



**Technology Today Limited v Kimenju & another (Civil Appeal
E371 of 2022) [2024] KEHC 7082 (KLR) (Civ) (11 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7082 (KLR)

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

CIVIL

CIVIL APPEAL E371 OF 2022

DKN MAGARE, J

JUNE 11, 2024

BETWEEN

TECHNOLOGY TODAY LIMITED APPELLANT

AND

DANSON KARANJA KIMENJU 1ST RESPONDENT

JOHN KIMANI 2ND RESPONDENT

*(Being an appeal from the Judgment of Hon. V.M. Mochache (RM) delivered
on 6th May, 2022 in Milimani Small Claims Court Case No. E126 of 2022)*

JUDGMENT

1. This is an Appeal from the decision of the Hon. V.M. Mochache, RM given on 6/5/2022 in Milimani Small Claims Court No E126 of 2022. The appeal is on both facts and law.
2. The Appeal is from the Small Claims Court. By dint of section 38(1), an appeal from the Small Claims Court is on points of law. Issue of liability is a question of fact. This was a material damage claim.
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 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 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.”

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. 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.
6. 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).”

7. 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 Mwasbetani 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.”

8. 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 demeanour – is an issue of law.”



9. 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.

10. There is no question of law involved in liability. There is nothing for the court to hear. In the circumstances the appeal is dismissed for raising on questions of fact. Being not based on negligence, there is nothing for the court to go on with.
11. Consequently the Appeal is dismissed. The Respondent shall have costs of Kshs 45,000/=.

Determination

12. The court makes the following orders:-
- a. There is no point of law raised in the Appeal. Consequently the Appeal lacks merit and is accordingly dismissed with costs of Kshs 45,000/=.
 - b. The Appellant shall pay costs within 30 days failing which execution shall issue.
 - c. 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:-

Mr. Obwocha for the Appellant

Mr. Munguti for the Respondents

Court Assistant – Jedidah

