



REPUBLIC OF KENYA



**Karume v Acacia Medical Centre Limited (Civil Appeal E175 of 2022)  
[2024] KEHC 5746 (KLR) (Commercial and Tax) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5746 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E175 OF 2022**

**DKN MAGARE, J**

**MAY 8, 2024**

**BETWEEN**

**DR MICHAEL KARUME ..... APPELLANT**

**AND**

**ACACIA MEDICAL CENTRE LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal from the Small Claims Court adjudicator V.M. Mochache given on 21/10/2022 in Milimani SCCCOMM E4205 of 2022. The Appellant was a defendant in the matter.
2. The Appeal proceeded by way of written submissions.
3. The appellant being aggrieved by the decision filed 3 grounds of Appeal.
4. The said grounds were: -
  - a. That the learned Magistrate erred in law and in fact in finding that the appellant's liable to pay the Respondent rent arrears of Kshs. 461,300/=.
  - b. That the learned Magistrate erred in law and in fact by presiding over a matter, which she had no jurisdiction.
  - c. That the learned Magistrate erred in law and in fact by failing to consider and have regard to the appellant's case and to the facts, evidence and submission presented in support thereof.
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:



- (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.
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 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 is 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. Given that the second issues herein is a question of mixed facts and law, the court shall not delve into it. It is only useful when it is the only decisive point.
8. 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).”
9. 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*.”
10. 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.”

11. The main issue for determination in this case is whether the Trial Court erred in law in dismissing the Appellant’s suit. 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.

### **Pleadings**

12. The Respondent filed a claim dated 28/6/22. The Respondent stated that there were a service level agreement where the Appellant was given space and support services at the JKIA Towers. The Appellant was to pay Kshs. 80,000/= for rented space and related services.
13. The Appellant is said to have packed belongings and left and never went back. In a nutshell, the Appellant was a sub Tenant with benefits. What was claimed was essentially rent arrears.
14. The service level agreement covered several issues including confidential. However, none of those other services are in question. The sole question is whether the Appellant paid Kshs. 80,000/= per month for space. Documents produced show that the amount claimed was rent arrears.
15. It is never in doubt whether this was a disputed our rent. The only issue raised is whether the adjudicator had jurisdiction.
16. The defence filed is evasive and not a standard defence. Parties testified on 27/9/2022.
17. The court went through the proceedings and delivered judgment stating that an amount of Ksh. 461,300 was outstanding.
18. The court found that the Appellant was to provide space.
19. In general, that is rent. Whether it is for standalone or for some table, the amount of Kshs. 80,000/= is rent.
20. The dispute was a tenancy one and nothing more nothing less. By dint of section 12 of the small claims court the court did not have jurisdiction. the same provides as follows: -
  - (1) Subject to this Act, the Rules and any other law, the Court has jurisdiction to determine any civil claim relating to—
    - (a) a contract for sale and supply of goods or services;
    - (b) a contract relating to money held and received;
    - (c) liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;



- (d) compensation for personal injuries; and
  - (e) set-off and counterclaim under any contract.
- (2) Without prejudice to the generality of subsection (1), the Court may exercise any other civil jurisdiction as may be conferred under any other written law.
- (3) The pecuniary jurisdiction of the Court shall be limited to one million shillings. (4) Without prejudice to subsection
- (3), the Chief Justice may determine by notice in the Gazette such other pecuniary jurisdiction of the Court as the Chief Justice thinks fit.
21. Section 13 of the [small claims court act](#) excludes jurisdiction as doth: -

“ 13. Exclusion of jurisdiction

- (1) If a claim has been lodged with the Court, no proceedings relating to the same course of action shall be brought before any other Court except where the—
    - a. proceedings before that other Court were commenced before the claim was lodged with the Small Claims Court; or
    - b. claim before the other Court has been withdrawn.
  - (2) A claim shall not be brought before the Court if proceedings relating to that claim are pending in or have been heard and determined by any other Court.
  - (3) Subject to section 12(3), a higher court may transfer a claim to a Small Claims Court.
  - (4) For the purposes of this section, a claim is deemed to have been lodged with the Court in any case where section 23 has been complied with.
  - (5) A claim shall not be brought before the Court if the cause of action is founded upon defamation, libel, slander, malicious prosecution or is upon a dispute over a title to or possession of land, or employment and labour relations.
22. Rent is specifically excluded as part of matters the court could Hear. In this case, the court took up jurisdiction in a matter it had no authority to do so. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, THE supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the



legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

23. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists.
24. In *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, justice Nyarangi JA, as he then was stated as doth;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: “By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order.

25. The Small Claims Court cannot deal with rental premises howsoever worded. Parties cannot though differently worded contracts confer jurisdiction on the court without one.
26. In the premises I find that the Appeal is merited. I allow the same. However, given that the court had no jurisdiction ab intio the only order commanding itself is to strike out the suit in the Small Claims Court.
27. This is because the proceedings before a court without jurisdiction are a nullity. In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

28. The effect is that the case was in a wrong court. The same calls for striking out. Of course does not rule out either party going to a proper court for remedies.

### **Determination**

29. In the circumstances, the Appeal is merited.



- a. I set aside the judgment and the decree of the court below and in lieu thereof substitute with an order striking out the small claims court SCCCOM E4205 of 2022.
- b. Each party to bear their costs in this court and the court below.
- c. Both this file and the Small Claims Court are hereby closed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA ON THIS 8<sup>TH</sup> DAY OF MAY, 2024.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

J. Okerosi Ochako & Co. Advocates for the Appellant

Kevin & Associates LLP Advocates for the Respondent

Court Assistant - Brian/Winnie

