

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISII**  
**CIVIL APPEAL NO. E169 OF 2024**

**JOHN NJENGA KARIUKI.....**

**APPELLANT**

**VERSUS**

**JARED MAKORI MAKONGE .....**

**RESPONDENT**

**JUDGMENT**

1. This is an appeal from the Ruling and order of Hon. Carolyn C. Rono (RM) dated 19.9.2024 arising from Kisii SCCC No. E112 of 2024.
2. The Memorandum of Appeal dated 31.8.2024 raises the following grounds:
  - a. The trial court erred in law and fact in holding that she had jurisdiction to hear the matter relating to bodily injury and not property damage.
  - b. The trial court erred in law and fact in holding that she had jurisdiction to hear the matter when it could not be quantified in monetary value with exact precision as required under Section 24(1)(d) of the Small Claims Court Act.

- c. The trial court erred in law and fact in finding she had jurisdiction when the Claimant averred that he would recover excess of Ksh. 1 Million on costs and interests contrary to the pecuniary jurisdiction of the small claims court.
  - d. The trial court erred in failing to find that the Statement of Claim did not conform to the standard form which envisaged jurisdiction of the court.
3. The Amended Statement of Claim dated 22.8.2024 claimed special damages of Ksh. 9,870/= and general damages arising from an alleged road traffic accident that occurred on 23.6.2024 involving the Respondent's motorcycle registration No. KMFR 051X and the Appellant's motor vehicle registration No. KCM 078G.
4. The Appellant entered appearance and filed a Response dated 10.9.2024 denying the particulars of negligence and injuries pleaded in the claim. The Appellant also filed a Notice of Preliminary Objection dated 10.9.2024 objecting to the jurisdiction of the court on the material grounds as follows:
  - a) The suit was incurably defective for want of form and substance and should be struck in limine for failure to comply with Section 24(d) & (f) of the Small Claims Court Act.
  - b) The court lacks jurisdiction as damages sought are general damages incapable of being quantified in

monetary value with precision contrary to Section 12 (1) (d) of the Small Claims Court Act.

5. The lower court heard the parties on the preliminary objection and proceeded to render ruling in which the Court disallowed the objection. Aggrieved by the finding of the lower court, the Appellant lodged a Memorandum of Appeal hence this appeal.

### 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. 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).**"

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 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) on 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 point 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 as follows:

*“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 Appellant stated that the court had no jurisdiction. The reason for the objection on jurisdiction was twofold: that the Statement of Claim was incurably defective in form and that the court could not assume jurisdiction on a matter based on general damages that were nonspecific and unascertainable in the first instance.
12. This then brings me to the crux of the matter. Was the court clothed with the requisite jurisdiction to deal with this running down claim? 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.

13. Section 13 of the said 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.**

14. The court found that the court had guidance in the case of **Ogwari vs. Hersi** [2023] KEHC 20111 (KLR) (Magare, J). It then went into the spirit of the case. It does not matter

that a court may have been wrong. The concept of *stare decisis* required fidelity to the decisions of the higher courts. Decisions cannot come out of the lower court to overrule a higher court. Even where there are conflicting decisions, the court can follow one but cannot overrule the other. (See in the case of **Dodhia vs National & Grindlays Bank Ltd and another (1970) E.A. 195** where the court said:

**“This court as the final court of appeal .....while it would normally regard a previous decision of its own as binding, should be free in both civil and criminal cases to depart from such a previous decision when it appears right to do so. It will, of course exercise this power only after careful consideration of the consequences of so doing and the circumstances of the particular case but I would not seek to lay down any more detailed guide to the circumstances in which such a departure should take place as the matter would be best left to the discretion of the court at the time it was up for consideration.”**

15. Looking at the preliminary objection, I note that Section 24 of the Small Claims Act for which the preliminary objection is based provides as follows:

*Every statement of claim shall contain the following particulars— (a) the name and address of each claimant and, in the case of a representative*

*claim, the name and address of each person represented;*

*(b) the name and address of each respondent;*

*(c) the nature of the claim;*

*(d) the sum of money claimed by each claimant or person represented;*

*(e) the relief or orders sought; and*

*(f) other particulars of the claim as are reasonably sufficient to inform the respondent of the ground for the claim and the manner in which the amount claimed by each claimant or person represented has been calculated.*

16. The foregoing, *ipso facto* means that the claim must be fully quantified and where the amount is calculated, the manner in which the amount claimed by each claimant or person represented has been calculated. The claim in the court below was for unquantified general damages and finding on liability.

17. The matter, however, turns on a singular and straightforward question, that is, whether the Small Claims Court can overrule or disregard a decision of the High Court. The answer is plainly in the negative. To the extent that the subordinate court ignored a binding decision of the High Court and embarked on a frolic of its own, it fell into clear error. This Court will therefore determine the appeal without revisiting that question, as the position of the law

was settled in ***Ogwari v. Hersi [2023] KEHC 20111 (KLR)***.

18. The question this court will have to determine is the utility of the matter proceeding in the lower court. The small claims court went into what they called the utility of the spirit of the small claims court. If the court has to literally read, it will be impossible to render justice between the parties as the claim was filed over 1 year ago. There is also a dispute as to the validity of proceedings after 60 days pursuant to section 34 of the small claims court.

19. Their claim is outside 60 days. The time for completing small claim matters has been misunderstood from my decision in **Biosystems Consultants v Nyali Links Arcade** (Civil Appeal E185 of 2023) [2023] KEHC 21068 (KLR) (31 July 2023) (Ruling), where I stated as follows:

My take is that we look at the provisions purposively. The timelines did not create proprietary rights. In the cases referred to earlier, there are consequences given for non-compliance.

54. I don't think the legislative intent of section 34 of the Small Claims Act is to impose unnecessary bottlenecks. Even tax statutes have timelines for paying or declaring taxes. It is never that non-payment makes those taxes void. There should be consequences. In the Income Tax Act, the non-compliance with deadlines does not vitiate the taxes. It attracts known penalties. What are the consequences under section 34 of the Small Claims Court?

55. A court is not entitled to impose a penalty that was not hitherto anticipated. The parties must know, a priori, the consequences of their actions. Any act, especially one promoting certain aspects of the constitution cannot be read mechanically.

The purpose of the Small Claims Court Act is to facilitate expeditious disposal of the disputes while at the same time respecting the right to be heard. The net result is that balancing the two may result at times to overshooting the 60 days. The 60 days do not have penal consequences for good reason. They are aspirational. This is part of having access to justice over amounts that need not be in the normal system. Allowing the application will open floodgates that will eventually defeat the purpose of the Act.

57. It is my take that the non-compliance goes to the court's performance and is answerable internally. It cannot affect parties who are in court and ready to be heard. I have seen defendants use various gimmicks to have matters adjourned and thereafter turn around to say, 60 days are over. The parties have wasted a full month arguing in this court and with preliminary objections that are much ado about nothing.

20. This was compared with the decision of Gichohi J in the case of **Kartar Singh Dhupar & Company Limited v ARM Cement PLC (In Liquidation)** (Civil Appeal 129 of 2022) [2023] KEHC 2417 (KLR) (Commercial and Tax) (23 March 2023) (Judgment), where she stated as doth;

**Guided by these authorities, this court is satisfied that the judgment delivered by Hon CA Okumu (Ms)/ Adjudicator on August 23, 2022 was done outside the statutory timelines set under section 34 of the Small Claims Court Act and hence made without jurisdiction. It is therefore a nullity, bereft of any force or effect in law.”**

21. This court considered the question of the timelines for concluding small claim matters in the case of **Premium Hydro Solve Limited v Oluoch (Civil Appeal E465 of 2023) [2025] KEHC 8161 (KLR) (Civ) (11 June 2025) (Judgment)**, and held as follows:

**Looking at both decisions, it is clear that section 34 of the small claims act is aspirational but is not repealed. Courts must strive to adhere to the days and each case turning on its own facts. Given the provisions of the said section 34, it is not possible to return the matter for rehearing. The claim is still within time. The best option is to file a fresh suit in the area where the transaction arose, that is in the chief magistrates court in Kisumu or the local limits where ...**

22. In this case the unfortunate effect of proceeding with the appeal is that the results are academic. Even if the preliminary objection is allowed, the period of one year was not envisaged in Section 34 of the Small Claims Act. A minor deviation is allowed but a major one like in this case defeats the very purpose of the Act.

23. Whichever school of thought one is in, the case in the lower court is now stale. There is thus no utility in making profound judgment over the same. The same cannot proceed. The only way the claim can proceed is to strike out the one in the lower court and in lieu thereof, the respondent should file a proper one in the chief magistrates' court.
24. The consequence of the foregoing is that the appeal is merited and is allowed. Judgment of the lower court is set aside. In lieu thereof, I substitute with an order striking out the suit in the Small Claims Court for being stale.
25. The issue of jurisdiction as covered above as decided in the case of [\*Ogwari vs. Hersi\*](#) [2023] KEHC 20111 (KLR) though dealt by this court is unnecessary to regurgitate herein. The small claims court is singularly unsuitable to handle accident matters without liquidated amounts.
26. As I depart, it is my sincere hope that the conflict will be resolved soon by the appropriate court. Until resolved, the small claims court remains singularly unsuitable to handle matters that do not have a subject matter that is quantified and that require strict proof. It will be unfair and in *contra bonos mores* to decide the question of liability, of a road accident by complying with section 32 of the Small Claims Court Act. This is more poignant, that the question of liability is a matter of fact, for which the High Court cannot

decide at the appeal level under section 38(1) of the Small Claims Act.

27. Who then is to bear costs? 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.

28. None of the parties are successful in this matter. It is an unfortunate situation that parties find themselves in. 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 disbursement 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. This is a situation, where section 33(4) applies. Each party shall bear its own costs.

#### Determination

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

- a) The appeal is allowed. The preliminary objection is allowed. In lieu thereof the claim in the Small Claims Court is struck out. In any case, there is no utility of the proceedings in the lower court having been filed over one

year ago contrary to section 34 of the Small Claims Court Act.

b) Each party to bear their own costs both in this court and the court below.

c) The Respondent is at liberty to file a suit in the Chief Magistrates Court since the claim is within time.

d) The file is closed.

**DELIVERED, DATED and SIGNED at NYERI on this 13<sup>th</sup> day of October, 2025.** Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

**In the presence of: -**

No appearance for parties

Court Assistant - Michael