



Kiu Construction Ltd v Karooooo Ltd (Formerly Retriever Ltd) (Civil Appeal E239 of 2023) [2025] KEHC 11273 (KLR) (Civ) (24 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11273 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E239 OF 2023

DKN MAGARE, J

JULY 24, 2025

BETWEEN

KIU CONSTRUCTION LTD APPELLANT

AND

KAROOOOO LTD (FORMERLY RETRIEVER LTD) RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of the Honourable V.M. Mochache (RM/ Adjudicator) dated 3.3.2023 in Milimani SCC COMM. No. E7587 of 2022. The Appellant was the Respondent in the Small Claims Court.
2. In the Statement of Claim dated 27.6.2022, the Respondent herein prayed for judgment of Kshs. 806,384.61/= as against the Appellant with costs and interest on account of a contract relating to installation of motor vehicle tracking devices.
3. It was pleaded that there was a contract between the Appellant and the Respondent in which the Respondent would install tracking devices on the Appellant's motor vehicles and the Appellant would pay a monthly subscription fees and for services rendered to the motor vehicles. The Respondent terminated the agreement because the Appellant failed to make the required payments and the Respondent therefore claimed Ksh. 806,384.61/= for the services rendered without payment.
4. In its Statement of Defence, the Appellant denied the claim and the existence of any contract.
5. In its judgment, the lower court found that the Respondent had proved its case to the required standard and allowed the claim. The court entered judgment against the Appellant for Kshs. 806,384.61/= with costs and interest.



6. Aggrieved, the Appellant lodged a Memorandum of Appeal dated 21.3.2023 on the following material grounds:
- a. The learned magistrate erred in law and fact in finding that the Respondent proved the existence of contracts.
 - b. The learned magistrate erred in law and fact in not finding that the services were to be paid for in cash.
 - c. The learned magistrate erred in law and fact in not finding that the Respondent had the onus of proving the allegations which it failed.
 - d. The learned magistrate erred in law and fact in dismissing the Appellant's case for failure to call a witness.
7. 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.
8. 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 v 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 v Bernard Munene Ithiga* (2016) eKLR).”
9. Then what constitutes a matter of law? In *Twaber 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 v 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 v Oxney* (1947) 1 All ER 126. See also *Khatib Abdalla Mwashetani v 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 v David Marakaru* (1960) EA 484.”
10. 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 v IEBC & 2 Others*, Nyeri



Civil Appeal No. 31 Of 2013 (Court Of Appeal) (Visram, Koome & Odek, JJA) on 13.02.2014, the Court 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.”

11. 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 v Mbaja* [2005] eKLR as follows:

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.

12. In this case, the lower court found that the Respondent had proved its case to the required standard. The burden question of evidence is governed by Section 32 of the *Evidence Act*. None of the issues raised in the claim is a question of law. The small claims adjudicator was the queen when it came to matters of fact. The court can only interfere if the conclusion from facts is such that no reasonable tribunal could have reached the same decision, in which case that becomes a question of law. In the case of *Coop Bank Fleet Africa Ltd v Lang'at* (Civil Appeal No. E095 of 2023) [2024] KEHC 9509 (KLR) (16 July 2024) (Judgment, the court, Mohochi S. M. J. posited as follows:

In other words, though not seen as a preliminary point, they must as of necessity arise out of the pleadings. They must hold true, to the law or implication of the law. This includes deciding on basis of no evidence, based on a nullity, failing to exercise discretion which the Court clearly has, failing to take up jurisdiction which the Court has or taking jurisdiction the Court does not have or otherwise reaching a decision which no reasonable person could have reached given the evidence and pleading...

13. Further, the court of appeal in the case of *M'Riungu v Republic* (1982-88) I KAR 360, posited as follows:

“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 as holdings of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first 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.”



14. Further, where a party disputes existence of a contract and at the same time argues that they were paying on cash basis, there is a problem. It is such submissions that the court had in mind in the case of *Raghubir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR, when the Court of Appeal stated as doth:

The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in *Thorp v Holdworth* (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible”, (underling supplied).

I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant’s defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a).”

15. Courts cannot also write or formulate contracts for and on behalf of the parties. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* (2002) 2 EA 503, (2011) eKLR the Court of Appeal at page 507 stated as follows: -

A court of law cannot rewrite 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.

16. It is also the view of this court that the trite maxim that the parties to a contract are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved apply where such terms exist in a valid contract. In *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that: -

We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.

17. The second limb relates to the postulations in the response. They remain bare when no evidence is tendered to support them. The court cannot be required in law, to have regard to a defence, which required evidence but was not tendered. The court was correct to make a negative inference from failure of the Appellant to testify.

18. In *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others* [2012] eKLR, the court stated as follows:

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party.

19. In the case of *Kimotho v KCB* (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession. The court was thus correct. It could not be



said that the decision of the court was so unreasonable that no tribunal could have arrived at the same. The burden of showing that the conclusion reached by the court is so perverse based on the evidence on record is on the appellant. The Appellant failed to reach such threshold. The appeal is accordingly dismissed.

20. 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.

21. 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.

22. The Respondent is entitled to costs of the appeal. Costs of Ksh. 55,000/= will suffice.

Determination

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

- a. The appeal is unmerited and is dismissed with costs of Ksh.55,000/=.
- b. There be 30 days stay of execution.



- c. The funds held in a joint account as security at Equity Bank A/C No. xxx in the names of both advocates be released to the firm of Cecilia Milimu Advocates.
- d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 24TH DAY OF JULY, 2025.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Kemunto for the Appellant

Ms. Mutuku for Ms. Mirimu for the Respondent

Court Assistant – Michael

