Bob v Kiro (Commercial Appeal E002 of 2024)
[2025] KEHC 15065 (KLR) (23 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15065 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

COMMERCIAL APPEAL E002 OF 2024

DKN MAGARE, J

OCTOBER 23, 2025

BETWEEN

DUKE KEBASO BOB ..... APPELLANT

AND

AMOS ORIRI KIRO ..... RESPONDENT

(An appeal from the decision of Hon. Kugwa Wahinya (Adjudicator) given on 11.07.2024 in Kisii SCCCOMM. E051 of 2024)

JUDGMENT

1. This is an appeal from the decision of Hon. Kugwa Wahinya (Adjudicator) given on 11.07.2024 in Kisii SCCCOMM. E051 of 2024. The appellant was the Respondent in the lower court.

2. 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.

3. However, an appeal of this nature is on matters of law. It can be pure matters of law or mixed matters of law but matters of law it is. An appeal on matters 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 v National Bank of Kenya Limited [2020] eKLR as follows:

   " 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)."

4. 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 v 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 v Oxney (1947) 1 All ER 126. See also Khatib Abdalla Mwashetani v 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 v David Marakaru (1960) EA 484."

5. The memorandum of appeal is a study on the best way never to draft a memorandum of appeal. However, it raises only one issue, that is, that the decision was not based on any evidence. The questions of facts shall be ignored in view of the dictates of Section 32 of the *Small Claims Court Act*.

(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.

(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.

6. It is all that is wrong with bad drafting. It will be an afront to good drafters to reproduce the grounds of appeal, which are more of submissions than grounds of appeal. The edict in Order 42 rule 1 of the Civil Procedure Rules appears to be more honoured in breach than in practice. It provides as follows:

1. 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.

7. The appellant filed submissions dated 4.09.2025. He lamented that the court erred in awarding special damages and a sum of Ksh 30,000/= as damages for loss of profits. This was said to be based on speculative evidence, misapplication of the law of contract and failure to consider the defence. The court was invited to re-evaluate the entire record and come to a conclusion. This the court will decline as its duty is circumscribed by section 38(1) of the Small Claims Act.

8. Reliance was based on sections 107-109 of the *Evidence Act* and the decision of Wambugu v Njuguna 1983 KLR 173 on the burden of proof. This was buttressed by the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] KEHC 1362 (KLR), Mulwa J. However, the case does not say what the Appellant posited it said.

9. The appellant posited further that section 3(3) of the Contract Act was ignored in that one Mpesa statement was said to constitute a contract. They questioned the assertion that profits ranged between 60-80,000/=. Reliance was placed on the decision of Hahn v Singh [1985] KECA 129 (KLR), where the court of appeal [Kneller, Nyarangi, JJA and Chesoni, Ag JA] reportedly held that special damages must be strictly pleaded and proved. This was not the decision of the court. It covered the question that loss must be mitigated. Reliance was placed in the case of Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] KECA 56 (KLR). In that case, the court of appeal [Makhandia, Ouko &M'inoti, JJ.A)] held that:

   The appellant apart from listing the alleged loss and damage, it did not, according to the respondent lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed there was not credible documentary evidence in support of the alleged special damages....

   We do not discern from our reading of this decision a departure from the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved.

10. It was submitted that in absence of proof only nominal damages are payable. Reliance was placed on the case of Kimakia Co-operative Society v Green Hotel [1988] KECA 114 (KLR), where Platt JA held as follows:

    Moreover no profits were proved on the basis of which damages could be assessed. Where damages are at large and cannot be quantified, the Court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given the chance to prove the loss and did not, he cannot have more than nominal damages. I agree with the appellant that the damages awarded were not awarded on any sound basis.

11. The appellant further submitted that the defence was not considered, that the respondent was merely an employee and produced evidence of unpaid salary. He relied on the case of Mbogo and Another v. Shah [1968] EA 93 where the court stated:

> "...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 is 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."

12. The appellant continued that there was no valid contract, offer, consideration, acceptance and intention to create legal relationships. They placed reliance on the court of appeal [Tunoi, Shah &

Keiwua JJ A] decision of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR). They sought that the appeal be allowed.

13. The respondent filed submissions dated 12.09.2025. They submitted that there was corroborative and supporting documentary evidence. They continued that the court was not wrong in making the assumption that the Respondent made profit of between 60,000/= to Ksh. 80,000/=. It was their submissions that the court was entitled to base the decision on the case of Kinakie Co-operative Society v Green Hotel (1988) KLR 242, whereby the Court of Appeal while taking the position that damages are indeed awardable for breach of contract in deserving cases held:

> " Where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and did not, he cannot have more than nominal damages..."

14. Further reliance was based on the decision of Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334. The import of this decision in the face of section 32 of the *Small Claims Court Act* is lost on the court.

15. They submitted that the court was correct in refusing to proceed under section 30 of the *Small Claims Court Act*. This part of the submission is correct and there is no need to deal with this question any farther. The Appellant cannot have their cake and eat it.

Analysis

16. It is not clear from the pleadings what the offer, consideration, or specific contractual obligations were. No written contract has been pleaded, and the alleged terms of the agreement remain in dispute. The appellant was operating a business, yet it is uncertain what form of investment, if any, was made by the respondent. The trial court found that the appellant had apparently made profits; however, such profits ought to have been specifically pleaded and strictly proved as special damages.

17. A decision founded on no evidence is an error of law. While there appears to have been some form of agreement between the parties, it is unclear who the actual operator of the business was or what constituted the consideration for the provision of the machines. The purported agreement lacks clear consideration on the part of both parties.

18. The court cannot create a contract between parties. If parties did not have clear terms, it is not for the court to clear the same. In the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [supra] the court of appeal (KLR) [Tunoi, Shah & Keiwua JJ A] held as follows:

    A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

    As was stated by Shah JA in the case of Fina Bank Limited v Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):

    "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.

19. Even where there is a contract, there must be a mechanism of stashing the consideration. The same cannot be left to the court. A party cannot throw to the court what they have lost. They must lay basis

for the same. In the case of David Bagine v 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 v. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
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> "Plaintiffs must understand that if they bring actions for damages it is for them 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"

20. The court gave a sum of Ksh 30,000/= as damages. The court is unable to trace the origin of this amount. It is an exgratis payment from the court. It is unclear the nexus to the pleadings. If the court awarded a sum of Ksh. 180,000/= for breach of contract, what then is Ksh. 30,000/=. Generally, there can be no damages for breach of contract. The award of Ksh. 30,000/= is set aside ex debito justitiae. While addressing the award of general damages in a contract in the case of Kenya Power & Lighting Co. Ltd v Abel M. Momanyi Birundu [2015] KECA 861 (KLR), the court of appeal [Maraga, Azangalala & Kantai, JJ.A] stated that:

> " There was therefore no doubt that one of the respondent's main claims was for general damages for breach of contract. He even gave particulars of breach. And when he testified before the subordinate court, he reiterated those particulars. He however, said nothing about how he had suffered save that his electric gadgets remained "lying idle." He did not particularize the suffering. He could have stated the loss the non-functioning of the electrical gadgets caused him which in our view, was clearly ascertainable and quantifiable and ought to have been specifically pleaded and strictly proved. In the case of Mohammed Hassan Musa and another -v- Peter M. Mailanyi & another [Civil Appeal No.243 of 1998], this Court stated:-
>
> "It has been held time and again by this Court that special damages must be pleaded and of course strictly proved."
>
> In this case, the respondent claimed damages for breach of contract. This, in our view, was a special damage claim which should have been specifically pleaded and strictly proved. As the respondent did not consider it a special damage claim, he did not specifically plead the same and of course could not lead evidence on the same. Clearly therefore the award of Kshs.200,000/= as general damages was, with due respect to the learned Judge, not proper.

21. The award of a sum of Ksh 30,000/= was therefore unlawful and has no basis. In a claim for special damages, when damages are not proved, the court cannot assess. Doing the best it can, it must dismiss the claim.

22. This then brings the court back to the claim of loss of profits. It may be understood that this is a small claim. However, only a sum of Ksh 1,500/= and Ksh 13,000/= were shown to be sent. The court read a contract into these. However there was no nexus to the pleadings. A sum of 1,500/- cannot be by any stretch of imagination be Ksh 180,000/=. The court is not allowed to proceed on no evidence even

where it is relying on section 32 of the *Small Claims Court Act*. In the circumstances, the appellant succeeds that the decision was based on no evidence. The court itself said so. It stated as both:

Kimakia Co-operative Society v Green Hotel [1988] KECA 114 (KLR), the court of appeal while taking a position inthat damages are indeed awardable for breach of contract in deserving cases, held:

> " Where damages are at large and cannot be quantified, the Court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given the chance to prove the loss and did not, he cannot have more than nominal damages."

23. What the court did and it was not edifying to do so in this era and time where judicial probity is the zenith of virtue is to omit the remaining figure by the court as stated above but which the court will set out for completeness of record:

> " I agree with the appellant that the damages awarded were not awarded on any sound basis."

24. More poignantly the court completely ignored the finding of Gachuhi JA in the concluding remarks that:

> " The consequence of the trial court's error regarding the continuation of the tenancy is that for the alleged breach the tenancy relationship the court proceeded to assess and award damages on that basis. And he did so despite his own confession that the defendant had failed to prove such damages so that the learned judge was left to guess what loss the defendant had suffered. In the result I agree with Platt JA that the appeal should be allowed: the tenancy was terminated when the Tribunal ordered that the Tenant give up possession of the premises for reconstruction; no new tenancy was created as the 'tenant' rejected as the terms of the Landlord's offer for a new lease and consequently there was no tenancy that the appellant could be aid to be in breach of and the award of damages were uncalled for."

I would concur in the orders proposed by Platt JA as to allowing the appeal, setting aside the award of damages and refund of the sum of Ksh. 20,000 to the appellant and on costs.

25. The net result is that from the conclusion of the small claims court the damages were not proved. It is not the duty of the court to generate damages where none were proved. In the circumstances I agree and I am bound by the decision of the Court of Appeal in Mwangi v Wambugu (supra), where the court posited as hereunder:

> " A court of appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence."

26. In the present matter, what is before the Court is not a mere error of fact or law, but a complete distortion of the decision of the Court of Appeal, twisted and truncated to fit a predetermined outcome. There can be no justification for a court deliberately excising or misquoting portions of an appellate decision that are favourable to the party before it, thereby occasioning a travesty of justice. It is one thing for a court to be genuinely unaware of a binding decision or to rely inadvertently on an incorrect authority; it is quite another when a decision advocating a particular position is deliberately truncated to convey the opposite meaning.

27. The outcome of the appeal is such that no reasonable tribunal informed of the matters before it could have arrived at the decision. Even the authorities the court used pointed to only one outcome, that of dismissal of the small claim suit.

28. The Deputy Registrar of the court should serve this decision on the Adjudicator in order to avoid the pitfalls in future.

29. The appeal is consequently allowed. The question then that remains is who is to bear costs in this court and the court below. 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.

30. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

31. 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.

32. Costs of the Small Claims Court are governed by Section 33 of the *Small Claims Court Act* which 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.

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

34. The appeal is allowed with costs of Ksh. 55,000/=.

Determination

35. In the upshot, I make the following orders:

a. The appeal is allowed with costs of Ksh. 55,000/=.

b. The Deputy Registrar of the court should serve this decision on the Adjudicator.

c. 30 days stay of execution.

d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 23RD 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

M. D. KIZITO, J.