



**Wachira v Maina & 3 others (Civil Appeal E001 of 2024)
[2024] KEHC 14150 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14150 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E001 OF 2024
DKN MAGARE, J
NOVEMBER 14, 2024**

BETWEEN

JACKSON MOSES WACHIRA APPELLANT

AND

ANTHONY MURATHE MAINA 1ST RESPONDENT

CHARLES MWANGI NGATIA 2ND RESPONDENT

KAMAITHA GITUKU T/A GK GITUKU KAMAITHA 3RD RESPONDENT

ANTHONY WAMBUGU 4TH RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and Decree of the Honourable Ismael S.I. made on 8/12/2023 in Nyeri SCCCOMM No. E358 of 2023. The Appellant was the Respondent in the Small Claims Court.
2. The matter started as a dispute between the Appellant and the Respondents over occupancy of part of Block Number TOL Plot No. 293. The Appellant is said to have been operating business on the said premises after it was allocated to him by the County Government of Nyeri. A portion of the said land appears to have been in possession of the Respondents who are said to have moved make shift structures to the premises.
3. It was the case of the Respondents that on 12/8/2023, the Appellant deliberately caused some makeshift structures at Grogon area to be moved. The Appellant is said to have erected structures vividly described to be a metallic container and as a result denied access to Grogon resident users to the public road and also moved the Respondents' make shift structures and the items therein.
4. The Respondents claimed that in the commotion, the Appellant caused them massive losses. The items were listed to have been lost or damaged. They included windscreen costing Kshs. 7,000/-, spanners of Kshs. 5,000, tool box of Kshs. 12,000/-, Windsor of Kshs. 3,000/-, 2 bulbs of Kshs. 6,000/-, spray



helper of Kshs, 7000/-, gauges of Kshs. 9,000/-, 2 door rubbers of Kshs. 5,000/-, corolla 102 corner lamp of Kshs. 1,200/-, puller jack of Ksh. 15,000/-, panel beating tools of Kshs. 20,000/-, 4, 14 -inch chrome wheels of Kshs. 28,000/-, 4 cross members and hub of Kshs. 40,000/-, brake pump and booster of Kshs. 7,000/-, 4 windscreens of Kshs. 16,000/-, 1 MV side door of Ksh. 5,000/-, 2 steering column of Kshs. 20,000/-, 1 gear box of Kshs. 34,000/-, 1 battery of Kshs. 8,000/- and 1 MV bbot door of Ksh. 7,000/-.

5. The Respondents prayed for loss of user for 10 days. The value of the loss was said to be Ksh. 255,000/= and loss of business for 3 mechanics at Kshs. 300,000/=.
6. The Appellant filed a response on 1/11/2023 stating that: -
 - i. The Appellant did not move or steal the structures and items.
 - ii. The claim arose from a dispute in occupancy of Block No. TOL Plot No. 293 Nyeri Town where the Appellant operated business with permission of county government since 2010.
 - iii. The court had no jurisdiction.
7. There is no doubt that the Respondents operated business as mechanics and the subject premises described as Block No. Tol Plot No. 293 Nyeri Town was the common point of conflict between the two factions herein. There is equally no doubt that the make shift structures and the mechanic spare parts and other items were moved and or lost in the course of commotion relating to the issue of which one of the parties was at the correct place in terms of the business location.
8. The County Government of Nyeri apparently allocated the said premises to the Appellant and the Respondents' business was immediately outside the said plot but not on any other plot of its own. It was the Appellant's case that the Respondents' business was located on an extension of part of the Appellant's allocated plot.
9. The court heard the matter and in spite of prior guidance from superior courts proceeded to enter judgment against the Appellant. Aggrieved by the decision, the Appellant filed an appeal and set forth the following grounds of appeal. The grounds were as follows:
 - a. That the learned trial magistrate erred in law in failing to take into account the appellant's evidence and submissions.
 - b. That the learned trial magistrate misdirected himself in law by determining the issues at hand in this case whereas the same had a criminal bearing and thus this court lacked the requisite jurisdiction to determine the same.
 - c. That the learned trial magistrate misdirected himself in law by disregarding the oral and circumstantial evidence relayed by the appellant on the circumstances surrounding this case which would have on a balance of probabilities proved that the appellant was not responsible for the alleged losses.
 - d. That the learned trial magistrate erred in law and in fact in making his decision without considering all the evidence before him and failed to exercise his inherent powers of doing substantial justice in the matter having regard to all circumstances of the case.
 - e. That the learned trial magistrate's decision is unfair, unjust and discriminatory and cannot be maintained as it is contrary to the interests of justice.
10. 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.
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. 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).”
12. 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.”
13. 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 point 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.”
14. 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 that:
- “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.

15. Since the court has no jurisdiction to hear malicious prosecution or stealing related offences, it also has no jurisdiction arising from losses arising from evidence retained in the case. Parties cannot by craft confer on the court jurisdiction it does not have. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

16. The court must therefore assume jurisdiction where it has and eschew usurping jurisdiction where none exists. A rose by any other name smells sweet, the Bard in Romeo and Juliet. The court was duty bound to read the relationship and interpret it as such. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKL , the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth:-

“Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”

17. Immediately the Respondents alleged that the goods and items were stolen, the court ought to have known that it was entering uncharted waters. In Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR, Justice Nyarangi JA, as he was then, stated as doth;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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.”

18. Two issues form the crux of the case before the court. Both issues are a subset of the same question; that is jurisdiction. The reason jurisdiction is important is because it is the linchpin of litigation. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

19. The nature of damages claimed arise from destruction and loss to property following a land occupancy dispute. This cannot be a basis for founding a small claim court case. Therefore, the best point to settle is whether the court is clothed with jurisdiction to deal with the matter in issue.

20. The nature of the claim gave the impression both in nature, which is malicious damage of property, and stealing on one hand and use and occupation of land on the other. The *Small Claims Court Act* forbids the court from dealing with issues of rent and criminal matters. The liability for loss of property covered is in tort and not damage to movable property or eviction. The nature of the claim was unlawful and criminal eviction. It is not covered under the Act. Section 12 of the *Small Claims Court Act* provides as follows: -

- (a) a contract for sale and supply of goods or services;
 - (b) a contract relating to money held and received;
 - (c) liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
 - (d) compensation for personal injuries; and
 - (e) set-off and counterclaim under any contract
- (2) Without prejudice to the generality of subsection (1), the Court may exercise any other civil jurisdiction as may be conferred under any other written law.

21. Section 13 of the Act provides for the exclusion of jurisdiction of the Small Claims Court 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.
22. The claim did not fall under liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property. The cause of action was the eviction. The theft and destruction as a result of eviction cannot and did not form part of the matters the court below could handle.
23. Therefore, I find merit in the appeal. On costs, there are 2 aspects. Costs in the lower court and costs for the appeal herein. Section 33 of the Small Claims Court provides that the court may award costs to a successful party. The Appellant is a successful party. There is nothing stopping the court from awarding him costs.
24. Before I depart, I must decry the way in which the Small Claims Court handled the case. There is no repeal of the requirement that special damages must be strictly pleaded and proved. The court went into the realm of conjecture by making findings on basis of no evidence. Section 32 of the [Small Claims Court Act](#) is not a panacea to all manner of infractions. In the case of David Bagine vs Martin Bundi [1997] eKLR, the court of appeal stated 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 C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
- “Plaintiffs must understand that if they bring actions for damages, it is for thm 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”
25. The less I say about this the better for all concerned. The suit remains in Small Claims Court without jurisdiction. The appeal is accordingly allowed. The suit in Small Claims Court is struck out for being in a court without jurisdiction.
26. The issue of costs is governed by Section 27 of the [Civil procedure Act](#), which provides as follows:
- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any



action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
27. The award of costs in this court are governed by Section 27 of the *Civil Procedure Act*. They are discretionally. The Supreme Court has 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.

28. Since costs follow the event, the Appellant is entitled to costs of the appeal. A sum of Kshs. 75,000/= will be right and just. Section 33 of the *Small Claims Court Act* provides for costs 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.
29. Ipso Facto, the Appellant is entitled to costs in the Small Claims Court.

Determination

32. In the upshot, I make the following orders:
- a. Judgment and Decree of the Honourable Ismael S.I. made on 8/12/2023 in Nyeri SCC COMM E358 of 2023 is hereby set aside. In lieu thereof, I substitute with an order striking out the said suit in Small Claims Court for lack of jurisdiction.
- b. The Appellant shall have costs of this appeal of Kshs. 75,000/=.
- c. The Appellant shall have the cost of the Small Claims Court to be assessed.
- d. 30 days stay of execution.



e. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 14TH DAY OF NOVEMBER, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

Represented by:-

J. Wangechi & Co. Advocates for the Appellant

Muthoni Muhoro & Associates Advocates for the Respondents

Court Assistant – Jedidah

