



Margaret Chelengat Kamau t/a Quickway Ventures v J & K Investment (K) Ltd (Civil Appeal E603 of 2023) [2024] KEHC 14479 (KLR) (Civ) (21 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14479 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E603 OF 2023
BK NJOROGE, J
NOVEMBER 21, 2024**

BETWEEN

**MARGARET CHELENGAT KAMAU T/A QUICKWAY
VENTURES APPELLANT**

AND

J & K INVESTMENT (K) LTD RESPONDENT

JUDGMENT

1. This is an Appeal from the Small Claims Court. It arises out of the decision of the Learned Adjudicator Hon. D.S Aswani (RM) delivered on 8th June, 2023 in Nairobi SCCCOMM No. 345 of 2023.

The Background facts

2. The Appellant was the Claimant before the Trial Court, while the Respondent was still the Respondent.
3. The suit before the Small Claims Court was initiated by the Appellant. She claimed to have entered into an oral agreement with the Respondent. The agreement was through one Li Shunkang a Director of the Respondent.
4. The Respondent sought the services of the Appellant to provided water bowser truck services. These were required to collect water and fill up a dam that the Respondent was constructing at Lodwar.
5. The agreement was never reduced into writing, for reasons that the Appellant states that the Respondent failed to draw it up. Instead, Mr. Li Shunkang had already traveled from Nairobi (when the agreement was to be drawn and signed) to Lodwar (where the contract was to be performed).



6. The Appellant availed 5 water bowsers truck; 4 with a capacity of 10,000 liters and 1 with a capacity of 35,000 liters.
7. The Appellant traveled to Lodwar by air to ensure the work commenced and was performed as requested.
8. It is disputed as to whether the water bowsers trucks delivered water for 8 days or even the number of the trips that the Appellant alleges that they made. The Respondent maintains that delivery was only done for a single day.
9. The Appellant pleaded that deliveries were done for 8 days after which the rains came. There was therefore no need to continue filing the dam. The deliveries stopped. She was aggrieved that she was not paid the agreed rates of Kshs.20,000 per trip for the 10,000-liter water bowser truck and Kshs.45,000/- per trip for the 35,000-liter capacity water bowser truck.
10. She based her claim on the vehicles making 4 trips each day and for the 8 days, she tabulated the total amount due as Kshs.1,000,000/-.
11. She also claimed that there was an oral agreement to be paid mobilization fees of Kshs.300,000/-. She was only paid Kshs.265,000/-. Therefore, she claimed the balance unpaid of Kshs.35,000/-.
12. Her total claim was therefore Kshs.1,035,000/-. However, for purposes of keeping the claim within the jurisdiction of the Small Claims Court, she waived off the Kshs.35,000/-, to keep the claim at Kshs.1,000,000/-.
13. The Respondent denied this claim. It denied contracting with the Appellant. It averred that the Appellant was an agent of a Mr. Wong. The contract to deliver the water bowser trucks had been given to Mr. Wong. That the Appellant had dealt with, engaged and at all times acted as an agent of Mr. Wong. It categorically denied engaging with the entity known as Quickway Ventures which is the business name associated with the Appellant.
14. It maintained that only 3 water bowsers delivered water to the dam and even then, only for a single day, not the 8 days alleged by the Appellant.
15. During the Appellant's trip to Lodwar, she incurred hotel accommodation costs of Kshs.49,500/- and car hire charges for 3 days amounting to Kshs.27,000/-. The Respondent had to pay this amount on behalf of the Appellant. It was averred that the Appellant ran away from Lodwar without settling the said bills. The Respondent therefore counter-claimed for the said amount.
16. The Respondent also claimed that the Appellant was paid a sum of Kshs.265,000/- to deliver the water to the dam. That the lorries made limited trips and only delivered services worth Kshs.125,000/-. The Respondent therefore claimed a refund of Kshs.140,000/- from the monies paid.
17. The Respondent therefore counter-claimed for a total sum of Kshs.212,900/- against the Appellant. From this Courts calculations, from a sum of Kshs.265,000/- when you deduct Kshs.125,000/-, and then add Kshs.49,500/- plus Kshs.27,000/- the balance should be Kshs.216,500/-.
18. The learned Adjudicator found that the Appellant had only proved to be entitled to a sum of Kshs.35,000/- on account the balance of the mobilization fees. She had also proved a sum of kshs.125,000/- as due on account of the water supplied. The Appellant had therefore proved a sum of Kshs.160,000/- in total.
19. As to the Respondent, the learned Adjudicator declined the claim for Kshs.140,000/- on account of the refund of monies paid for supply of the water, but claimed not to have been utilized.



20. The learned Adjudicator did allow the claim for refund of hotel accommodation Kshs.49,500/- as well as the car hire charges of kshs.27,000/-. This totals to Kshs.76,500/-.
21. The Respondent's Counter-claim of Kshs.76,500/- was set off from the Appellant's claim of Kshs.160,0900/-. This left a sum of Kshs.83,500/-.
22. Judgment was entered in favour of the Claimant against the Respondent in the sum of Kshs.83,500/-. Costs plus interest at Court rates from the date of filing suit until payment in full were also awarded to the Appellant.
23. It is this decision of the Learned Adjudicator that has triggered this Appeal.
24. This matter was flagged down for the Rapid Result Initiative (RRI) for the month of September, 2024. The Appeal having been admitted, directions were issued that it be prosecuted by way of written submissions.
25. The appeal is unopposed.
26. The Appellant has filed an amended Memorandum of appeal amended on 15/7/2024.
27. It raises 3 grounds as follows;
 - i. That the learned trial Magistrate/Adjudicator misdirected herself on several matters of the Law.
 - ii. That the learned trial Magistrate/Adjudicator erred in law by finding that the Appellant did not prove her claim for the supply of water to the Respondent's site in Lodwar for 8 days.
 - iii. That the learned trial Magistrate erred in law in failing to hold that the Appellant had proved a supply of water to the Respondent for eight (8) trips.
28. The Appellant has filed written submissions dated 15/7/2024, together with authorities. The Court has had the benefit of going through the submissions.

Issues for determination

29. Having perused the Memorandum of Appeal, the Record of Appeal and the Submissions filed, the Court frames two issues for disposal of this Appeal.
 - a. Whether the Appeal is merited or not?
 - b. Whether reliefs arise from this Appeal?

Analysis

30. Appeals from the Small Claims Court lie to this Court only on points of law. This is pursuant to Section 38 of the Act which states as follows;

“ 38. Appeals

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”



31. An Appeal to this Court is therefore not in the same manner as in the usual first appeal. The Court’s mandate is restricted to reviewing the decision of the learned Adjudicator on points of law. See *Mwaura v Wambua* (Commercial Appeal E003 of 2024) [2024] KEHC 13897 (KLR) (11 November 2024) (Judgment)

“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.

The duty of the court is to defer to the findings of fact of the adjudicator and analyse the matter for issues of law. The issues of law are either due to the subject matter or the finding of law by the court. In the case of *Mbogo and Another vs. Shah* [1968] EA 93, the court of appeal stated as doth:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is

clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

However, an appeal of this nature is on points of law. It can be pure points of law or mixed points of law but point of law it is. 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.”

15. For what constitutes a point of law the Court refers to the decision of *Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others*, (2014) eKLR;

“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 Mwasbetani 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.”

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.”

A point of law is similar to a preliminary point of law but has a broader meaning. Justice Prof J.B. Ojwang J (as he was then) 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.”

31. The Court proceeds to analyse the two issues framed in seriatim as follows;
 - a. Whether the Appeal is merited or not?
32. The matter before the Small Claims Court proceeds by way of documents pursuant to Section 30 of the Act which states as follows;

“

 30. Proceeding by documents only
Subject to agreement of all parties to the proceedings, the Court may determine any claim and give such orders as it considers fit and just on the basis of documents and written submissions, statements or other submissions presented to the Court.”
33. What the Court hears the Appellant to submit is that the learned Adjudicator erred in failing to award the 8 days of delivery of water to the dam.
34. Her argument is that she provided sufficient evidence to prove the case. She refers to the statement of one Patrick Njuguna Ndegwa and Samuel Ndungu, witnesses who supported the Appellant's claim for delivery of water for 8 days.



35. Looking at the transcripts of the trial, the appreciation by the learned Adjudicator of this issue is clear.
- “The conversation excerpts produced also speak to 5 bowsers of water having been supplied, but not necessary for the 8 days now pleaded. It has been left to the Court to infer that the supplies were consistent for 8 days. The chart provided along with the statement of claim is not proof of this, being a self-generate done. If indeed the 5 bowsers were supplied for 8 days as pleaded, other than this self-generated chart, nothing else speaks to this being the position. It is trite law that he who alleges must prove. No demand for this amount now pleaded has been proved to have been made.”
36. What the learned Adjudicator is stating is that the evidence placed before her was insufficient to prove delivery for 8 days. An example is that there was a Manager for the Appellant on site. What kind of records did this Manager keep of the deliveries. It is such evidence that would have persuaded the learned Adjudicator to rule otherwise.
37. It also becomes clear that the Appellant is seeking that this Court reviews the evidence adduced at the trial and reaches a different conclusion from the learned Adjudicator.
38. Unfortunately, Section 38 bars this Court from delving into a review of the evidence before the trial Court and arriving at an indifferent conclusion. The decision of the learned Adjudicator on issues of fact remains final. That was the intention of the Statute. See Directline Assurance Company Limited v Muli (Civil Appeal E088 of 2024) [2024] KEHC 13928 (KLR) (Civ) (8 November 2024) (Judgment)
39. This Court will only interfere when it is shown clearly that the appeal arises from points of law either from the pleadings or the Memorandum of Appeal.
40. The Court is not persuaded that the Appeal which seeks to review on the basis of evidence is merited.
- b. What reliefs arise from the Appeal?
41. In view of what the Court has stated above, the appeal fails.
42. On the issue of costs, as the Appeal is not opposed, there will be no orders as to costs.

Determination

43. The Appeal is dismissed in its entirety.
44. There will be no orders as to costs.
45. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2024

NJOROGE BENJAMIN K

JUDGE

In the presence of

.....for the Appellant

.....for the Respondent

Court Assistant.....

