



**Coop Bank Fleet Africa Ltd v Lang’at (Civil Appeal E095 of 2023)
[2024] KEHC 9509 (KLR) (16 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9509 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E095 OF 2023
SM MOHOCHI, J
JULY 16, 2024**

BETWEEN

COOP BANK FLEET AFRICA LTD APPELLANT

AND

DUNCAN KIPKEMOI LANG’AT RESPONDENT

*(Appeal from the Judgment of Hon. E. M. OTIENO-, in
NAKURU SCCC No. E074 of 2023 delivered on the 24.04.2023.)*

JUDGMENT

Introduction

1. The Appellant moved the Court vide Statement of Claim dated 20th January 2023 seeking compensation for damages which the Respondent occasioned on 10th March, 2020 as a result of a road traffic accident. The Appellant/Claimant submitted that, on the fateful day he was lawfully, carefully and properly Driving riding motor vehicle registration KGB 571T along Kaptembwa, when Respondent’s driver and or agent drove motor vehicle registration number, KCV 781X in a careless, reckless and negligent manner, causing it to hit the Appellant/Claimant motor vehicle thereby occasioning great damage.
2. At the conclusion of the trial, the learned adjudicator held that, the Respondent was 100% liable for the accident but that, the Claimant had not strictly proven special damages hence dismissed the claim with costs to the defendant.
3. The Trial Court stated that, the Appellant/Claimant had not attached receipts, only invoices. It was also held that the claim payment requisitions that the Appellant/Claimant had presented were not sufficient proof of payment.



4. The Appellant/Claimant being aggrieved by the learned adjudicator's holding. lodged this appeal through a memorandum of appeal dated 17th May 2023 and the Record of Appeal dated 18th September 2023.
5. The Respondent, the Defendant therein, entered appearance and filed his Notice of Preliminary Objection dated 7th December, 2023.

The Appeal

6. The Appellant being dissatisfied with the decision of the Trial Court filed the instant Appeal vide Memorandum of Appeal dated 17th May 2023 on the following six (6) grounds;
 - i. That the learned trial magistrate erred in law and in fact in holding that the Appellant failed to prove liability and wholly disregarding the evidence adduced and the submissions adduced by the appellant herein.
 - ii. That, the learned magistrate erred in law and in fact in failing to observe that the Appellant/Claimant had sufficiently proved special damages as particularized in the list of documents and had met the required legal threshold of proving special damages and failed to observe that the Applicant had filed assessment receipt amounting to kshs 6,380 as well as motor vehicle search receipt amounting to kshs 550. The same ought to have been awarded plus costs of the suit.
 - iii. That, the Learned Trial Magistrate erred in law and in fact by dismissing the Appellant's claim and awarding costs to the Respondent herein despite the evidence and pleadings filed before the Court
 - iv. That, the Learned Trial Magistrate erred in law and in fact by holding that there were no receipts to prove the amount was paid and by directing that claim payment requisitions are not sufficient proof of payment despite various judgments and precedents providing that the same is sufficient proof of payment the claim payment requisitions were equally electronically signed.
 - v. That, the Learned Trial Magistrate's erred in law and in fact in dismissing the Claimant's claim without proper reasons.
 - vi. That, the Learned Trial Magistrate's decision is a miscarriage of justice.
7. The Appellant sought that the Appeal be allowed with costs to the Appellant and the entire Judgment by the Trial Court at Naivasha dated 24th April, 2023 be set aside and the costs be awarded to it.
8. Parties were directed on the 29th September 2023 to file written submissions. The Respondent raised a preliminary objection on 7th December, 2023 whereas the Appellant's submissions on both the Appeal and in response to the notice of preliminary objection were filed on 9th February 2024.

Appellant's Case

9. With regards to the Notice of Preliminary objection dated 7th December, 2023 the Appellant/Claimant submits that: -
 - i. That Section 38 of the *Small Claims Court Act* which provides that an aggrieved party can only appeal on points of law and not factual matters cannot be taken to mean that the conclusion of an adjudicator of the small claims Court cannot be challenged as a point of law.



- ii. That in *Bashir Haji Abdullahi v Mohammed Nooru and 3 others* [2014] eKIR, the Court defined matters of law and matters of facts as defined in the Black's Law Dictionary as follows:
"A matter of fact is a matter involving a judicial inquiry into the truth of alleged facts and a matter of law is a matter involving a judicial inquiry into the applicable law."
- iii. That the Court in the above case further quoted *Bracegirdle v Oxley (2)* [1947] 1 ALL 1 E.R. 126 which stated:
"The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deduced by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law....." "... The Court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them."
- iv. The Court of Appeal in *Bashir Haji* added that the reasoning in *Bracegirdle* had been adopted in our jurisdiction as was the case in *A.G v David Murakaru* [1960] EA 484. Chief Justice Ronald Sinclair and Rudd J. in the case stated that, an appellate Court which is restricted to determining questions of law may interfere with the conclusion of a lower Court if the same is erroneous in point of law. This is the case where that lower Court arrives at a conclusion on the primary facts that it could not reasonably come to. Such a conclusion or decision becomes an error in point of law. (See also *Patel v Uganda* [1966] EA 311 and *Shah v Aguto* [1970] EA 263).
- v. That from the above cases it is clear that where a Court comes to a decision on primary facts that it could not reasonably come to, then a higher Court can determine the case as having an error in point of law since that decision can be considered bad law.
- vi. It's the Appellants submission that the decision appealed against, made on 24th April, 2023 in the small claims Court, is erroneous in point of law because it is a decision that the Court did not reasonably come to. The holding that there was no sufficient proof of payment was erroneous since the Appellant/Claimant had presented claim payment requisitions which is sufficient proof of payment to which the Appellant/Claimant provided precedents to back that up. It is clear that determining claim payment requisitions are not sufficient proof of payment is bad law and thus the appeal raises a point of law.
- vii. It is important to note that as a point in law costs follow the event. In this case the Claimant/Appellant had filed claim payment requisition payments as proof of payment, further and on a without prejudice basis assuming the claim payment requisitions were not sufficient and for that reason costs were not awarded. The re-inspection receipt filed was proof that indeed the Applicant's insurance company incurred costs and as such judgment ought to have been in the Appellant's favour as well as costs and interests.
- viii. That it is noteworthy, that the Claimant/Applicant raises a triable issue with a high probability of success and it would be unjust to dismiss their case unheard.



- ix. That the Respondent/Applicant's application is just but an attempt to defeat and embarrass the cause of justice which is a draconian move to evade justice and waste the Court's precious time.
 - x. It is for this reasons that the Applicant submits that the Application by the Respondent/Applicant should be dismissed and the Court allows parties to proceed for
10. The Appellant filed its written submissions dated 5th February 2024 refining two issues for determination namely:
- a. Whether the appellant/Claimant has proven its case?
 - b. Whether the Appellant/Claimant is entitled to special damages?
11. It was the Appellant/Claimant's submission that, it has proven its case, the Trial Court held that, liability against the Respondent had been sufficiently proven by the Appellant/Claimant hence the holding that, the Respondent was liable. However, the Trial Court held that, the Appellant/Claimant failed to strictly prove special damages and was therefore not awarded the amount pleaded. The question is whether the Appellant/Claimant has strictly proved special damages hence should be awarded the same.
12. As to whether the Appellant/Claimant has strictly proven special damages, it was the Appellant/Claimant's submission that they strictly proved special damages. The special damages that the Appellant/Claimant pleaded in the statement of claim amounted to Kshs. 392,884/-.
13. That the Appellant/Claimant produced a fee note and receipt dated 23rd March 2020 from Latent Motor Assessors and Valuers for kshs. 6,380/ for Assessment of motor vehicle registration number GKB 571T.
14. That the Appellant/Claimant also produced an eCitizen paid receipt by the National Transport and Safety Authority showing payment of Kshs. 550/- for a motor vehicle search.
15. These were strictly proved as is required by law. In paragraph 31 of the judgment by the Small Claims Court, the Court stated that the amount of Kshs. 6,380 had been proven by the production of a receipt but did not award the said amount.
16. That, in the judgment, the Court also stated that the production of receipts was necessary to prove payment and quoted the case of Great Lakes Transport Co Ltd v Kenya Revenue Authority [2000] eKLR which held that an invoice gained the status of a receipt if it had the word "paid" on it. The eCitizen receipt of kshs. 550/- for a motor vehicle search had the word "paid" on it which made it a receipt. Despite providing the receipts of kshs. 6,380/= and kshs. 550/ the Small Claims Court did not award the Appellant/Claimant the said amounts. The Lower Court using their own words stated that receipts are proof of payment yet the Court failed to award the special damages for the receipts produced plus costs and interest of the suit.
17. The above notwithstanding the Appellant/Claimant produced claim payment requisition forms for the rest of the amount pleaded. These claim payment requisitions were for kshs. 211,954 for repairs done on the Appellant/Claimant's motor vehicle and kshs.174,000/- paid to the Appellant/Claimant for replacement of the motor vehicle for 15 days. The Small Claims Court held that the claim payment requisitions were not sufficient to prove that the said amounts were paid. The Court stated that only receipts could prove payment.



18. It was the Appellant/Claimant's submission that, the claim payment requisition forms produced by the Appellant/Claimant are sufficient proof of payment. In the case of *Ndungu v M'Ikiao & another (Civil Appeal 182 of 2019)* [2022] KEHC 15753 (KLR) (15 November 2022) the High Court at Kiambu held that claim payment requisitions are proof of payment. The Court stated:

“On perusal of claim payment requisition voucher dated July 28, 2016 for kshs 378,740/- from CIC, I note that it indicates cheque number as 265903 and shows it was authorized by CIC”.

19. That, from the foregoing, it was the Appellant/Claimant's view that there is sufficient proof of payment of the repair's costs to Top Quality Auto Ltd, the garage which repaired the vehicle. The trial magistrate's finding that there was no prove of payment of the said amount was erroneous.

20. That, the claim payment requisition forms produced by the Appellant/Claimant were electronically signed showing authorization by the Appellant/Claimant's insurance company (Britam). The Claim payment requisition for garage fees was electronically approved by Mwagema and even contains a payment reference number which is proof that the payment was made. The insurance company also replaced the Claimant's vehicle with a car hire vehicle pending repairs of his insured vehicle. The Insurance company raised a claim payment requisition generated by Mwagema amounting to Kshs 174,000 the same was produced in Court but the lower Court erred in failing to state that special damages have been proved.

21. As to Whether the Appellant/Claimant is entitled to special damages It is our submission that the holding of the Small Claims Court was erroneous and that the Appellant/Claimant is entitled to special damages. The Appellant/Claimant strictly proved special damages by providing receipts of kshs. 6,380/ and kshs. 550/- and Claim payment requisition forms of kshs. 211,954/ and kshs. 174,000/- which are sufficient to prove that payment was made. The Appellant is therefore entitled to the award of the amount pleaded in the statement of Claim of kshs. 392,884/-.

22. That it is trite law that "costs follow the event" as it was aptly stated by Supreme Court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR that:

“the award of costs would normally be guided by the principle that, "costs follow the event": the effect being that the party, who calls forth the event by instituting suit, will bear the costs if the suit fails...”

23. In view of the foregoing, Appellant/Claimant's submission that, it be granted the costs and interests of this suit at Court rates,

24. The Appellant/Claimant submits that, the Judgment of the Small Claims Court was erroneous and that the Appellant/Claimant has proven its case praying that its Appeal be allowed.

Respondent's Submissions

25. The Respondent in opposing the Appeal filed a Notice of Preliminary Objection dated 7th December, 2023 that:

a. The Appeal is bad in law, misconceived, incompetent and an abuse of this Honorable Court's process and specifically:

i. That Contrary to the provisions of Section 38 of the *Small Claims Court Act* which provides that, 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, the Memorandum of Appeal filed by the Appellant raises issues of fact. Further, the Memorandum of Appeal dated 17th May 2023, which the Appellant seeks to set aside, refers to a judgment of the Small Claims Court at Naivasha dated 24th April, 2023, which the Respondent is a total stranger to.

- ii. That without prejudice to the ground hereinabove, the Respondent notes that the Appellant failed, to produce before Court an indemnity contract, which contract would have raised basis for the Appellant's claim under the doctrine of subrogation, a doctrine that the Appellant is relying on in this matter.
- iii. That, the Appellant has further disregarded the law by seeking to rely on the doctrine of subrogation without first ensuring liability of the Respondent for the accident. The High Court in *Kenya Power & Lighting Company Limited vs. Julius Wambale & Another* (2019) eKLR was clear in stating that recourse under the doctrine of subrogation only lies in the filing of a suit against the third party blamed for the occurrence of the risk in question for recovery of the sums expended, by the Claimant, not the Insurer, and such right could not be exercised on appeal in first instance. This means therefore, since there is no decree apportioning liability to the Respondent, there cannot be a claim by the Insurer.
- iv. That, the Appellant has only produced invoices and payment requisition notes instead of receipts confirming payment, both of which are not sufficient proof of payment.
- v. That the Appeal in the circumstances has been brought in a manner that is contrary to statute and is therefore an abuse of the Court process and the Respondent prays that the Appeal be dismissed in its entirety, with costs to the Respondent.

Duty of the Court.

26. This primary issue for determination is whether a Notice of Preliminary Objection dated 7th December, 2023 has merit?
27. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”



28. In view of the foregoing, this Court shall seek to establish whether the grounds outlined in the Preliminary Objection herein, have meet the threshold set out in the aforementioned cases.
29. This Court as a first appellate Court has a duty to is to re-evaluate the evidence and infer its own conclusions while bearing in mind that it did not have the advantage of hearing the witnesses. This position was held in *Selle and Another v Associated Motor Boat Co. Limited and Others* [1968] EA 123 where the Court of Appeal stated inter alia that:

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanor of a witness is inconsistent with the evidence generally...Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions...”

Analysis and Determination

30. Notice of Preliminary Objection dated 7th December, 2023 is pursuant to Section 38 of the Small Claims Court that provides that:

“38.

- (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.”

31. What constitutes, points of law, has been settled. In the case of *Peter Gichuki King'ara v IEBC & 2 Others*, Nyeri Civil Appeal No. 31 of 2013, (Court of Appeal) (Visram, Koome & Odek, JJA) the Court of Appeal stated 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 demeanor – is an issue of law.”

32. In *Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others*, [2014] eKLR the Court held that:

“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 13th January, 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”.



33. Even on the normal legal lingua, a point of law must clearly arise out of the pleadings. In case of appeal, it should arise out of the memorandum of appeal vis some vis the pleadings in the Court below. In the case *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696: -

“A preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court.”

34. In other words, though not seen as a preliminary point, they must as of necessity arise out of the pleadings. They must hold true, to the law or implication of the law. This includes deciding on basis of no evidence, based on a nullity, failing to exercise discretion which the Court clearly has, failing to take up jurisdiction which the Court has or taking jurisdiction the Court does not have or otherwise reaching a decision which no reasonable person could have reached given the evidence and pleadings.

35. The Court has carefully considered Notice of Preliminary Objection, the grounds and record of appeal and the evidence adduced, the written submissions as well as the authorities relied on. I find that the solo issues for determination is whether the Appeal contravenes Section 38 of the [Small Claims Court Act](#).

36. The right of appeal is thus limited to what Section 38 of the [Small Claims Court Act](#) provides.

“Regarding evidence, the Court is bound by section 32 of the [Small Claims Court Act](#), which provides as doth: -

“32. Exclusion of strict Rules of evidence

- (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.



- 37. In this particular instance the Learned adjudicator found that the burden of proof was not discharged to the required standard and that the despite the Court being bombarded with several documents in proof the same were invoices that have been found not to be receipts.
- 38. Special damages are the precise amount of pecuniary loss which the claimant can prove to have flowed from the particular facts set out in the pleadings. They must be specifically pleaded. In this instance it was a factual finding that special damages were never proven and in arriving at the preposition the Court considered precedent.
- 39. This Court recalls the Court of appeal holding in *M’riungu And Others v R* [1982-88] 1 KAR 360 when it stated, (per Chesoni AJA) at page 366:

“We would agree with the views expressed in the English case of *Martin v Glyneed Distributors Ltd (t/a MBS Fastenings)* [1983] 1 CR 511 that where a right of appeal is confined to questions of law only, an appellate Court has loyalty to accept the findings of fact of the lower Court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial of first appellate Court unless it is apparent that; on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad law.”
- 40. This Court sitting as 2nd Appellate Court can only interfere with the 1st Appellate Court’s decision where it is apparent on evidence, no reasonable tribunal could have arrived at the conclusion. In this particular instance is the long-drawn argument of strict proof of special damages and the ever-evolving jurisprudence in this regard which process of determination is matters of fact.
- 41. It is a well settled principle of law that an invoice is not proof of payment. Special damages can only be proved by producing actual receipts or invoices endorsed with the word “Paid” (See: *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited* [2015] eKLR.)
- 42. The factual findings cannot be Appealed against by dint of Section 38 of the *Small Claims Court Act* warranting the upholding of the Notice of Preliminary Objection dated 7th December, 2023 by this Court.
- 43. The Appeal is accordingly found to be lacking merit and is accordingly dismissed with costs to the Respondents
Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 16TH DAY OF JULY 2024.

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MOHOCHI S. M.
JUDGE

