Ngugi v Trident Insurance Company Limited (Civil Appeal E002 of 2024)
[2024] KEHC 13948 (KLR) (11 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13948 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E002 OF 2024

DKN MAGARE, J

NOVEMBER 11, 2024

BETWEEN

FRANCIS MBURU NGUGI ..... APPELLANT

AND

TRIDENT INSURANCE COMPANY LIMITED ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of the Honourable E.M. Gaithuma made on 21/12/2023 in Nyeri SCCC No. E219 of 2023. The Appellant was the Claimant in the Small Claims Court. In the lower court the Appellant sought for a declaration that the Respondent is liable to satisfy the Judgment of court in Nyeri SCCC No. E116 of 2023 with costs and interests and an order compelling the Respondent to settle the decree and costs and the auctioneers' charges.

2. It was stated that the Appellant took out a third-party insurance policy for his motor vehicle Registration No. KBJ 622S with the Respondent. Also, that the said motor vehicle was involved in an accident leading to a claim in Nyeri SCCC No. E116 of 2023, where judgment was enter against the Appellant for Kshs. 482,467/= and the Respondent neglected and refused to settle the judgment sum hence the declaratory suit.

3. The Respondent never entered appearance or filed defence and so default judgment was entered. In its judgment dated 21/12/2023, the lower court found that the Claimant had not proved his case to the required standard and dismissed the claim. Aggrieved, the Appellant lodged a Memorandum of Appeal dated 22/1/2024.

4. The Court has perused the 7 grounds in appeal which are however, a classical study on how not to write a Memorandum of Appeal. They are prolixious, repetitive, argumentative and unseemly. Order 42 Rule 1 requires that the memorandum of appeal be concise. The same provides as doth: -

> " Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
>
> (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

5. A copious amount of grounds do not enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs. The Court of Appeal had this to say in regard to Rule 88 (which is pari materia with order 42 Rule 1) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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> > "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

5. The repetitiveness of grounds of appeal only tend to cloud the key issue in dispute for determination and burden the court will unnecessary information that is devoid of value in achieving the justice of the parties. Further in Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that : -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In

William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:

> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

5. Therefore, the proper way of filing an appeal is to file a concise Memorandum of Appeal without arguments, cavil or evidence. The rest of the King's language should be left to submissions and academia.

5. The memorandum of appeal in this appeal raises only one ground, that is: the learned magistrate erred in law and fact in failing to find that the Appellant proved on a balance of probabilities that the Respondent was entitled to settle judgment in the declaratory suit.

5. The lower court suit proceeded by way of documents under Section 30 of the *Small Claims Court Act*. The Appellant submitted that he had proved on a balance of probabilities that the Respondent was entitled to settle the decretal sum in accordance with the provisions of Section 10(1) of the Insurance (Motor Third Party Risks) Act, Cap 405 as follows: -

> If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

Analysis

6. 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.

7. However, an appeal of this nature is on matter of law. It can be pure points of law or mixed points of law but points 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 appellate court 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)."

8. 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."

9. To this court, even where the matter involves application of judicial discretion, such discretion though unfettered must be exercised in accordance with the law. This Court therefore is persuaded that the exercise of judicial discretion is a matter of law. 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."

10. A matter 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.

11. In this case, the lower court found that the Respondent had not proved his case to the required standard. This court appreciates that the philosophy behind the preponderance of probabilities as a standard of proof in civil claims derives from the understanding that in percentage terms, a party, be it claiming or responding, who is able to establish their case to a percentage of 51% as opposed to 49% of

the opposing party is said to have established his case on a balance of probabilities. Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 stated as follows:

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

12. What falls for this Court's determination is whether the learned magistrate misapprehended the applicability of Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya to the suit as to erroneously disallow the declaratory suit. The Appellant contends that pursuant to the provisions of Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405, the Appellant was not entitled to claim under this statute for damages to the motor vehicle as the provisions only apply to bodily injury or death.

13. I will reproduce in extenso, the entire provisions of section 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 which stipulates as follows: -

> If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

14. The law requires that for the insurer to be liable, the insured ought to have issued a statutory notice upon the insurer under Section 10(2) of the Insurance (Motor Third Party Risks) Act, Cap 405 as follows:

> "10
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> (2) No sum shall be payable by an insurer under the foregoing provisions of the section.
>
> a. in respect of any judgment, unless before or within 14 days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings....."

15. The import of the above provision of the law to be that for liability to accrue under Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405, there is a 4-fold test to be met. Firstly, that the motor vehicle in question was insured by the Appellant; Secondly, that the Respondent has a judgment in his favour against the insured; Thirdly, that statutory notice was issued to the insurer either at least 14 days before the filing of the suit wherein judgment has been obtained or within 30 days of filing the suit where judgment has been obtained; and finally, the Respondent was a person covered by the insurance policy.

16. The Black's Law Dictionary defines "Third Party" as follows:

> " A party who is not a party to a lawsuit, agreement or other transaction but who is somehow implicated in it; someone other than the principle parties."

17. The purpose of the above provisions and the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 is to ensure that a third party who suffered injury or loss due to acts or omission on the part of an insured motor vehicle would be assured of compensation for their injury, loss or inconvenience in circumstances where the owner or driver of the insured motor vehicle has no means to settle the claim. This view is supported by Sir Clement De Lestang, J.A. in New Great Insurance Co. of India Ltd – Vs - Lilian Everlyne Cross & Another (1966) EA, 90 at page 104 as doth:

> " Generally speaking the Act seeks to achieve that object (of making provision against third party risks arising out of the use of motor vehicle on the roads) not by placing the whole burden of compensating third parties injured in accidents on the insurers but by combination of two means namely:
>
> 1. by making it obligatory, on pain of punishment, for any person who uses or causes or permits any other person to use a motor vehicle on the road, to have in relation to the user of the vehicle a policy of insurance which satisfies the requirements of the Act, and
>
> 2. restricting the right of insurers to avoid liability to third parties."

18. The Appellant ought also to understand that a statute is not named in a vacuum, but in a framework of circumstances, so as to give remedy for a known state of affairs. The state of affairs are in the knowledge of the Appellant and should be laid bare before the court for the court to discern the existence or otherwise of such circumstances. Lord Denning in Escoigne Properties Ltd – Vs - I.R. Commissioners (15) [1958] A.C at 565 stated that;

> " A statute is not named in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used, and what was the object, appearing from those circumstances, which parliament had in view."

19. In this case, the learned magistrate dismissed the declaratory suit on the basis that the judgment or decree subject of the declaratory suit was not filed in court. A person claiming under declaratory suit should file the Judgment or Decree of the court that gives the party the cause of action. This is in addition to filing the statutory notice duly served in the primary suit. The court below, found on evidence that the Appellant did not file the Judgment or Decree. It was also that court's finding on fact that Statutory Notice did not indicate when it was served or to the least, whether it was served. Such evidence is settled in the lower court. There was no error of law in respect of the two findings.

20. The fact that the small claims court is not bound by strict rules of evidence does not give that court a carte blanche to decide without any evidence. The burden of proof still remains on the person alleging. If a party alleges that there is a judgment, at the very least, evidence of that judgment should be produced to show parties who were parties in that case. In another life, I pointed out the poignancy of such matters in the lower court, given the nature of proof required. In *Ogwari v Hersi (Civil Appeal 223*

of 2022) [2023] KEHC 20111 (KLR) (3 July 2023) (Judgment) this court, prophetically postulated as doth:

> The claim for personal injury for accident cases, in view of the notices to be served after filing under Cap 405 and the particulars of negligence which must be proved in common law is singularly unsuited for the small claims court. Personal injury for assault and allied causes can still be filed.

21. It must be remembered that even where the matter proceeds for formal proof, the Appellant, as the claimant must prove their case in what is otherwise known as formal proof. In the case of Samson S. Maitai & Another -vs- African Safari Club Ltd & Another [2010] eKLR, the High Court in trying to define Formal Proof stated thus:

> " ..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

22. The Appellant's contention that the learned magistrate failed to take into consideration the evidence adduced by the Appellant is not a question of law. No such evidence was tendered. Section 32 of the *Small Claims Court Act* is not a panacea from all infractions. The said section provides as follows:

> (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.
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> (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. 33. Cost of proceedings

23. Formal proof does not dispense with compliance with Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405. There is thus no question of law placed before the court for determination.

24. Parties must be alive to the fact that submissions are not evidence. Section 30 of the *Small Claims Court Act* does not excuse the tendering of evidence or filing of documents to be relied on. The parties must never presume that the court will walk to the registry to get the file that is referred. Section 30 tempers this altruism but cannot be a reason not to file documents. Documents not filed cannot be refereed to. While addressing a scenario similar to the case herein, in Robert Ngande Kathathi v Francis Kivuva Kitonde [2020] eKLR, Odunga J stated as follows:

> 17. In this case, however, instead of producing the exhibits by consent or otherwise, the parties proceeded to file submissions instead. No exhibits were produced before the trial court. The law is clear on how exhibits are to be produced. Even in a full-fledged trial, if documents are simply referred to by witnesses but not formally produced they do not acquire the status of exhibits in the case. This was the position in Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others (2015) eKLR where the court held;-
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> > "16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence" What weight should be placed on a document not marked as an exhibit"
> >
> > 17. The respondents' contention is that the appellant by failing to object to the three documents marked as "MFI 1", "MFI 2" and MFI 3" must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.
> >
> > 18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.
> >
> > 19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which document was before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.
> >
> > 20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or it authenticity and relevance to the facts of the case. Once this foundation is laid,

the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.

21. In Des Raj Sharma –vs- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa –vs- The state (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production o the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they were simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification....."

25. In legal proceedings, evidence ought not to be introduced by way of submissions. As was held by Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007:

> " Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided...

26. Mwera J, posited as follows when postulating on what is the role of submissions. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim. In the case of Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993:

> " Indeed, and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention

on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

27. Submissions are not, strictly speaking, part of the case; the absence of which may do no prejudice to a party. Their presence or absence does not in any way prejudice a case as held in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held that:

> "As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

28. The Court of Appeal was more succinct in that submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

29. Based on the foregoing, I find no reason to interfere with the finding of the lower court. The Appeal is consequently dismissed. Having proceeded ex parte, there shall be no order as to costs.

Determination

30. In the circumstances, I make the following orders: -

    a. The appeal is dismissed.

    b. There is no order as to costs.

    c. The lower court file be returned to the small claims court for closing.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF NOVEMBER, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for parties

Court Assistant – Jedidah