Mwabili v Nayab Motors Limited & another (Civil Appeal E1210 of 2023)
[2025] KEHC 11393 (KLR) (Civ) (23 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11393 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1210 OF 2023

DKN MAGARE, J

JULY 23, 2025

BETWEEN

STEPHEN MWACHANDI MWABILI ..... APPELLANT

AND

NAYAB MOTORS LIMITED ..... 1ST RESPONDENT

ADT INSURANCE AGENCY ..... 2ND RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of the Honourable D.S. Aswani (RM) given on 12.10.2023 in Nairobi SCC COMM. No. E1246 of 2023. The Appellant was the claimant in the Small Claims Court.

2. The appellant filed a claim dated 20.02.2023 against the respondent claiming a sum of Ksh. 500,100/=. A sum of Ksh. 55,100/= was said to be out of pocket expenses as against the 2nd Respondent. No basis was laid for the said money.

3. A sum of Ksh 445,000/= was said to be a deposit paid for a car the Appellant bought but did not complete paying. It was repossessed by the 1st Appellant for default and sold. There is no claim in the claim against the 1st respondent. The Appellant made a claim against the 2nd respondent. Default judgment was entered. Upon hearing the matter, the court set aside ex-parte judgment and dismissed the case against the 2nd respondent.

4. It is against the above background that the appeal was filed. Only grounds numbers 3 and 5 have a semblance of legal issues to be determined. These grounds are:

    a. That the learned magistrate erred in law and in fact by setting aside the interlocutory judgement and dismissing the claim against the 2nd defendant suo moto.

b. That the learned magistrate erred in fact and in law in misconstruing the provisions of *the constitution* and rules of natural justice which should be applied across the board and should have considered the appellant's submissions that the appellant had paid an amount of Kshs.445,000/= to the 1st Respondent and that as the one aggrieved one who approached court for redress should have given a favourable judgment.

5. The rest of the ground are issues of fact for which this court has no jurisdiction. This is on the basis of the injunction by the Supreme Court in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, The court stated as doth: -

> "This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

6. Given that the appellant was the only one who filed submissions, the court will subsume the same in the judgment, but to the extent only to which they raise legal issues. I shall ignore questions of fact. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. The court will address the two sub issues:

a. Whether the court erred in setting aside judgment against the second respondent suo motto.

b. Whether a party who approaches the court has a right to a favourable judgment.

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. 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)."

9. 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'inoti & Sichale, JJA) of 23.01.2014 following AG vs David Marakaru (1960) EA 484."

10. 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."

11. 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 documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

12. As stated earlier only two grounds point to questions that appear to be issues of law. The first part regards submissions which raised payment. 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."

13. 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."

14. 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."

15. The court is bound by section 32 of the *Evidence Act* on aspects of the case. The court found that the amount of Ksh. 445,000/= was not refundable. There was no question in the court contesting the non-refundability of the deposit. In the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR the court observed as 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".

16. Even where the court will have wished to deal with the harshness or illegality of the clause requiring that there was to be no refund, the court must be moved. The court in this case was told about negotiations and intervening factors. The issues raised herein are not part of the pleadings in the court. They cannot be introduced by submissions. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Odinga & another *v Independent Electoral and Boundaries Commission & 2 others (Election Petition 1 of 2017)* [2017] KESC 31 (KLR) (Election Petitions) (28 August 2017) (Ruling) found and held as follows in respect to the essence of pleadings in an election petition: -

51. In the case of Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & anor, Civil Appeal Nos 5710-5711 of 2012; [2014] 2 SCR the Supreme Court of India held that [paragraph 8]:"Before the court permits the recounting, the following conditions must be satisfied: i. The court must be satisfied that a prima facie case is established; ii. The material facts and full particulars have been pleaded stating the irregularities in counting of votes; iii. A roving and fishing inquiry should not be directed by way of an order to re-count the votes; iv. An opportunity should be given to file objection; and v. Secrecy of the ballot should be guarded.

52. Further, the court went on and observed that: "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...'

17. 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;-

> So that where the intention of parties has in fact been reduced to writing, under the so called parol evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of 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 evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.
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> In Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005 the Court citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;
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> > "It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence."

18. The court cannot interfere with the contract between parties unless invited and for a good reason, including fraud, undue influence and illegality. These are however not in issue herein. A pleading that there were oral assurances cannot be a ground to set aside a contract. However, a party cannot benefit from a contract that they have not executed.

19. The second question is whether the court rightly set aside the ex parte judgment. The court found on evidence that there was no contract between the parties and the second respondent. The matter was proceeding for formal proof but there was no legitimate claim in the file. In the case of Samson

S. Maitai & Another -vs- African Safari Club Ltd & Another [2010] eKLR, the High Court in trying to define Formal Proof stated thus:

> " ..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

20. The payment of Ksh. 445,000/= was paid to the first defendant as per the finding of the court. There was no spending of Kshs. 51,100/=. Thus, there was nothing claimed and proved against the second respondent. The court rightly found that the claim was a nullity. There could be nothing to be salvaged from it. In Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

21. The contract in question was between the Appellant and the 1st Respondent. Concomitantly, liability cannot attach to a person who is not a party to the contract, even if they derive some benefit from it. Privity of contract dictates that only parties to a contract can sue or be sued on it. This principle was reaffirmed in the case of Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] KECA 58 (KLR), where the court of appeal [Hancox, Nyarangi JJA & Platt Ag JA] addressed the question that a third party cannot enforce a contract to which they are not a party, notwithstanding any benefit they may receive from it. This must thus apply to suit against a third party who is not party to a contract. The court stated as follows:

> But that is a wholly different thing from binding themselves contractually, the one to the other, to pay for services for another party. To put it another way, what was the consideration moving from the first respondent to the AFC in return for its promise to pay? As it stated in Halsbury's Laws of England, 3rd Edition, Volume 8 at paragraph 110:
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> > "As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

22. A party cannot claim out of pocket expenses in respect of a contract. Losses in a contract are defined and cannot be at large. Court of Appeal in Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited (2016) eKLR, stated as follows:

> " ...whereas the general legal principle is that courts do not normally award damages for breach of contract, there are exceptions such as when the conduct of the respondent is shown to be oppressive, high handed, outrageous, insolent or vindictive."

23. The Appellant did not bring the out-of-pocket expenses to a level of entitlements or damages that accrued from breach of contract. Having concluded that there was no loss or damages proved, the court below was right in dismissing the case herein.

24. The only question remaining is costs. Costs are 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 percent per annum, and such interest shall be added to the costs and shall be recoverable as such.

25. 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.

26. 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.

27. The loss having occurred from the nonspecific nature of the claim, the best order is that of each party bears its own costs.

Determination

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

    a. The appeal is dismissed for lack of merit.

    b. Each party bears their own costs.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 23RD DAY OF JULY, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Ogome for the Appellant

No appearance for the Respondent

Court Assistant – Michael