



REPUBLIC OF KENYA



KENYA LAW
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**Watu Credit Limited v Randu (Civil Appeal 365 of 2023)
[2024] KEHC 4430 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 365 OF 2023
DKN MAGARE, J
APRIL 18, 2024**

BETWEEN

WATU CREDIT LIMITED APPELLANT

AND

CHARO KADZU RANDU RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of the Honourable Viola Muthoni made on 7/12/2023 in Mombasa SCCOM No. E698 of 2023. The Appellant were the Respondent in the matter.
2. The respondent filed a claim for 200,000/= which was money he intended to buy a three wheeler. An employee of the defendant entered an agreement with the appellant which turned out to be fictitious. The court made an order that the Appellant make a refund.
3. The appellant was aggrieved and set forth 5 grounds of Appeal, all of which are on points of fact and evidence. These were as doth: -
 - a. The learned adjudicator erred in law in awarding compensation of Ksh 200,000 and costs of 5,000/- to the respondent without considering the contractual, procedural measures put in place by the Appellant.
 - b. The learned adjudicator erred in law in apportioning liability to the Appellant for actions performed by a third party who was not party to the proceedings.
 - c. The learned adjudicator erred in law in failing to consider the evidence of the Appellant.
 - d. The learned adjudicator erred in law by disregarding the Appellant's evidence.
 - e. The learned adjudicator erred in law disregarding or ignoring the submissions.



4. All the foregoing except (b) are points of fact for which this court has no jurisdiction

Analysis

5. This being an Appeal from the small claims court, the duty of the court is circumscribed under 38 of the [Small Claims Court Act](#) which provides as doth: -
- a. A person aggrieved by the decision or an order Appeals. of the Court may appeal against that decision or order to the High Court on matters of law.
 - b. (2) An appeal from any decision or order referred to in subsection (1) shall be final.
6. The duty of the court is to defer to the findings of fact of the adjudicator and analyse the matter for issues of law. The issues of law are either due to the subject matter or the finding of law by the court. In the case of *Mbogo and Another v Shah* [1968] EA 93, the court of Appeal stated as doth:
- “...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
7. 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 [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 v Bernard Munene Ithiga](#) (2016) eKLR).”
8. Then what constitutes a point 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 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.”
9. In [Peter Gichuki King'ara v 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 demeanor – is an issue of law.”

10. A point 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.

11. The appellant filed submissions where they stated that the court erred in apportioning liability for an agreement with a former employee Constance Odhiambo. The employee entered into an agreement in the offices of the Appellant. They describe the agreement as different.

12. They also raised issues of privity of contract. They submitted that he should be made at least a party. They stated that they had a no cash and Mpesa only policy. The appellant relied on the case of *Dominic Ndunda Mutiso & another v Transallied Limited* [2020] eKLR, where the court state as doth: -

“the act of the driver offering a lift to the deceased was outside the scope of his employment. It was not amongst the acts he was authorized to perform and neither was it for the Respondent’s benefit. The Respondent’s witness testified that the deceased was a stranger to it. This is further corroborated by evidence showing that the Respondent is in the business of buying and selling cars while the deceased was a veterinary officer. It was submitted that selling vehicles and veterinary are two distinct and unrelated businesses. This further enforces the fact that the driver in carrying the deceased in the motor vehicle was doing so for his sole benefit. The letter of appointment clearly states that he was not authorized to carry any passengers making his actions beyond the scope of his employment.”

13. I cannot trace the Respondent’s submissions.
14. All the issues were issues of fact. The Appellant blames its employee for the fraud. It however did not join him as a party.

Determination

15. In the upshot, I make the following Orders:
- a. The Appeal lacks merit and as such it is dismissed.
 - b. Each party to bear their costs.
 - c. The file is closed.



DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 18TH DAY OF APRIL, 2024.

Judgement delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Ms Mboya for the Appellant

No appearance for the Respondent

Court Assistant – Brian

