



**Wanjiru v Muriithi (Civil Appeal E069 of 2022)
[2024] KEHC 6918 (KLR) (11 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6918 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E069 OF 2022
DKN MAGARE, J
JUNE 11, 2024**

BETWEEN

MARY NYAMBURA WANJIRU APPELLANT

AND

JOYCE NYAMBURA MURIITHI RESPONDENT

(Being an appeal from the Judgment of Hon. E.M. Gaithuma - RM in Nyeri Small Claims Court SCC COMM. No. E055 of 2022, delivered on 16th November, 2022)

JUDGMENT

1. This is an appeal from the Judgment of Hon. E.M. Gaithuma - RM in Nyeri Small Claims Court SCC COMM. No. E055 of 2022 delivered on 16th November, 2022. The Appellant was a tenant filing a claim against the landlord. It related to recovery of rent arrears. An AMENDED claim was filed on 28/10/2022.
2. This being an Appeal from the Small Claims Court, the duty of the court is circumscribed under section 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.
3. 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.”

4. 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 issue 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.
5. 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 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*.”

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. 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.

9. The timelines for small claims are punishing. It is therefore imperative that the case facing Parties be clear and succinct. Mere allegations will not count. Parties must know that it is a court of law and not a kangaroo court or a baraza. Pleadings are therefore paramount. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, A C Mrima stated as follows: -

“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

10. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

11. The pleadings in court were for a tenancy agreement. The court found the claim baseless. It must be recalled that issues over rent are issues for different forums. As such parties cannot by craft confer on



the court jurisdiction it does not have. 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 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.”

12. The court must therefore assume jurisdiction where it has and eschew usurping jurisdiction where none exists. A rose by any other name smells sweet, the Bard in Romeo and Juliet, once posited. The court was duty bound to read the relationship and interpret it as such. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKL , the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

“Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”

13. 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.

13. 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.

14. What constitutes land is set out in section 13 of the *Environment and Land Court Act*. This governs disputes under Article 162(2). The small claims court cannot deal with tenancy disputes.
15. Immediately the word lease or rent arrears turned up, the court ought to have known that he was entering un-chartered waters. 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.”



16. In this case the claim was based on allegations of braking over rent arrears. The court found rightly that the claim is baseless. All the issues raised touch on tenancy and on fact. There is no single issue of law. On the issue of costs, the Appellant lost in the lower court. Section 33 of the small claims court provides as follows: -
- (1) The Court may award costs to the successful party in any proceedings.
 - (2) In any other case parties shall bear their respective costs of the proceedings.
 - (3) Without prejudice to subsections (1) and (2), the Court may award to a successful party disbursements incurred on account of the proceedings.
 - (4) Except as provided in subsection (2), costs other than disbursements, shall not be granted to or awarded against any party to any proceedings before a Court.
17. The respondent was a successful party. Consequently, she is entitled to costs. The Appeal in respect thereof is thus baseless.
18. The bottom line is that the Appeal lack merit. It is accordingly dismissed. GIVEN THAT the respondent was in person, she shall be awarded disbursements of Ksh. 10,000/=. The file is closed.

Determination

19. I make the following orders: -
- a. The Appeal lacks merit and is accordingly dismissed.
 - b. The respondent shall be paid disbursements of Ksh. 10,000/=.

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. Macharia for the Appellant

Respondent – present

Court Assistant - Jedidah

