



REPUBLIC OF KENYA



**KENYA LAW**  
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**Trident Insurance Company Limited v Ripe Freight Services Limited (Civil Appeal 242 of 2019) [2023] KEHC 614 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 614 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 242 OF 2019  
OA SEWE, J  
FEBRUARY 10, 2023**

**BETWEEN**

**TRIDENT INSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

**RIPE FREIGHT SERVICES LIMITED ..... RESPONDENT**

*(Being an Appeal from the Ruling of Hon. J.K. Kassam SRM, delivered on the 25th January, 2019 in Mombasa CMCC No. 1432 of 2014)*

**JUDGMENT**

1. The appellant was the defendant in Mombasa CMCC No. 1432 of 2014 in which the respondent sued for Kshs. 1,757,888/= together with cumulative interest in the sum of Kshs. 4,050,181.44 on the aforesaid sum as well as interest at 12% per month from the date of filing the suit until full payment. The respondent's cause of action was that, on the 26<sup>th</sup> August 2011, it made an application to the Customs Authority through the defendant for Customs Transit Bond, which was accordingly approved on 8<sup>th</sup> November, 2011. The respondent was accordingly provided with a bond of Kshs. 70,000,000/= with a lifespan of 3 years, subject to annual premium renewal.
2. The respondent further explained, per paragraph 7 of its Complaint dated 8<sup>th</sup> August 2014, that from 8<sup>th</sup> November 2011, it was entitled to transact with and enjoy the facility in running its business operations; and did so uninterrupted until sometime in August 2012 when, without notice or cause, the appellant irregularly and prematurely terminated the bond facility in spite of payment of the requisite premiums. A computation of the sums due from the appellant by way of principal and interest was set out at paragraph 16 of the Complaint; hence the claim for Kshs. 1,757,888/= together with interest in the sum of Kshs. 4,050,181.44 as well as interest and costs of the suit.
3. The appellant denied the respondent's allegations vide its Defence dated 1<sup>st</sup> October 2014. It denied that the respondent's bond was prematurely terminated but asserted that it validly expired. The



- appellant further denied that the respondent was entitled to the unutilized premium of Kshs. 351,588/ = or a credit note for the said amount. Thus, the appellant prayed that the respondent's suit be dismissed with costs.
4. The matter was heard by Hon. Lewa, SRM, and a judgment delivered on 28<sup>th</sup> October 2018. The learned magistrate was satisfied that the respondent had proved its case against the appellant in terms of prayers (a), (c) and (d) of the Plaint. She however dismissed the claim for cumulative interest as set out in paragraph (b). A decree was thereafter issued by the lower court dated 10<sup>th</sup> December 2018.
  5. Thereafter, the appellant filed a Notice of Motion dated 24<sup>th</sup> December 2018 seeking a review of the judgment delivered by Hon. Lewa on 23<sup>rd</sup> October 2018. The application was predicated on the ground that the learned magistrate erred in awarding interest at 12% per month, which translates to 114% per annum without giving reasons for the award, which in essence resulted in a decretal sum in excess of the lower court's jurisdiction, contrary to Section 7(1) of the *Magistrates Court Act*, No. 26 of 2015. The application for review was heard and determined by Hon. Kassam on 25<sup>th</sup> January 2019. He dismissed the application on the ground that it challenged Hon. Lewa's decision on the merits.
  6. Being aggrieved by that decision, the appellant filed the instant appeal on 29<sup>th</sup> November 2019, on the grounds that:
    - (a) The learned magistrate erred in law and fact by holding that jurisdiction is not an issue that can be addressed through an application for review;
    - (b) The learned magistrate erred in law and fact in failing to consider legal arguments raised by the appellant;
    - (c) The learned magistrate erred in law and fact in finding that the applicant's application for review was an attempt to introduce new issues and/or arguments to strengthen the applicant's case;
    - (d) The learned magistrate erred in law by failing to adhere to the doctrine of precedents;
    - (e) The learned magistrate erred in law by failing to take into account the legal position that a court acting without jurisdiction acts in vain and any decision rendered is a nullity ab initio.
  7. Thus, the appellant prayed that the ruling and orders of the learned Senior Resident Magistrate dated 25<sup>th</sup> January 2019 be set aside and that the applicant for revision be heard afresh by either the appellate court or by the Chief Magistrate's Court.
  8. The appeal was canvassed by way of written submissions, pursuant to the Court's directions dated 14<sup>th</sup> June 2022. Accordingly, Mr. Khakula for the appellant relied on his written submissions dated 19<sup>th</sup> September 2022. He proposed the following issues for determination:
    - (a) Whether jurisdiction can be a ground for review;
    - (b) Whether Hon. T. Lewa, SRM, had jurisdiction to deliver the judgment dated 23<sup>rd</sup> October 2018;
    - (c) Whether this Court can issue the orders sought in the appeal.
  9. On whether jurisdiction can be a ground for review, Mr. Khakula relied on Section 80 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 45 of the *Civil Procedure Rules* to support his argument that there is an error apparent on the face of the judgment of Hon. Lewa that requires the intervention of the Court. He also relied on *Muyodi v Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243 and *Republic v Commissioner for Investigations*



- Enforcement, Ex parte Wananchi Group Kenya Limited [2014] eKLR for the proposition that a decision delivered by a court without jurisdiction is a mere nullity and may not only be set aside at any time by the court in which they were rendered but also declared void by every court in which they may be presented. In Mr. Khakula's submission, the only way a court can set aside a decision that it gave in a matter where it was devoid of jurisdiction is through an application for review before the same the same court; and therefore that Hon. Kassam's decision to dismiss the applicant's application for review was wrong.
10. On whether Hon. Lewa had jurisdiction to deliver the judgment dated 23<sup>rd</sup> October 2018, Mr. Khakula made reference to Republic v Chairman Meru Central District Land Disputes Tribunal & 6 Others, Ex Parte Salacious Kaburu Kirigia & Another [2018] eKLR as well as the Owners of Motor Vessel Lillian "S" v Caltex Oil (Kenya) Limited [1989] eKLR to underscore his submission that the decision of Hon. Lewa was a nullity as jurisdiction must be acquired before judgment is given. He consequently concluded his submissions by stating that, whereas Hon. Lewa had pecuniary jurisdiction of Kshs. 7,000,000/=, she ended up passing judgment in the total sum of Kshs. 12,614,568/=; an amount in excess of her pecuniary jurisdiction.
  11. On his part, Mr. Tindi for the respondent submitted that, instead of appealing the decision of Hon. Lewa, the appellant opted to challenge the ruling of Hon. Kassam and therefore that the appeal lacks merit in so far as it amounts to a back-door appeal against the judgment of Hon. Lewa. He also pointed out that the sum claimed was only Kshs. 1,757,888/= together with accumulated interest of Kshs. 4,050,181.44 as at date of filing the suit. He therefore urged the Court to find that the suit was well within the pecuniary jurisdiction of Hon. Lewa; and therefore that the application for review was properly dismissed by Hon. Kassam. He accordingly prayed for the dismissal of the appeal with costs.
  12. I have given due consideration to the appeal in the light of the proceedings held before the lower court and the written submissions filed herein by learned counsel. There is no doubt in my mind that the appellant has convoluted the issues in this appeal; and therefore that it needs to be clarified that this is an appeal from the ruling and orders of Hon. Kassam, SRM, delivered on 25<sup>th</sup> January 2019. It is not an appeal in respect of the judgment of Hon. Lewa, and therefore the issue as to whether Hon. T. Lewa, SRM, had jurisdiction to deliver the judgment dated 23<sup>rd</sup> October 2018 is not germane in this appeal. Hence, the only issue emerging for my determination is the question whether Hon. Kassam erred in ruling that jurisdiction cannot be a ground for review.
  13. The centrality of the issue of jurisdiction cannot be overemphasized. Authorities abound in this regard that are premised on The Owners of Motor Vessel Lillian "S" (supra) in which Hon. Nyarangi, JA, in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR stated:

“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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”
  14. In the same vein, the Supreme Court held thus in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR:

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree



with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...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 on 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."

15. It is plain then that assumption of jurisdiction where non-exists or an award of a sum in excess of the awarding court's pecuniary jurisdiction would amount to an error of judgment as opposed to an error on the face of the record; and therefore ought to have been appealed instead of being challenged on review. The Court of Appeal made this clear in *Julius Ochieng Oloo & Another v Lilian Wanjiku Gitonga* [2019] eKLR thus:

"...lack of jurisdiction by the court making the ruling/order is not an error apparent on the face of the record, but rather an error of judgment that goes to the merit of the decision. Such an error can only be corrected by an appellate court."

16. The Court of Appeal had earlier, in *National Bank of Kenya Limited v Ndungu Njau* [1977] eKLR held that:

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. In the instant case the matters in dispute had been fully canvassed before the learned judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."

17. It was therefore unseemly for the appellant to seek for the setting aside of Hon. Lewa's judgment by way of review by a court of concurrent jurisdiction. In the premises, I find no merit in the appeal. It is hereby dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 10<sup>TH</sup> DAY OF FEBRUARY 2023**

**OLGA SEWE**

**JUDGE**

