

REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL NO. E003 OF 2024

**JOSEPH MWITA, CHIEF
MASANGORA LOCATION.....1ST**

APPELLANT

**JOHN GUMO, ASSISTANT CHIEF
GWITEMBE SUBLOCATION.....2ND**

APPELLANT

**YUSUF MEREMA, ASSISTANT CHIEF
SERONGA
SUBLOCATION3RD**

APPELLANT

OCS NTIMARU POLICE STATION4TH

APPELLANT

**HON ATTORNEY GENERAL5TH
APPELLANT**

VERSUS

LUCAS GETOKA MARWA

RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of the Hon. Chelangat Koech Patricia in the Small Claims Court at Migori, in SMCC No. E003 of 2023 given on 18.12.2023. The Appellants are public officers appointed under the National Police Service Act and the National Government

Co-Ordination Act. They were sued for actions they took in their official capacity.

2. The appellants filed 6 grounds of appeal. However, 5 of them are on points of fact and are thus dismissed in *limine*. The only ground of appeal that is viable is part of ground 4 that is:

4. The learned trial magistrate erred in law and [...] in finding that the claimant proved his case on a balance of probabilities, leading to an erroneous judgment not supported by law [...].

3. I have excluded questions of fact from the said ground, given the duty of the High Court as the first and final appellate court for the Small Claims Act. In fact, the court is bound by section 32 of the Evidence Act. 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 follows:

(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.

4. However, an appeal of this nature is on matters of law. It can be pure points of law or mixed points of law, but it is a matter of law. 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] KECA 894 (KLR):

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.**)

5. Then what constitutes a matter 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 Vs 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 vs Oxney (1947) 1 All ER 126*. See also *Khatib Abdalla Mwashetani Vs 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 vs David Marakaru (1960) EA 484.*”

6. The claim was based on an operation where the said public servants confiscated cattle from the appellant’s homestead. They were taken to a police station, where he was allegedly

beaten. The matter was taken to court. All appellants denied taking the cows. The OCS denied that cows were taken to the police station. The respondent had been arrested by the anti-stock-theft unit.

7. There was no evidence of the existence or the value of the cows. Nevertheless, the court found the appellants liable. It found that the appellants confiscated the cows, and the respondent was arrested and taken to court vide Kehancha Misc. E052 of 2023 and was eventually released. The court stated that the fact that the appellants went to the Respondent's home without the area chief shows that they were acting out of malice. Reliance was placed on Article 2(2) of the constitution.
8. The court went ahead to estimate the value of each cow at Ksh. 60,000/= and Ksh 7,000/= for the goat. This triggered this appeal. However, despite being informed, the parties did not file submissions.
9. The sad part of the claim is that the appellants were sued as businesses trading as Assistant Chief and OCS Ntimaru Police Station. From the complaint at page 41 of the record, the appellants are said to have unlawfully taken the cows and permanently deprived the respondent of his 7 heads of cattle and a goat. This was a result of abuse of office and failure to follow due process of law. This falls within two known crimes, that is theft, within the meaning of section 268 of the penal code, and abuse of office. Section 268(1) provides as follows:

A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

10. Effectively, the taking of cows, whether true or false, is a claim of theft. Abuse of office is set in section 101(1) of the Penal Code as follows:

Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another is guilty of a felony.

11. Abuse of office is also provided under section 46 of the Anti-Corruption and Economic Crimes Act, Cap 65, Laws of Kenya, which provides as follows:

A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.

12. Consequently, it was immaterial whether the appellants committed the offences and unlawfully took the said cattle. This claim is based on a crime. Then the question that remains is whether the court has jurisdiction to deal with theft. Section 12 of the Small Claims Court Act provides as follows:

(1) Subject to this Act, the Rules and any other law, the Court has jurisdiction to determine any civil claim relating to-

- a. A contract for sale and supply of goods or services;
- b. A contract relating to money held and received;
- c. liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
- d. Compensation for personal injuries; and
- e. Set-off and counterclaim under any contract.

(2) Without prejudice to the generality of subsection (1), the Court may exercise any other civil jurisdiction as may be conferred under any other written law.

(3) The pecuniary jurisdiction of the Court shall be limited to one million shillings.

(4) Without prejudice to subsection (3), the Chief Justice may determine by notice in the Gazette such other pecuniary jurisdiction of the Court as the Chief Justice thinks fit.

13. The claim was falsely indicated as a claim for loss of property. This was a claim for theft of cows and a goat by persons employed in the public service. There was evidence that the court ignored the confiscation by an anti-stock-theft unit. Having been taken into custody as part of law enforcement, the respondent can't turn around and file a small claims action against the OCS and the Assistant Chiefs.

14. Assistant Chiefs are appointed under section 15(2)(e) of the National Government Co-Ordination Act. Consequently, they are public servant protected in the performance of their duties. The assistant chief are protected under section 22 of the National Government Co-Ordination Act. It provides as follows:

Nothing done by a public officer appointed under this Act shall, if done in good faith for the purpose of executing the functions of the office, render such officer personally liable for any action, claim or demand.

15. There is a presumption that any action done by the authorities is legitimate. If the respondent wished to claim, he needed to make a claim under the Government Proceedings Act and strictly comply with the said Act, in particular Section 13A of the Act, which provides as follows:

(1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings.

(2) The notice to be served under this section shall be in the form prescribed in the Third Schedule to this Act and shall include the following particulars-

- a. The full names, description and place of residence of the proposed plaintiff;
- b. The date upon which the cause of action is alleged to have accrued;
- c. The name of the government department alleged to be responsible and the full names

of any servant or agent whom it is intended to join as a defendant;

- d. A concise statement of the facts on which it is alleged that the liability of the government and of any such servant or agent has arisen;
- e. The relief that will be claimed and, so far as may be practicable, the value of the subject matter of the intended proceedings or the amount which it is intended to claim.

16. The decision made by a government official remains valid until the court is moved for a declaration or for an order of judicial review. The court cannot, as such, inquire into such decisions while there is no declaration of invalidity of the act or quashing of the decision. The Small Claims Court cannot thus question a government decision obliquely without setting the decision aside.

17. The court has no jurisdiction to question criminal and quasi-criminal proceedings, law enforcement, and security questions. The court was wrong in purporting to involve itself in anti-stock market affairs. In the case of **Macharia & another v Kenya Commercial Bank Ltd & 2 others** [2012] KESC 8 (KLR), the Supreme Court, [WM Mutunga, CJ, PK Tunoi, JB Ojwang, SC Wanjala & N Ndungu, SCJJ] stated as follows:

A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and

second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

18. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. The court must first be assured that it has jurisdiction before proceeding. If the small claims court keeps hauling chiefs and police commanders into court, it will stall national security efforts and undermine crime-fighting. The small claims court should desist from hearing matters involving the actions by chiefs and police officers in their official capacities.

19. The injunction given earlier in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd**

[1989] eKLR, by Nyarangi JA, as he then was should have sufficed:

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what

I have already said is consistent with authority: “By jurisdiction is meant the authority which a court has as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

20. On the other hand, even if the court had jurisdiction, there was no material given on the value of the cows and goat. The court cannot make a decision on special damages as if the same is general damages. In the case of **David Bagine V Martin Bundi [1997] KECA 54 (KLR)**, the Court of Appeal [E. Gicheru, A.B. Shah and G. S. Pall], posited 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 vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:

"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"

21. The court had no jurisdiction to estimate special damages. The same must be based on evidence and not guesswork, surmise, or conjecture. Basing a decision on no evidence is a matter of law. Consequently, the decision was not based on law. The appeal is consequently allowed.

22. This leaves the issue of costs, which 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.

23. Costs are generally discretionary. However, the discretion is not arbitrary. 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.

24. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others** [2014] KESC 31 (KLR), 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, prior-to, during, and subsequent-to the actual process of litigation

22. 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. The

relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

25. Since parties did not file submissions, each party will bear their own costs.

26. The next question is who is to bear costs in the small claims court. Section 33 of the Small Claims Court Act provides 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 disbursements 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.

28. There was no successful party in the lower court. Consequently, each party shall bear its own costs in the Small Claims Court.

Determination

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

- a) The appeal is allowed. Judgment entered in SMCC No. E003 of 2023 given on 18.12.2023, is set aside. In lieu thereof, the said suit is dismissed.

- b) Each party shall bear their own costs for the appeal.
- c) Each party shall bear its own costs in the small claims court.
- d) The file is closed.

DELIVERED, DATED and SIGNED at NYERI on this 11th day of March, 2026. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of:-

No appearance for parties

Court Assistant – Michael