Thuku v Ndaka (Civil Appeal E044 of 2024)
[2024] KEHC 11864 (KLR) (7 October 2024) (Judgment)

Neutral citation: [2024] KEHC 11864 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E044 OF 2024

DKN MAGARE, J

OCTOBER 7, 2024

BETWEEN

NEWTON CHEGE THUKU ..... APPELLANT

AND

ISAAC MWILU NDAKA ..... RESPONDENT

(Being an Appeal from the Ruling of Hon. Ismael Imoleit in Nyeri Small Claims Court No. SCCCOM E361 of 2023 delivered on 24/07/2024)

JUDGMENT

1. This is an appeal from the decision of the adjudicator, Hon. Ismael Stanley Imoleit given in Nyeri SCCCOM E361/2023 on 24/7/2024. The decision related to setting aside the default judgment entered on 15/11/2023.

2. The Respondent instituted a criminal case against the Appellant being Nyeri CR E1293/2023. It related to an alleged sum of Kshs. 990,000/=. Simultaneously with the criminal case, he instituted a claim in the Small Claims Court vide Nyeri CR E1293/2023. This was while well knowing that the Appellant was safely tacked away in remand over the same money. The claim in the small claims court was also for the same Kshs. 990,000/- from being money had and received between 2/2/2023 to 1/5/2023. The amount initially requested was Kshs.5,000/= on 2/2/2023. The Appellant kept asking for more money.

3. Knowing that he had obtained default judgment for 990,000/=, he accepted a sum of Ksh 700,000/= being in full and final settlement. Like any other greedy person, he knew that he still has a judgment for the same amount tacked away somewhere, which was awaiting the Appellant upon release. The Appellant did not know what was awaiting him until he was jolted to reality and filed a notice of motion dated 15/4/2024 to set aside the judgment. The facts surrounding the case are not disputed. The only issue is service and whether the Appellant should be allowed to defend the claim, maintaining that it is

settled. The court struggled to find fault with the application and finally relied on Section 193 of the Criminal Procedure Code to dismiss the application.

4. The Appellant filed a 7 paragraph Memorandum of Appeal. The Appeal raises both questions of law and of fact. I shall address only the issues of law.

Background

5. The claim was dated 1/10/2023. The first hearing was to be on 23/10/2024. A request for judgment was made on 9/11/2023. The Appellant was allegedly receiving money ranging from 5,000/= to 120,000/=, in a short span. The said amounts do not appear to be a loan. Who piles debts upon debts? The total on the M-pesa is Kshs. 771,000/=.

6. Upon the request, the court entered a sum of Kshs. 990,000/=. There appears to have been an agreement in a criminal court pursuant to section 204 of the criminal procedure code. In that agreement a sum of Kshs. 700,000/= was said to be paid. The balance was waived. Pursuant to the agreement, the Appellant was discharged and was not to pursue the balance. As a result, the claim in Nyeri CR E1293/2023 was withdrawn. The criminal proceedings indicate that the amount of 700,000/= was paid and the balance foregone.

7. The evidence from the criminal proceedings show that it is the same amount that is being claimed herein. The Applicant made an application stating he never received summons. He actually annexed the proceedings showing the matter is settled.

8. The parties argued the application dated 7/3/2024. The Respondent indicated that the letter written was to allow withdrawal of the case. He stated that the Appellant did not raise any defence. He stated that Kshs. 700,000/= is an admission of existing debt. The court heard the parties and surprisingly dismissed the application.

Analysis

9. 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 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.

10. 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 is 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."

11. 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.

12. 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)."

13. 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."

14. 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."

15. A question 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."

16. The court below was plainly wrong. In setting aside, the court is required to look at the:

a. Defence offered.

b. Service of process.

17. There are 2 tests in setting aside. If a judgment is regular, it must ex debito and as a matter of right be set aside. There is no discretion in that respect. The second limb is whether the service was regular. The Applicant must show that it has a triable issue. It is not an issue that must succeed but triable. However, the test is even more punishing in small claims court where the timelines are given. In Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd vs Augustine Kubede (1982-1988) KAR, the Court of Appeal held that: -

> The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties. Kimani -v- MC Conmell (1966) EA 545 where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied that there is a triable issue.

18. Sheridan J. in addressing the issue of ex parte proceedings held as follows in Sebei District Administration vs Gasyali & others (1968) EA 300: -

> The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court.

19. In Tree Shade Motors Limited v D.T. Dobie And Company (K) Limited & Another [1998] eKLR, the Court of Appeal Kwach, Tunoi & Bosire, JJA posited as doth as regards ex parte judgment stated as follows: -

> The learned judge did not look at the draft defence to see if it contained a valid or reasonable defence to the plaintiff's claim. Where a draft defence is tendered with the application to set aside the default judgment, the court is obliged to consider it to see if it raises a reasonable defence to the plaintiff's claim. If it does, the defendant should be given leave to enter and defend. That is what this Court decided in the case of Kingsway Tyres and Automart Ltd v Rafiki Enterprises Ltd (Civil Appeal No. 220 of 1995) (Unreported). In the course of its judgment the court said:-
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> "To our minds, the onus was on the respondent to fault the service. Having failed to do so, and in the absence of evidence on record to lead us to hold that the service was improper, it is our view and so hold that ex parte judgment was a regular judgment. It would only, if at all, be properly, vacated on grounds other than non-service of summons.
>
> There are ample authorities to the effect that, notwithstanding regularity of it, a court may set aside an ex parte judgment if a defendant shows he has a reasonable defence on the merits. The respondent did not annex to its application in the lower court a draft defence. A director of the company did, however, swear an affidavit to state that the appellant's claim was based on certain LPOs which had been stolen from it (the respondent) by its employees. Too, that the employees had been arraigned in court on criminal charges relating thereto. In view of that, it did not think the claim, properly, lay against it. It was desirable, we think for the respondent to annex to its application a draft defence to include all that and any other defences it may have had to the appellant's claim. Be that as it may, the defences, above,

were not such as would have properly, influenced the court below to exercise its discretion in favour of setting aside. That is the more so considering the manner the parties conducted business between themselves."

20. The court found that there was a criminal case in which money had been paid. It is on record. No evidence is needed to prove otherwise. The court found that the dispute was admitted that a sum of 290,000/= was in issue. The decree was for 990,000/=. The court simply ignored the established facts and proceeded to its frolics. This resulted in the Appellant being driven, nay bundled, out of the seat of justice. The ruling is a sore thump to our collective conscious as a people and anathema to good order. However, tired the court is, it should never ignore established precedent.

21. Recently, the Supreme Court was at great pains trying to fathom the precedents created while ignoring the guidance from the Supreme Court. The Court in Muruli v Oparanya *& 3 others (Petition 11 of 2014*) [2016] KESC 14 (KLR) (21 April 2016) (Ruling) guided as follows: -

> The value of precedent in judicial decision-making is a recurring theme in our decisions such as: Wanjohi v. Kariuki & others Petition No. 2A of 2014 (paragraphs 79, 82, 83 and 86); Outa v. Okello & 3 others, Sup. Ct. Petition 10 of 2014 (paragraph 57); and Obado v. Oyugi & 2 others, Sup Ct. Petition No 4 of 2014, (paragraph 122). In Kidero & 5 others v. Waititu and others, Sup. Ct. Petition No. 18 of 2014(Consolidated with Petition No. 20 of 2014) Njoki Ndungu, SCJ in her concurring opinion, made the following apposite remarks (para.236):
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> The principle of stare decisis in Kenya unlike other jurisdictions is a constitutional requirement aimed at enhancing certainty and predictability in the legal system. The Articles of establishment and jurisdiction reveal the Court's vital essence and the decisions of this Court protect settled anticipations by ensuring that *the Constitution* is upheld and enforced and that the aspirations of the Kenyan people embodied in a system of constitutional governance are legitimized. The constitutional contours of article 163(7) oblige this Court to settle complex issues of constitutional and legal controversy and to give jurisprudential guidance to the lower Courts. In the exercise of our mandate, we determine the constitutional legality of statutes and other political acts to produce judicially-settled principles that consolidate the rule of law and the operation of government, and the political disposition, particularly in the settlement of electoral disputes. As a Court entrusted with the final onus of settling constitutional controversies, one of our principal duties is the enforcement of constitutional norms."

22. The entire precedent is based on respecting precedent. I cannot understand why the court went into a tirade on merit of the suit merit and ignoring the decisions which were binding on him. The court, though aware that service was bogus, did not rule. He went into deductive reasoning. There can be no service in prison without the prison authority, endorsing the same. There is no provision of service in prison in the small claims rules. Order 5 rule 18 of the civil procedure rules provide as follows: -

> Where the defendant is confined in a prison, the summons shall be served on him personally in the presence of the officer in charge of the prison.

23. The certificate of service was signed not by the prison officer but the Respondent. Rule 8(4) of the Small Claims Courts Rules, 2019 provides for service by a process server. It states as doth: -

> 4) A person who effects service of any document under this rule is required to file a Certificate of Service in Form SCC 5 set out in the Schedule hereto.

24. Ipso facto there was no service. The Appellant was entitled to defend as of right. Without service the judgment was a nullity. It must ex debito justiceae, be set aside. Such a judgment was once described by Lord Denning M.R while delivering the opinion of the Privy Council at page 1172(1) In Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, as doth:

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 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.

25. The second issue raised was a defence of res judicata. It was the Appellant's case that the matter had been settled in Criminal Case No. Nyeri E1293/2023. In that case, the Respondent admitted in receiving Kshs. 700,000/= in full and final settlement of this debt. The case was then concluded under Section 204 of the CPC. It provides:-

204. Withdrawal of complaint

If a complainant, at any time before a final order is passed in a case under this Part, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused.

26. Consequently, the withdrawal marked the end of the debt. That is to say the Appellant had an absolute defence. He was entitled to defend since the matter was res judicata. Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya defines the doctrine of Res Judicata in the following terms: -

> " No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

27. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. The matter referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other. In the dicta in re Estate of Riungu Nkuuri (Deceased) [2021] eKLR the court stated as follows:

The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

" (a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

28. In the case of Attorney General & another ET vs (2012) eKLR it was held that;

> " The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi vs NBK & Others (2001) EA 177 the court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit".
>
> In that case the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated:
>
> If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata....."

29. In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. The court in the English case of Henderson v Henderson (1843-60) All E.R 378, observed thus:

> " ...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

30. Res judicata applies to applications just like suits. In the case of Julia Muthoni Githinji v African Banking Corporation Limited [2020] eKLR the court stated thus:

> 14. After a careful reappraisal of the application for injunction before the lower court, I have come to the conclusion that the application was res judicata and the entire suit was sub-judice as there was an active pending suit before a court of competent jurisdiction being Nakuru ELC No. 272 of 2017. All issues raised in the suit before the subordinate court could be properly litigated in the suit pending before the ELC. The filing of the suit by the appellant in the subordinate court when she had a similar suit in the ELC Court was an abuse of the Court process which the Court cannot countenance.

31. Regarding the concept of res judicata, the court in *Maumbwa & 3 others v Kisemei (Civil Appeal E009 of 2021)* [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment Maumbwa & 3 others v Kisemei (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment) stated doth:

> By comparing the two applications and the authorities on res judicata, it is clear to me that the issues being canvassed in the application dated 11th January 2021 is res judicata. The issues in issue in that application were directly and substantially in issue in the application dated 13th September 2017. These issues relate to the same parties and these issues have been tried by a competent court. To my mind to bring the same issues between the same parties that have been determined by a court of competent jurisdiction is an abuse of the court process.

32. The second aspect was service. Service was done at GK Prisons. The Appellant was in prison pursuant to the Criminal Case No. E1293 of 2023 where the Respondent was the complainant. Service by a prison officer cannot be effected without the prison authorities signing. In this case the certificate of service was false.

33. The Appellant was in the criminal case on 1/11/2023. This was a proper date he should have served. In the circumstances there was no service upon the Appellant. He was entitled to unconditionally defend. Further, judgment was entered for 990,000/= when:

    i. Kshs. 700,000/= had been paid.

    j. Kshs. 290,000/= was waived.

34. In any case only 771,000/= was shown in the documents. This has a bearing on the orders I shall be making shortly.

35. Section 13 of the small claims court provides as follows: -

    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.

36. The claim for 990,000/= was fully settled vide the agreement in the criminal proceedings. It cannot be tried again in the small claims court. The small claims court cannot have jurisdiction on a matter that has been settled and paid, albeit through mediation or agreements.

37. In short, there was no proper claim in the small claims court. It is rather cavalier to purport that the Respondent lied to the criminal court that the money was paid. It was not the duty of the court to rewrite the agreement between the parties. Though indicated to be due, the court ignored the fact that court of competent jurisdiction had acted on the agreement between the parties in criminal court. In any case, by finding, albeit erroneously that 290,000/= could be due, the court was duty bound to give effect to out of court settlements. This is a constitutional imperative as provided in article 159 of *the constitution*, which provides as doth:

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause

(d). justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

38. It is imperative to note that the duty in relation to alternative dispute resolution is not just to promote but also to protect. It is not enough to encourage out of court settlement but the court has a duty to protect those settlements. In *National Land Commission v. the Attorney General & 6 Others Reference No. 2 of 2014*; [2014] eKLR, the court posited as follow:

> " Our perception of the matter before us is informed by the elaborate principles and values proclaimed in *the Constitution*, which though affirming independence on the part of separate governance entities, require common purpose in public service. In this context, the Judiciary as an organ of dispute resolution is to be guided (Article 159(2)(c)) by the principle of promoting 'alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution.

39. In the case of Geoffrey M. Asanyo & 3 others v Attorney General [2018] eKLR, the Supreme Court gave guidance as follows:

(91) Further, in Zacharia Okoth Obado v. Edward Akong'o Oyugi & 2 others SC Appl. No. 7 of 2014; [2014] eKLR this Court emphasized the need to abide by the constitutional principles in Article 159 by stating thus:

"[72] In addition, Article 3(1) of *the Constitution* imposes an obligation on every one, without exception, to respect, uphold and defend *the Constitution*. This obligation is further emphasized with regard to the exercise of judicial authority, by Article 159(2)(e) which requires that in the exercise of judicial authority the Courts must pay heed to the purpose and principles of *the Constitution* being protected and promoted."

(92) Furthermore, in the case of *Council of Governors v. Senate & another Reference No. 1 of 2014*; [2014] eKLR the Court emphasized the liberty of the parties to withdraw a matter so as to pursue out of court settlement. It stated thus:

"[26] Suffice it to say that indeed a party's liberty to withdraw a matter cannot be taken away. Courts have to facilitate pursuance of other means of dispute resolution. Hence, it is

only in order that the law allows a party who has approached the Court to withdraw such a matter if he deems so fit to do. Barring parties from withdrawing matters once filed in courts of law will be contrary to the constitutional principle of alternative dispute resolution as provided in Article 159 of *the Constitution* ...

(95) The Supreme Court of Nigeria further observed that the Court has discretion in recording the 'terms of settlement' to ensure that the same is not vague. It also found that in the circumstances of the matter before it, the Court of Appeal was right in not recording the terms of settlement as they were vague, ambiguous and un-ascertainable. However, the Supreme Court noted that as the parties were inclined to settle the matter amicably, it referred the matter back to the Court of Appeal to adopt a new 'terms of settlement' to be filed by the parties and stated thus:

"However, since parties have shown their intention to resolve this matter amicably and in order to put an end to litigation I hereby order that this matter be sent back to the Court of Appeal, Lagos Division (court below) for hearing, and the parties shall put before that court terms of settlement that are capable of being enforced, with the acquired and abandoned rights clearly set out. Consequently, I set aside the court below order which struck out the appeal before it and in its place order that the appeal be retried before another panel of the lower court. Costs shall be in the cause."

40. It is true that criminal case can and may proceed at the same time as civil cases. However, where a civil settlement is reached in a criminal case, as was in this case, the court had no jurisdiction to sit on Appeal from the magistrate's decision to accept the withdrawal of charges on grounds that the amount was settled and the balance of 290,000/= foregone.

41. In the circumstances, there was no proper case in the Small Claims Court. It is a fraudulent scheme to get 2 judgments from courts of competent jurisdiction. It follows that there was no proper claim in the Small Claims Court having been fully settled in Nyeri Criminal E1293/2023. The suit is thus untenable. There will be nothing to hear.

42. The appeal is therefore allowed. The judgment of the court below is set aside. The Appellant was able to show that the issue was settled in a court of competent jurisdiction. There is no purpose served to return the file for rehearing. In the circumstances, I set aside the whole of the judgment and decree and in lieu thereof, strike out the suit for being res judicata.

43. The next question is costs. 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.

44. The circumstances of the case show that the appellant was successful in the court below. He is entitled to costs of Kshs. 40,000/= in the Small Claims Court.

45. In regard to costs in this case, The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows:

(18) It emerges 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; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases."

46. Success is success, even if it is by a whisker, in the circumstances the Appellant is entitled to costs. There is no basis for denying the Appellant costs.

47. The Appellant shall have costs of Kshs. 85,000/= payable within 30 days, in default execution to issue. Any security deposited be returned to the Appellant.

Determination

48. The upshot of the foregoing is that I make the following orders: -

a. The appeal is merited and is accordingly allowed. The Ruling dated 25/7/2024 is set aside. In lieu thereof, the judgment and decree through default judgment entered on 15/11/2023 is set aside.

b. Further, the matter had been settled in Nyeri Criminal E1293/2023. The court has a duty to protect and promote out of court settlements.

c. The Appellant was entitled to defend the suit.

d. Judgment and decree entered in the lower court in Nyeri SCCCOM E361/2023 is set aside in total.

e. Costs of Kshs. 45,000/= for the Appeal.

f. Given the orders in Nyeri Criminal Case No. E1293/2023 where the debt was acknowledged as paid, there is nothing to hear in Nyeri SMCC No. E361/2023. The said claim is therefore struck out for being res judicata.

g. The Appellant shall have costs of Kshs. 40,000/= in the Small Claims Court.

h. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 7TH DAY OF OCTOBER, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mrs. Machirah for the Appellant

No appearance for the Respondent

Court Assistant – Jedidah