REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
[Coram: A.C. Mrima, J.]
CIVIL APPEAL NO. E1177 OF 2023

-between-

KANINI HARAKA ENTERPRISE LIMITED…… APPELLANT

-versus-

KENINDA ASSURANCE CO LIMITED…….. RESPONDENT

[Being an appeal from the Judgment Hon. V. M. Mochache (Adjudicator) in Nairobi Small Claims Commercial Court Case No. 5002 of 2023 delivered on 6th October 2023]

JUDGMENT

Background:

1. The Appellant, *Kanini Haraka Enterprise Limited*, sued *Keninda Assurance Co. Limited* the Respondent herein, in *Nairobi [Milimani] Small Claims Commercial Court Case No. 5002 of 2023* [hereinafter referred to as ***'the suit'***] for Kshs. 737,305/- under a Fidelity Guarantee Insurance Policy [hereinafter referred to as ***'the policy'***]. It claimed loss of stock due to theft by two storekeepers, which they asserted, was discovered on 14th January 2023.

2. The Respondent opposed the claim. It argued that the loss was outside the active policy period and that the Appellant breached terms by failing to provide evidence or proper controls.

3. The suit was heard and ultimately, the Court dismissed it for two main reasons. Firstly, it found that the Appellant failed to strictly prove the alleged loss. It observed that the Appellant was required to provide specific evidence like stock-taking records to substantiate the value of the missing goods and the actual occurrence of the theft. It also found that that the police

abstract and the charging of the storekeepers were insufficient proof of the actual loss.

4. Secondly, the trial Court found that the Appellant failed to demonstrate that the loss arose during the period of cover. It found that the discovery period only provided a window to report a claim that happened while the policy was active, not to cover losses that occurred after the policy expired. Since the Learned Adjudicator observed that the loss occurred on 14th January 2023 which date fell outside the valid insurance period, the suit could not stand and was consequently disallowed.

5. It was the dismissal that prompted the instant appeal. Parties filed their respective written submissions on the appeal, hence, this judgment.

The Appeal:

6. Through a Memorandum of Appeal dated 4th November 2023, the Appellant urged this Court to allow the appeal and set aside the trial Court judgement on the following grounds: -

    1. *The Learned trial adjudicator erred in law by applying strict rules of evidence contrary to the provisions of Section 32 (1) of the Small Claims Court Act which gave room for flexibility.*

    2. *The Learned trial adjudicator grossly misdirected herself by requiring a higher degree of proof than a balance of probability as ordinarily required in civil cases and thus unreasonably dismissing the Claimants Case.*

    3. *The learned trial Adjudicator erred in law by holding that only upon conviction of the Appellants employees could prove loss of goods through theft.*

    4. *The learned trial Adjudicator erred in law by failing to appreciate the police abstract and the Claim form as sufficient evidence of loss of goods through theft by the Appellant's employees.*

    5. *The learned trial Adjudicator erred in law by failing to take judicial notice that the loss of goods had been acknowledged by the Respondent save that it had*

avoided the Claim primarily on two issue namely the Appellant had lodged another claim with his current insurer and secondly the loss occurred outside the policy period.

6. *The trial Adjudicator erred in law in treating the evidence and submissions before her superficially and consequently arriving to a wrong conclusion.*

7. *The Learned trial adjudicator misdirected herself by ignoring the principles applicable and binding authorities before her.*

The submissions:

7. In its written submissions dated 19th March 2025, the Appellant expounded its grounds of appeal. It was its case that the trial Adjudicator erred by applying strict rules of evidence contrary to the flexibility allowed by Section 32(1) of the Small Claims Court Act. It argued that the Adjudicator required a higher degree of proof than a balance of probabilities and incorrectly held that only conviction of the Appellant's employees could prove loss of goods through theft. The Appellant also argued that the Police Abstract and the Claim Form constituted sufficient *prima facie* evidence of the loss. It called to its aid the case of *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 to define the balance of probabilities standard and the decision in *Masembe -vs- Sugar Corporation and Another* [2002] 2 EA 434 to argue that criminal proceedings are not necessary to prove a civil claim.

8. The Appellant further submitted that the loss was acknowledged by the Respondent who only sought to avoid the claim on the grounds that it had lodged another claim with a different insurer and that the loss occurred outside the policy period. It asserted that the loss, which was discovered on 14th January 2023, was within the 18-month discovery period stipulated in the policy that commenced on 1st January 2022. The Appellant also argued that the Respondent failed to prove that any reliance on exclusion clauses or breach of policy terms, such as a subsequent claim with a different insurer, was brought to its attention. It also claimed that under the *contra*

proferentem principle, exclusion clauses should be resolved to the benefit of the consumer and that the insurer must demonstrate utmost good faith. It also submitted that the burden of proving allegations of fraud or breach shifted to the Respondent, a standard which they failed to meet.

9. The Appellant called upon this Court to, accordingly, allow the appeal.

The Respondent's case:

10. *Kenindia Assurance Company Limited*, opposed the appeal through written submissions dated 30th June 2025. From the outset, it contended that the Small Claims Court correctly rejected the Appellant's claim as it failed to discharge the legal burden of proof on both the issue of liability under the insurance policy and the quantum of special damages. It was its case that the loss of stock, allegedly worth Kshs. 737,305/- was discovered on 14th January 2023, after the policy period had lapsed. It submitted that Appellant also failed to prove that the two storekeepers, *Geoffrey Maina* and *Daniel Mwangi*, were their employees, fell under the insured categories, or were the actual perpetrators of the loss by failing to file appointment letters or payroll/pay slips.

11. Furthermore, the Respondent contended that the loss was characterized as an *unexplained loss*, which is an exception/exclusion under the policy. Finally, the Respondent submitted that the Appellant did not prove ownership of the goods or that it incurred the loss, as no purchase or stock records were filed.

12. On the issue of quantum, the Respondent argued that the special damages of Kshs, 737,305/- were not strictly proved. It was its case that the Appellant provided no supporting documents such as stock taking records, inventory, books of accounts, stock movement records, purchase records, or receipts, leaving the Court to speculate on the type, quantities, value, ownership and dates of the lost stocks.

Analysis:

13. Having appreciated the disputants' respective cases, the written submissions and the decisions referred to, the totality of the grounds of appeal is whether the suit was proved.

14. Before embarking on the above issue, suffice to state that this Court's appellate jurisdiction is provided for under *Section 38* of the *Small Claims Court Act* and is only limited to appeals on matters of law. Such appeals are final. On what matters of law entails, this Court appreciates that whereas there has been no universally accepted definition of the term *'matters of law'*, there has been some working definitions thereto. The term '***point of law'*** may also be referred to as ***'matter of law'***. The ***Black's Law Dictionary*** defines '*a matter of fact*' and '*a matter of law*' as follows: -

> ***Matter of fact:*** A matter involving a judicial inquiry into the truth of alleged facts and **Matter of law**: A matter involving a judicial inquiry into the applicable law.

15. *Lord Denning, J* in ***Bracegirdle vs. Oxley*** (2) [1947] 1 ALL E.R. 126 at p 130 in espousing the two terms had the following to say: -

> *…. The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road Traffic Act, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the*

primary facts, was not one that could reasonably be drawn from them.

16. Drawing from the above, the Court of Appeal in ***Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others*** [2014] eKLR sated as under: -

> *…. That reasoning has been adopted in this jurisdiction. In* ***A.G. Vs. DAVID MURAKARU*** *[1960] EA 484, for instance, Chief Justice Ronald Sinclair sitting with Rudd J. adverted to the factual foundations of legal questions by stating that an appellate court restricted to determining questions of law may yet quite properly interfere with the conclusion of a lower court if the same is erroneous in point of law.* ***This is the case where that lower court arrives at a conclusion on the primary facts that it could not reasonably come to. Such a conclusion or decision becomes an error in point of law****. See also* ***PATEL vs. UGANDA*** *[1966] EA 311 and* ***SHAH Vs. AGUTO*** *[1970] EA 263.*

17. Earlier, the Court of Appeal in ***M'riungu and Others -vs- R*** *[*1982-88] 1 KAR 360 observed thus: -

> *…. We would agree with the views expressed in the English case of Martin v Glyneed Distributors Ltd (t/a MBS Fastenings) [1983] 1 CR 511 that where a right of appeal is confined to questions of law only,* ***an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial of first appellate court unless it is apparent that;_on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad law.***

18. Later, the Court of Appeal in ***Charles Kipkoech Leting -vs- Express (K) Ltd & another*** [2018] eKLR discussed what entails matters of laws as the Court considered its role as a second appellate Court. It observed thus;

> *…. Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina -vs- Mugiria [1983] KLR 78, Kenya Breweries Ltd v Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & another v Bernard*

Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, ***the Court confines itself to 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…..***

19. And, in ***Peter Gichuki King'ara vs. IEBC & 2 others***, Nyeri Civil Appeal No. 31 of 2013, Court of Appeal held that a decision challenged on the basis of wrongful exercise of discretion raises a point of law. [See also ***Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others***, (2014) eKLR].

20. From the foregoing, an appeal on matters of law calls upon the appellate Court to steer clear of findings of fact derived from primary evidence and to also restrain itself from treating findings of fact as holdings of law or mixed findings of fact and law unless the findings are so perverse as to defeat the object of justice.

21. In discharging its appellate role in matters from the Small Claims Court, the High Court should remain alive to the rationale behind the establishment of the Small Claims Court as a special and unique Court which is different from the mainstream civil Courts. It must always be remembered that the focal point of the Small Claims Courts is expeditious disposal of cases and that is why the Court is not bound by the strict rules of evidence [***Section 32*** of the Small Claims Court Act] and further the Court has power to control of its own procedure in determining any claim before it subject to regard to the principles of natural justice [***Section 17*** of the Act]. The High Court, therefore, is duty-bound to assist the Small Claims Court realize it’s said objective and it ought to consider appeals from the said Court through those special lenses.

22. Having said so and upon careful perusal of the Memorandum of Appeal in this matter, this Court finds that the grounds are based on issues of law. Therefore, this Court has the requisite

jurisdiction over this appeal and shall now consider whether the suit was proved.

23. The starting point is the contention that the Court applied a wrong standard of proof in deciding the suit. The principle of '*standard of proof*' is fundamentally a matter of law. It determines the legal threshold or level of certainty that a party must satisfy in order to succeed in proving the existence or non-existence of a contested fact. In criminal cases, that standard is *beyond reasonable doubt* while in civil matters it is on a *balance of probabilities* whereas in election matters, it is an *intermediary standard*; that is beyond balance of probabilities, but below beyond reasonable doubt.

24. As the matter before this Court is a civil appeal, a look at the standard of proof on *'balance of probabilities'* suffices. In ***Abdul -vs- Mokua*** (Civil Appeal E077 of 2023) [2025] KEHC 4105 (KLR) the Court, had the following to say on the principle: -

> *... A party who persuades the Court more than the other of the likelihood of the events in controversy will carry the day. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau -vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:*
>
> > *… 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."*
> >
> > *The balance of probability standard means that a court is satisfied an event occurred as stated by Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 that; "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability…...*

25. In its judgment, the trial Court stated and re-stated that the applicable standard of proof was on a balance of probabilities. That was correct. The Court then went ahead to meticulously consider the issues on that understanding. On the allegation that the trial Court held that loss could only be proved on conviction of the suspects, this Court has carefully perused the judgment and is alive to the context within which the Court referred to the conviction. For clarity sake, *paragraph 12* of the judgment stated as follows: -

> *12. The police abstract ..... found guilty.*

26. In arriving at the above finding, the trial Court had decried the sorry state of evidence in proof of the alleged loss. It had found that the Appellant only relied on a Police Abstract and nothing more. It further found that the results of the police investigations or any other investigation including the Appellant's stock-taking exercise were not availed in Court neither was there any other evidence connecting the alleged 2 storekeepers with the loss, if any. It was on that score that the trial Court stated that had the Appellant availed evidence of conviction of the storekeepers, at least that would have lent credence to the allegation of loss. Therefore, in that context, this Court finds that the trial Court did not err and did not adopt a higher standard of proof than that of balance of probabilities. The contention, *hence*, fails.

27. In this matter, the most central issue at trial was whether the Appellant suffered any loss of goods. This Court so says since the rest of the issues were dependent on this issue. In other words, if there was no proof of loss, then the rest of the issues fell automatically by the wayside. Having gone through the record, this Court finds that indeed no evidence of the loss of goods was availed. Whereas the Appellant contended that it realized the loss when it was undertaking a stock-taking exercise at its premises, nothing was placed before Court to that end. None of the records on the stocks were availed. Further, no any other evidence to that end was availed. Therefore, since no loss was proved, then the suit could not

stand even if the alleged loss was claimed to have occurred within the policy period.

28. On a reconsideration of this matter, this Court finds that the standard of proof applied was appropriate and that the trial Court arrived at a correct finding in disallowing the suit for want of proof. As such, the appeal is unmerited.

Disposition:

29. With the foregoing conclusions, the following final orders hereby issue: -

[a] The Appeal is dismissed in its entirety.

[b] The Appellant shall shoulder the costs of this appeal which are assessed at Kshs. 60,000/= [Read: Kenya Shillings Sixty Thousand Only]. The costs shall be paid within 30 days of this order and in default execution shall issue.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **19th** day of **November, 2025.**

A. C. MRIMA
JUDGE

Judgment virtually delivered in the presence of:

Mr. Mwangi for Miss. Keter, Learned Counsel for the Appellant.

Mrs. Cheruiyot, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.