



**West Kenya Sugar Company Limited v Okendo (Civil Appeal
E056 of 2023) [2024] KEHC 2844 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2844 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E056 OF 2023
PJO OTIENO, J
MARCH 8, 2024**

BETWEEN

WEST KENYA SUGAR COMPANY LIMITED APPELLANT

AND

VICTOR OKENDO RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. C.J. Cheruiyot (RM)
in Kakamega SMCC Claim No. E008 OF 2023 delivered on 13th March, 2023)*

JUDGMENT

Background

1. By his statement of claim dated 11/1/2023, the respondent sued the appellant for general damages, special damages in the sum of Kshs. 565,150/-, interest and costs of the suit. His case was that on or about 11/11/2022 at around 1800hrs he was walking as a pedestrian along the Butula-Nambale highway when the appellant's driver negligently drove Motor Tractor Registration Number KTCC 783A hence knocking him down.
2. In a judgment of the trial court delivered on 13/3/2023, the respondent was awarded general damages in the sum of Kshs. 600,000 and special damages of Kshs. 565,150/- which were both capped at Kshs. 1,000,000/- together with costs of the claim and interest from the date of judgment.
3. Aggrieved with the decision of the trial court, the appellant lodged a memorandum of appeal dated 11th April, 2023 premised on the following grounds;
 - a. That the learned trial court erred in fact by making a finding that the appellant was 100% liable for the accident.
 - b. That the learned trial court erred in fact and in law by awarding an amount that is way above the pecuniary jurisdiction of the court.



- c. That the learned trial court erred in fact and in law by making heavy reliance on circumstantial evidence as opposed to the documents tendered before court.
 - d. That the learned trial court erred by admitting into evidence expert opinions and documents without cross examination of the makers of the said documents.
4. For the above reasons, the appellant prays that the judgment of the trial court and consequential orders be set aside with costs.
 5. The appeal was directed to be canvassed by way of written submissions. As I prepare this decision only the appellant's submissions are on record on record.
 6. The submission by the appellant takes the view that section 12(3) of the *Small Claims Act*, 2016, caps the pecuniary jurisdiction for small claims court to Kshs. 1,000,000/ and therefore when the respondent sought special damages of Kshs. 565,150/- and submitted for an award of Kshs. 800,000/- in general damages, the trial court ought to have downed its tools at that juncture as any ensuing proceedings and decision in the absence of jurisdiction was a nullity to which regard they cite the case of *R v Magistrates Court, Mombasa; Absin Synergy Limited (Interested Party)* (Judicial Review E033 of 2021) (2022) eKLR.
 7. They further place reliance on the case of *Wambua v Kimondiu & 3 others* (Miscellaneous Civil Application 087 of 2022(2022) KEHC 10426 (KLR) (3 August 2022) where the learned judge observed that, even during submissions stage, if the trial court realizes that the damages sought would be more than the pecuniary jurisdiction of the court, then the court should down its tools suo moto.
 8. Further submissions were offered that the trial court failed to consider the documents filed in court and in specific the abstract and the medical examination reports in line with the respondent's case during trial that he was knocked down by tractor KTCC 783A on 10/11/2023 at around 6PM. It was pointed out that the police abstract issued on 5/1/2023 confirms that the accident occurred on 10/11/2022 while the treatment notes from Busia County Referral Hospital show that the respondent was admitted at the hospital on 9/11/2022 and that the doctor's receipt produced at page 32 of the record of appeal indicate that as early as 4/1/2022 the respondent was already undergoing various medical examinations.
 9. They also submit that the respondent produced two medical reports one dated 1/12/2023 and another issued on 4/1/2023 and none of the makers of the said documents was called to adopt them and be cross examined on the same.
 10. On whether the trial court had the pecuniary jurisdiction to handle the claim, it is the submission by the respondent that the appellant did not raise any objection as to the pecuniary jurisdiction of the court. He argues that the law on the issue of a party raising a new point not raised during trial was addressed by the court of appeal, Platt, JA, in *Wachira vs. Ndanjeru* (1987) KLR 252, at Page 258 where the judge summarized the principles to be that; the discretion to allow a point of law to be taken for the first time on appeal will not be exercise unless full justice can be done between the parties; It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case.
 11. The respondent then contends that the appellant through its memorandum of response submitted itself to the court's jurisdiction and actively participated in the trial without raising a preliminary objection. He further submits that he waived his right to recover an award in excess of Kenya shillings one million excluding costs in his memorandum of claim.



12. He submits in addition that in exercise of this court's jurisdiction under article 165 of the *Constitution*, is not limited or affected by the provisions of section 12 of the *Small Claims Court Act*, and prays that the general damages awarded by the trial court be enhanced to a sum of Kshs. 1,400,000/- in light of the injuries suffered by the respondent. In that regard he refers the court to the case of *Macharia Miriam & another v Muema Ndila* (2017) eKLR where the respondent sustained an unstable pelvic fracture, injuries to the bladder and urethra, deep cut wound to the perineum region, cut wound to the abdomen, urethral structure and bruises to the right hand and the court awarded Kshs. 1,400,000/- in general damages.
13. On whether the trial court erred in admitting expert evidence without cross examination of the makers of the documents, it is his submission that no objection was raised hence the same was duly admitted. He further submits that section 32 of the *Small Claims Court Act* excludes the applicability of the strict rules of evidence in the Small Claims Court.
14. On whether the trial court considered the material evidence on record he submits that the issue as to whether the accident occurred in 9th or 10th November, 2022 was never raised by the appellant during trial. He contends that there is overwhelming evidence to corroborate the fact that the respondent was involved in an accident on or around the 10th day of November, 2022 including the statement recorded by one Jafred Suguti- the driver of the motor tractor who confirmed that the accident indeed occurred. The respondent referred the court to the statement at page 67 of the record of appeal.

Issues, Analysis and Determination

15. This court has considered the grounds of appeal, the proceedings of the lower court and the submissions by both the appellant and the respondent and discerns the issues for determination to be; whether the trial court had the jurisdiction to entertain the respondent's claim; whether the finding on liability was supported by evidence and whether in allowing production of medical evidence by persons other than the makers, the court erred.
16. Section 38 of the *Small Claims Court Act* restricts the jurisdiction of the High Court on appeals from the Small Claims Court to matters of law only. The grounds of appeal commence by challenge to submissions by the respondent at trial asking for a sum of Kshs 800,000 together with pleaded special damages outstripped the jurisdiction of the trial court.
17. The language of the statute on the extent of the court's jurisdiction leaves no room for debate as it is beyond equivocation. In fact, the statutory form for lodging a claim binds the claimant to waive and forfeit the recovery of all sums in excess of Kshs 1,000,000. Being a pleading, it binds both the court and the pleader. To that extent, it was erroneous of the respondent to urge the court to award to him what he had waived and forfeited. That however is a different matter from whether the court had the jurisdiction in the matter.
18. To this court, a court being bound by pleadings, to the same extent as the parties, had its path in the matter well chatted in the claim form filed. The assertion by the appellant that there was evidence to demonstrate a claim of more than the jurisdiction of the court is untenable on the same principle that the parties and the court being bound by the pleadings filed where not expected to offer or receive any evidence led in contradiction with the claim filed¹. Even if such had been offered the court was bound to reject it for all purposes but definitely it cannot be the reason to divest the court of jurisdiction. However, a perusal of the record reveals not that any evidence was led to place the claim outside the

¹ See Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR



jurisdiction of the court. It was only in the submissions that the sum of Kshs. 800,000 was urged, but as the law remains, submissions are not pleadings.

19. This court thus holds that there was never material placed before the court to divest it of jurisdiction and that as pleaded the claim was well within the jurisdiction of the court.
20. Having said that and the law being settled that jurisdiction is everything, it was erroneous of the court to imagine and pray that it could do more than the law vests. The trial court ought to have fixed its eyes on the ceiling mounted by the Act and made no attempt outside of it. That however does not vitiate the decision reached which fell well within its jurisdiction. The court finds no merit in the contention that the trial court acted in a matter beyond its jurisdiction. In coming to this conclusion, the court has not ignored the persuasive authorities cited to it by the appellant. It has found that it is not persuaded and that the facts of the two cases are not the same.
21. On whether liability was proved, the appellant contends that the respondent's case during trial was that he was knocked down by tractor KTCC 783A on 10/11/2023 at around 6PM and that whereas the police abstract which was issued on 5/1/2023 confirms that the accident occurred on 10/11/2022, the treatment notes from Busia County Referral Hospital show that the respondent was admitted at the hospital on 9/11/2022 and that the doctor's receipt produced at page 32 of the record of appeal indicate that as early as 4/1/2022 the respondent was already undergoing various medical examinations. That position is taken to assert that the case was marred with contradictions. The court has perused the proceedings of the lower court and takes the view that, away from the dates, the question was whether the claimant was injured in the manner pleaded on or about the date pleaded. Indeed, the pleadings were that the accident occurred on or about the 10th November 2022. That fact was confirmed by the evidence of the only witness called by the appellant. It would be a travesty of justice to hold that no accident occurred involving the claimant and the respondent's tractor when both sides agree on the occurrence. In any event, the appellant had the chance to raise the issues at the cross-examination stage but made no such attempts.
22. Matters not canvassed by the parties and which the trial court did not get a chance pronounce itself upon are not available for consideration by the appellate court. In this finding the court is bound and guided by the Court of Appeal in *Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others ex-parte Tom Mbaluto* [2018] eKLR (as cited in *Frera Engineering Company Limited v Morris Mureithi Mutembei*(2020)eKLR) where the court held that;

“It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case...

In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court.... As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance.”
23. In the matter at hand, there is no ground of appeal challenging the decision upon the alleged contradictory evidence and the court has delved into the issue merely because it has its duty to re-appraise the entire evidence afresh. It is the courts determination that the alleged contradiction upon



proper appraisal of the record do not vitiate the judgment at trial on the liability of the appellant. Far from it, the analysis and finding by the trial court that the appellants witness was less candid and thus less credible cannot be faulted.

24. On the last issue whether there was an error on the court in admitting medical documents by the claimant and not the maker, the court finds the challenge to be wholly misconceived. The record reveals that the production of the exhibits was done in the presence of counsel and he raised no objection to such production. The court reminds itself that the dispute belongs to the parties and that they are the best custodians of their legal interests and rights and that what they do by consent or lack of contestation must be respected by the court. In any event, even if the point were to be that the rule of evidence is that the documents be produced by the makers, the law in section 32, *Small Claims Court Act*, exclude strict application of the rules of evidence to facilitate the purpose and aspirations of the law in creating the court. The finds that mounting that challenge at this stage is not in good faith and for the ends of justice. It lacks merit and is thus equally dismissed.
25. In conclusion and for the reasons set out above, the court finds the subject appeal to be bereft of any merit and the same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 8TH DAY OF MARCH, 2024

PATRICK J. O. OTIENO

JUDGE

In the presence of:

No appearance for the Appellant

No appearance for the Respondent

Court Assistant: Polycap Mukabwa

