



REPUBLIC OF KENYA



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**Macharia v Kendagor & another (Civil Appeal E998 of 2024)
[2025] KEHC 7170 (KLR) (Civ) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7170 (KLR)

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

CIVIL

CIVIL APPEAL E998 OF 2024

AC MRIMA, J

MAY 30, 2025

BETWEEN

WILSON MACHARIA APPELLANT

AND

SUSAN KENDAGOR 1ST RESPONDENT

PAUL KIMANI 2ND RESPONDENT

*(Being an appeal from the judgment and decree of Hon. Manuela
W. Kinyanjui (Senior Principal Magistrate/Adjudicator) delivered
on 29th July, 2024 in Nairobi SCCCOMM No. E1047 of 2024)*

JUDGMENT

1. The appeal subject of this judgment deals with the failure by a trial Court to render itself on the fate of default judgment against a third-party vis-a-vis a Respondent who has wholly denied liability in respect to a Claimant's cause of action.
2. Vide a Statement of claim dated 9th February 2024, the 1st Respondent [then Claimant] sued the Appellant [Respondent] in the Nairobi [Milimani] Small Claims Court in SCCCOMM No. E1047 of 2024 [hereinafter referred to as 'the suit'] claimed for special damages of Kshs.138,420/= being costs incurred as a result of an accident that occurred on or about 19th February 2021. In the suit, the 1st Respondent claimed that she was lawfully driving her car registration number KBM 325R when the Appellant, then driving motor vehicle registration number KBK 903N, rammed into the rear of her car thereby causing extensive damage. The 1st Respondent, through her insurers, sued for recovery of the expenses under the doctrine of subrogation.



3. The Appellant entered appearance and filed Statement of Defence wherein he attributed blame to a third-party motor vehicle registration number KAX 291V for ramming his vehicle on the rear thereby forcing it to hit the 1st Respondent's car which was just in front. The Appellant then took out a Third-Party Notice under the Small Claims Court Rules and a default judgment was entered against a third party who is the 2nd Respondent herein, Paul Kimani. The suit was heard by reliance of documents under Section 30 of the *Small Claims Court Act* and in a judgment that was rendered on 29th July 2024, the Appellant was held wholly liable for the accident and judgement entered against him. It was that judgment that prompted the instant appeal.
4. In an Amended Memorandum of Appeal dated 6th September 2024, the Appellant proposed the following grounds of appeal: -
 - i. That the Honourable Learned Magistrate erred in law in applying the wrong principle of law on standard or proof in civil cases.
 - ii. That the Honourable Learned Magistrate erred in law in failing to appreciate the appellant's case on a balance of probability as required under section 107(1) of the *Evidence Act*.
 - iii. That the Honourable Learned Magistrate erred in law in finding that the Respondent/appellant was to blame and failed to comment on issues of law as regards to the Third Party.
 - iv. That the Honourable Learned Magistrate erred in law in failing to consider and properly evaluate the appellant's evidence.
 - v. That the Honourable Learned Magistrate erred in law in failing to consider the evidence and the submissions by the appellant while arriving at the judgement.
 - vi. That the Honourable Learned Magistrate erred in law in awarding costs of the suit to the appellants.
5. Pursuant to the directions of this Court, the appeal was canvassed by way of written submissions. The Appellant's submissions were dated 14th March 2025 while the 1st Respondent's submissions were dated 4th April 2025. The gist of these submissions will be ingrained in the latter part of this judgment.
6. Section 38 of the *Small Claims Court Act* [Cap. 10A of the Laws of Kenya, hereinafter referred to as 'the Act'] provides for appeals from decisions and/or orders of the Small Claims Court. Under that provision, a party may appeal to the High Court only on matters of law and that the decision thereof is final. Whereas there has been no universally accepted definition of the term 'matters of law', there has been some working definitions thereto.
7. The term 'point of law' may also be referred to as 'matter of law'. There has been no universally accepted definition of the term 'point of law' or 'matter of law'. However, there has been some working definitions thereto. The Black's Law Dictionary defines 'a matter of fact' and 'a matter of law' as follows: -

Matter of fact: 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.
8. Lord Denning, J in *Bracegirdle vs. Oxley (2)* [1947] 1 ALL E.R. 126 at p 130 in espousing the two terms had the following to say: -

.... 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 deduced 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.

9. Drawing from the above, the Court of Appeal in *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* [2014] eKLR sated as under: -

.... That reasoning has been adopted in this jurisdiction. In *A.G. Vs. 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 Vs. Uganda* [1966] EA 311 and *Shah Vs. Aguto* [1970] EA 263.

10. The foregoing was reiterated in *Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others*, (2014) eKLR. Further, in *Peter Gichuki King'ara vs. IEBC & 2 others*, Nyeri Civil Appeal No. 31 of 2013, Court of Appeal held that a decision challenged on the basis of wrongful exercise of discretion raises a point of law. The Supreme Court of Kenya in *Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others*, [2014] eKLR held that 'jurisdiction is a pure question of law and should be resolved on priority basis'.
11. Applying the said dichotomy in this case, it is this Court's finding that since the matters in contention in this appeal relate to the fate of default judgment against a third-party vis-a-vis a Respondent who has wholly denied liability in respect to a Claimant's cause of action and the manner in which the trial Court handled the third party proceedings in the judgment, then such issues transcend the borders of matters of fact into the realm of matters of law.
12. Therefore, this Court is properly seized of jurisdiction over this appeal.
13. Returning to the main issue at hand, there is no doubt that the trial Court entered a default judgment against the third party on 29th May 2024. Thereafter the suit was heard under Section 30 of the Small Claims Court Act. However, in the impugned judgment, the liability or otherwise of the third party was not dealt with. The decision only centred between the Appellant and the 1st Respondent despite the Court having entered a default judgment against the third party. Since the liability of the third party in the suit was an issue and the Court had already entered a default judgment against such third party, then it was incumbent upon the Court to finally render itself on the liability of the third party in the judgment. The failure thereof amounted to a grave error in law thereby calling upon this Court to intervene.
14. Having so found, this Court remains alive to the legal position that its jurisdiction is only on matters of law. Liability is an issue of fact. However, the manner in which a Court handles such may arise to an issue of law for instance where there is a wrong exercise of discretion or like in this matter, the Court



failed to consider the issue at all. As the issue of the third party was never considered by the trial Court in the judgment, this Court cannot, therefore, exercise its appellate jurisdiction over it. The best this Court can do is to remit the matter for a consideration by the trial Court.

15. To that end, this Court hereby makes the following final orders: -

- (a) The appeal is merited and the judgment in Nairobi [Milimani] Small Claims Court in SCCCOMM No. E1047 of 2024 is hereby set-aside and quashed accordingly.
- (b) The suit is hereby remitted to the trial Court for a fresh hearing. In doing so, the Court will be at liberty to either take fresh evidence or proceed with the hearing under Section 30 of the *Small Claims Court Act*.
- (c) The sum of Kshs. 150,000/= deposited in Court be returned to the depositor.
- (d) As the issue in consideration in this appeal was on the part of the Court, there shall be no order as to costs.

Orders accordingly.

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

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Miss. Chiptoo, Learned Counsel for the Appellant.

Mr. Ng'ang'a, Learned Counsel for 1st Respondent.

Amina/Abdirazak – Court Assistants.

