Petko Limited v Korosek Logistics Limited (Civil Appeal E904 of 2023)
[2025] KEHC 8281 (KLR) (Civ) (11 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8281 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E904 OF 2023

DKN MAGARE, J

JUNE 11, 2025

BETWEEN

PETKO LIMITED ..... APPELLANT

AND

KOROSEK LOGISTICS LIMITED ..... RESPONDENT

(An appeal from the Judgment and decree of the Honourable C.W. Ndumia (SRM) given in Milimani SCC COMM. No. E4010 of 2023)

JUDGMENT

1. This is an appeal from the Judgment and decree of the Honourable C.W. Ndumia (SRM) given in Milimani SCC COMM. No. E4010 of 2023. The Appellant was the Respondent in the Small Claims Court.

2. The Respondents filed a claim dated 02.06.2023 against the Appellant claiming a sum of Ksh. 471,166/=. The original amount was pleaded as Ksh 491,166/= wherein only Ksh. 20,000/= was paid. The claim arose out of transportation of dolomite at a rate of Ksh 1,400/= per tonne. A total of 667.32 tonnes of dolomite was said to have been transported.

3. The Appellant filed a response dated 4.07.223. They stated that only a sum of Ksh. 66,398/= was due and owing. They averred that a total of 512.25 tonnes were transported. This resulted in a sum of 345,467/=. A sum of Ksh 131,610/= was alleged to be paid to Braishanz Ltd on instructions of the Respondent.

4. The court considered the evidence and entered judgment as prayed in the claim for a sum of Ksh. 471,166/=. The appellant was aggrieved and set forth a memorandum of appeal as follows:

a. That the learned Judge erred in law and in fact in failing to consider that the Appellant had negotiated the contract from Kes. 1,400 to Kes. 1,100.

b. That the learned Judge erred in law and in fact in failing to consider that there was money paid by the Appellant to Braishanz Holding Ltd on instruction of the Respondent which was not accounted for in the Judgment.

c. That the learned Judge erred in law and fact by failing to consider that the Respondent herein breached the contract negotiated.

d. That the learned Judge erred in law in failing to consider the Appellant's submissions and judicial authorities thereby arriving at an erroneous decision.

e. That the learned magistrate misapplied the law and arrived at an erroneous decision.

5. The appeal proceeded by way of written submissions. The Appellant filed submissions dated 4th June 2024, while the Respondent filed their submissions on 12th June 2024. In their submissions, the Appellant contended that the terms of the contract had been renegotiated. They also stated that a payment of Ksh. 131,610/= was made to Braishanz Holding Ltd. It was further submitted that there was a breach of contract.

6. The Appellant relied on a case which could not be traced from the Kenya Law database. They also submitted that the trial court misapplied the law and placed reliance on non-existent authorities.

7. On their part, the Respondent submitted that the sum of Ksh. 471,166/= was duly proved. They argued that, under Section 38 of the *Small Claims Court Act*, the appellate court is not permitted to re-evaluate matters of fact unless the findings of the trial court were so perverse that no reasonable tribunal could have arrived at such conclusions. Reliance was placed on the case of Omundi v Lama Fresh Produce Limited [2022] KEHC 13681 (KLR).

8. They stated that the Respondent did not renegotiate the contract from 1,400/= per tonne. They relied on the case of Housing Finance Company of Kenya Limited Vs Gilbert Kibe Njuguna (NRB) HCCC No. 1601 of 1999, where the Court held as follows;

> " Courts are not fora where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with a meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract."

Analysis

9. 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.

10. 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 appeal was set out in the case of M/s 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)."

11. 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."

12. 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."

13. 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.

14. The main issue for determination in this case is whether the trial court erred in law in allowing the Respondent's case.

15. The court is bound by section 32 of the Small Claims Act as regards 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.

16. Looking at the findings of fact, the same are expected from the evidence. There is no finding that is bad in law. The rest of the issues raised are questions of fact for which this court has no jurisdiction to deal with. As a recap, it must be recalled that contracts belong to parties and not the court. The appellant wants the court to create another contract for which the court has no power to do. In the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR the court held 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.
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> As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000)* (unreported):
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> > "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".

17. 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.

18. 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 discretionally but the discretion must be exercised judiciously.

19. 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.

20. 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.

21. Since costs follow the event, the Respondent is entitled to costs of the appeal. A sum of Ksh 65,000/= will be right and just.

Determination

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

    a. The appeal lacks merit and it is accordingly dismissed with costs of Ksh. 65,000/=.

    b. 30 days stay of execution.

    c. 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:

Wanjiru for the Appellant

Kibet for the Respondent

Court Assistant – Jedidah