Gikonyo & another v Ougo (Civil Appeal E826 of 2023) [2025] KEHC 8658 (KLR) (Civ) (12 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8658 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E826 OF 2023

DKN MAGARE, J

JUNE 12, 2025

BETWEEN

WILLY GITAU GIKONYO .... 1ST APPELLANT

SAMUEL NDEGWA .... 2ND APPELLANT

AND

ERICK BOGECHO OUGO .... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of the Honourable C. Ndumia given on 18.08.2023 in Milimani SCC No. E2840 of 2023. The Appellant was the Respondent in the Small Claims Court.
2. The appellant identified two issues for determination, that is:
   a. whether the court erred in relying on Section 30 of the *Small Claims Court Act*;
   b. Whether the court erred in finding the appellant 100% liable.
3. The court finds no difficulty dismissing the claim that the court erred in ordering the matter to proceed under Section 30 of the Small Claims Act. This is because, it is not a question that determined judgment of 18.08.2023. This is for two reasons. The decision was made on 2.08.2023. No appeal was filed from that decision. The second aspect is that it was a consent between the parties. The principles that appertain to setting aside of consent orders are well established in a line of cases including Brooke Bond Liebig vs Mallya (1975) EA 266 where it was stated thus:

   > The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on grounds of fraud or collusion, that there was no consensus between

the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed." Analysis

4. There was no application filed and determined setting aside the consent. Ipso facto the grounds related to Section 30 of the Small Claims Act is dismissed for lack of merit.

5. The second aspect is the question of the court misdirecting itself on liability. It is important to note that liability is not a matter of law but a question of fact. Unless an issue arises obliquely, then there can be no issue of law relating to liability. One of the issues parties must understand, is that finding on liability is based on facts. 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 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. The court is bound by Section 32 of the Small Claims Act as regard to evidence. The court cannot deal with evidence and facts unless the conclusion reached are such that there is no reasonable tribunal, which properly informed of the facts and pleadings could have arrived at such a decision. In the case of Omundi v Lama Fresh Produce Limited [2022] KEHC 13681 (KLR), D.S. Majanja J posited as follows:

    In dealing with matters of law, the Court is not permitted to re-evaluate the entire record of evidence and come to its own conclusion as required in ordinary appeals (see Selle and Another v Associated Motor Boat Co., Ltd and Others [1968] EA 123). In Charles Kipkoech Leting v Express (K) Ltd & Another NKU CA Civil Appeal No. 40 of 2016 [2018] eKLR, the Court of Appeal in relation to its jurisdiction on second appeals to determine matters of law observed as follows:

    This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina v Mugiria [1983]KLR78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007 and Stanley N. Muriithi & Another v Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to 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 also the English case of Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511wherein, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s)and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or fist appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.

7. The court analysed evidence and found the Appellant 100% labile. It does not matter, that had I been sitting, I would have come to a different conclusion. It cannot be said that the findings could not come out of the evidence tendered. The decision in Mount Elgon Hardware v United Millers is irrelevant to the questions of fact in a small claims court. There is no provision for a reply to defence in small claims court. It is thus irrelevant that none was filed. It must not be surprising since pleadings are simplified.

This is why there is no provision for entry of appearance in small claims court. Thus the findings of fact, the same are expected from the evidence. There is no finding that is bad in law. Being a finding on fact, the court cannot disturb findings of fact in Small Claims Court. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

8. There is no question of law raised in this appeal. I find no merit in the appeal. It is inevitable that the same deserves to be saved from the ignominy of its own incompetence. The appeal is accordingly dismissed.

9. The next question is the issue of costs. Award of costs in this court are governed by section 27 of the *Civil Procedure Act*. Costs are discretionary but the discretion must be exercised judiciously.

10. 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.

11. 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.

12. Since costs follow the event, the Respondent is entitled to costs of the appeal. A sum of Ksh 55,000/ = will be right and just.

Determination

13. In the upshot, I make the following orders:

    a. The appeal lacks merit and is accordingly dismissed with costs of Ksh. 55,000/=.

    b. 30 days stay of execution.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 12TH DAY OF JUNE, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Ms. Kariuki for Rienye for the Appellant

Mr. Ochieng for the Respondent

Court Assistant – Jedidah