



REPUBLIC OF KENYA



KENYA LAW
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**Njeru v Rukwaro (Civil Appeal E073 of 2024)
[2025] KEHC 11285 (KLR) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11285 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E073 OF 2024
DKN MAGARE, J
JULY 23, 2025**

BETWEEN

SAMUEL NJIHIA NJERU APPELLANT

AND

RUTH MUKAMI RUKWARO RESPONDENT

(Being an appeal from the Judgment and decree of the Honourable E.M. Gaithuma [RM/Adjudicator] delivered on 3.10.2024 in Nyeri SCC COMM. No. E182 of 2024.)

JUDGMENT

1. This is an appeal from the Judgment and decree of the Honourable E.M. Gaithuma [RM/Adjudicator] delivered on 3.10.2024 in Nyeri SCC COMM. No. E182 of 2024. The Appellant was the Respondent in the Small Claims Court.
2. According to the Statement of Claim filed on 16.5.2024, the Respondent herein entered into a verbal agreement with the Appellant by which the Respondent let the Appellant to stay on the Respondent's premises at Asian Quarters but during his stay, the Appellant destroyed part of the premises, and some building materials under his care were stolen estimated at Ksh. 199,800/=.
3. The Appellant entered appearance and filed a response dated 28.10.2024 denying the claim and also lodged a counterclaim for Ksh. 504,000/= on account of his property allegedly left at the Asian Quarters where he had put up a workshop.
4. The matter proceeded for hearing when both parties testified in court. The court having considered the respective party cases delivered its judgment on 1.10.2024 in which it entered judgment for the Respondent against the Appellant at Ksh. 142,000/= and dismissed the Appellant's counterclaim.



5. The Appellant lodged the appeal by way of the memorandum of appeal dated 24.10.2024 on grounds that the lower court erred by failing to appreciate the facts of the case despite overwhelming evidence and that the court also shifted the burden of proof contrary to the law.

Analysis

6. The Respondent pleaded that she welcomed the Appellant to stay on her premises to take care of the said premises. The premises was said to be known as Asian Quarters. In the course of his occupancy, some building materials were stolen and part of the premises vandalized. There was no evidence of the existence of a police report or criminal court case.
7. Jurisdiction is the very first point of inquiry. This then brings me to the crux of the matter; was the court clothed with jurisdiction to deal with the matter in issue? The nature of the claim gave the impression of a criminal case; that is theft and destruction of property. The *Small Claims Court Act* forbids the court from dealing with issues of rent and criminal matters. Section 12 of the *Act* provides as follows:-
 1.
 - [a] a contract for sale and supply of goods or services;
 - [b] a contract relating to money held and received;
 - [c] liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
 - [d] compensation for personal injuries; and
 - [e] set-off and counterclaim under any contract
 - [2] Without prejudice to the generality of subsection [1], the Court may exercise any other civil jurisdiction as may be conferred under any other written law.
8. Section 13 of the *Act* provides for the exclusion of jurisdiction of the small claims court as follows: -
 - [1] If a claim has been lodged with the Court, no proceedings relating to the same course of action shall be brought before any other Court except where the:-
 - [a] proceedings before that other Court were commenced before the claim was lodged with the Small Claims Court; or
 - [b] claim before the other Court has been withdrawn.
 - [2] A claim shall not be brought before the Court if proceedings relating to that claim are pending in or have been heard and determined by any other Court.
 - [3] Subject to section 12[3], a higher court may transfer a claim to a Small Claims Court
 - [4] For the purposes of this section, a claim is deemed to have been lodged with the Court in any case where section 23 has been complied with.
 - [5] A claim shall not be brought before the Court if the cause of action is founded upon defamation, libel, slander, malicious prosecution or is upon a dispute over a title to or possession of land, or employment and labour relations.
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 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 versus Bernard Munene Ithiga* [2016] eKLR].”
11. 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 Mwasbetani 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.”
12. 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 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 v 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. Since the court has no jurisdiction to hear theft and property destruction offences, it also has no jurisdiction over losses consequent to theft and such destruction, malicious or otherwise. Parties cannot by craft confer on the court jurisdiction it does not have. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the supreme 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."

15. The court must therefore assume jurisdiction where it has and eschew usurping jurisdiction where none exists. A rose by any other name smells just as sweet, the Bard in Romeo and Juliet. The court was duty bound to read the relationship and interpret it as such. 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..."

16. Immediately the Respondents alleged that the premises were destroyed and building materials were stolen, the court ought to have known that it was entering uncharted waters. In *Owners of the Motor Vessel "Lillian S" v Caltex Oil [Kenya] Ltd* [1989] eKLR, Justice Nyarangi JA, as he then was stated as doth;

"With that I return to the issue of jurisdiction and to the words of Section 20 [2] [m] of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority



are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.”

17. The Respondent also failed to lay bare before court materials based on which it would be inferred that a contract existed. It was not enough to allege that there was a verbal contract without detailing the duties, obligations and liabilities of the parties, and above all, the consideration. The court had to establish the nature of contract, which it failed as none in law existed. I quote the very relevant words of Steyn LJ in *G. Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25. Lord Steyn said:

“...It is important to consider briefly the approach to be adopted to the issue of contract formation ... It seems to me that four matters are of importance. The first is that... law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men. ... that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance. See *Brogden -v- Metropolitan Railway* [1877] 2 AC 666; *New Zealand Shipping Co Ltd v A M Satterthwaite & Co. Ltd.* [1974] 1 Lloyd's Rep. 534 at p.539 col.1 [1975] AC 154 at p. 167 D-E; *Gibson v. Manchester City Council* [1979] 1 WLR 294. The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. See *British Bank for Foreign Trade Ltd. v. Novinex* [1949] 1 KB 628 at p. 630. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See *Trollope & Colls Ltd. v. Atomic Power Constructions Ltd.* [1963] 1 WLR 333.”

18. Therefore, I find merit in the appeal which I allow. Only ground 5 was merited.
19. On costs, Section 33 of the [Small Claims Court](#) provides that the court may award costs to a successful party. There was no success in the court below as the claim therein related to tenancy. The issues related to the counterclaim are not in this court. Having dismissed both the claim and counterclaim, there is no successful party. Each party shall bear their costs in the court below.
20. Award of costs in this court are governed by Section 27 of the [Civil Procedure Act](#). They are discretionary. 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 Appellant is entitled to costs of the appeal. A sum of Ksh 45,000/= will be right and just.

Determination

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

- a. Judgment and decree of the lower court dated on 3.10.2024 in Nyeri SCC COMM. No. E182 of 2024 is hereby set aside. In lieu thereof, I substitute with an order dismissing the suit in the Small Claims Court.
- b. The Appellant shall have costs of this appeal of Ksh. 45,000/=.
- c. There be 30 days stay of execution.
- d. If any amount was paid, the same shall be refunded to the Appellant.
- e. 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:-

No appearance for the Appellant

Respondent present

Court Assistant – Michael

