



**Surrow Transport & Construction Ltd v M'Mauta t/a Tabiri Light Agency (Civil Appeal E1453 of 2023) [2026] KEHC 754 (KLR) (Civ) (29 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 754 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E1453 OF 2023**

**AC MRIMA, J**

**JANUARY 29, 2026**

**BETWEEN**

**SURROW TRANSPORT & CONSTRUCTION LTD ..... APPELLANT**

**AND**

**KIMANI JAMES M'MAUTA T/A TABIRI LIGHT AGENCY ..... RESPONDENT**

*(Being an appeal from the judgement of Hon. J.W. Munene (Resident Magistrate/ Adjudicator) delivered on 22nd November 2023 in Nairobi SCCCOM No. E5637 of 2023)*

**JUDGMENT**

1. By a statement of Claim dated 27<sup>th</sup> July 2023, Kimani James M'Mauta t/a Tabiri Light Agency, the Respondent' sued Surrow Transport and Construction Ltd, 'the Appellant, in Nairobi [Milimani] Small Claims Case No. E5637 of 2023 [hereinafter referred as 'the suit'] for judgement in the sum of Kshs. 765,000/= plus costs and interests resulting from the supply of 20 lorries of Ballast that stood unpaid.
2. In their reply to the Statement of claim dated 28<sup>th</sup> September 2023, the Appellant denied owing the said sums. It averred that the Respondent was contracted to supply 20 lorries of ballast at a unit price of Kshs. 22,000/= per lorry but which he was unable to deliver, and in the in the alternative, he supplied 22 lorries of sand at the unit price of Kshs. 9,0000/= totalling to Kshs. 198,000/=. It further averred that it made a cash payment of Kshs. 138,000/= leaving a balance of Kshs. 60,000/= which it claimed was unsettled for reasons that the Principal Secretary, Ministry of Lands Public Works, Housing and Urban Development had not yet paid it. In the end, it emphasized that it owed the Respondent the sums of Kshs. 60,000/= and it was amiable to settle.
3. The suit proceeded under Section 30 of the *Small Claims Court Act* and after close of pleadings, the Court rendered itself in a judgment delivered on 22<sup>nd</sup> November 2023, in favour of the Respondent



for the sums of Kshs. 765,000/= together with costs and interest at court rates from the time of filing the suit.

4. Aggrieved by the rendition, the Appellant filed the instant appeal vide the Memorandum of Appeal dated 20<sup>th</sup> December 2023, proffered the following grounds of appeal: -

1. That the learned magistrate misdirected herself in basing her judgement on alleged delivery notes dated 15/11/2020,16/11/2020,19/11/2020,21/11/2020(no.019),21/11/2020(No.017),21/11/2021(No.0140,22/11/2021 for ballast and 22/12/2020 for hardcore whilst the same were not part of the Claimant's original filed documents but were filed with the submissions after close of pleadings thus prejudicing the Respondent's case.
  2. That the parties having consented to the hearing of the case proceeding under Section 30 of the Small Claims Act, it was not open for the Claimant to introduce new evidence by way of further list of documents.
  3. That the Trial Magistrate erred in law in rejecting the Respondent's evidence of partial payment made to the claimant to Kshs. 138,000/= on the ground that it had not specified the material yet the same had not been disputed or denied by the claimant.
  4. That the learned Magistrate misdirected herself in failing to consider and evaluate the Appellant's evidence on record or assigning reasons for disregarding the same as well.
  5. That the trial magistrate erred in law in holding that the claimant had proved his case to the required standard.
5. In a response to the Memorandum of Appeal, the Respondent filed a Notice of Preliminary Objection dated 19<sup>th</sup> January 2024 to the extent that the appeal, as coined and the grounds thereof, do not raise matters of law as contemplated under Section 38 of the Small Claims Act.
6. The appeal was canvassed by way of written submissions. The Appellant's submissions were dated 2<sup>nd</sup> June 2025 and relied on a myriad of decisions to establish that the trial Court erred in arriving at the decision especially when it admitted documents introduced after the close of pleadings as it was prejudiced and could therefore not challenge or examine the documents introduced. In the end, it urged this Court to set aside the trial Court's judgment with costs.
7. The Respondent's submissions on the other hand were dated 5<sup>th</sup> June 2025. He faulted the Memorandum of Appeal for lack of citing any law that was infringed by the decision of the trial Court. The Respondent emphasized that the grounds on which the appeal was anchored invites this Court to consider matters of evidence and fact and therefore offends Section 38 of the [Small Claims Court Act](#). For these reasons, he urged this Court to dismiss the appeal with costs.
8. Having carefully perused the Memorandum of Appeal, parties' written submissions, the decisions relied on and the rival arguments thereto, the following two issues stand out for determination: -
- (i) Whether the objection is merited.
  - (ii) Depending on [i] above, whether the appeal is merited.
9. The Court will now deal with the above issues.



10. On the first issue, the law on objections is well settled. The longstanding legal principle on Preliminary objections was succinctly established in the locus classicus case of *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd* (1969) E. A. 696 where the Court rendered itself thus: -

...so far as I am aware, 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 objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

11. Further, the Supreme Court of Kenya in *Aviation & Allied Workers Union Kenya -vs- Kenya Airways Ltd & 3 Others* [2015] eKLR held that: -

.... Thus, a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.

12. And, in *John Musakali -vs- Speaker County of Bungoma & 4 others* (2015) eKLR the Court observed that: -

.... The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law...

13. Next is a consideration of whether the appeal is on matters of law. The Supreme Court of Kenya in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Petition 2B of 2014 [2014] eKLR had the following to say about ‘matters of law’: -

.... From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase “matters of law” as follows:

- a. the technical element: involving the interpretation of a constitutional or statutory provision;
- b. the practical element: involving the application of *the Constitution* and the law to a set of facts or evidence on record;
- c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.

14. 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 deduced 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 Noor & 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 this matter, the Appellant mainly challenged the manner in which the trial Court dealt with the evidence before it. It is contended that the Court accepted and relied on evidence in form of documents which were filed together with the Respondent's written submissions. The Appellant referred to several provisions of the *Small Claims Court Act* and the Rules thereunder in challenging the manner in which the judgment was arrived at. Having relied on provisions of the law to further the argument, there should be no doubt that the appeal revolves on a matter of law even on that point alone. Having so found, this Court is persuaded that the objection is not merited and is hereby disallowed.
22. Turning to the second issue, this Court will now ascertain if the appeal is merited. 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*]. However, Section 17 of the Act gives the Court the power to control its own procedure in determining any claim before it subject to regard to the principles of natural justice. Article 50 of *the Constitution* accords with this provision.
23. The Respondent did not challenge the assertion that he filed further documents with his written submissions after the parties had agreed, on the basis of the documents then on record, to have the suit determine under Section 30 of the Act. There is as well no denial that the further documents formed the basis of the judgment. Whereas one would ordinarily find that since the claim was based on a supply contract and the further documents only demonstrated the claim and nothing more, then no prejudice was visited on the Appellant, there is also the other side of it. The parties agreed that the suit be heard under Section 30 of the Act [reliance on the documents on record] before the further documents were filed. There was a possibility that the Appellant may have taken a different position on the hearing of the suit if the further documents were on record given the contents of the filed Response to the Claim.
24. There is no doubt that the manner in which the further documents were introduced offended Section 23 of the Act which provides for timelines as well as Rule 3 of the Small Claims Court Rules. Further, it is worth-noting that no leave of the Court was sought on the filing of the further documents after the close of pleadings. Therefore, since the further documents were not on record at the time when the Appellant made the decision to settle for hearing of the suit under Section 30, then fair play called that the Appellant ought to at least have been given an opportunity to state its position on the further documents if the Court formed the opinion that the further documents ought not to be expunged from the record. The Appellant's contention is, hence, merited.
25. Since the foregoing was the Appellant's main contest in this appeal, this Court finds it prudent to bring this matter to an end. Consequently, the following final orders hereby issue: -



- (a) The appeal is wholly allowed with costs.
  - (b) The judgment in the suit is hereby set-aside and the suit shall be heard afresh.
- Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JANUARY, 2026.**

**A. C. MRIMA**

**JUDGE**

Judgment virtually delivered in the presence of:

Mr Mutembei, Learned Counsel for the Appellant.

Michael/Amina – Court Assistants.

