



REPUBLIC OF KENYA



**Wanjugu v Wainaina (Civil Appeal E067 of 2024)  
[2025] KEHC 8220 (KLR) (9 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8220 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E067 OF 2024  
DKN MAGARE, J  
JUNE 9, 2025**

**BETWEEN**

**IAN MAINA WANJUGU ..... APPELLANT**

**AND**

**CHARLES KAMAU WAINAINA ..... RESPONDENT**

*(An appeal from the judgment and decree of the Honourable E.M. Gaithuma given on 12.09.2024 in NYERI SCCC No. E166 of 2024)*

**JUDGMENT**

1. This is an appeal from the judgment and decree of the Honourable E.M. Gaithuma given on 12.09.2024 in NYERI SCCC No. E166 of 2024. The appellant was the claimant in the Small Claims Court.
2. He set out the following two grounds of appeal:
  - a. That the learned trial magistrate erred in law in holding that the claimant had not proved his claim on the disputed sum to the required standard.
  - b. That the learned trial magistrate erred in law in dismissing the claimant's case and ordering that each party should bear its own costs.
3. 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.



4. 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 points 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).”

5. Then what constitutes a point 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'noti & sichale, jja) of 23.01.2014 following *AG vs David Marakaru* (1960) EA 484.”

6. In *Peter Gichuki King'ara vs 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.”

7. The main issue for determination in this case is whether the trial court erred in law in dismissing the appellant's case. A point 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.



8. 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 and not a Kangaroo court or a 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. 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.”

9. 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 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.....”

10. 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 document's meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”

11. The first major mistake the Claimant made was that he filed a suit against a person in Maralal, Samburu County. He pleaded that the Respondent breached a contract between them. He claimed for a sum



of Kshs. 592,280/=. Most of the amounts, other than Kshs. 503,000/= were outrageous and have no basis in law.

12. The Respondent refunded a sum of 503,000/= being money had and received. The Appellant was keen on an extra sum of Kshs. 69,280/=. This sum was said not to be due and payable. The court below found that the same was not proved in evidence. The court also found that some of the amounts claimed were incurred after the suit was filed hence not within the period claimed. What they called advocates costs are in law not incurred in a suit but part of costs.
13. The court was king in respect of fact. Even in cases where appeals are not on points of law only, it is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...but the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

14. In this case parties proceeded vide Section 30 of the *Small Claims Court Act*. It provides as follows:

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.

15. The foregoing section places the court in a position to make a finding in terms of section 32 of the Small Claims Act, which provides as follows:
  1. The Court shall not be bound wholly by the Rules of evidence.
  2. Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.
  3. Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that Court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.
  4. The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.
  5. All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.
  6. For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.
  7. An Adjudicator may require any written evidence given in the proceedings before the Court to be verified by statutory declaration



16. The court found correctly that special damages have not only to be pleaded but proved. Surely no one can fault the court for so holding and restating a correct position in law. In the case of David Bagine Vs Martin Bundi [1997] eKLR, the Court of Appeal stated as follows: -

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "...special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it.”

17. Further special damages must be both pleaded and proved before they can be awarded by the Court. In the case of Swalleh C. Kariuki & another v Violet Owiso Okuyu [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -

“In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

18. The court is bound by Section 32 of the [Evidence Act](#) on aspects of the case. The last aspect is the complaint on costs. The amount of Ksh 503,000/= hitherto claimed was paid in the course of the hearing. The court did not get a chance to pronounce itself on the aspect of the said amount having been paid. The court is bound by Section 33 of the [Small Claims Court Act](#) as to when to award and when not to award costs.

19. The said section 33 of the Small Claims Act provides as follows:

1. The Court may award costs to the successful party in any proceedings.
2. In any other case parties shall bear their respective costs of the proceedings.
3. Without prejudice to subsections (1) and (2), the Court may award to a successful party disbursements incurred on account of the proceedings.
4. Except as provided in subsection (2), costs or other than disbursements, shall not be granted to or awarded against any party to any proceedings before a Court.

20. The award of costs in this court are governed by Section 27 of the [Civil Procedure Act](#). 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.
21. 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.
22. 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. Since costs follow the event, the Appellant herein knowing he had lost the case justly, filed a baseless appeal. They were begging to pay the Respondent costs. It is my duty to use discretion judiciously and award the party which succeeds costs. The Respondent is thus entitled to costs of the appeal. A sum of Ksh 45,000/= will be right and just.

### **Determination**

24. In the upshot, I make the following orders:
- a. The appeal lacks merit and is accordingly dismissed with costs of Kshs. 45,000/=.
  - b. 30 days stay of execution.
  - c. The file is closed.



**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 9<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

