



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ndungu v Nderitu (Civil Appeal E047 of 2024)
[2025] KEHC 6470 (KLR) (19 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6470 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E047 OF 2024
DKN MAGARE, J
MAY 19, 2025**

BETWEEN

SAMUEL NGARI NDUNGU APPELLANT

AND

CHRISTINE WANGARI NDERITU RESPONDENT

*(Appeal from the Judgment and Decree of the Honourable E M
Ismael S I given on 11.07.2024 Nyeri SCCCOMM E074 OF 2024.)*

JUDGMENT

1. This is an Appeal from the Judgment and Decree of the Honourable E M Ismael S I given on 11.07.2024 Nyeri SCCCOMM E074 OF 2024. The Appellant was the Respondent in the Small Claims Court. The claim by the Respondent was rather juicy and sad. Kiage JA captured the mood the case is in, in the first paragraph of his judgment in the case of *Walutsachi v Mary's Mission Hospital* [Civil Appeal E050 of 2021] [2022] KECA 1023 [KLR] [23 September 2022] [Judgment] Neutral citation: [2022] KECA 1023 [KLR], where is stated as hereunder.

The field of love, no doubt, is littered with the wreckage of many a broken heart. The tears that have flowed in the wake of betrayal, perfidy and other two- or multiple-timing adventures of lovers, is beyond reckoning. Thus must one who ventures into love do so alive to the perils that abound.

2. The Respondents filed a claim dated 27.02.2024 against the Appellant claiming a sum of Ksh. 350,630/=. It is unclear under which branch of law she intended to claim this money. The first claim was that the amount was a result of an accident sustained as a result of the defendant's employee/agent. On the other hand it is in respect of goods taken between 2015 and 2020. The Appellant is said to have taken advantage of the romantic relationship to pulverize her business. The Respondent was left destitute after the relationship ended. Under the nature of the claim, it is indicated that goods were sold between 2015 and 2020.



3. The main complaint related to the extramarital issues the Appellant had, which resulted in the Respondent leaving home. She stated that she was entitled to the proceeds of sale minus the amount in arrears. The Respondent filed suit to recover the money but withdrew the suit to file a matrimonial cause and a small claim. shop but paid. The claim was surprising in that the same arose after a breakup. He maintained that the Respondent had been forum shopping
4. The appellant claimed that he bought spares from the Respondent's shop.
5. Parties proceeded under Section 30 of the *Small Claims Act*. The court entered judgment for the said amount. This resulted in the Appeal herein. Only grounds 2 and 5 are relevant to the act.
6. The Appellant Appealed and set forth the following grounds: -
 - i. That the learned trial Magistrate erred in law in failing to properly analyze both the documents/ conversations produced by the Appellant and the Respondent thereby arrived at a wrong decision and/or conclusion in his judgement.
 - ii. That the learned trial Magistrate failed to note and consider that the contract was strictly between the Appellant and the Respondent and not Vivian Otok severally mentioned in deciding the matter.
 - iii. That the learned trial Magistrate erred in law and fact by failing to consider that and/or make any payments to anyone, the said Vivian Otok being a stranger to the dismissing the appellant's suit.
 - iv. That the learned trial Magistrate failed to note and consider that the preliminary Respondent had failed prove by way of evidence that she was instructed to direct.
 - v. That the learned trial magistrate failed to note that the Respondent was the Appellant was a member and thus there was no way the Respondent could give the appellant's money to a third party without any consultation and permission from the Appellant.
 - vi. The learned trial magistrate erred in law and fact in failing to appreciate the long-established principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to balances owed to the appellant by the Respondent.
7. The matter proceeded by way of submissions. The Respondent filed submissions and supported the decision. They also prayed for costs.

Analysis

8. 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.
9. However, an Appeal of this nature is on points of law. It can be pure points of law or mixed points of law but points of law it is. An appeal on matters 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 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. Then what constitutes a matter of law? 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 13.01.2014 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 23.01.2014 following *AG v David Marakaru* [1960] EA 484.”

11. In *Peter Gichuki King'ara v 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.”

12. 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 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 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.

13. The main issue for determination in this case is whether the Trial Court erred in law in allowing the Respondent’s case.



14. 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. v Stephen Mutinda Mule & 3 others* [2014] eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji [NIG] v 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.”

15. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of *Raila Amolo Odinga & Another v 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.....

16. 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 court cannot add evidence to documents. 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 documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”



17. The grounds 1,3 and 4 are otiose. 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 claim appears to have been for a debt from 2015 to 2020 while the parties were married. The court is bound by section 32 of the Small Claims Act to consider evidence. It does not in any way negate the duty to act on some evidence. Acting on the basis of no evidence is a matter of law. The court had no basis to delve into love issues that resulted in the pulverising of business. Where the lines of business are blurred, the court can never infer a contract. A contract must be evidenced in writing. A court cannot originate a contract or rewrite one. In the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit [K] Ltd & another* [2001] eKLR as follows: -

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of *Fina Bank Limited v Spares & Industries Limited* [Civil Appeal No 51 of 2000] [unreported]:

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain”.

18. The court ignored the fact that amounts claimed before 1.3.2018 cannot be claimed by dint of section 4 of the *Limitation of Acts*. The same provides as follows:

1. The following actions may not be brought after the end of six years from the date on which the cause of action accrued-
 - a. actions founded on contract;
 - b. actions to enforce a recognizance;
 - c. actions to enforce an award;
 - d. actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
 - e. actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

19. It is thus necessary to plead when and how the goods were purchased, for how much and how much was paid. It is not enough to throw papers to the court without a proper pleading. Parties are bound to plead their cases fully. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, Justice A C Mrima stated as doth: -

“ 11. 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. v Stephen Mutinda Mule & 3 others*



[2014] eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji [NIG] v 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.”

In the case of *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled “*The Present Importance of Pleadings*” published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadingsfor the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”



20. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of *Raila Amolo Odinga & Another v IEBC & 2 others* [2017] eKLR found and held as follows 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.....”

21. It may be necessary to have relaxed and more informal pleadings in small claims. However, a claim cannot be imagined and filed. The respondent ought to have decided whether this was a question of failing to pay for goods or pulverizing businesses or the losses incurred.
22. The case of *Raghbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR the court of Appeal stated as doth: -

“The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing [per Jessel M. R. in *Thorpe v Holdworth* [1876] 3 Ch. D. 637]. This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible”, [underling supplied].

I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant’s defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13[1][a].”

23. The court cannot deal with matrimonial disputes or issues dealing with partnerships and other liaisons. Claims jilted lovers are best dealt with in the proper court. The claim herein was not pleaded and proved. The court erred by proceeding with no evidence at all. In the circumstances, I find that the Appeal is merited and accordingly allowed.
24. 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.
25. Award of costs is discretionary. 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.
26. 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.
27. Since costs follow the event, the Appellants are entitled to the costs of the Appeal. A sum of Ksh 45,000/= will suffice. Pursuant to section 33 of the *Small Claims Act*, there is no success in the lower court. Each party to bear their own costs in the Small Claims Court.

Determination

28. In the upshot, I make the following Orders:
- i. Judgment and Decree of the Honourable E M Ismael S I given on 11.07.2024 Nyeri SCCCOMM E074 0F 2024 is hereby set aside. In lieu thereof, I substitute with an order dismissing the suit in the small claims court.
 - ii. Each party to bear their own costs in the Small Claims Court.
 - iii. The Appellant shall have the cost of this Appeal of Ksh. 45,000/=.
 - iv. 30 days stay of execution.
 - v. If any amount was paid, the same shall be refunded to the Appellant.
 - vi. The file is closed.



DELIVERED, DATED AND SIGNED AT NYERI ON THIS 19TH DAY OF MAY, 2025

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Kioni & Company Advocates for the Appellant

Mr. Mbau & Company Advocates for the Respondent

Court Assistant – Michael

