Rukwaro v Ng'ang'a (Civil Appeal E004 of 2025)
[2025] KEHC 11317 (KLR) (28 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11317 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E004 OF 2025

DKN MAGARE, J

JULY 28, 2025

BETWEEN

MICHAEL WAMBUGU RUKWARO ..... APPELLANT

AND

JAMES MWANGI NG'ANG'A ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of the Honourable E.M. Gaithuma (RM/ Adjudicator) given on 7.9.2023 in Nyeri SCC COMM. No. E241 of 2023. The Appellant was the Respondent in the Small Claims Court.

2. The Respondent filed a claim dated 13.07.2023 against the Appellant claiming a sum of Ksh. 97,200/ = being amounts agreed to be refunded as money had and received. The said amount was said to have been agreed upon vide an agreement dated 21.10.2020. The Appellant had undertaken to clear the said amount by 27.02.2021.

3. The Appellant on the other hand claimed that he had paid vide Mpesa, an amount of Ksh. 7,500/= and cash of Ksh. 20,000/=. He stated that one of the debtors died before paying Ksh. 17,500/=. The appellant claimed that Respondent owed him a sum of Ksh. 6,430/=.

4. Two parties testified with a second witness for the Respondent. The court found that the Appellant was liable for the debt of Ksh. 97,500/=. Appellant appealed and set out four grounds of appeal as follows:

    a. The Honourable Adjudicator erred in law and in fact in finding that there was a case made out by the Claimant against the Respondent without any evidence to that effect being placed before the court.

b. The Honourable Adjudicator erred in law and fact by finding that there was a valid agreement made between the Claimant and the Respondent.

c. The Honourable Adjudicator erred in law and fact by failing to consider the evidence presented by the Respondent.

d. The Honourable Adjudicator erred in law and fact by finding that the Respondent owes the Claimant Ksh. 97,200/=.

5. The matter proceeded by way of submissions. However, both parties did not file submissions as at 29.03.2025 when they were to be filed. They however filed them on 4.06.2025.

6. The respondent filed submissions dated 4.06.2025, where he submitted that the duty of the court is set out in the case of Mwita v Woodventure (K) Limited & another [2022] KECA 628 (KLR), where the Court of Appeal [P.O. Kiage, J Mohammed, M Ngugi] stated as follows:

This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of Stanley N. Muriithi & Another v Bernard Munene Ithiga [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR in which it was held that:

In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two 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.

7. He stated that the questions dealt with are questions of fact contrary to the dictates of Section 38(1) of the Small Claims Act. It was his further submissions that parties entered into an agreement on 21.10.2020. It was his case that small claims court is not bound by strict rules of evidence pursuant to section 32 of the Small Claims Act.

8. The appellant filed submissions on 4.06.2025. He relied on one case and 2 fictitious citations. He cited the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR 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".

9. It is not edifying for counsel to cite fictitious decisions to the court, mostly generated from artificial intelligence. This is the essence of using the new reference system which pins a case to a particular neutral citation.

Analysis

10. 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* 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.

11. 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)."

12. 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."

13. The main issue for determination in this case is whether the trial court erred in law in allowing the Respondent's case. The matter was based on an agreement dated 21.10.2020 whose contents were self-explanatory. None of the issues raised was raised as a counterclaim. 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. 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..."

14. All the grounds raised are matters of fact. There is no single matter of law raised. The limit on appeals to questions of law, is telling. Only matters of law are entertained. In the circumstances, there is no matter of law to determine. The appeal lacks merit and is consequently dismissed. The court is bound by section 32 of the *Evidence Act* on aspects of the case.

15. There was an invitation to depart from the question of validity of a contract. In the case of Housing Finance Company of Kenya Limited vs Gilbert Kibe Njuguna (NRB) HCCC No. 1601 of 1999, the Court held as follows:

> " Parties only bind themselves by the terms contracted and executed and not anything else e.g. charging interest rates not in accord with what was covenanted cannot make a total figure a chargee considered having fallen in default and therefore entitling it to exercise its statutory power of sale... Courts are not fora where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract.

16. In the case of Omar Gorhan v Municipal Council of Malindi (Council Government of Kilifi) v Overlook Management Kenya Ltd [2020] eKLR, the court held the view in respect of a valid contract as follows:

The basis of any suit in contract performance or non-performance is as per requirements in Subsection 3 of the Law of contract. Act (Cap 23 of the Laws of Kenya). The appellant was therefore expected to prove on a balance of probabilities the following essential elements to a lease agreement with the respondent:

(a) An offer.

(b) An acceptance.

(c) Any consideration.

(d) Any intention to create legal relations.

The essential components of a contract as was observed by Harris JA in Garvey v Richards {2011} JMCA 16 ought to ordinarily reflect the following principles:

"It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence."

And the Supreme Court of United Kingdom in RTS Flexible Systems Ltd v Moikerei Alois Muller GMBH & Co K. G. {2010} UKSC 14:

"The general principles are not in doubt, whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon them, by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precaution to a concluded and legally binding agreement."

17. None of this was impeached in the suit and all the others are questions of ambiguity. There was no ambiguity whatsoever. In any case such was not pleaded and proved. There is thus no legal question raised at all. The appeal lacks merit and is accordingly dismissed.

18. Award of costs in this court are governed by section 27 of the *Civil Procedure Act* and are discretionary and 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.

19. 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.

20. 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. The Respondent was a successful party. No one will begrudge him. In the circumstances he shall have costs. A sum of Ksh. 45,000/= will suffice.

Determination

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

    a. The appeal lacks merit and is consequently dismissed with costs of Ksh. 45,000/=.

    b. The same be paid within 30 days, in default execution do issue.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 28TH DAY OF JULY, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Wangechi Mwangi for the Appellant

Mr. Kibicho for the Respondent

Court Assistant – Michael