

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NUMBER E296 OF 2024

DAN JOSHUA KASINA.....APPELLANT

-VERSUS-

THIKA GARISSA ROAD SERVICE STATION
LIMITED.....1ST RESPONDENT
*(Being an appeal from part of the judgment and decree in Small Claims Court
at Thika (Hon. Sylvia Wayodi RM) claim number E780 of 2023 dated 3-10-
2024)*

JUDGMENT

This is an appeal from the Small Claims Court and by virtue of Section 38(1) of the Small Claims Court Act, this court’s jurisdiction is limited to matters of law only. It has been held once and again that where an appellate court’s jurisdiction is limited to matters of law, it has to respect the decision of the trial court on factual issues unless it is demonstrated that the trial court ignored some material evidence making the decision so perverse that no reasonable court of law or tribunal properly applying its mind would have reached such a decision.

In *Kamau v Matunda (Fruits) Bus Services [2024] KEHC 4829 (KLR)*, Honourable Justice D.S. Majanja (may his soul continue resting in peace) held that;

‘A court limited to matters of law is not permitted to substitute the Subordinate Court’s decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them.’

Alive to the above position, I will first proceed to ascertain whether this appeal raises any matters of law and if I find none, I will have no option but to down my tools and end it there. The cause of action in this matter was damage caused to the appellant's motor vehicle registration number KCG 858Y by the act of the respondent's employee refilling it with the wrong type of fuel.

According to the testimony and evidence tendered before the trial court, on 10-12-2022, the appellant who was driving his aforesaid motor vehicle pulled into the respondent's service station and requested to have his tank refilled with petrol. Instead, the attendant started fueling with diesel but midway realized that she had made a mistake and stopped it but by that time, the fuel had gotten into the system and as a result the vehicle's engine was damaged. The appellant prayed for Kshs 267,960.00 being the cost of repairing the vehicle.

The respondent's attendant who served the appellant agreed that she fueled the car with diesel but stated that, she was following the appellant's instructions. She added that they even kept on talking as she fueled including the appellant asking for her contacts.

After the trial, the court found that both parties were to blame for the mix-up and apportioned liability at 50 per cent against the parties and awarded the special damages as pleaded. The appellant was aggrieved by the decision on liability and approached this court on appeal relying on the following grounds;

1. *THAT the learned Magistrate erred in law and in fact by failing to consider the entire evidence of the claimant.*
2. *THAT the learned Magistrate erred in fact by finding that the appellant's motor vehicle was driven after being filled with petrol while in fact it was towed to Nairobi.*

3. *THAT the learned Magistrate erred in law in failing to find that the appellant had driven the subject motor vehicle for over 8 years and therefore could not have erroneously asked the fuel attendant to fill the car with diesel instead of petrol.*
4. *The learned Magistrate erred in law and in fact by apportioning liability equally between the parties herein. Either the wrong type of fuel was put in the car or not.*
5. *The learned Magistrate erred in law and fact by finding that material damage and special damage had been proved by the claimant and then proceed to apportion liability equally.*
6. *The learned Magistrate erred in law and fact by assuming that the claimant's window was rolled down and therefore was in a position to see what type of fuel was being filled in his car.*
7. *The learned trial Magistrate erred in law and fact by failing to appreciate that fuel tanks are ordinarily placed at the back of the vehicle and therefore drivers sit in front and face front and therefore will not necessarily see what is going on behind.*
8. *The learned trial Magistrate erred in law and fact by failing to give cogent reason as to why liability had been apportioned equally.*
9. *The learned trial Magistrate erred in law and fact by failing to find that on a balance of probability, the claimant had proved his claim.*

An appeal does not become one on law or fact simply because the memorandum of appeal says so. The position is determined from the arguments put forth by the parties as compared to which part of the trial court's decision is being challenged.

I have gone through the evidence of the parties and in my opinion, the only people who could talk into the issue of liability were the appellant and the service station attendant. The court in analyzing liability carried a process of seeking to establishing who between the two was telling the truth. In other words, to arrive at liability the court had the duty and business of determining the truth of the facts which were placed before it. In establishing the truth of the facts, the court is always engaging on matters of facts as opposed to applying the law on the evidence so far received which is categorized as a matter of law. That is the distinction between matters of law and matters of facts.

This distinction has come up for discussion in many cases. One of them is ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others [2018] KECA 677 (KLR)*** where the Court of Appeal put emphasis on the distinction as follows;

*'We must emphasize that for a memorandum of appeal to pass muster and be compliant with **section 85A**, it must raise only questions of law which must be distinctly, concisely and precisely set forth. Anything short is deserving only of dismissal. We agree with the reasoning of the Supreme Court of the Philippines which was quoted with approval by our own in **MUNYA vs. KITHINJI** (supra). Dismissing an offending petition in **NEW RURAL BANK OF GUMBA vs. FERMINA S. ABAD AND RAFAEL SUSAN G.R. No. 16818 [2008]** that court stated;*

“The petitioner would have us delve into the veracity of the documentary evidence and truthfulness of the testimonial evidence

presented during the trial of the case at bar ...We reiterate the distinction between a question of law and a question of fact. A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set of facts; or when the issue does not call for an examination of the probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts being admitted or when the query invites calibration of the whole evidence considering mainly the credibility of the witness, the existence and relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole, and to the probability of the situation. This Court cannot adjudicate which party told the truth... by reviewing and revising the evidence adduced at the trial court. Neither verbal sophistry, nor artful misinterpretations of supposed facts can compel this Court to re-examine findings of fact which were made by the trial court... absent any showing that there are significant issues involving questions of law.”

Based on the above, it is my considered opinion that the issues raised in the memorandum of appeal and the submissions of the parties are matters of facts. The way the appeal and submissions have been couched are calling upon the court to re-evaluate the testimonies and evidence of the parties and in my view, that analysis will have nothing to do with application of the law.

Is there anything in the judgment pointing out to pervasiveness or is there any evidence which the trial court failed to consider? Having read the decision of the trial court, I do not see and it has not been pointed to me what evidence or

material the trial court ignored. I have also not seen anything that could manifest pervasiveness of the decision.

The conclusion from what I have stated above is that, the appeal is on matters of facts and consequently this court has no jurisdiction to entertain it. The same is dismissed with costs.

Dated signed and delivered at Nairobi this 27th day of February 2026.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Aniela holding brief for Mr. Okatch for the respondent and absence of the appellant.