



Kenya Women Micro Finance Bank v Onyango & another (Civil Appeal E836 of 2021) [2024] KEHC 5607 (KLR) (Appeals) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5607 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

APPEALS

CIVIL APPEAL E836 OF 2021

DKN MAGARE, J

MAY 9, 2024

BETWEEN

KENYA WOMEN MICRO FINANCE BANK APPELLANT

AND

MONICA ATIENO ONYANGO 1ST RESPONDENT

ECHO NETWORK AFRICA (ENA) 2ND RESPONDENT

JUDGMENT

1. This is an appeal from the small claims court's decision on Nairobi Milimani SCECOM 305 of 2021 on 18/10/2021 the parties agreed to proceed by way of submission which they did so, the advocates for the appellant was of the view that they could mediate this shares.
2. They raised the following 5 grounds of Appeal: -
 - a. That the Honorable Learned Magistrate/Adjudicator erred in law and fact by failing to appreciate the facts and evidence provided by the parties in support of their respective defenses to the claim and instead, proceeding to enter judgment against the Appellant and in favour of the 1st Respondent.
 - b. That the Honorable Learned Magistrate/Adjudicator erred in law and fact in failing to appreciate the fact and evidence presented before court that the Appellant was a mere agent of the 2nd Respondent in the investment.
 - c. That the Honorable Learned Magistrate/Adjudicator erred in law and fact by arriving at the finding which contradicts the facts and evidence on record to with that 2nd Respondent ran the investment on behalf of the Appellant.



- d. That the Learned Magistrate/Adjudicator erred in law and fact by ignoring and/or failing to appreciate the facts and evidence put forward by the Appellant in support of its Defence that it was a mere agent of the 2nd respondent in the investment.
- e. That the Honorable Magistrate/Adjudicator consequently erred in law and fact in failings to take into consideration the totality of the evidence tendered and consequently arriving at a decision not supported by the facts and evidence on record.
3. 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:
- (1) 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.
- (2) An appeal from any decision or order referred to in subsection (1) shall be final.
4. 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 vs. 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.”
5. 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 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).”
6. 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 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.”



7. 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.”

8. 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 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.”

9. The Respondent filed a claim in regard to shares bought at Ksh. 500, 000/= from the Appellant. The court analyzed the evidence and law a conclusion that the Appellant is liable. The Court did not find any contractual obligation of the 2nd Respondent.

10. The court found that the 2nd Respondent was among a section of the 1st Respondent. She was issued with what they called KWFC CSOP Trust Certificate. The Appellant was said to have failed to allocate the first Respondent shares when the plaintiff was dead.

11. I have perused the submissions. They dealt with a factual matrix which they said will help in determining this case. The same was unnecessary and without basis in these kind of matters. As a result, they file humongous and copious amount of pages of submissions which were on issues of fact. Having found no issue of Law in the Respondent's submissions I shall not deal with this case.

12. The grounds of Appeal related to the evidence in support of the case, the small claims court's duty as to evidence is set out in section 32 of the *Small Claims Act* as dealt: -

- (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.
13. All the submissions raise questions of fact and evidence. In the circumstances the Appeal is untenable and is consequently dismissed with costs of Ksh. 55,000/= to the Respondent.

Determination

14. In the nutshell I make the following orders: -
- a. I find no merit on this Appeal and shall dismiss the same in line with costs of Ksh.55, 000/= to the 1st Respondent.
 - b. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 9TH DAY OF MAY, 2024.

KIZITO MAGARE

JUDGE

Judgment delivered through Microsoft Teams Online Platform. In the presence of:

Mulanya for the Appellant

Mr. Ouko and Onyango for the 1st Respondent

Court Assistant –Brian

