



REPUBLIC OF KENYA



**KENYA LAW**  
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**Babu v Muriuki (Civil Appeal E009 of 2024)  
[2025] KEHC 8264 (KLR) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8264 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E009 OF 2024  
DKN MAGARE, J  
JUNE 12, 2025**

**BETWEEN**

**ADOLF NJEMA BABU ..... APPELLANT**

**AND**

**JACKSON MUYA MURIUKI ..... RESPONDENT**

*(Appeal from the Judgment and decree of the Honourable E.M. Gaithuma made on 6.2.2024 in Nyeri SCCC No. E232 of 2023.)*

**JUDGMENT**

1. This is an appeal from the Judgment and decree of the Honourable E.M. Gaithuma made on 6.2.2024 in Nyeri SCCC No. E232 of 2023. The Appellant was the Respondent in the Small Claims Court.
2. According to the Statement of Claim filed on 23.11.2023, the Appellant was a tenant in the Respondent's house situate at King'ong'o area when on 8.9.2023 there was deliberate torching of the Respondent's house. It was averred that the Appellant's spouse torched the house due to a marital dispute with the Appellant.
3. The Respondent claimed that in the arson, the Appellant caused the Respondent loss of Ksh. 390,850/-.
4. The Appellant filed a response on 8.12.2023 on a general defence that it is his spouse who torched the house and who should have been held liable.
5. The matter proceeded by way of documents under Section 30 of the *Small Claims Court Act*. on 6.2.2024, the lower court delivered judgment in which it found that the Appellant as tenant was bound to maintain the premises which he failed, and entered judgment against the Appellant for Ksh. 390,850/=.



6. The Appellant lodged the appeal by way of the memorandum of appeal dated 26.2.2024 on the grounds that the lower court erred in assuming jurisdiction over a tenancy governed by landlord/tenant relationship. It was also based on the grounds that the lower court erred in finding the Appellant liable without evidence.
7. Both parties did not file submissions.

### **Analysis**

8. It was not disputed that one Trizza Wanza Kilonzo captured in the OB extract dated 8.9.2024 and filed in the lower court on 8.12.2024 was the spouse of the Appellant and she was the one who torched the house in which the Appellant was the tenant.
9. The Respondent filed the Cost Estimate Report dated October 2023 by the Department of Transport, Infrastructure and Public Works which estimated the loss occasioned by the arson at Ksh. 390,850/-. Damages arising from destruction of a rented house or loss of property therein following an occupancy dispute cannot be a basis for founding a small claim. There was no evidence of an existing criminal case against the said suspected arsonist.
10. This then brings me to the crux of the matter; was the court clothed with jurisdiction to deal with the matter in issue? The nature of the claim gave the impression of a criminal case in nature, that is arson. The *Small Claims Court Act* forbids the court from dealing with issues of rent and criminal matters. Section 12 of the Act provides as follows: -
  - (1)
    - (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.
11. Section 13 of the Act provides for the exclusion of jurisdiction of the Small Claims Court as follows: -
  - (1) If a claim has been lodged with the Court, no proceedings relating to the same course of action shall be brought before any other Court except where the-
    - (a) proceedings before that other Court were commenced before the claim was lodged with the Small Claims Court; or
    - (b) claim before the other Court has been withdrawn.
  - (2) A claim shall not be brought before the Court if proceedings relating to that claim are pending in or have been heard and determined by any other Court.
  - (3) Subject to section 12(3), a higher court may transfer a claim to a Small Claims Court.



- (4) For the purposes of this section, a claim is deemed to have been lodged with the Court in any case where section 23 has been complied with.
- (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 labour relations.
12. This being an appeal from the Small Claims Court, the duty of the court is circumscribed under Section 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.
13. However, an appeal of this nature is on matters of law. It can be pure matters of law or mixed matters of law but matters 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 appellate court was set out in the case of *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).”
14. 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.”
15. To this court, even where the matter involves application of judicial discretion, such discretion though unfettered must be exercised in accordance with the law. This Court therefore is persuaded that the exercise of judicial discretion is a matter of law. In *Peter Gichuki King’ara Vs Iebc & 2 Others*, Nyeri Civil Appeal No. 31 of 2013 (Court of Appeal) (Visram, Koome & Odek, JJA) on 13.02.2014, 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.”

16. A matter of law is similar to a preliminary matter 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 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.

17. Since the court has no jurisdiction to hear arson offences, it also has no jurisdiction arising from losses arising from evidence retained in the case of arson. Parties cannot by craft confer on the court jurisdiction it does not have. 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.”

18. The court must therefore assume jurisdiction where it has and eschew usurping jurisdiction where none exists. A rose by any other name smells as sweet, the Bard in Romeo and Juliet. The court was duty bound to read the relationship and interpret it as such. 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...”

19. Immediately the Respondents alleged that the house was torched, the court ought to have known that it was entering uncharted waters. In Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR, Justice Nyarangi JA, as he then was stated 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.”

20. Therefore, I find merit in the appeal which I allow.
21. On costs, Section 33 of the Small Claims Court provides that the court may award costs to a successful party. There is no success in the lower court and in this matter. The appeal succeeded on a technicality. There is nothing stopping the court from awarding them costs.
22. Award of costs in this court are governed by Section 27 of the *Civil Procedure Act*. They are 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.
23. The appellant despite being a successful party, is not entitled to costs in this court or the court below. The court cannot reward crime. In the circumstances each party shall bear their own costs.

### **Determination**

24. In the upshot, I make the following orders:
  - a. Judgment and Decree of the lower court dated 6.2.2024 in Nyeri SCCC E232 of 2023 is hereby set aside. In lieu thereof, I substitute with an order, dismissing the suit in the Small Claims Court.
  - b. Each party to bear its costs both in this court and the court below.



c. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 12<sup>TH</sup> DAY OF JUNE, 2025.**

Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

No appearance for parties

Court Assistant – Jedidah

