



**Fidelity Insurance Company Ltd v Korir (Civil Appeal
13 of 2023) [2024] KEHC 3365 (KLR) (22 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3365 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 13 OF 2023
JRA WANANDA, J
MARCH 22, 2024**

BETWEEN

FIDELITY INSURANCE COMPANY LTD APPELLANT

AND

JONAH KIMUTAI KORIR RESPONDENT

RULING

1. This Appeal arises from the Judgment delivered in Eldoret Small Claims Court Civil Suit No. 246 of 2022 on 13/01/2023 in which the Court awarded to the Respondent the sum of Kshs 223,000/- against the Appellant.
2. The background of the matter is that by his Statement of Claim filed on 3/11/2022 through Messrs Bundotich Korir & Co. Advocates, the Respondent pleaded that the Appellant had insured the Respondent's motor vehicle with comprehensive cover and thus was obligated to compensate the Respondent for loss arising from the accident that occurred on 14/08/2022 whereof the motor vehicle was damaged, and that the Appellant failed to make the payment.
3. Aggrieved by the decision, by the Memorandum of Appeal filed through Messrs Kitiwa & Partners Advocates on 24/01/2023, the Appellant filed this appeal. The grounds preferred were as follows:
 - i. The Honourable trial Magistrate erred in law and fact in entering judgment for the Respondent against the Appellant for Kshs 223,000 contrary to the evidence on record.
 - ii. The Honourable trial Magistrate erred in law and fact in failing to find that the Respondent did not prove his case against the Appellant on a balance of probabilities.
 - iii. The Honourable trial Magistrate erred in law and fact in failing to dismiss the Respondent's case.



- iv. The Honourable trial Magistrate erred in law and fact in failing to find that the Respondent had already been paid the sum of Kshs.223,000.
 - v. The Honourable trial Magistrate erred in law and fact in failing to consider the Appellant's submissions.
4. Before the Appeal could be heard, the Respondent filed the Preliminary Objection dated 27/6/2023, premised on the following grounds:
- i. The appeal offends the provisions of Section 38 of the *Small Claims Act*, 2016.
 - ii. The appeal herein arising from the decision or an order of the Small Claims lies on only matter of law.
 - iii. That all the (5) grounds set out in the appeal are matters of fact.
 - iv. That the appeal therefore does not lie.

Hearing of the Preliminary Objection

5. It was then agreed and directed that the Preliminary Objection be heard by way of written Submissions. Pursuant thereto, both parties filed their respective Submissions on 25/10/2023.

Respondent's Submissions

6. Counsel for the Respondent submitted that in entering Judgment, the Adjudicator invoked the doctrine of estoppel as provided under Section 120 of the *Evidence Act* and also relied on the famous decision of Lord Denning in the case of *Pickard v Sears* E.R and also the case of *Serah Njeri Mwobi vs John Kimani Njoroge*.
7. In respect to the Preliminary Objection, Counsel submitted that the appeal delves into matters of fact and does not lie as the same is in violation of Section 38 of the *Small Claims Court* by which appeals against decisions of that Court ought to be only on matters of law. He cited the case of *Mwangi v Wambugu* [1984] KLR 453 and also the case of *Mkubee v Nyamuro* [1983] KLR, 403-415. Counsel further submitted that the Appellant, in his response, admitted the Respondent's claim and/or averments to a larger extent save that allegedly, upon re-inspection of the vehicle after the Respondent had repaired the vehicle, it was found that the repairs had been done at a cost of Kshs 223,000/- and that the Appellant averred further that it had paid the Respondent the said sum. He added that the Respondent produced a cash-in-lieu-of-repairs discharge voucher in which the Claimant accepted to repair the motor vehicle whereafter he would be paid by the Appellant a sum of Kshs 258,000/-, that the Respondent also produced a form prepared by the Appellant in which the Respondent was to fill and provide details of his bank account to facilitate the payment and that in the form, the Respondent advised the Appellant to make payments to his Sidian Bank Account. Counsel submitted further that the Appellant also called one witness who confirmed that indeed the motor vehicle was damaged and confirmed that the Appellant ought to have paid to the Respondent the sum of Kshs 223,000/- upon re-inspection of the motor vehicle after the Respondent had repaired it.
8. In conclusion, Counsel submitted that the Adjudicator acted on correct principles and in view of the fact that she had advantage of seeing the demeanour of witnesses, urged this Court not to interfere with her decision.
9. It will be noted right away that although at this stage, this Court is only determining the Respondent's Preliminary Objection, on the contrary, the Respondent's Submissions as recited above addresses



the entire main substantive Appeal. There is very little reference of the Preliminary Objection in the Submissions yet that is what the Court wished to hear about at this stage. Submitting on the main Appeal is premature, the Appeal not even having been admitted and certified as ready for hearing.

Appellant’s Submissions

10. In opposing the Preliminary Objection, the Appellant’s Counsel submitted that what constitutes points of law has been settled by the Court of Appeal in the case of *Peter Gichuki King’ara v IEBC & 2 Others*, Nyeri Civil Appeal No. 31 of 2013. He also cited the case of *Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 Others* [2014] eKLR, and the case of *Mwangi v Kihiu* (Civil Appeal No. 16 of 2023 [2023] KEHC 18643 KLR.
11. Counsel submitted that in view of the foregoing, it is evident that the question of whether the trial Court properly considered and/or evaluated the evidence on record and arrived at a correct determination that is supported by law and evidence is a question of law, and not fact, that the 5 grounds of appeal are to the effect that the trial Court failed to properly consider the evidence and the Appellant’s submissions, that the grounds call for examination and/or interrogation by this Court of the trial Court’s findings on primary facts and evidence in totality with a view to determining whether the same was properly arrived at. Counsel argued that the grounds in the Memorandum of Appeal are based on points of law. He urged the Court to dismiss the Preliminary Objection, admit and set down the appeal for hearing.

Analysis and Determination

12. Upon examination of the Record of Appeal and the pleadings filed, including the respective Submissions, I find the issue that arises for determination herein to be “whether the grounds of Appeal raised by the Appellant comply with the proviso that appeals from the Small Claims Court are limited to only matters of law”.
13. What constitutes a Preliminary Objection was explained in the locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, in the following terms:

“...a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.”

.....

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion
14. No challenge has been raised against the validity or appropriateness of the Preliminary objection, correctly so in my view. I say so because looking at the matters raised by the Respondent, I am satisfied that the same fit well within the limits contemplated for what should fall within a Preliminary Objection.
15. Coming to back Section 38(1) and (2) of the *Small Claims Court Act* No. 2 of 2016, the same is premised as follows:

“38. Appeals



- (1) A person aggrieved by the decision or an order Appeals. 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.”

16. What the above means is basically that under Section 38 of the *Small Claims Court Act*, 2016, the High Court, while handling an appeal from the Small Claims Court is not permitted to substitute that Court’s decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them.
17. In the present case, the Respondent objects to the appeal herein for reasons that the same delves into matters of fact, rather than law, and is thus in breach of Section 38 aforesaid.
18. 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 finesse, 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.
19. Commenting on the same concern, D. Kizito Magare J, in the case of *Mwangi v Kibiu* (Civil Appeal 16 of 2023) [2023] KEHC 18643 (KLR) (28 April 2023) (Judgment) when handling an Appeal emanating from the Small Claims Court, stated as follows:

“ Even on the normal legal lingua, a point of law must clearly arise out of the pleadings. In case of appeal, it should arise out of the memorandum of appeal vis-à-vis the pleadings in the court below

”
20. In any event, casually perusing the grounds of appeal as framed by the Appellants, it is clear to me that the appeal is solely anchored on issues of evidence. A reading of Section 32 of the *Small Claims Act* expressly stipulates that the Small Claims Court shall not be bound wholly by Rules of evidence. The Section is premised as follows:
 - “ 32. Exclusion of strict Rules of evidence
 1. The Court shall not be bound wholly by the Rules of evidence.
 2. Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though



the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.”

21. The nature of the Small Claims Court is such that it is intended to ensure that “small claims” are dealt with efficiently without the burden of strict rules and at a minimum cost to the parties. In making the Rules, the Chief Justice is guided by the Section 3 of the Act which provides as follows:

“Section 3 - Guiding principles

- (1) In exercise of its jurisdiction under this Act, the Court shall be guided by the principles of judicial authority prescribed under Article 159(2) of the Constitution.
- (2)
- (3) Without prejudice to the generality of subsection
 - (1) the Court shall adopt such procedures as the Court deems appropriate to ensure—
 - (a) the timely disposal of all proceedings before the Court using the least expensive method;
 - (b)
 - (c) fairness of process; and
 - (d) simplicity of procedure.”

22. It must therefore be always recalled that the proceedings before the Small Claims Court are expected to adhere to the principle of “timely disposal, use of the “least expensive method” and “simplicity of procedure” In this instant matter, it has not been alleged that the procedure adopted by the Court did not comply with “fairness of process which is also one of the guiding principles mentioned above.

23. I agree, as pronounced by the Court of Appeal in the case of Peter Gichuki King'ara Vs. IEBC & 2 Others, Nyeri Civil Appeal No. 31 of 2013, that the question whether the trial Court properly considered and/or evaluated the evidence on record and arrived at a correct determination supported by law and evidence is a question of law, and not fact. However, that statement cannot just be pasted in the ground of appeal and left at that. Some effort must be made in the drafting to indicate how and in what manner exactly the trial Court is being faulted for not properly considering and/or evaluating the evidence on record. That statement must also be construed within the context of the Small Claims Court Act, its aspirations, intentions and purpose. The Act was enacted to address a genuine concern and it is the duty of the Court to ensure that focus is not lost on such concern and that the mischief that the Act sought to cure remains within sight.

24. I associate myself with the sentiments of E.K. Ogola J in the case of Mombasa Law Society v Attorney General & another [2021] eKLR in which he stated as follows:

“one of the objectives of the Small Claims Court Act is to see that small claims are disposed of using the least expensive method. This is probably because the small claims, as the name suggests, are claims whose subject is of a much lower value. Most likely for that reason, the law makers felt that the cost of Appeal to the High Court then to the Court of Appeal would be much higher than the small claim.”



25. For the said reasons, the High Court has to be careful and firm in admitting appeals from the Small Claims Court. The High Court is under obligation to sieve through such appeals and ensure that only those that are compliant and well-deserving see the light of day. The High Court must therefore interrogate Appeals from the Small Claims Court and admit only those that raise matters of law, not facts.
26. With the foregoing in mind, it is without doubt that the Appellant's Memorandum dated 24/1/2023 raises only matters of fact, and not of law, and as such does not call forth the appellate jurisdiction of this Court.
27. In the result, the Preliminary Objection dated 27/6/2023 succeeds with the consequence that this Appeal is accordingly struck out with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 22ND DAY OF MARCH 2024

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WANANDA J.R. ANURO

JUDGE

