



**Rugano Books Limited v Mabiria (Civil Appeal E865 of 2022)  
[2024] KEHC 6281 (KLR) (Civ) (31 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6281 (KLR)

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

**CIVIL**

**CIVIL APPEAL E865 OF 2022**

**JN NJAGI, J**

**MAY 31, 2024**

**BETWEEN**

**RUGANO BOOKS LIMITED ..... APPELLANT**

**AND**

**DAVID MAMBOLEO MABIRIA ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein brought suit against the respondent seeking for compensation in the sum of Ksh 482,439/= which the appellant alleged that the respondent had misappropriated from the appellant in his capacity as a director. The respondent denied the claim. The trial adjudicator found no sufficient evidence to support the claim and entered judgment for the appellant in the sum of Ksh 34,000/=. The appellant was aggrieved by the judgment and lodged this appeal.
2. The appeal is premised on the grounds that:
  - a. The learned adjudicator erred in law and fact in awarding an inordinately low compensation amount to the claimant.
  - b. The learned adjudicator erred in law and fact by not considering the appellant's weight of evidence and misapprehended the appellant's submissions and authorities before her to arrive at the compensation to the claimant.

**The appellant's case**

3. The case for the appellant before the adjudicator was that the respondent and two others, Abigail Akello Arunga and George Magunga Williams Oduor, were directors and shareholders of the appellant company that they incorporated in 2017.



4. It was the contention of the latter two directors that after incorporation of the company, the respondent took up the role of building and maintaining the company's website as he had background in web design services and also handled its financial matters. That the respondent took advantage of his role as the director in charge of financial affairs and withdrew money from the appellant's bank account for his personal use. That on 24<sup>th</sup> September 2019, the respondent admitted to the two other directors of withdrawing Ksh 351,848/= and promised to repay the money. The respondent also admitted to have misappropriated a further Ksh 130,591/= from the appellant's bank account held at Kenya Commercial Bank between December 2019 and January 2020. The total that he respondent misappropriated from the appellant as of 11<sup>th</sup> January 2020 stood at Ksh 482, 439/=. The respondent promised to repay the money but failed to do so.
5. It was further their case that the respondent was responsible for paying for the web hosting. Later the company's website failed and Abigail established that the same had not been paid for. They demanded the respondent relinquish control of the web site, its system log-ins and or credentials and he refused. The Claimant filed suit.

### **Respondent's Case**

6. The respondent denied misappropriating the money. He said that the claimant did not produce any audited report of the appellant showing that company funds had been misappropriated. He denied admitting misappropriation of any money. He pleaded that the claimant had not specifically pleaded any allegations of fraud against him. He denied that he refused to grant the claimant the logins for the web sites of the company.

### **Submissions**

7. The appeal was canvassed by way of written submissions.

### **Appellant's Submissions**

8. The appellant submitted that the trial court misapprehended the appellant's evidence and submissions. The appellant pointed out to the court the circumstances in which an appellate court may interfere with a judgment of a lower court as stated in the case of *United India Insurance Company Ltd v East African Underwriters (Kenya) Ltd* (1985) EA that the court misdirected itself in law, misapprehended the facts or that it took account of considerations of which it should not have taken account, failed to take account of considerations of which it should have taken account of that the decision is plainly wrong.
9. The appellant submitted that it produced a statement showing that the respondent withdrew a sum of Ksh 130,591/= from the appellant's bank account at Kenya Commercial Bank between December 2019 and January 2020. That the trial court only considered entries bearing the respondent's name which totaled Ksh 34,000/= and none bearing the respondent's telephone number: 254713579437.
10. The appellant faulted the adjudicator for failing to consider screenshots of a WhatsApp conversation between the appellant and one of the directors, Abigail, where the respondent admits to misappropriating money from the appellant. That in one of the messages he promised to pay back Ksh 50,000/=. Therefore, that the appellant had proved its case against the appellant on a balance of probabilities. The appellant urged the court to allow the appeal with costs.



## Respondent's Submissions

11. The respondent submitted that the appeal is misconceived in that section 38 of the *Small Claims Court Act* states that appeals from that court to the High Court are on matters of law only. That the appellant herein has proffered an appeal on matters of fact which were appropriately dealt with by the adjudicator. Therefore, that this court has no jurisdiction to entertain the matter.
12. The respondent submitted that the issue of quantum of damages is an issue of fact and is to be determined at the discretion of the adjudicator. That there is thereby no legal justification for this appeal and the same should be dismissed.

## Analysis and Determination

13. This being a first appeal the duty of the court is to analyze and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing witnesses testify – See *Siele v Associated Motor Boat Company Ltd & Others* (1968) EA 123. In *Kiruga v Kiruga & Another* (1988) KLR 348 the Court of Appeal held that:-

“an appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”

14. The respondent has raised an issue of jurisdiction and it is therefore imperative for this court to first deal with the issue. This is in recognition of the fact that jurisdiction is the foundation upon which the court has the mandate to deal with the matter before it, as was observed in the case of the *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, Justice Nyarangi JA, as he then was stated as doth: -

“With that I return to the issue of jurisdiction and to the words of *Section 20 (2) (m) of the 1981 Act*. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

15. Section 38 of the *Small Claims Court Act* provides as follows:
  - (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.
16. The issue for determination is whether the grounds of appeal raise questions of law or questions of fact. In that respect it is important to distinguish the difference between the two terms.
17. The *Blacks' Law Dictionary* 4<sup>th</sup> Edition, defines a matter of fact as:

“A matter involving judicial inquiry into the truth of alleged facts.”



18. A matter of law is defined:

“as a matter involving a judicial inquiry into the applicable law.”

19. What constitutes a point of law has been the subject of interpretation by superior courts in this country. In *Twaber Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others*, [2014] eKLR the court in following decisions in *Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 Others*, Malindi Civil Appeal No. 39 Of 2013 (Court of Appeal), (Okwengu, Makhandia & Sichale, JJA) of 13/1/2014 stated that:

“A decision is erroneous in law if it is one to which no court could reasonably come to.”

20. In *Kenya Breweries LTD v Godfrey Odongo*, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another V. Benard Munene Ithiga [2016] eKLR, the court stated:

“The court confines itself to matters of law only, unless it is shown that the 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.” See also Court of Appeal decision in *Mwangi v. Wambugu [1984]* KLR 453 for similar proposition.

21. In *M’riungu and others v R.* [1982-88] IKAR 360, Chesoni AJA observed:

“We would agree with the views expressed in the English case of *Martin V. Glyneed Distributors Ltd (T/A MBS Fastening)[1983] ICR 511* that where a right of appeal is confined to a question 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 on mixed findings of fact and law and it should not interfere with the decisions of the trial of first appellate court unless it is apparent that; on the evidence, no reasonable tribunal court have reached that conclusion, which would be the same as holding the decision is bad law.”

22. In *Momentum Credit Limited v [Kabuiya]* (Civil Appeal E035 of 2022) [2022] KEHC 13705 (KLR) (Commercial and Tax) (7 October 2022) (Judgment) the court in considering an appeal like this one did observe that:-

“In determining this appeal, I am cognizant of the fact that under section 38(1) of the *Small Claims Court Act*, 2016 an appeal to this court is limited to matters of law only. Accordingly, the court is not permitted to substitute the subordinate 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 (*John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018]* eKLR).”

23. In the case of *Wamae v Wainaina* (Civil Appeal 19 of 2023) [2024] KEHC 2468 (KLR) (12 March 2024) (Judgment) Magare J. held as follows:

In the case of *Mwita v Woodventure (K) Limited & another (Civil Appeal 58 of 2017) [2022] KECA 628 (KLR) (8 July 2022) (Judgment)*, the Court of Appeal while referring to a second Appeal, which is essentially on points of law and thus similar to the duty of the court under section 38 of the Small Claims Court, stated as doth: -

“This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of *Stanley N. Muriithi &*



*Another v Bernard Munene Ithiga* [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also *Kenya Breweries Limited v Godfrey Oduyo* [2010] eKLR.

24. In *Mwangi v Kibiu* (Civil Appeal 16 of 2023) [2023] KEHC 18643 (KLR) (28 April 2023) (Judgment the court held that failure to exercise discretion is a point of law and cited the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR, where the court stated that:

“ This is a second appeal. 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 they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* (2016) eKLR).

25. The complaint by the appellant in this appeal is that the learned adjudicator awarded an inordinately low compensation amount to the claimant against the weight of the evidence. The appeal being one from the Small Claims Court, this court as an appellate court can only interfere with the judgment of the adjudicator if it is shown that the adjudicator considered matters she should not have considered or failed to consider matters she should have considered or looking at the entire decision, it is perverse, as was held in *Kenya Breweries LTD v Godfrey Odongo* (*supra*) and *Stanley N. Muriithi & Another V. Benard Munene Ithiga* (*supra*).
26. The case for the appellant was that the respondent misappropriated the appellant’s money while working in his capacity as a director of the company. The appellant sued seeking to recover refund of the money misappropriated. The appellant basically relied on whatsapp communication between the respondent and a director of the appellant, Abigail, in which it was contended that the respondent admitted owing the company a total of Ksh 482, 439/=. The appellant also relied on a bank statement of the appellant company that showed that the respondent had withdrawn appellant’s money from that account that went to his personal use.
27. The learned adjudicator in her judgment found as a fact that there was evidence from the whatsapp conversation that the respondent had misappropriated the appellant’s money and the question was how much he had misappropriated. The adjudicator reviewed the bank statement presented before her and found that the amount proved to have been withdrawn by the respondent was Kshs.34,000/=. She found no evidence that the rest of the money was withdrawn by the appellant.
28. The appeal herein challenges the decision of the adjudicator on the ground that the award made was inordinately low and that the award was against the weight of evidence. What is the question of law raised in the appeal?
29. In my view, there is no question of law disclosed in the appeal. This is not a case like where the court had discretion to award damages. The case was dependent on whether the court believed the evidence that the appellant admitted in the whatsapp conversations to owing the sum of Ksh 482,439/=. The trial court reviewed the evidence presented before it and did not find sufficient evidence to prove the sum claimed. These are, in my view, matters of fact. This court can only interfere if it is shown that the trial court considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse - See *Mwita v Woodventure (K) Limited & another* (*supra*). This was not demonstrated. The adjudicator considered all the evidence and reached the decision that she did. The decision cannot be said to be perverse.



30. The upshot is that the appeal does not raise any issue of law. In the premises, the appeal is struck out with costs to the respondent.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 31<sup>ST</sup> DAY OF MAY 2024**

**J. N. NJAGI**

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**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

In the presence of:

Mr Maitha for Appellant

Miss Ouma for Respondent

Court Assistant - Amina

30 days Right of Appeal.

