

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. E272 OF 2023

JOSEPH
MUSAUAPPELLANT
KAMAMI

VERSUS

ANTONY
MUTIARESPONDENT
MAINGI

JUDGEMENT

Introduction and Background

1. The brief facts of the case are that on 27/10/2022, the Appellant (Claimant in the Small Claims Court) had parked his motor vehicle registration number KAD 204B at Kathome Market outside the shops way off the road when motor vehicle registration number KDB 906B belonging to the Respondent was driven at a high speed from Kitanga direction joined the Machakos- Nairobi road at a high speed, lost control, hit an electric pole, overturned and rammed into the Appellant's motor vehicle as a result of which it was extensively damaged.
2. The Appellant blamed the Respondent for the negligence which led to the accident. He therefore claimed special damages of Kshs.350,000 =, costs and interests.
3. The Respondent filed his response and denied the that the Appellant was the owner of motor vehicle registration number KAD 204B. Further that the motor vehicle was a wreck even before the accident.
4. The matter proceeded by way of oral evidence. The Appellant called three witnesses whereas the Respondent closed his case without calling a witness.
5. The Appellant filed final submissions on the Claim but the Respondent did not file submissions. Upon considering the evidence on record, the pleadings and the submissions filed by the Appellant, the Learned Adjudicator framed two issues for determination; first, whether the Appellant was the owner of motor vehicle registration number KAD 204B and second whether the said motor vehicle was a wreck before the accident.

6. On whether the Appellant was the owner of motor vehicle registration number KAD 204B, the learned Adjudicator stated that the Appellant produced a police abstract which did not show the owner of motor vehicle registration number KAD 204B but it indicated C/O of **Joseph Kamami** (the Appellant). The police abstract had no Insurance details of the motor vehicle and the Appellant was also not able to provide the same during cross examination to confirm that he was the policy holder. That the Appellant also produced a sale agreement through which he alleged to have purchased the vehicle from the registered owner. The Learned Adjudicator noted that she had looked at the agreement and the same did not bear the date of purchase. It also did not indicate if the Appellant ever took possession of the motor vehicle or not. That from the agreement itself, it was therefore difficult to tell whether the Appellant purchased the vehicle before or after the accident. The fact that the issue of ownership was raised in the response, the Appellant should have gone an extra step of providing other good evidence like Insurance or even calling the original owner as a witness to confirm that he sold the vehicle to him prior to the accident or at least the Appellant should have ensured the agreement was dated to support his case.
7. The Learned Adjudicator further noted that the Appellant had submitted that since the Respondent had not adduced any evidence, their evidence on ownership remained uncontroverted. The Adjudicator cited the Court of Appeal in the case **Charterhouse Bank Limited (Under Statutory Management vs. Frank N. Kamau (2016) eKLR** which considered the burden of proof of the plaintiff where the defendant failed to adduce evidence.
8. The Learned Adjudicator stated that the burden of proof would only shift to the Respondent if the Appellant had established his case which the court would call upon the Respondent to answer to.
9. The Learned Adjudicator went on to state that the law is very clear where the burden of proof lies and Sections 107, 108 and 109 of the said Evidence Act Cap 80 of the Laws of Kenya clearly captures these aspects besides hundreds of decided authorities on the same. The Adjudicator then quoted the provisions of the above Sections.
10. The Learned Adjudicator found that the Appellant had failed to prove the case on a balance of probability that he was the owner of motor vehicle registration number KAD 204B.

11. On whether the motor vehicle registration number KAD 204B was in working condition or a wreck before the accident, the Learned Adjudicator stated that the Appellant produced an assessment report and her keen look at the report showed that the vehicle's rear tyres were missing. She found this bit only to raise suspicion on the Appellant's allegation that he had driven the motor vehicle to the scene of the accident that day. The Learned Adjudicator posed a question; if the vehicle was in a working condition where did the rear tyres disappear to?
12. The Learned Adjudicator further observed that the Assessor did not also give a stand on the condition of the engine and the gear box. He simply stated that they were possibly damaged. She found this information not to be useful on the condition of the vehicle. There was also no estimate of the cost of the repairs to justify the conclusion of the vehicle being a write off. The Learned Adjudicator was therefore not satisfied with the Appellant's evidence that the vehicle was in a working condition before the accident.
13. In the upshot, the Learned Adjudicator found that the Appellant had failed to prove his case on the required standards and the suit was dismissed with costs to the Respondent.
14. The Appellant being aggrieved by the decision of the Learned Adjudicator lodged the appeal herein vide a Memorandum of Appeal dated 11th October 2023 on the following 13 grounds:
 - a) *The learned Adjudicator erred in law by dismissing the claimant's statement of claim without considering all evidence on record.*
 - b) *The learned Adjudicator erred in law by failing to consider all material facts to the case*
 - c) *The learned Adjudicator erred in law ruling that the Appellant had not established the ownership of Motor vehicle Reg. No. KAD 204B*
 - d) *The learned Adjudicator erred in law by failing to appreciate that the Agreement produced by the claimant*

was a photocopy and this did not mean that the original agreement was not dated.

- e) The learned Adjudicator erred in law by failing to appreciate that whereas the copy of agreement produced by the appellant though it was not dated nonetheless it met the legal requirements of a valid contract.*
- f) The learned Adjudicator erred in law by failing to appreciate that from the totality of the evidence on record that the appellant was at all times material to this case the owner of the Motor Vehicle Reg No. KAD 204B*
- g) The learned Adjudicator erred in law by failing to appreciate that the respondents Witnesses were credible and their testimonies were uncontroverted.*
- h) The learned Adjudicator erred in law by considering extraneous issues by making a determination primarily based on the issues as to whether motor vehicle Reg. KAD 204B was working or a Wreck before the accident whereas the appellant evidence that the subject vehicle was in good working condition before the accident remained uncontroverted by evidence to contrary.*
- i) The learned Adjudicator in arriving at the said finding erred in law by failing to consider to appreciate that the rear tires of motor vehicle Reg No. KAD 204B could only have burst as a result of the impact on the rear part of the said motor vehicle which part was completely smashed as a result of the accident.*
- j) The learned adjudicator erred in law when she made a finding that since the assessor had not given a stand on condition of the engine and gear box the assessment report was not useful.*
- k) The learned adjudicator erred in law by ruling that by the assessor failing to give estimates of the costs of repairs the assessor could not justify the conclusion of the motor vehicle being a write off.*

l) The learned Adjudicator erred in law raising the standard of proof in the instant case hence failing to find that the Appellant had proved his case on a balance of probabilities.

m) The learned Adjudicator erred in law by failing to appreciate that the appellant had discharged the evidentiary burden placed on him in such a case.

15. The Appellant prays that the following orders do issue;

i Appeal herein be allowed and the trial court's judgement delivered on 25/09/2023 be set aside.

ii This honourable court be pleased to re-assess and re-evaluate the entire evidence on record and arrive on its own independent conclusion and enter judgement in favour of the appellant as per the reliefs sought in the statement of claim dated 13/12/2022.

iii Any other orders the honourable court may deem fit.

16. The Appeal was canvassed through written submissions. The Appellants submissions dated 6th November 2024 filed by the law firm of Janet Jackson & Susan LLP while the Respondent's submissions dated 26th May 2025 are filed by the law firm of Kamoti Omollo & Co. Advocates.

Analysis and determination

17. The law on appeals from decisions and orders of the Small Claims Court is firmly set out. An appeal from the Small Claims Court is on issues of law only. This is pursuant to Section 38 of the Small Claims Court. The Section provides that:

1) A person aggrieved by the decision or an order of the court may appeal against the 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.

See the case of **Mwangi v Kihiu (Civil Appeal 16 of 2023) [2023] KEHC 18643 (KLR) (28 April 2023) (Judgment)**.

18. What constitutes, points of law, has been settled. In the case of **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 stated 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 demeanor – is an issue of law.”

19. The issues of failure to exercise discretion is equally a point of law. In the case of **Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR**, the court stated as doth: -

*“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**).*

20. Even on the normal legal lingua, a point of law must clearly arise out of the pleadings. In case of an appeal, it should arise out of the Memorandum of Appeal vis a vis the pleadings in the court below. In the case **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**: -

“A preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may

dispose off the suit. Examples are an objection to the jurisdiction of the court."

21. In other words, though not seen as a preliminary point, points of law must as of necessity arise out of the pleadings. They must hold true, to the law or implication of the law. This includes deciding on basis of no evidence, based on a nullity, failing to exercise discretion which the court clearly has, failing to take up jurisdiction which the court has or taking jurisdiction the court does not have or otherwise reaching a decision which no reasonable person could have reached given the evidence and pleadings.
22. In the Memorandum of Appeal, the Appellant contends that the Learned Adjudicator erred in "**law** " in entirely dismissing the Appellant's' Claim and arriving at finding that the Appellant had not proved his case on the required standards.
23. Following the above, I have carefully perused through the Memorandum of Appeal filed by the Appellant and I must say I am unable to pick out any point of law to be considered in this appeal. None of the 13 Grounds of appeal raise any provision of the law that the appeal is to be determined. All that the Appellant raise in the grounds of appeal are matters of facts which go against the provisions of Section 38 of the Small Claims Court Act. No single point of law has been cited by the Appellant for the court's consideration and determination on the appeal.
24. Furthermore, in prayer (b) of the Memorandum of Appeal, the Appellant is inviting this Court to re-assess and re-evaluate the entire evidence on record and arrive on its own independent conclusion and enter judgement in favour of the Appellant as per the reliefs sought in the Statement of Claim dated 13/12/2022. It is my considered view, the Appellant is asking this court to re-assess and re-analyse issues of fact in the evidence presented before the trial court so as to arrive at a different conclusion other than that of the trial Court. In short, the Appellant invites this Court to re-evaluate the trial evidence, contrary to Section 38 of the Small Claims Court Act and to make contrary findings thereon.
25. It is my further consideration that the Learned Adjudicator properly analysed the factual material and/or evidence presented before her and rightly arrived at the decision she made. I thus find no reason to

disturb the decision by the Learned Adjudicator in Small Claims Civil Suit No. E681 of 2022.

26. Consequently, this Court finds that the appeal herein lacks merit and is dismissed with costs to the Respondent.

27. Orders accordingly. File closed

JUDGEMENT WRITTEN, SIGNED & DATED AT MACHAKOS THIS 2ND OCTOBER 2025

**NOEL I. ADAGI
JUDGE**

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 2ND OCTOBER 2025

In the presence of :

Mr. Muia..... for Appellant

Ms. Mangala for Mr.Omollo..... for Respondent

MillyGrace..... Court Assistant