for damages for trespass on land. The preliminary objection raised is related to the time bar in respect of the cause of action as pleaded.



Analysis

4. The appeal was not on evidence; hence, the court will deal with the pleadings and appeal under the said understanding. The duty in that regard is covered by the decision of the court. Given that it is not a matter of law, the court has the same latitude as the court below. In the case of *Sugut v Jemutai & 3 others* (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR) Kiage JA stated as doth: -

“I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; *Selle v Associated Motor Boat Co* [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard, having taken up the case when it was already halfway heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge.”

5. The court's duty in a small claims court is circumscribed under Section 38 of the *Small Claims Court Act*. Ipso facto, there is only one chance of appeal to this court. It is an appeal on points of law. Section 38 of the *Small Claims Court Act*, posits as follows: -

- “(1) 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.
- (2) An appeal from any decision or order referred to in subsection (1) shall be final.”

6. In the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR, the Court of Appeal addressed the duty of a court considering matters of law as doth:

“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).”

7. In the case of *Mwita v Woodventure (K) Limited & another* (Civil Appeal 58 of 2017) [2022] KECA 628 (KLR) (8 July 2022) (Judgment), the Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of the court under section 38 of the Small Claims Court, stated as doth:

“This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of *Stanley N. Muriithi & Another v Bernard Munene Ithiga* [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have



considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also *Kenya Breweries Limited v Godfrey Oduyo* [2010] eKLR in which it was held that: “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.”

8. The court’s duty is to consider whether the issues could have arisen or did indeed arise in the Small Claims Court.

9. A matter of law is similar to a preliminary objection arising during the appeal. The court succinctly addressed the issue of preliminary objection by Justice Prof. J.B. Ojwang J (as he then was) in *Oraro v 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 matter 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.”

10. If the court will have to find which facts are true, then it is not a matter of law. On the other hand, where the court decides a case by ignoring pleadings or admissions made, then ipso facto, that is a question of law. The court also cannot decide on whims or arbitrarily or in fact manufacture facts. This court will deal with question of making a decision on no evidence, which is a matter of law.

11. A preliminary objection has to be on non-disputed facts in its constitution. It cannot be based on disputed facts or argumentative postulations. The Court is not involved with questions of fact. In hearing a preliminary objection, this court proceeds on an understanding that what is pleaded is true. It is what the English common law used to call a demurrer. In the locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A. 696, the court, Law JA, made this pertinent observation:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop”.

12. In a Tanzanian case of *Hammers Incorporation Co. Ltd Versus The Board of Trustees of the Cashewnut Industry Development Trust Fund*, the Court of Appeal, (Rutakangwa, N. P. Kimaro and S. S. Kadage JJA), sitting in Dar es Salaam in their decision given on 17/9/2015 regretted that the practice of raising preliminary objection that was frowned upon by the Court of Appeal in *Kampala* in the *Mukisa biscuit case* (Supra) still persists. They stated as doth: -

“It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the “improper practice” never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in *Karata Ernest & Others V The Attorney General*, Civil Revision No. 10 of 2010



(unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the MUKISA BISCUIT case (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate.”

13. In the case of Martha Akinyi Migwambo v Susan Ongoro Ogenda [2022] eKLR, Justice Kiarie Waweru Kiarie, summarized the preliminary objection nicely as seen from two of the judges in Mukisa Biscuit Manufacturing Co. Ltd (supra): -

“A preliminary objection must be on a matter of law. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969]EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

....A Preliminary Objection consists of a matter 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. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure matter of law which is usually 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....”

14. A Tanzania Court of Appeal sitting in Dar es Salaam, in Karata Ernest & Others v Attorney General (Civil Revision No. 10 of 2020) [2010] TZCA 30 (29 December 2010),(Luanda, J.A. , Ramadhani, C.J. , Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

“At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a matter of law which has been pleaded, or which arises by clear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.

15. Therefore, a preliminary objection must be based on current law and be factual in its constitution. It cannot be based on disputed facts or facts requiring further inquiry. In determining a preliminary objection, therefore, only three documents are required in addition to *the constitution* – the impugned law, the plaint, and the preliminary objection. If you have to refer to the defence, then the preliminary objection is untenable.

16. Section 12 of the Small Claims Act provides as follows:



1. Subject to this Act, the Rules and any other law, the Court has jurisdiction to determine any civil claim relating to-
 - (a) a contract for sale and supply of goods or services;
 - (b) a contract relating to money held and received;
 - (c) liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
 - (d) compensation for personal injuries; and
 - (e) set-off and counterclaim under any contract.
 - (2) Without prejudice to the generality of subsection (1), the Court may exercise any other civil jurisdiction as may be conferred under any other written law.
 - (3) The pecuniary jurisdiction of the Court shall be limited to one million shillings.
 - (4) Without prejudice to subsection (3), the Chief Justice may determine by notice in the Gazette such other pecuniary jurisdiction of the Court as the Chief Justice thinks fit.
17. The Act also provides under section 13(5) of the [Small Claims Court Act](#) for matters where the court has no jurisdiction.
 - (5) A claim shall not be brought before the Court if the cause of action is founded upon defamation, libel, slander, malicious prosecution, or is upon a dispute over a title to or possession of land or employment and labor relations.
18. Ipso facto, the dispute herein related to trespass to land. The Small Claims Court has no jurisdiction to hear the land matter. The court was thus bound to down its tools as stated ably by Justice Nyarangi JA, as he then, in the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR, as doth;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what,

I have already said is consistent with authority: “By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.”



19. The court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation, nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, In the matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

20. Other than jurisdiction, the next issue was the time bar. The claim was the destruction of property. The same ought to have been filed within 3 years as provided under section 4(2) of the *Limitation of Actions Act*. The said section provides as follows:

An action founded on tort may not be brought after the end of three years from the date on which, the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

21. The suit was to be filed by March 2024. The same was filed in June 2024. The court in the case below was correct in finding the matter to be improperly filed out of time.

Costs

22. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

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 is 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. 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– those 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.

25. In the end, the Respondent was successful. The best order is for the appeal to be dismissed, with costs of Ksh. 55,000/=.

Determination

26. The upshot of the foregoing is that I make the following orders: -

- a. The appeal is dismissed, with costs of Ksh. 55,000/=.
- a. 30 days stay of execution.
- b. The file is closed.

DELIVERED, DATED, AND SIGNED AT NYERI ON THIS 10TH DAY OF MARCH, 2025.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Appellant in person

Ms. Onchwari for Begi for Respondent

Court Assistant – Michael

M. D. KIZITO, J.

