



**Wamae v Wainaina (Civil Appeal 19 of 2023)
[2024] KEHC 2468 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2468 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 19 OF 2023
DKN MAGARE, J
MARCH 12, 2024**

BETWEEN

EPHRAIM WAIGWA WAMAE APPELLANT

AND

ANASTACIA WANJIRU WAINAINA RESPONDENT

*(Being an appeal against the Judgment of the Resident Magistrate E.
M. Gaithuma delivered on 17/3/2023 in Nyeri SCCC No. E003 of 2023)*

JUDGMENT

1. The Appellant being aggrieved and dissatisfied with the judgment of the Small Claims in Nyeri SCCC No. E003 of 2023 filed an appeal against the Judgment of the honourable Adjudicator E. M. Gaithuma delivered on 17/3/2023. The Appeal was filed on 31/3/2023.
2. I gave directions on 11/3/2024 for ruling today.

Background

3. Appellant filed suit as the registered, insured and/or beneficial owner of motor vehicle Reg. No. KCQ 219R Nissan Note against the Appellant who was the registered owner, beneficial owner and/or policy holder of motor vehicle Reg. No. KBT 782W.
4. She stated that her motor vehicle registration number KCQ 219R Nissan Note was insured by Jubilee Insurance Company Limited under policy cover Number P/108/1002/2019/000331 and the Respondent and as such filed the suit in the Small Claims Court on her behalf and her insurer's right of subrogation as the aforesaid underwriter has fully compensated and restituted the Respondent's claim.
5. She stated that on or about 19th January 2020, the Appellant was lawfully driving motor vehicle registration number KCQ 219R Nissan Note at Mathaithi area along Karatina-Nyeri Road, when



- the Appellant his driver, agent, employee and/or servant carelessly and/or negligently drove motor vehicle registration number KBT 782W causing it to violently hit the Respondent's motor vehicle KCQ Nissan Note at the front left side of the Respondent's vehicle and as a direct result of the said accident motor vehicle KCQ 219R Nissan Note was extensively damaged thereby occasioning the Respondent loss for which the Respondent holds the Appellant fully liable and/or vicariously liable.
6. The Respondent allegedly suffered loss and damage, which damage had been fully and rightly indemnified by its insurer.
 - a. Repair charges - Kshs.123,711.00
 - b. Assessors fees - Kshs.8,530.00
 - c. Tracing fees - Kshs.27,300.00
 - d. KRA Search charges - Kshs.550.00Total - Kshs.160,091.00
 7. The Respondent sought for the foregoing sum. The court heard the parties. The Respondent had a record 4 witnesses.
 8. The court entered judgment on 17/3/2023 as follows: -
 - a. Liability 80: 20
 - b. Special damages Ksh. 158,711/=
 - c. Less 20% Ksh. 31,742.20
 - d. Net award Ksh. 126,968.80
 9. The Appellant being aggrieved and dissatisfied with the judgment of the Small Claims Court filed an appeal against the same on the following grounds: -
 - a. That the learned trial magistrate erred in law and fact by failing to appreciate that there was no evidence to be relied upon in determining who was liable for the accident in this matter.
 - b. That the learned trial magistrate erred in law and fact by trying to determine what the Investigating Officer failed in her duty to establish.
 - c. That the learned trial magistrate erred in law and fact by relying on unsupported, unsubstantiated narrative and innuendos instead of appreciating that the Traffic Police officers did not charge the Appellant with any traffic offence or offences.
 - d. That the learned trial magistrate erred in law and fact by failing to find that there was no documentary evidence linking the said accident to the Appellant.
 - e. That the learned trial magistrate erred in law and fact by misdirecting her verdict after determining in her judgment paragraph 11 that it was the Respondent's motor vehicle that hit an external object while it was odd that it was the Respondent's motor vehicle that was hit.
 10. The first witness to testify was Corporal Japheth Bett of the Kenya Police Service. He stated that Motor vehicle Registration KBT 782 W was found reliable. The driver of the said Motor vehicle Registration KBT 782 W failed to give way to motor vehicle Reg. No. KCQ 219R.
 11. The Respondent adopted her statement dated 4/2/2023 and produced documents. She was cross-examined. PW3 testified that she is a Recoveries Officer who adopted the statements. A Motor Assessor



produced a report showing repair was for Kshs.132,320. The vehicle had a frontal impact on the left side.

12. The Respondent testified in support of his case. He stated his vehicle was hit on the rear. He had crossed the road joining the road going to Mukurweini. Upon closing their respective cases, the aforementioned judgment was delivered.

Analysis

13. The jurisdiction of the small claims court is set out in the *Small Claims Court Act*. *Ipsa facto*, there is only one chance of Appeal to this court. It is an Appeal on points of law. In view of the provisions of section 38 of the *Small Claims Court Act*, which posits as doth: -

“38. Appeals (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.
An appeal from any decision or order referred to in subsection (1) shall be final.”

14. In the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR, the court of Appeal addressed the duty of a court considering points of law as doth: -

“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).

15. 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 Odoyo* [2010] eKLR in which it was held that:

“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.”

16. Each of the grounds of grounds of appeal in the appellant’s memorandum of appeal shows that they relate primarily to questions of fact.



17. Justice prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of *Oraro v Mbaja* [2005] eKLR: -

“I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point. Whereas the judge was dealing with a preliminary point, it bears no difference with a point of law, in that the factual matrix must be taken to be admitted. The claim on the issues of facts raised are beyond the jurisdiction of this court.”

18. A court cannot handle a matter it has no jurisdiction to do so. In the locus classicus 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. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: -

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to ...

19. The claim relates to liability for the Accident. The court found as a fact that the parties were liable 80:20. The facts and evidence were settled by the court. There was no question of law raised by the Appellant. The only issue raised relate to evidence. The burden of proof is placed on whosoever alleges. However, in small claims court the standard is different. Section 32 of the *Small Claims Court* provides 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.
- (3) Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that Court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.
- (4) The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.
- (5) All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.
- (6) For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.
- (7) An Adjudicator may require any written evidence given in the proceedings before the Court to be verified by statutory declaration.”

20. The issues raised by the Appellant are wholly evidential.

21. Turning to the case in court, the Respondent, instead of filing a response, filed a memorandum of appearance and defence. There is no place for a memorandum of Appearance and defence under the small claims Rules under the *Small Claims Court Act*. The *Small Claims Act* provides as doth: -

“25. Response to claim,

- (1) The Registrar or other officer designated for that purpose shall cause to be served on the respondent a copy of the statement of claim.
- (2) The respondent shall lodge with the Court a written response to the claim, including any counter-claim or set-off, in the prescribed form, within fifteen days.”

22. Due to the dictates of the *constitution*, I shall treat the defence as a response for purposes of this Appeal. Article 159(1) and (2) of the *constitution* provide as follows: -

- “(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
- (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
 - a. shall be done to all, irrespective of status;
 - b. justice shall not be delayed.



- c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
 - d. justice shall be administered without undue regard to procedural technicalities; and.
 - e. The purpose and principles of this Constitution shall be protected and promoted.
23. The end result is that the appeal in all fronts is untenable. The upshot of the foregoing is that I find no merit in the Appeal.
24. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“ 18. It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.”

25. The order that commends itself is that costs follow the event and the event is finding this Appeal lacking in merit.
26. In the circumstances, I find that the Appellant’s Appeal is unmerited and consequently, dismissed with costs of Ksh.45,000/=.
27. The file is closed.

Determination

28. The upshot of the foregoing is that I make the following orders: -
- a. The Appeal is not merited.
 - b. Consequently, I dismiss the entire Appeal in limine with costs of Ksh.45,000/=.
 - c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 12TH DAY OF MARCH, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.



KIZITO MAGARE

JUDGE

In the presence of:-

No Appearance for the Appellant

Mr. Lenin Awino for the Respondent.

