



REPUBLIC OF KENYA



**Africa General Limited & another v Tuffsteel Limited (Civil Appeal
E394 of 2022) [2024] KEHC 7083 (KLR) (Civ) (11 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7083 (KLR)

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

**CIVIL
CIVIL APPEAL E394 OF 2022**

DKN MAGARE, J

JUNE 11, 2024

BETWEEN

AFRICA GENERAL LIMITED 1ST APPELLANT

ISAIAH OBONYO 2ND APPELLANT

AND

TUFFSTEEL LIMITED RESPONDENT

JUDGMENT

1. This is an appeal from the decision of Hon. Caroline Ndumia on 13.5.2022 in Nairobi SCCComm. E082 of 2022. The Appellants were the Respondents. The Appeal what are said to be questions of law.
2. Only one question is seen. The Respondent filed a claim for payment of goods sold and delivered. The delivery was between 28.10.2020 to 5.11.2020 for Kshs. 949,164.01/=. The 2nd Appellant is said to be a guarantor of the 1st Appellant.
3. The Respondent produced various invoices. Appellants admitted being in a business relationship but denied owing Kshs. 949,164.01. They stated that the original amount owed was 2,010,025.07/= as per Claimant's statement.
4. The amount was reduced to Kshs. 1,247,356.74 but the Respondent was to pick items to reduce indebtedness. An admitted figure of debt of Kshs. 499,856.74 was pleaded. They pleaded that Kshs. 600,000/= was paid due to unreasonable pressure. They sought Kshs. 500,000/= for illegal debt.
5. The court heard the matter and entered judgment for the Respondent for Kshs. 919,164/= plus costs and dismissed the counter claim.



Analysis

6. 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 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.
7. 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.”
8. 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.
9. 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).”
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 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.

13. I have thus not seen any questions of law. All issues raised are evidential in nature and are not within the remit of this court. The Appeal is accordingly dismissed with costs of Ksh 50,000/=.

Determination

14. In the conclusion the court makes the following orders: -

- a. The Appeal lacks merit and is accordingly dismissed with costs of Kshs. 50,000/=
- b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JUNE, 2024.

Judgment Delivered Through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Miss. Maina for the Appellant

No appearance for the Respondent

Court Assistant – Jedidah

