Mwangi v Thiriku (Civil Appeal E010 of 2025)
[2025] KEHC 8201 (KLR) (11 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8201 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E010 OF 2025

DKN MAGARE, J

JUNE 11, 2025

BETWEEN

DANIEL WAMBUGU MWANGI ..... APPELLANT

AND

ANDREW KARIMI THIRIKU ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of the Honourable Ismail S.I, Adjudicator, dated 27.2.2025 in Nyeri SCCC No. E081 of 2024. The Appellant was the Respondent in the Small Claims Court.

2. In the Statement of Claim dated 16.7.2024, the Respondent herein prayed for judgment of Kshs. 312,410/- with interest and costs as against the Appellant.

3. It was pleaded that on 16.7.2021, the Respondent's motor vehicle registration number KBN 453H was being driven along Nyeri-Othaya road when the Appellant or his authorized driver drove motor vehicle registration number KCA 022M so negligently that it collided with the Respondent's said motor vehicle.

4. It was the case of the Respondent that CIC General Insurance Co. Limited compensated the Claimant for the loss detailed as Ksh. 312,410/= and was as such entitled to recover from the Appellant through subrogation.

5. The Appellant filed a Response to the Claim dated 7.8.2024. The Appellant denied the claim and also took out third party proceedings against one James Kibe Muchiri. It was the general defence of the Appellant that they were wrongly sued as he was not the legal or beneficial owner of the accident motor vehicle having sold it to one James Kibe Muchiri prior to the accident. Third Party Proceedings were initiated but it is not clear whether the Third Party was served with the Third Party Notice.

6. In its judgment, the Small Claims Court found that the Respondent had proved his case to the required standard and allowed the claim. The court entered judgment against the Appellant at 100% liability and awarded for Kshs. 312,410/= with costs and interest.

7. Aggrieved, the Appellant lodged a Memorandum of Appeal dated 7.3.2025 on the following 4 grounds that:

    a. The learned magistrate erred in law and fact in failing to find that the Respondent's claim was time barred under section 4(2) of the *Limitation of Actions Act*.

    b. The learned magistrate erred in law and fact in not finding that the Respondent's failure to testify and adopt his witness statement left his claim unsubstantiated.

    c. The learned magistrate erred in law and fact in applying wrong principles of law and occasioning miscarriage of justice.

    d. The learned magistrate erred in law and fact in failing to apply the pleadings and evidence.

8. The Appellant filed submissions on 12.5.2025 by which it was submitted intensely on the issue of limitation of actions and urged this court to find that the claim was filed outside the limitation of action.

9. It was also the Appellant's submission as grounded in the Memorandum of Appeal that the failure of the Respondent to adopt his witness statement and testify in court was detrimental to the Appellant.

10. On the other hand, the Respondent submitted vide its submissions filed on 15.5.2025 that the matter was not time barred and that the Respondent called witnesses who produced documents.

11. 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.

12. 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)."

13. 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."

14. Even where the matter involves application of judicial discretion, such discretion though unfettered must be exercised in accordance with the law. This court is therefore 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, 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."

15. 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.

16. In this case, the lower court found that the Respondent had proved his case to the required standard. The philosophy that informs the preponderance of probabilities as a standard of proof in civil claims derives from the understanding that in percentage terms, a party, be it claiming or responding, who is able to establish their case to a percentage of 51% as opposed to 49% of the opposing party is said to have established a case on the balance of probabilities. Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 held as follows:

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

17. The appeal turns on legal issues. The Appellant did not challenge the merits of the findings of the lower court. The issues raised at this level are issues that never arose in the lower court. Even the Appellant

who was the Respondent in the lower court did not raise the issues of limitation of actions and failure to testify or adoption of witness statement by the Respondent who was the Claimant.

18. It is typically not correct for the Appellant to plead that the learned magistrate erred in law and fact, for the learned magistrate could as well have properly dealt only with the issues that were before him. The Appellant raised issue of limitation of actions. Section 4 of Cap 22 states as follows:-

> Actions of contract and tort and certain other actions
>
> (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
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> a) actions founded on contract;
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> b) actions to enforce a recognizance;
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> c) actions to enforce an award;
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> 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.
>
> (2) 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:
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> Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

19. The philosophy behind limitation of actions is two ways: It serves to protect against indolence and against vindication for matters which have rested due to long lapse of time and so memory. In the case of Rawa vs Rawa (1990) KLR, 275, the Court emphasized thus:

> " The object of any Limitation enactment is to prevent a Plaintiff from prosecuting stale claims on one hand and on the other hand protect a Defendant after he had lost evidence for his defence from being disturbed after long lapse of time."

20. Whereas the Appellant did not raise the issue of limitation of actions in the lower court, the court may take on this issue suo moto. However, the issue has been raised in this appeal. From the Statement of Claim, the cause of action arose on 16.7.2021 when the accident occurred. The suit was filed on 16th July 2024 on the last day of the 3-year limitation period. The suit was as such not filed out of time. Raising issues at the submissions level is neither a pleading nor evidence.

21. Mwera J, posited as follows when postulating on what is the role of submissions. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim. In the case of Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993:

> " Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly

establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

22. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Their presence or absence does not in any way prejudice a case as held in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, that:

> "As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

23. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

24. 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. 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."

25. In the case of Malawi Railways Ltd vs 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 pleadings .....for 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 matters other than those specific may be raised without notice."

26. 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 vs. 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.....'"

27. A perusal of the proceedings shows that parties agreed to proceed without calling the makers of the documents. This is different from proceeding on the basis of the documents, submissions or

statements. Section 30 of the *Small Claims Court Act*, Cap 10A on proceeding by documents only provides thus:

> Subject to agreement of all parties to the proceedings, the Court may determine any claim and give such orders as it considers fit and just on the basis of documents and written submissions, statements or other submissions presented to the Court.

28. Even though the Respondent did not testify in court, he called witnesses who produced evidence in support of his case. His case cannot be said to be mere suggestion. Conversely, the Appellant did not call any witness or tender any evidence. The case that the Respondent put forward was thus uncontroverted and the Appellant's defence was but mere suggestions. In the case of Karuru Munyororo vs Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988, Makhandia, J held thus:

> " The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."
>
> 21. It is my view, that a party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party's pleading are not to be taken as evidence, but the same remain mere statements of fact which are of no probative value since the same remain unsubstantiated pleading which have not been subjected to the required test of cross-examination. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff's case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged. In such a situation the plaintiff is taken to have proved its case on balance of probability in absence of the defendant's evidence. In the instant case the plaintiff gave evidence which was not challenged, proved documents in support of her claim. I find the plaintiff's evidence to be credible and I am satisfied the plaintiff pleaded and proved her claim for special damages.

29. Averments in the pleadings and statements depend upon evidence for proof of their contents. This position was upheld by C.B. Madan JA in the Court of Appeal case of CMC Aviation Ltd Vs. Crusair Ltd (No.1) (1987) KLR 103 where he made the following remarks:

> " The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents."

30. The Appellant's plea that for the reason that the Respondent did not testify the case ought to have been dismissed is declined. Consequently, I find no merit in the appeal. The rest of the issues raised are questions of fact.

31. Costs follow the event. Section 27 (1) of the *Civil Procedure Act* provides as doth:

> 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.

32. The determination of costs payable to the successful party is also a judiciously-exercised discretion of the court, accommodating the special circumstances of the case, while being guided by ends of justice. The Supreme Court 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.

33. It is my considered view that the Respondent is entitled to the costs of the appeal.

Determination

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

a. The appeal is devoid of merit and is dismissed.

b. The Respondent shall have costs of this appeal of Ksh 55,000/=.

c. There be 30 days stay of execution.

d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JUNE, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Mrs. Magua for the Appellant

Ms. Masudi for the Respondent

Court Assistant – Jedidah