



ATC Tower Kenya Limited v Logix Technical Solution (Civil Appeal E047 of 2024) [2025] KEHC 630 (KLR) (Civ) (30 January 2025) (Judgment)

Neutral citation: [2025] KEHC 630 (KLR)

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

**CIVIL
CIVIL APPEAL E047 OF 2024**

**LP KASSAN, J
JANUARY 30, 2025**

BETWEEN

ATC TOWER KENYA LIMITED APPELLANT

AND

LOGIX TECHNICAL SOLUTION RESPONDENT

(Being an appeal from the judgment of V. M. Mochache (Adjudicator) (RM) Small Claims Court delivered on 12th January, 2023 in Nairobi Milimani SCCC No. E6026 of 2023)

JUDGMENT

1. This appeal emanates from the judgment delivered on 12.01.2024 in Nairobi Milimani SCCC No. E6026 of 2023 (hereafter the lower Court claim). The claim was filed by Logix Technical Solution, the claimant before the lower Court (hereinafter the Respondent) as against ATC Tower Kenya Ltd, the respondent before the lower Court (hereinafter the Appellant) seeking judgment in the in the sum of Kshs. 735,422/- and costs of the claim. It was averred that on or about October 2021, the Appellant awarded the Respondent a contract after which the latter embarked on proof of concept in the location of Karen, Gitau and Karura thereafter incurring a total sum of Kshs. 735,422/-. That the Appellant later on terminated the award without justification and without compensating the Respondent the amount spent, to wit, the Respondent holds the Appellant liable for the amount incurred to totaling Kshs. Kshs. 735,422/-.
2. The Appellant filed a response to the Respondent's statement of claim denying the key averments therein. It went on to aver that it did not tender any award to the Respondent but only requested for a proof of concept on three (3) sites which was to form the basis of the award of the tender, but due to dishonesty about pricing, the Appellant informed the Respondent of its decision not to approve the award. It was further averred that the Appellant offered to pay mobilization costs to the Respondent at



Kshs. 66.780/- after issuing a termination notice, which offer the Respondent denied. That the project was dropped due to the dishonesty of prices by the Respondent which was contrary to the parties' agreement and also the prices were not within the Appellant's budget for that period.

3. The claim proceeded to hearing during which both parties called evidence in support of the averments in their respective pleadings. In its judgment, the trial Court found in favour of the Respondent and proceeded to enter judgment in its favour to the tune of Kshs. 735,422/- plus costs of the claim and interest on the award from date of judgment until payment in full.
4. Aggrieved with the outcome, the Appellant preferred this appeal challenging the whole judgment based on the following grounds; -

- “ 1. The learned trial Magistrate erred in law and fact in arriving at the said decision and making a finding against the Respondent.
2. The learned trial Magistrate erred in law and in fact by failing to adequately evaluate evidence tendered by the Appellant and making a finding that the amount claimed by the Respondent of Kenya Shillings Seven Hundred and Thirty-Five Thousand, Four Hundred and Twenty-Two (735,422/-) is fair and proportional to the work done.
3. The learned trial Magistrate erred in law and in fact by failing to consider the evidence, submissions and authorities submitted by the Appellant and therefore reaching a wrong conclusion that there existed a contractual relationship between the parties herein to the extent of being adjudged to pay the sum of Kenya Shillings Seven Hundred and Thirty-Five Thousand, Four Hundred and Twenty-Two (735,422/-)
4. The learned trial Magistrate erred in law and in fact by showing open bias in her interpretation of the law and fact in arriving at her judgment.
5. The learned trial Magistrate decision was unjust against the weight of evidence and was based on misguided points of facts and wrong principles of law and had occasioned a miscarriage of justice.
6. The learned trial Magistrate erred in law by awarding the Respondent's costs.” (sic)

5. The appeal was canvassed by way of written submissions of which this Court has duly considered alongside the memorandum of appeal and the record of appeal. This is a first appeal, specifically from the Small Claims Court. This Court has repletely observed and must iterate that the Small Claims Court is a specialized Court on accord of legislation that establishes the said Court. That said, Section 38 of the *Small Claims Court Act* prescribes the nature of appeals that lie from the Small Claims Court to the High Court by providing that; -

- “(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.”

6. Ordinarily on a first appeal, the appellate Court ought not to interfere with a finding of fact made by a trial Court unless such finding was based on no evidence, or if it is demonstrated that the Court



below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* (1982 – 1988) 1 KAR 278. Nonetheless, by dint of Section 38 of the *Small Claims Court Act* this is no ordinary first appeal and this Court must first satisfy itself that the appeal before it satisfies the prescription in Section 38 of the Act.

7. The Court of Appeal in *Kenya Breweries Ltd v Godfrey Odoyo* [2010] KECA 498 (KLR) discussed its mandate on a second appeal, that is, on points of law only. Equally, in this appeal, albeit being a first appeal, the *Small Claims Court Act* prescribes that an appeal to this Court from the Small Claims Court be on matters of law only. In the foregoing case, the Court of Appeal made a distinction between matters of law vis-à-vis matters of fact by stating that: -

“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 a retrial and facts must be revisited and analysed afresh, - see *Selle and Another vs. Associated Motor Boat Company Ltd 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.”

8. Black’s Law Dictionary defines the two concepts as follows; -

“Matter of fact as: 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.”

9. The Court of Appeal in its subsequent decision in *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* [2014] eKLR, in addressing the question whether the memorandum of appeal, though on a second appeal, raised factual issues, recognized that an appellate Court when faced with a situation where a memorandum of appeal raises factual issues it is at liberty to strike out the offending ground(s) while retaining those that are compliant.
10. Notably here, counsel for the Appellant in all the grounds in the memorandum of appeal, save for ground 6, specifically pleaded and or applied the use of the trouble-inviting pair of words, so to speak, “in law and in fact” in the face of a plain and straight-forward statutory exclusion of matters of fact pursuant to Section 38 of the *Small Claims Court Act*. A purposeful examination of the grounds undoubtedly reveals the Appellant’s intent. The issues raised challenge the lower Court’s inferences and decision on facts and not exclusively on the “law” save for ground 6. It is trite that parties are bound by their pleadings and a review of the pertinent and or affected grounds in the memorandum of appeal, tenaciously invite the Court to interrogate factual and evidentiary material, canvassed or otherwise, before the lower Court.
11. Therefore, applying the dicta in *Bashir Haji Abdullahi* (supra), which this Court takes due cognizance was an appeal arising from an election dispute, to the grounds of appeal in the instant matter, the same would appear to exemplify “an attempt at legal ingenuity to dress-up and camouflage purely factual issues with the borrowed garb of “legalness” in a bid to escape the strictures of Section 38 (1) of the



Small Claims Court Act. Nevertheless, a perfunctory review of the impugned judgment by the lower Court, the trial Court in part observed that: -

“ 12. The Court has carefully considered the pleadings, evidence and submissions by the parties. It is clear to the Court that a relationship existed between the parties following the proposal submitted by the claimant and the acceptance thereof by the Respondent. Pursuant to the relationship, there is no doubt that work was carried out before the agreement was terminated.

.....

23. The claimant claimed that the contract was terminated without notice. The Respondent claimed that he contracts was terminated for breach.

24. It is to be noted that the parties had not reduced their agreement into writing and rely on various communication and conduct. In the absence of a written contract, it was expected that reasonable notice of the intention to terminate is to be provided. In this case, there is no notice.

25. In the end, the Court is satisfied that the claimant is entitled to reimbursement of the costs for the work done. The Court is also satisfied that the amount claimed is fair and proportional to the work done. Judgment is therefore entered for the claimant against the Respondent for the sum of Kshs. 735,422.00. The claimant will also have costs of the suit and interest from filing until paid in full.” (sic)

12. From the above excerpts, it is ostensive that the learned Magistrates’ determination was arrived at upon analysis of the evidentiary or factual material and submissions presented before her in respect of the agreement between the parties and monies purportedly owing to the Appellant. Questions similarly canvassed in the Appellant’s memorandum of appeal and submissions before this Court. As earlier stated, the Appellant is covertly inviting this Court to re-evaluate the trial evidence, contrary to the provisions of Section 38 of the Small Claims Court Act and consequently to make an alternate finding on the facts presented before the trial Court. As held in Bashir Haji Abdullahi (supra) an appellate Court faced with a situation of this kind is at liberty to strike out any grounds of appeal that offend the above provision, while retaining those that are compliant. In this case, having conscientiously reviewed each of the Appellant’s grounds of appeal, the Court is constrained to strike out every ground, save for ground 6, for the tacit invitation contained therein entreating this Court to address factual issues.

13. On accord of this Court’s earlier finding, that only ground with the semblance of an issue of law for this Court’s consideration is ground 6, which this Court will proceed to consider as hereunder. The ground is to the effect that “The learned trial Magistrate erred in law by awarding the Respondent’s costs”. (sic). The learned Magistrate upon finding the claim in favour of the Respondent, proceeded to award costs. That said, as to costs, the law is settled and this Court does not intend to re-invent the wheel. An order as to costs in respect of a suit is provided for pursuant to Section 27 of the CPA, which provides that; -

“(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.”

14. As earlier stated, and at the risk of repetition, the Small Claims Court being a specialized Court, costs are provided for under Section 33(1) of the Act which states that: - “The Court may award costs to the successful party in any proceedings”. There is no dearth of authorities expounding on the above provision. The Court of Appeal in *Punchlines Limited v Joseph Mugo Kibaria, Boniface Kilonzo Kisilu, Moses Muinde John, Henry Muoki Kitila, Jackson Muteti Mwongo, Benson Wabwile Onyiso, Linus Omenta Gesicha, George Antony Kabue, Moses Kikwau David, Henry Muhanji Lugano & Jamen Ichuliza Chadaka* [2018] KECA 217 (KLR) discussed at length Section 27 of the CPA which is *pari materia* with Section 33(1) of the *Small Claims Court Act*. The Court in the above decision observed as follows on the question of costs: -

As for costs, the substantive law governing an award of costs is enshrined in Section 27 of the *Civil Procedure Act* (CPA). It provides:

.....

The High Court in the *Party of Independent Candidates of Kenya versus Mutula Kilonzo & 2 others, HC EP No. 6 of 2013*, had this to say on the issue of costs: -

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so.”

In Richard Kuloba, *Judicial Hints on Civil Procedure*, 2nd Edition, page at page 101, the author states as follows: -

“The law of costs as it is understood by courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs-the court has no discretion and cannot take away the plaintiff’s right of costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course”(sic)”.

15. The Court proceeded to state that; -

“In *Devram Dattan versus Dawda* [1949] EACA 35, the predecessor of this court held, *inter alia*, that it is trite law that the right of a successful litigant to recover his costs is left to the



discretion of the Judge who tried his case. Being a judicial discretion, the law demands that it must be exercised judiciously on facts. The question of the sufficiency of the facts on the basis of which the trial Judge is called upon to exercise such discretion is entirely a matter for the Judge himself to decide, and the court of Appeal will not interfere with the exercise of such discretion except within the limits permitted by law.

In *Supermarine Handling Services Ltd versus Kenya Revenue Authority [2010] eKLR (Civil Appeal 85 of 2006)*, the court provided guidelines that 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. Second, that where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. For example, where the trial court gives no reason for its decision; or alternatively where the reasons given do not constitute “good reason” within the meaning of the rule.

See also cases of *James Koskei Chirchir versus Chairman Board of Governors Eldoret Polytechnic [2011] eKLR (Civil Appeal No. 211 of 2005)*, John Kamunya & another versus John Ngunyi Muchiri & 3 others [2015] eKLR, and Robric Limited & another versus Kobil Petroleum Ltd & another, Nairobi *CA No. 109 of 2015*.

Applying the above threshold to the appellant’s complaint on the award of costs made against it by the trial court, we find no justification in interfering with the trial Judge’s order.”

16. With the above in mind, while the general rule is that, costs follow the event, and consequently that the successful party ought to be awarded costs, a Court while exercising its discretion on costs can depart from that stricture where there exist grounds to justify such a course of action. The latter can further be construed from the wording of Section 33(1) of the *Small Claims Court Act*, given the use of the word “may”. On this appeal, the Respondent was the successful party whereas no extenuating circumstances presented during the hearing of the matter that would have vitiated the trial Court’s discretion to arrive at an alternate award on costs. To the foregoing end, the ground on costs fails in its entirety. In conclusion, it is this Court’s unreserved deduction that the instant appeal lacks in merit and is accordingly dismissed with the attendant costs issuing to the Respondent in any event.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF JANUARY 2025.

HON. L. KASSAN

JUDGE

In the presence of:

No appearance for the Appellant

No appearance for Respondent

Guyo - Court Assistant

