



**Mutwa & 2 others v Mutembei & 2 others (Civil Appeal
E038 of 2025) [2026] KEHC 5855 (KLR) (30 April 2026) (Judgment)**

Neutral citation: [2026] KEHC 5855 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E038 OF 2025
FN MUCHEMI, J
APRIL 30, 2026**

BETWEEN

**TABITHA MUNANIE MUTWA 1ST APPELLANT
PRISCILLA LYNET MUTWA 2ND APPELLANT
MONAN VENTURES LIMITED 3RD APPELLANT**

AND

**LAWRENCE NICHOLAS MUTEMBEI 1ST RESPONDENT
HELLEN MAKASI MUTHENGI 2ND RESPONDENT
PLANBEE CONTRACTORS & GENERAL SUPPLIERS LIMITED 3RD
RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. S. A. Wayodi (RM/Adjudicator)
delivered on 23rd January 2025 in Thika Small Claims Court SCCCOMM No. E1164 of 2024)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCCOMM No. E1164 of 2024 whereby the 1st respondent sought for judgment against the appellants and respondents for a sum of Kshs. 1,040,000/-. The court found that the 1st respondent had proved his case and entered judgment in his favour for a sum of Kshs. 1 million.
2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 11 grounds of appeal summarized as follows:-



- a. The learned adjudicator erred in law and in fact by failing to take into account the appellants' pleadings and submissions thereby denying them a fair hearing as guaranteed under Article 50 of *the Constitution*.
 - b. The learned trial magistrate erred in law and in fact by failing to appreciate that the failure by the appellants to attend the hearing was not deliberate but was occasioned by circumstances beyond their control and the failure to consider their pleadings and submissions resulted in a manifest miscarriage of justice.
 - c. The learned adjudicator erred in law by failing to consider the principles of natural justice particularly the right to be heard which is a fundamental tenet of fair administrative action under Article 47 of *the Constitution*.
 - d. The learned adjudicator in exercising her discretion, misdirected herself by giving consideration to irrelevant and extraneous matters and failed to consider the relevant matters in arriving at her decision thus occasioning a miscarriage of justice.
 - e. The learned adjudicator erred in law by overlooking the procedural fairness requirements guaranteed by *the Constitution* and the *Small Claims Court Act* in Section 32.
3. Parties disposed of the appeal by way of written submissions.

The Appellants' Submissions

4. The appellants refer to the case of Stephen Maina Githiga & 5 Others v Kiru Tea Factory Company Limited (no citation given) and submit that the right to be heard is sacrosanct. The appellants argue that the learned adjudicator's failure to consider their response, amended witness statement and written submissions, all forming part of the record of appeal was not a minor omission but a fatal denial of the right to be heard. Further the learned adjudicator's refusal to consider their submissions due to an advocate's inadvertent error and then proceeding to penalize them by ignoring their entire defence elevates procedural technicality over substantive justice contrary to Article 159(2)(d) of *the Constitution*. The appellants further argue that Section 32 of the *Small Claims Court Act* which encourages informality and expeditiousness cannot be construed as ousting the principles of natural justice.
5. The appellants submit that the learned adjudicator's findings on their liability was based on the 2nd respondent's testimony that she transferred funds to them, which findings ignored the principle of privity of contract. Further despite the 1st respondent stating that he was contracted with the 2nd respondent, he did not present any evidence of any agreement, offer, acceptance or consideration between the 1st respondent and the appellants. Relying on the cases of Agricultural Finance Corporation v Lengetia Ltd [1985] KLR 765 and William Muthie Muthami v Bank of Baroda [2014] eKLR, the appellants argue that a contract cannot confer rights or impose obligations on strangers to it. Further, the appellants argue that the finding of joint venture between the respondents to impose liability on them was made without any legal analysis of agency or partnership.
6. The appellants refer to the decision in Aesthetics Limited v Times and Seasons Chemicals (Civil Appeal E027 of 2023) [2025] KEHC 2483 (KLR) (Civ) (13 February 2025) and submits that Section 38 of the *Small Claims Court Act* does not bar this court from interrogating procedural irregularities, violations of constitutional rights as well as the misapplication of judicial discretion. Thus the grounds



of appeal meet the legal threshold to qualify as matters of law as they challenge the legal correctness of the adjudicator's conduct and not her actual findings.

The 1st Respondent's Submissions

7. The 1st respondent refers to Section 38(1) of the [Small Claims Court Act](#) and the case of Lusoi Greens Limited v Tibi [2025] and submits that an appeal to this court can only be entertained on matters of law and therefore the instant appeal ought to be dismissed as the Memorandum of Appeal dated 4th February 2025 pleads facts. Accordingly, the court has no jurisdiction to hear and determine the instant appeal. To support his contentions, the 1st respondent relies on the cases of Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) eKLR; Sir Ali Salim v Shariff Mohammed Sharray (1938) KLR; Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others (2012) eKLR and Africa Management Communications Limited v Airtel Kenya Networks Limited [2016] eKLR.
8. The 1st respondent submits that the appellants company directors gravely breached their duty of reasonable care, skill and diligence of Section 145 of the [Companies Act](#) and ought to be liable jointly and severally.

Issues for determination

9. The main issues for determination are:-
 - a. Whether the appeal is properly before the court.
 - b. If not, whether the appellants right to be heard was infringed.

The Law

10. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under Section 38 of the [Small Claims Court Act](#), set out the duty of the second appellate court in the case of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR as follows:-

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 that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

11. In distinguishing between matters of law and fact the Court of Appeal stated in Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR as follows:-

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See *Selle and Another v Associated Motor Boat Company Limited and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two 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.

12. Section 38 of the Act provides:-



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.

13. Upon perusal of the grounds in the memorandum of appeal it is noted that the grounds relate primarily to questions of law. The appellants are aggrieved that the learned adjudicator infringed on their right to hearing as she failed to take into account their pleadings and submissions. Further, the appellants failure to attend court was not deliberate but was occasioned by circumstances beyond their control. On perusal of the lower court record, the appellants filed their response to the claim and accompanying witness statements dated 9th August 2023. The appellants thereafter filed a preliminary objection dated 7th November 2023 on the grounds that the lower court lacked the pecuniary jurisdiction to hear the matter. The learned adjudicator dismissed the preliminary objection vide ruling on 7th March 2024. On the same day, the appellants' counsel sought the leave of the court to file an amended response to the claim. The court granted the appellants seven (7) days to file an amended response and the matter was fixed for mention on 9th September 2024 to take a hearing date.
14. On 9th September 2024, the appellants and their counsel were absent and the court scheduled the matter for hearing on 4th November 2024. The matter came up for hearing on the said date and the 1st respondent's advocate informed the court that he had served the appellants and produced a certificate of service dated 24th September 2024. Upon being satisfied with the proof of service, the matter proceeded in the absence of the appellants. The evidence was taken and cross examination conducted. The appellants and their counsel failed to attend court for hearing without sending a message to the court or the advocate instructed to hold brief and apply for adjournment. The absence of a counsel together with his three clients raises eyebrows. When the counsel came to court on 05/12/2024, he said he had sent another counsel to represent him, but this did not happen as the court record does not reflect any such appearance. The respondents herein all closed their cases and the matter was scheduled for mention to confirm filing of submissions on 5th December 2024.
15. The record shows that on 5th December 2024, the respondents informed the court that they had complied with filing submissions. As for the appellants counsel, he claimed that although he was absent he had sent another counsel to apply for adjournment. The court record does not show any such appearance before the court. The court was kind enough to give 10 days to the appellants to comply by filing their submissions and scheduled the matter for judgment for 23rd January 2025. Despite being granted more time, the counsel for the respondent failed to comply. In that scenario, the lower court had no option but to retire and write down its judgment.
16. It is noted on record that the appellants had filed their response to the 1st respondent's claim and filed witness statements but did not file an amended response to the claim. The evidence on record showed that the 2nd and 3rd respondents herein admitted the 1st respondent's allegations were genuine and argued that the appellants bore the responsibility to pay the sums owing to the 1st respondent but they failed to do so leading to the institution of the claim before the lower court.
17. In my view, the appellants were given their right to be heard and to file their submissions but abdicated their responsibility. It is therefore not correct that the court denied them the right to be heard.
18. I have perused the judgment of the court below and noted that the appellants filed their response to the claim and filed their witness statements. The court in preparing judgment took into account all the evidence on record including the evidence of the appellants, analyzed the same and came up with its finding.
19. I reach a conclusion that the appellants were not denied their right of being heard. Whatever they lost was only appearing court on 04/11/2024 having been duly notified of the hearing date but they chose



not to attend court. They were given two chances to file their submissions but failed to do so. It is improper and dishonest for the appellants to turn round and accuse the court of denying them the right to be heard.

20. Consequently, I find no merit in this appeal and it is hereby dismissed with costs to the 1st respondent.

21. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 30TH DAY OF APRIL 2026.

F. MUCHEMI

JUDGE

