



REPUBLIC OF KENYA



**Kahuya v Kisilu & another (Civil Appeal E056 of 2023)
[2023] KEHC 18236 (KLR) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18236 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E056 OF 2023
DKN MAGARE, J
MAY 2, 2023**

BETWEEN

KEVIN KAHUYA PLAINTIFF

AND

MUANGE KISILU 1ST RESPONDENT

JOHN ABUGA NYASETA 2ND RESPONDENT

JUDGMENT

1. This is an appeal from the decision of Hon V Muthoni, an adjudicator, in Mombasa SCCCC No E 155 of 2022. The appellant raises 4 grounds of Appeal where he maintains that the second respondent has accepted liability and should be liable.
2. The appellant and respondent have one thing in common. They have a motor vehicle Registration No KCP 971P to wrestle with. The said motor vehicle was hired out to the Appellant, who in turn hired it to the 3rd party. The claim made herein is both for breach of contract and loss of user. Then there is an accident in Nyamira County. this resulted in the loss.
3. Nyamira County is not within Mombasa (Pun Intended). then an issue arises whether, this claim ought to have been filed in a small claims court in Mombasa being inter county in its nature.

Duty of the Court

4. The appeal from the small claims court is on issues of law only. This is pursuant to Section 38 of the [Small Claims Court](#). It provides as doth:
-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



5. 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) of 13.02.2014, 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.”

6. The issues of failure to exercise discretion is equally a point of law. In the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR, the court stated as doth: -

“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).

7. 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.”

8. 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 visavis 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 off the suit. Examples are an objection to the jurisdiction of the court.”

9. 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.

10. In the case of of *Macfoy v United Africa Co. Ltd* [1961] 3 All ER (the Macfoy case) in which Lord Denning held that:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court to declare it to be so. And every



proceeding which is founded on it is also bad and incurably bad, you cannot put something on nothing and expect it to stay there. It will collapse.”

11. It also means if a judgment is based on a nullity, it must as a matter of law be set aside.
12. In the locus classicus case of *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1, Justice Nyarangi, JA as then he was stated as doth: -

”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. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

13. In the case of *Mombasa Law Society v Attorney General & another* [2021] eKLR, justice E k Ogola, held as doth:- regarding the jurisdiction of the small claims court.

“In R v Big M Drug Mart Ltd (supra), the court stated that both purpose and effect are important in determining constitutionality. The purpose of the *Small Claims Court Act* is to deal with matters of a lower subject value in a cost effective way. In all rationality, the costs of appealing to the Court of Appeal would defeat the purpose of the Act in question. My view is that the Act has not limited the right of a litigant to Appeal to the Court of Appeal, instead it has considered the economic right of a common citizen.

30. In the 1979 case of Njeru v Republic, Miller JA and Wicks CJ held that “It is well established that there is no right of appeal apart from statute, either it is expressly granted by statutory authority or it is not. There is no right of appeal by mere implication or by inference.”

14. 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.”

15. The court cannot make decisions on fact. However, the court cannot be completely blind to the facts. The rules on pleadings are also to be taken into consideration. Parties are bound by their pleadings. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co Ltd* [2018] eKLR, the court, AC Mrima, had this to say: -

“ 11. 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 v Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v 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.”

Analysis

16. The 1st Respondent sued the rental over the said motor vehicle. These Rentals are what we ordinarily classify in tortious cases as loss of user.



17. The court granted both loss of lesser out the value of the motor vehicle. The vehicle was repairable. The same has not been ascertained It is not fair to award the value of the motor vehicle without any assessment. The salvage value is also crucial. The loss of user can only be given to within a reasonable period the vehicle is awaiting repair.
18. The Court, pronounced itself succulently on these principles in *Kemfro Africa Ltd v Meru Express Servcie v AM Lubia & Another* 1957 KLR 27 as follows: -
- “The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.”
19. The claim for loss of user can only be specifically pleaded and strictly proved. in this case, there are two aspects that were not dealt with. The vehicle has not been assessed. Salvage is unknown and as such the special damages claims are spurious. further, loss of user has not been set out properly. there must be a nexus between loss of user, and the repair period. in the case of *David Baginevs Martin Bundi* [1997] eKLR the court of Appeal settled what is required of special damages. The law Lords posited as follows: -
- “It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v Jackson M Nyambu t/a sisera store*, Civil Appeal No 5 of 1990 (unreported) and *Idi Ayub Sahbani v City Council of Nairobi* [1982-88] IKAR 681 at page 684: “....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard CJ in *Bonham Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:
- Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it” We also refer to the cases of *Ouma v Nairobi City Council* [1976] KLR 297 at page 304 and *Kenya Bus Services v Mayende* [1991] 2 KAR 232 at page 235.”
20. Further, part of the claim arose in Mombasa county and part in Nyamira. the major loss occurred in Nyamira. It is even doubtful that rentals were payable after the accident.
21. As I read through the judgment, Section 4 of the *Small Claims Court* comes to my mind. It provides: -
- (1) There is established a court to be known as the Establishment of the Court. Small Claims Court which shall be a subordinate Court pursuant to Article 169 (1) (d) of *the Constitution*.
 - (2) Pursuant to Article 6(3) of *the Constitution*, the Chief Justice shall, by notice in the Gazette, designate any Court station as a Small Claims Court with such geographical jurisdiction as may be specified in the notice.
 - (3) Notwithstanding subsection (2), the geographical jurisdiction may be in relation to a sub-county or other units of decentralization in compliance with Article 6(3) of *the Constitution*.
22. I take judicial notice that the adjudicator is gazette in respect of Mombasa county. she cannot as such handle matters in respect of Nyamira county.



23. In the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi, JA stated as follows, with concurrence of Masime and Kwach JJA: -

“This an issue of whether the court below had jurisdiction arises in Lillian S 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 Arespect 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. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

24. The court does not have jurisdiction in a matter that straddles nor confines and two complex causes of Action. Though the agreement was written in Mombasa, the loss occurred in Nyamira. The loss is also not a total loss. Had this court had jurisdiction, I will have dismissed the case in the court below for lack of valuation, or evidence of repair. However, the horses have bolted.
25. It is not necessary to look at the memorandum of Appeal when the Court clearly had no jurisdiction.
26. In the circumstances I allow the appeal and set aside the judgment in the small claims court. I note that the matter is within the limitation period. In lieu of the said Judgment I substitute it with an order striking out the entire claim in the small claims courts.
27. The claimant, if he so wishes should file a proper claim against both the parties herein in the Chief Magistrate’s Court in Nyamira and not the small claims court and proceed normally with proof required in Road Traffic Accidents.
28. Given that the claim was valid, and it has only been struck out for lack of jurisdiction, each party will bear their own costs.
29. Before departing, I note that there is a correspondence to IPOA for release of the motor vehicle. The best is not to complain but to get an order for release, which can be done, if the Attorney General and Inspector general of police are made parties. I do not think that valuation can be hampered only because of the vehicle being in a police station.

Determination

30. The upshot is that the appeal is allowed to the following extent: -
- (a) The judgment in the small claims court is set aside in toto.



(b) The entire suit in the small claims court be and is hereby struck out.

(c) The claimant is at liberty to file a suit in the Chief Magistrate's Court in Nyamira or within a court in Nyamira county where the accident occurred.

(d) Each party to bear their costs in this court and in the small claims court.

(e) Both this file and the small claims file are hereby closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 2ND DAY OF MAY 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

N/A for the Appellant

N/A for the Respondents

Court Assistant - Firdaus

