Wesonga v Bomata Enterprises (Civil Appeal E584 of 2024)
[2025] KEHC 10751 (KLR) (Civ) (21 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10751 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E584 OF 2024

DKN MAGARE, J

JULY 21, 2025

BETWEEN

DENIS MASAKHWE WESONGA ..... APPELLANT

AND

BOMATA ENTERPRISES ..... RESPONDENT

(Appeal from the Judgment and decree of the Honourable V.K. Momanyi (RM/ Adjudicator) given on 12.04.2024 in Milimani SCC COMM. E883 of 2024)

JUDGMENT

1. This is an appeal from the Judgment and decree of the Honourable V.K. Momanyi (RM/Adjudicator) given on 12.04.2024 in Milimani SCC COMM. E883 of 2024. The Appellant was the Claimant in the Small Claims Court.

2. The Appellant filed a claim dated 30.1.2024 claiming a sum of Ksh. 40,596. This was said to be a loss in publication of a book, aptly named as Impediments. The Respondents printed the plates that he used. For the said plate the respondent was paid Ksh. 6,500/= for the preparation of plates. Something appears to have gone wrong and the respondent was blamed for this. The matter was fully heard and the court found no merit in the claim and dismissed the same in limine with costs of Ksh. 5,000/=.

3. The Appellant felt aggrieved and filed an appeal and set forth the following grounds of appeal:

    a. That the learned trial magistrate gravely erred in law and fact in disregarding and/or ignoring the totality of the evidence tendered and rendered by the Appellant before the Hon. Court, and thereupon, came to a lopsided conclusion, in contravention of the evidence on record.

b. The learned trial magistrate erred in law and fact in not appreciating, considering and/or addressing the salient and pertinent features of the claim, without any lawful cause and/or basis.

c. The learned trial magistrate gravely erred in law and fact in failing to render herself fully on all the aspects of the claim, and that the resultant decree was inconclusive as it was deficient.

d. That the learned trial magistrate erred in law and fact in failing to cumulatively and/or exhaustively evaluate the entire evidence on record, hence was unable to capture and decipher the dominant issues and features of the claim, thereby reaching an erroneous conclusion.

e. That the learned magistrate erred in law and fact in allowing the claim to proceed under Section 30 of the *Small Claims Court Act*, despite knowing that claim involved expert evidence that would have been adduced through a hearing.

f. That the trial magistrate erred in law and fact in mismanaging and/or mishandling the case.

g. That the learned trial magistrate erred in law and fact in not recognizing and appreciating that pursuant to Section 112 of the *Evidence Act*, the evidential burden of proof shifted to the Respondent the moment it reckoned with the nature and effect of the evidence adduced by the Appellant.

h. That the learned trial magistrate erred in law and fact in misapprehending the logically framed issues that needed to be proved and the evidence brought by the Appellant to prove them.

i. That the learned trial magistrate erred in law and fact in subjecting the appellant to an inordinately high quantum of proof from that which is applicable in civil cases, i.e., by a preponderance of the evidence.

j. The learned trial magistrate erred in law and fact in declining to follow or to be bound by the decision of the High Court in Dormakaba Limited vs Arcitectural Supplies Kenya Ltd.

k. That the learned trial magistrate erred in law and fact in finding and holding that there was no basis and/or justification for the respondent to reimburse the appellant, at the very least, the Kshs.6,500/= that the appellant paid for the botched plates, notwithstanding that the Respondent itself was on record for offering to refund the Kshs.6,500/= through an out of court settlement.

l. That the Judgment and/or decision of the trial magistrate is a nullity ab initio and a mockery of the due process of the law, and hence ought to be set aside Ex-Debito Justitiae.

4. The appeal proceeded by way of submissions. The Respondent filed submissions and supported the decision. They also prayed for costs. Hitherto the Appellant had filed an application to amend the pleadings both in this court and the court below. The same was dismissed on 11.06.2025 for lack of merit.

Analysis

5. The appellant filed a notice of appeal and a memorandum of appeal. The notice of appeal has no place in the appeals to this court. It is accordingly struck out. The proper document was the memorandum of appeal which was duly filed in time. However, it breached every rule in the book both under the

Small Claims Act and the *Civil Procedure Rules*. Order 42 Rule 1 of the Civil Procedure Rules provides are doth:

> "(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
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> (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

6. The Court of Appeal had this to say about compliance with Rule 86 [now Rule 88] of the *Court of Appeal Rules* (which is pari materia with Order 42 Rule 1 of the *Civil Procedure Rules*) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

> "We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the *Court of Appeal Rules*. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v. IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:
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> > "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

7. The court abhors repetitiveness of grounds of appeal which tend to cloud the key issues in dispute for determination by the court. In the case of *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR, the court of appeal observed that: -

> "Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross V. Hezekiah Kiptoo Kimue & 4 others*, Civil Appeal No. 223 of 2013, this Court stated:
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> > "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

8. 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.

9. 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)."

10. 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."

11. In *Peter Gichuki King'ara Vs Iebc & 2 Others*, Nyeri Civil Appeal No. 31 of 2013 (Court of Appeal) (Visram, Koome & Odek, JJA) of 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."

12. 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 vs 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.

13. The main issue for determination in this case is whether the Small Claims Court erred in law in dismissing the Appellant's case.

14. The court is bound by section 32 of the *Evidence Act* on aspects of the case as regards questions of fact. The matters of fact that are raised are thus dismissed in limine for lack of merit pursuant to Section 38(1) of the *Small Claims Court Act*. Having dismissed all questions of fact, the only question that remains is:

    i. Whether the court erred in allowing the matter to proceed under section 30 of the *Small Claims Act*.

    ii. Whether the court failed to be bound by precedent in the case of *Dormakaba Limited Vs Architectural Supplies Kenya Limited* [2021] KEHC 210 (KLR)

15. What is not in doubt is that the Respondent carried out its duty of preparing plates and releasing them to the appellant who accepted the same. In law, that was the end of the contract. Losses occurring thereafter are of no effect to the fully executed contract. The court was thus correct in all aspect as regarding the execution of the contract for Ksh. 6,500/=.

16. Secondly, the question of section 30 of the *Small Claims Act* is not a serious one. The appellant was represented by Mr. Makori who consented to proceeding under section 30 of the *Small Claims Act*. The said section provides as follows:

> Subject to agreement of all parties to the proceedings, the Court may determine any claim and give such orders as it considers fit and just on the basis of documents and written submissions, statements or other submissions presented to the Court.

17. There was agreement between all the parties to proceed under section 30 of the said *Act*. In that connection there is no legal issue raised that is capable of succeeding. The court considered all the evidence on record and came to a conclusion that the claim was not proved. The court below is king when it comes to section 32 of the *Small Claims Court Act*. The said section provides as follows:

    (1) The Court shall not be bound wholly by the Rules of evidence.

    (2) Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.

    (3) Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that Court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.

    (4) The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.

    (5) All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.

(6) For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.

(7) An Adjudicator may require any written evidence given in the proceedings before the Court to be verified by statutory declaration.

18. On the question of the precedent in the case of *Dormakaba Limited Vs Architectural Supplies Kenya Limited* [2021] KEHC 210 (KLR), it is noted that Mativo J stated as follows regarding successful claim damages, where a plaintiff must also show that;

(a) a contract exists or existed;

(b) the contract was breached by the defendant; and

(c) the Plaintiff suffered damage (loss) as a result of the Plaintiff's breach. The plaintiff is not required to establish the causal link between the breaches of an agreement and damages, with certainty but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what could probably have occurred, based upon the evidence and what could be expected to have occurred in the ordinary cause of human affairs, rather than an exercise in metaphysics."

19. This was done and the Appellant was found not to have established any breach. The court did not disregard the precedent but it was not necessary for a small claim, for the court to quote each and every decision before it.

20. In a layman's term, the respondent was given work, which they did. They were paid. There was no breach that was shown, even on the pleadings. The case was untenable from the word go. The court was thus correct in dismissing the suit in the small claims court.

21. In *Union Bank of Nigeria PLC v Alhaji Adams Ayabule & another* (2011) JELR 48225 (SC) (SC 221/2005 (16/2/2011)), Mahmud Mohammed, JSC delivering the judgment of the Supreme Court of Nigeria stated:

> I must emphasise that the law is firmly established that special damages must be pleaded with distinct particularity and strictly proved and as such a court is not entitled to make an award for special damages based on conjecture or on some fluid and speculative estimate of loss sustained by a plaintiff.... Therefore, as far as the requirement of the law are concerned on the award of special damages, a trial court cannot make its own individual arbitrary assessment of what it conceives the plaintiff may be entitled to. What the law requires in such a case is for the court to act strictly on the hard facts presented before the court and accepted by it as establishing the amount claimed justifying the award.

22. In the case of *David Bagine Vs Martin Bundi* [1997] eKLR, the Court of Appeal stated as follows: -

> "It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sahbani v. City Council of Nairobi* (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter vs. Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:
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> > "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak,

throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

23. The court was correct in all aspects. The appeal is accordingly dismissed.

24. 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.

25. Since costs follow the event, the respondent is entitled to costs of the appeal. A sum of Ksh 35,000/= will be right and just.

Determination

26. In the upshot, I make the following orders:-

    a. The appeal lacks merit and is accordingly dismissed with costs of Ksh. 35,000/=.

    b. 30 days stay of execution.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 21ST DAY OF JULY, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Appellant present

No appearance for the Respondent

Court Assistant – Michael