Ncege v Kala (Civil Appeal E1173 of 2023)
[2025] KEHC 11024 (KLR) (Civ) (23 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11024 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1173 OF 2023

DKN MAGARE, J

JULY 23, 2025

BETWEEN

FRANKLINE KARIUKI NCEGE ..... APPELLANT

AND

SAADIA MOHAMED KALA ..... RESPONDENT

JUDGMENT

1. This is an appeal from the ruling and order of the Honourable C.A. Okumu (RM/Adjudicator) give on 24.10.2023 in Nairobi Milimani SCC COMM No. E5485 of 2022. The Appellant was the Respondent in the Small Claims Court.

2. The Appellant raised the following grounds of appeal:

    a. The learned trial magistrate erred in law and fact by failing to take into account the Appellant's duly filed Response to Statement of Claim and Counter-claim dated 14th June, 2023 and thus considered a draft statement which was filed as an annexture to the Applicant's Stay of Proceedings dated 9th February, 2023 thus arrived at a wrong decision.

    b. The learned trial magistrate erred in law and fact by failing to consider the Appellant's evidence in the list of documents dated 14th June, 2023 and held that the Appellant presented no evidential document to controvert the Respondent's claim, thereby arriving at a wrong decision.

    c. The learned trial magistrate erred in law and fact by failing to take into account the Appellant's submissions while considering her judgment.

    d. The learned trial magistrate erred in law and fact in failing to apply proper legal principles in her decision, thus arriving at a bad decision.

3. The appellant then sought that the judgment be stayed. The appellant filed submissions on the duty of the court. However, they relate to the court as a first appellate court on both facts and law. He relied on the case of *Peters v 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..."

4. The Appellant also sought for loss of earning of Ksh. 600,000/=. Reliance was placed on the case of *Hahn v Singh* 1 985 eKLR. Further reliance was placed on the case of *Pinnacle Project v Prebysterian Church of East Africa* in regard to the right to fair hearing.

5. The Respondent filed submissions opposing the application.

6. Court was duty bound to read the documents and interpret them as such. The documents filed by the appellant supports 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..."

Analysis

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 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 appellate court was set out in the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR that: -

> " 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 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'inoti & Sichale, JJA) of 23.01.2014 following *AG v David Marakaru* (1960) EA 484."

10. All questions raised are questions of evidence. The failure to consider submissions cannot be serious ground of appeal in the small claims court. The adjudicator is only required to make a finding on the facts. It is not necessary to have a well-reasoned judgment. In this case, the court did not find evidence that the debt was paid. Pendency of the debt was admitted. The only question was whether it was 633,000/= or 200,000/=.

11. The duty to show that a debt was paid was on the debtor. In action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible. In the case of *Raghbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR, 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)."

12. Having admitted arrears, the claim for loss of earnings fell by the way side. Having not shown how the debt of 633,000/= was paid, the adjudicator had no option other than proceed the way he did.

13. Lamentations on submissions are not questions of law. 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 v. 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 v. 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. There is thus no known matter of law raised. The net effect is that the appeal lacks merit and is accordingly dismissed.

16. The next question is award of costs, which are discretionary as set out in Section 27 of the *Civil Procedure Act*. 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.

17. Since costs follow the event, the Respondent is entitled to costs of the appeal. A sum of Ksh 55,000/= will be right and just.

Determination

18. In the end the court makes the following orders:

    a. The appeal is dismissed with costs of Ksh. 55,000/= to the respondent.

    b. 30 days stay of execution.

    c. The file is closed.

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

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Waithira for the Appellant

Balala for the Respondent

Court Assistant – Michael