Ainu Shamsi Hauliers Ltd v Asto Transporters Ltd (Civil Appeal E067 of 2024) [2025] KEHC 5139 (KLR) (29 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5139 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E067 OF 2024

RN NYAKUNDI, J

APRIL 29, 2025

BETWEEN

AINU SHAMSI HAULIERS LTD ..... APPELLANT

AND

ASTO TRANSPORTERS LTD ..... RESPONDENT

JUDGMENT

1. The appellant is aggrieved with the decision of Hon. T. Mbugua dated 5th April, 2024 where the subordinate court allowed the Respondent's claim for Kshs 328,550/= and found the Appellant 100% liable. The amended memorandum of appeal dated 11th April, 2024 raises the following grounds:

    a. That the learned magistrate erred in law and in fact in finding that the Appellant was 100% liable for the said accident and apportioned liability fully on the Appellant.

    b. That the learned magistrate erred in law by awarding special damages of Kshs. 328,550 without the Claimant adducing enough evidence on loss of user and whether the vehicle was actually repaired.

    c. That the learned magistrate erred in law and in fact in failing to appreciate the submissions of the appellant.

    d. That the learned magistrate erred in law and in fact in failing to appreciate the appellants' notice of preliminary objection.

2. The facts giving rise to the claim by the Respondent at the subordinate court are that on 17th June, 2020 the Claimant/Respondent's motor vehicle registration number KCY 656C was lawfully parked off the road along Eldoret-Nakuru at Nabkoi junction when the Respondent's driver, servant and/or authorized agent carelessly and negligently drove motor vehicle registration number KBK 894E/ZD 2518 and veered off the road thereby ramming into the Claimant's vehicle and occasioning its extensive

damage. The Claimant/Respondent averred that the Respondent/Appellant as the registered, insured and/or beneficial owner of motor vehicle registration number KBK 894E/ZD 2518 is personally and vicariously liable for the negligence acts of its driver, servant and/or authorized agent in control of the said vehicle and the resultant damage occasioned to the Claimant's vehicle. As a result, the Claimant/Respondent sought the following reliefs:

a. Judgment against the Respondent in the sum of Kshs. 208,550/=

b. Loss of user/lost income Kshs. 120,000/=

c. Costs of the claim

d. Interest from the date of filing the claim.

3. The appellant filed a response to the statement of claim dated 16th June, 2023 and stated that he is not liable to compensate the claimant for loss or damage to the subject motor vehicle. The Respondent/Appellant denied the ownership of the motor vehicle in question and added that if at all the accident occurred, it was solely caused by the negligence on the part of the Claimant.

4. The trial court considered the claim together with the response and judgment was entered in favour of the Respondent where the Appellant was found 100% liable and damages assessed in the sum of Kshs. 328,550/=.

5. The appeal was canvassed through written submissions. The Appellant filed submissions dated 18th June, 2024 and supplementary submissions dated 28th June, 2024 whereas the Respondent filed submissions dated 25th November, 2024.

The Appellant's Submissions

6. On liability, learned counsel Mr. Ojienda started by submitting that in accident liability, the trial court could not infer who actually caused the accident for lack of evidence and inconclusive police report. The police report and appellant's witness statement ought to have guided the court in determining the cause of the accident. According to the appellant, the Respondent alleges that he had parked his motor vehicle at an undesignated area, on the left side and facing Nakuru. The Appellant's vehicle on the other part came in hooting and with lights on, a sign of imminent danger and loss of control of the vehicle, before if veered off the road. That as such, the Respondent should have taken adequate measures not to get his vehicle to safety, the appellant's vehicle having veered off losing control.

7. From the forgoing learned counsel maintained that the court could not reach a conclusive decision that the Appellant actually caused the accident. He cited the decisions in Hussein Omar Farar v. Lento Agencies C.A Nairobi Civil Appeal No. 34 of 2005 [2006] eKLR, Ndatho v Chebet (Civil Appeal 8 of 2020 [2022] KEHC 346 (KLR), Bwire v wayo & Sailoki (Civil Appeal 032 of 2021) (2022) KEHC 7 (KLR) and Plantinum Car Hire and Tours Limited v Samuel Arasa Nyamesa & Another [2019] eKLR.

8. Learned Counsel submitted on the question of quantum that this is a discretion of the court. That the Respondent is not entitled to any damages as no evidence has been adduced to prove the alleged negligence occasioning an accident, or proof of repairs. That it is only an assessment report that was produced before the trial court to show that that vehicle was repaired and this is not enough evidence. In Counsel's view, the Respondent is required to show the extent of damage and what it cost him to be able to be awarded damages. However, this was not done.

9. Mr. Ojienda cited various decisions and submitted that despite the Respondent claiming that the vehicle was a public service vehicle, the Respondent did not tender any proof of loss of user. That the

Respondent only supported his allegation via witness statement and not tangible evidence to show that indeed the vehicle used to make the quoted amount by the Respondent.

10. On the supplementary submissions, learned counsel introduced the issue of a Notice of Preliminary Objection which he had filed at a trial court, which he alleges that was not considered. The Objection was majorly raised on grounds of jurisdiction in light of the decision in Jerusha Auma Ogwawi v. Ibrahim Asha Hersi and Aisha Hersi Ibrahim. Counsel submitted that the appellant intended to raise the objection at an earlier stage even before the matter was fully concluded, but the same was not considered by the Learned Magistrate. Had it been considered, there would be no appeal.

Respondent's submissions

11. Learned Counsel for the Respondent submitted that from the onset, it should be noted that the *Small Claims Court Act* is self-effectuating Act and it only allows one appeal purely on matters of law. Counsel cited the provisions of section 38 of the Small Claims Act and the case of Lumumba v Rift Gas Limited (Civil Appeal E805 of 2022) (2023) KEHC 25998 (KLR) (Civ) (30th November, 2023). Counsel submitted that it therefore follows that in as far as special relates to factual issues, the same is fatally and incurably defective.

12. Mr. Kimani identified only three issues that warrant this court's attention:

    a. As whether the trial court erred in law in finding the appellant 100%

    b. As to whether the adjudicator erred in awarding damages.

    c. Whether the Preliminary Objection is merited.

13. Regarding the first issue, learned counsel started by citing the provisions of section 32 of the *Small Claims Court Act*. That the court is not bound wholly by the Rules of Evidence. According to counsel, it is not in dispute that the Appellant's vehicle departed from its motoring lane at a high speed, veered off the road and rammed into the Respondent's vehicle KCY 656C that was parked off the road at a Covid-19 screening point and all the passengers including the driver who had alighted for screening. That therefore the trial adjudicator was right holding the appellant 100% liable.

14. As to the damages, it was submitted for the Respondent that the trial court did not err in awarding the special damages. Counsel submitted that it is trite law that in a material damage claim, what the claim needs to prove in respect of special damages is the extent of damage and cost of restoring the damaged item. In support of this, counsel cited the case in Nkuene Dairy Farmers Co-op Society Ltd v Ngacha Ndeiya [2010] eKLR. Counsel submitted that in this case, the Respondent herein produced a copy of assessment report which placed the cost of repair at Kshs. 203,000/=. The Appellant herein never produced a rival report and as such this aspect was proved to the required standard.

15. On loss of user, it is submitted for the Respondent that it is not in dispute that the Respondent's vehicle was a matatu operating under North Rift shuttle. He submitted that it is trite law that loss of user in respect of a profit making chattel is in the nature of general damages and it needs only to be proved on the balance of probabilities. That in the instant case, CW2 testified that he was the manager of Asto Transporters which owns motor vehicle registration number KCY 656C. It was his evidence that the said vehicle used to generate Kshs. 8,000/= per day after all expenses. He thus sought for loss of user for 15 days that the said vehicle was under repair and the adjudicator was right in awarding Kshs. 120,000/= in the premises and her decision cannot be impeached.

16. On the preliminary objection, learned counsel argued that the same is moot and a waste of precious judicial time and it was just thrown in as a by the way when the matter was pending for submissions and from the record, there is no evidence that the appellant drew the court's attention to it.

17. Learned counsel submitted that in the event the said objection would have been considered, it is important to note that the decision cited by the appellant related to injury claim and the matter at hand relates to material damage claim as envisaged under section 12(1) (c) of the *Small Claims Court Act*.

Analysis & Determination

18. I have considered the memorandum of appeal, the record of appeal as well as the submissions by the respective parties. This is a first appeal. 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."

19. When reviewing trial court findings, appellate courts typically show restraint, only overturning factual determinations in limited circumstances: either when a finding lacks any evidential support, or when the lower court applied incorrect principles in reaching its conclusion. This principle is illustrated in the case of Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-1988] 1 KAR 278.

20. However, appeals from the Small Claims Court follow a different standard. Under Section 38 of the *Small Claims Court Act*, the appellate court must first establish whether the appeal properly falls within the scope defined by this provision, as these appeals operate under distinct parameters compared to standard appellate proceedings.

21. In considering its mandate on a second appeal, that is, on points of law only, the Court of Appeal in Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR, distinguished 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 a fresh, - see Selle and Another v 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."

22. Black's Law Dictionary states 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."

23. In examining the grounds of appeal as presented by the Appellant, I find them woefully inadequate to meet the threshold required under Section 38 of the *Small Claims Court Act*. Rather than articulating specific legal principles that the adjudicator allegedly misinterpreted or misapplied, the Appellant has resorted to formulaic, generalized assertions that merely claim errors "in law and fact" without substantive elaboration. This approach reveals a critical misunderstanding of appeals from the Small Claims Court, which are not avenues for general grievance but strictly limited forums for addressing legal missteps. The Appellant appears to have conflated traditional appellate procedure with the specialized framework governing Small Claims appeals, seemingly inviting this Court to substitute its own assessment of the evidence, a power explicitly withheld by statute. Such perfunctory pleadings fail to provide this Court with the necessary foundation to exercise its limited appellate jurisdiction. Were this Court to entertain such imprecisely framed grounds, it would effectively render meaningless the legislative intent behind Section 38 and undermine the Small Claims Court's mandate to provide swift, cost-efficient resolution of modest disputes. The appellate filter must be applied with appropriate rigor to preserve the integrity of this specialized judicial framework.

24. While considering the same issue, Justice Wananda JRN in the case of *Fidelity Insurance Company Ltd v Korir (Civil Appeal 13 of 2023)* [2024] KEHC 3365 (KLR) had this to say:

> "My own perusal of the grounds of Appeal listed in the Memorandum of Appeal reveals that the same, as framed, lack specificity. The grounds are a reproduction of the usual general template-like grounds that I would dare say, are always "copy-pasted" in majority of Memoranda of Appeal that I routinely see before the Courts. The same would fit well in ordinary appeals where an appellate Court is obligated to re-evaluate the evidence afresh and reach its own independent findings. The same cannot be said where, as herein, the Small Claims Act has expressly limited the right to appeal to only points of law. Drafting of grounds of appeal in such appeals requires a little bit more finese, care and caution. While grounds of appeal contained in a Memorandum of Appeal should not include or consist of arguments, in Appeals of this nature, where the right to appeal is limited to only matters of law, the same ought to some extent contain a clear statement in summary form of the exact matter of law that is being appealed against. By presenting their grounds of appeal in the too generalized manner in which it has been done here, the Appellants have shot themselves in the foot. By presenting such generalized grounds, the Appellants have denied this Court the relevant material that would have enabled it to verify the Appellant's contention that the Appeal is based on matters of law only."

25. The Court of Appeal in Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others [2014] eKLR while addressing the question whether a memorandum of appeal on a second appeal raised factual issues and the distinction between a matter of fact and matter of law, observed that; -

> "One of the best expositions on the distinction between the two is to be found in the judgment of Denning J in the English case of BRACEGIRDLE v OXLEY (2) [1947] 1 ALL E.R. 126 at p 130;
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> The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter

for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road *Traffic Act*, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them."

26. The Court of Appel the continued to state that: -

> " That reasoning has been adopted in this jurisdiction. In A.G. v David Murakaru[1960] EA 484, for instance, Chief Justice Ronald Sinclair sitting with Rudd J. adverted to the factual foundations of legal questions by stating that an appellate court restricted to determining questions of law may yet quite properly interfere with the conclusion of a lower court if the same is erroneous in point of law. This is the case where that lower court arrives at a conclusion on the primary facts that it could not reasonably come to. Such a conclusion or decision becomes an error in point of law. See also Patel v Uganda[1966] EA 311 and Shah v Aguto[1970] EA 263.
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> There is no denying from the cases we have referred to, that in not a few cases the determination of whether a particular complaint on appeal a question of law is or of fact is not always a very straight-forward one, not least because the determination of whether a lower court drew the correct legal conclusions inevitably entails an examination of the factual basis of the decision. That reality has with it the inherent danger that legal ingenuity may attempt to dress-up and camouflage purely factual issues with the borrowed garb of "legalness." This is what the majority of this Court had in mind in M'riungu And Others v R [1982-88] 1 KAR 360 when it stated, (per Chesoni AJA) at p366;
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> "We would agree with the views expressed in the English case of Martin v Glyneed Distributors Ltd (t/a MBS Fastenings) [1983] 1 CR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial of first appellate court unless it is apparent that; on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad law."

27. Reviewing the Appellant's grounds of appeal with critical scrutiny, it becomes unmistakably clear that they constitute pure challenges to factual determinations rather than legitimate points of law. The Appellant has not even made a credible attempt to disguise these factual disputes as legal questions. Each ground merely expresses disagreement with the adjudicator's factual conclusions regarding liability apportionment, sufficiency of evidence for damages, and consideration of the preliminary objection. Unlike sophisticated appeals that might cleverly frame evidential challenges within legal principles, this appeal bluntly invites the Court to reassess witness credibility, reweigh documentary evidence, and substitute its judgment on matters of pure fact. There is a striking absence of any allegation that the adjudicator misinterpreted a statutory provision, misapplied a legal test, or violated a procedural rule that impacted the outcome. The Appellant's submissions further reveal the factual nature of the dispute, focusing on the specifics of vehicle positioning, driver behavior, and sufficiency of repair documentation, all quintessential factual matters. This appeal represents precisely the type of case that Section 38 of the *Small Claims Court Act* was designed to exclude from appellate review,

as entertaining such purely factual challenges would effectively nullify the legislative intent to create a final, efficient forum for modest disputes.

28. Even if this Court were to indulge the Appellant's grievances regarding the unaddressed preliminary objection, a fundamental procedural obstacle remains: this appeal pertains specifically to the judgment rendered by the adjudicator and not to the entirety of the trial record. A meticulous review of the trial court's judgment reveals that the question of a preliminary objection features nowhere in the adjudicator's reasoned decision. The Appellant's contention that this objection was unjustly overlooked cannot be entertained when there is no evidence that it was properly placed before the court for consideration at the appropriate procedural juncture. This Court, bound by the record of the proceedings under review, cannot manufacture issues that were not demonstrably part of the adjudicative process.

29. There are many intrinsic difficulties of language that are heightened in the creation of a statute by the legislature and as it is crafted through various public participation models, it is foreseeable and acknowledged that its application in real life situations, there might be unforeseeable variety of circumstances which may not have been factored during the making of the statute. It is the very reason why in certain exceptional circumstances the judiciary or the High Court constitutionally is mandated to construe and interpret the intention of parliament frequently deducible from the drafting process. Essentially, when a statute becomes the subject of a dispute in court, it is the duty of judges to interpret that law predominantly now as the various jurisprudential decisions tell us, it falls within the Purposivism and textualism approaches. As a practical matter, judicial decisions interpreting provisions of a statute necessarily shape the way those provisions are to be implemented for the common good of society. This interpretation using any of the legal philosophical foundations cited above, should not just stop at the pronouncement of the decision, our parliament ought to know as a matter of urgency how courts have ascribed the new meaning found in the cases decided to give meaning to the statutory text so as to remove any ambiguity which became a subject of litigation. There is always a presumption that a decision made in Moyale High Court, in Migori, Lamu etc is capable of being assimilated by the various legal forums as the predominant decision which has outlawed or rendered certain provisions null and void. Apparently, that is not the case in Kenya. There is no doubt that the High Court decision duly cited by legal counsel for the appellant there is an ongoing and evolving legal debate over the best way to determine the meaning of the impugned provisions. The drafters of the statute might not have even be served with the decision under reference to participate meaningfully in this discussion about the unconstitutionality of the provisions of the *Small Claims Court Act*. If this decision of the Preliminary objection was indeed raised before the trial court, none of its discussions made to the final judgment subject matter to help an appeals court understand the procedural protocols which were navigated to arrive at a decision on the matter which is now being appealed against the appellant. Incidentally, these jurisdictional issues on accident claims being heard and determined by the Small Claims Court is not a fait accompli matter in the realm of legislation. I take cognizance of the fact that judges sometimes make law as a result of the day to day decision-making process but there is a limitation of that discretion for *the Constitution* itself designated parliament as the law making branch of government unless and until *the constitution* frowns to a particular provision in the statute infringing any of the fundamental rights and freedoms of any of the citizens of the Republic. In so far as this point is concerned, it is a legal mirror to the foreseeability on whether certain provisions of the *Small Claims Court Act* are indeed unconstitutional to redress any of the remedies sought by litigants in that very same Act as intended by parliament.

30. Furthermore, even if this Court were to set aside these procedural irregularities and examine the substance of the purported preliminary objection, the Appellant's position remains untenable. The authority cited by the Appellant at the trial court regarding jurisdictional questions has not been

incorporated into binding law through legislative amendment. The decision in Jerusha Auma Ogwawi v. Ibrahim Asha Hersi and Aisha Hersi Ibrahim, while noteworthy, has not culminated in statutory reform of the *Small Claims Court Act*. Legal precedent, however persuasive, cannot supplant express statutory provisions until formally adopted through appropriate legislative channels. The operative statutory framework remains intact and fully enforceable, continuing to vest jurisdiction in the Small Claims Court over matters such as the present dispute until such time as Parliament enacts amendments to the contrary.

31. The Appellant's attempt to rely on inchoate jurisprudential developments to challenge the adjudicator's jurisdiction represents yet another instance of seeking to litigate factual and procedural questions under the guise of legal error. This approach further underscores the fundamentally misconceived nature of this appeal within the constraints of Section 38 of the *Small Claims Court Act*.

32. There is a great controversy within our domestic legal system on the jurisdiction of the small claims court. This is more so on the legislative scheme of conferring the jurisdiction to the Adjudicators to hear and determine matters arising out of accident claims. The aforesaid debate is still raging on until the law is marked as settled. Thus, an interpretation which is constitutionally compliant must be preferred over an interpretation which is not in line with *the constitution*. It is also my considered view that more significantly the legislative provisions must be interpreted through the prism of the Bill of Rights under chapter 4 of our constitution. What that means when courts are interpreting statutes the law requires of them to do so within the contest of *the constitution* and no discretion shall be exercised to distort the language intended by the legislature so as to extract the meaning beyond that which the words can reasonably bear. The rule of law requires that any law passed by the legislature must be clear and uncertainable.

33. In light of the foregoing analysis, I find that this appeal is fundamentally misconceived and falls outside the jurisdictional parameters established by Section 38 of the *Small Claims Court Act*. The Appellant has presented grounds that, despite their nominal characterization as "errors of law," constitute challenges to factual determinations that this Court is statutorily precluded from revisiting. The legislative intent behind Section 38 is unambiguous; to provide finality to Small Claims Court proceedings except on genuine questions of law, thereby ensuring the expeditious and cost-effective resolution of modest disputes. To entertain this appeal would be to undermine this legislative purpose and to blur the crucial distinction between appellate review and factual reassessment. The Small Claims Court adjudicator applied the correct legal principles to the evidence before her, and her findings on liability and quantum cannot be impugned on any recognized point of law. Accordingly, this appeal is hereby dismissed in its entirety with costs to the Respondent.

34. It is so ordered.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 29TH DAY OF APRIL, 2025.

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R. NYAKUNDI

JUDGE