

REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL NO. E001 OF 2024

JOHN MAMBO OKECH.....

APPELLANT

VERSUS

FAULU MICROFINANCE BANK LTD

RESPONDENT

JUDGMENT

1. This is an appeal from the Ruling and order of Hon. Patricia Chelangat (RM/Adjudicator) dated 29.8.2024 arising from Migori SCCCOMM. No. E109 of 2024.
2. The Memorandum of Appeal materially raises the following grounds:
 - a. The trial court erred in law and fact in holding that the decretal sum be paid of Ksh. 150,000/= on or before 30.9.2024 and a monthly balance of Ksh. 30,000/= until payment is full.
 - b. The trial court erred in law and fact in failing to consider that one month interval for making a deposit of Ksh. 150,000/= was unreasonable due to the Appellant's incapability as a result of proven financial incapacity.

3. The rest of the 11 grounds repeated the two above. The Statement of Claim dated 13.6. 2024 claimed Ksh. 479,696.90/= as the loan arrears in respect of the loan granted to the Appellant of Ksh. 400,000/=, and to which he had defaulted in repayment.
4. The Respondent filed a Response by which he admitted only Ksh. 379,696.90/= as the loan arrears owing, and refuted the rest.
5. The lower court heard the parties in its impugned judgment and having entered judgment for the Respondent at Ksh. 539,648.07/= directed the Appellant to pay an initial sum of Ksh. 150,000/= and the balance in monthly installments of Ksh. 30,000/= until payment in full.
6. The Appellant applied for installment payment of Ksh. 10,000/= per month which the court did not allow.

Analysis

7. 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.**
8. 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 vs National Bank of Kenya Limited [2020] eKLR**: -

“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**.)”

9. 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'noti & Sichale,*

JJA) of 23.01.2014 following AG vs David Marakaru (1960) EA 484."

10. To this court, even where the matter involves application of judicial discretion, such discretion, though unfettered, must be exercised in accordance with the law. This Court is therefore persuaded that the exercise of judicial discretion is a matter of law. In *Peter Gichuki King'ara Vs Iebc & 2 Others, Nyeri Civil Appeal No. 31 Of 2013 (Court Of Appeal) (Visram, Koome & Odek, JJA) Of 13.02.2014*, the Court of Appeal held as follows: -

"It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence - with the caveat that the appeal court did not see the witness demeanour - is an issue of law."

11. A matter of law is similar to a preliminary point of law but has a broader meaning. Justice Prof. J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of **Oraro vs Mbaja** [2005] eKLR:

"I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and

declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

12. In this case, the Appellant stated that the court's decree for payment of Ksh. 150,000/= by 30.9.2024 and subsequent payment of Ksh. 30,000/= monthly was excessive to him regarding his unavailable financial means.
13. The issue before this court was not a question of law or any allegation of manifest erroneousness of the Small Claims Court's finding as a result of failure to take into account relevant matters or taking into account irrelevant matters.
14. The appeal was not against the merits of the finding of the small claims court. It was on a matter of the mode of execution of that judgment. The court took into consideration the sentiments of the Appellant as was detailed in the case of **Rajabali Alidina vs Rehmatulla Alidina & Anor** [1961] EA 565 which held:

The court can consider the circumstances in which the debt was incurred; the conduct of the debtor; his financial position; and his *bona fides*.

15. The learned adjudicator neither departed from the correct trajectory of the law nor exercised her discretion in a fettered manner. The questions raised before her were matters of fact which she dealt with by exercise of discretion. S. M. Githinji discussed in the case of **MN & MA t/a the RM School v IB (through her father and next friend BB) [2019] KEHC 8321 (KLR)**, that the principles for exercise of discretion in matters of creditors and debtors are as follows:

The case of Keshvaji Jethabhai & Bros Limited V Saleh Abdulla [1959] EA 260 lays down the principles that should guide the Court in the exercise of discretion in such matters and states as follows:

- a. Whilst creditors' rights must be considered, each case must be considered on its own merits, and discretion exercised accordingly;
- b. The mere inability of a debtor to pay in full at once is not a sufficient reason for the exercise of the discretion;
- c. The debtor should be required to show he is bona fide by arranging prompt payment of a fair proportion;
- d. Hardship of the debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.

16. Further, this was well enunciated in the case of **Diamond Star General Trading LLC v Ambrose D O Rachier carrying on business as Rachier & Amollo Advocates [2018] KEHC 9034 (KLR)**, where G.L. Nzioka J, held as follows:

47. However, the Applicant other than alleging inability to pay, has not demonstrated his financial position to enable the Court ascertain the reasonable amount that he can pay. ... unless there are good, sufficient, and adequate reasons, a judgment debtor should be allowed to enjoy the fruits of the judgment. Therefore, as much as the Court will consider the circumstances under which this debt was incurred, the Court will also have to consider the right of the judgment creditor to prompt payment.

17. Award of costs in this court are 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.

18. 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.

19. 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

judicious exercise of discretion by the Court, accommodating the special circumstances of the case while being guided by the 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.

20. Costs follow the event; however, the Respondent was not involved in the appeal. Therefore, each party is to bear their own costs in the appeal.

Determination

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

- a) The appeal is not merited and is dismissed.
- b) Each party to bear its own costs of the appeal.
- c) The file is closed.

DELIVERED, DATED, and SIGNED at **NYERI** on this **21st** day of **April, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of: -

Appellant present

No appearance for the Respondent

Court Assistant - Michael