



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wachira v Mwai (Civil Appeal E022 of 2023)  
[2024] KEHC 3173 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3173 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E022 OF 2023  
DKN MAGARE, J  
MARCH 15, 2024**

**BETWEEN**

**PHILIP WACIURI WACHIRA ..... APPELLANT**

**AND**

**PHILLIP MATHENGE MWAI ..... RESPONDENT**

*(Being an appeal against the Judgment of Hon. E. M. Gaithuma Resident Magistrate/  
Adjudicator Nyeri delivered on the 17th March 2023 in SCC COMM NO. E006 OF 2023)*

**JUDGMENT**

1. This is an appeal against the judgment of the Hon. E. M. Gaithuma, Adjudicator given in Nyeri SCC COMM No. E006 of 2023 on 17<sup>th</sup> March, 2023.
2. The appellant raised grounds of Appeal as follows:
  - a. That the learned trial Magistrate erred in law and in fact in enforcing an illegal contract and in failing to appreciate that the contract was void for want of capacity to contract by the parties.
  - b. That the learned trial Magistrate erred in law and in fact in failing to appreciate the legal maxim that no one can give what they do not have (Nemo dat quod habet) rule.
  - c. The learned trial Magistrate erred in law and in fact in failing to analyze the evidence presented by the respondent in its entirety and the submissions filed thereto and in essence arriving at a wrong conclusion.
3. The 3<sup>rd</sup> ground is on evidence, as such I shall dismiss the same in limine.



4. The jurisdiction of the Small Claims Court is set out in the [Small Claims Court Act](#). Ipso 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.

(2) An appeal from any decision or order referred to in subsection (1) shall be final.

5. 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).

6. 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.”

7. A cursory glance at the grounds of appeal in the appellant’s memorandum of appeal shows that they relate primarily to questions of fact. The appellant was aggrieved by the finding of the first appellate court that he was not entitled to security costs. The third ground, which raises the question whether the interest on the payment made to the 1<sup>st</sup> respondent should run from the date of filing suit, not from the date of the hire purchase agreement between the appellant and the 1<sup>st</sup> respondent, is a matter of law.”

8. The power of the court is set out in section 38(1) of the [Small Claims Act](#) No.2 of 2016. The claimant is said to have sold a motor vehicle Registration No. KCM 557X Toyota Allion but the respondent refused to pay. The Respondent was said to be in possession. The vehicle that was sold was in the names of Stanbic and the Appellant.

9. The court below is entitled to evaluate the evidence and come up with the evidence they believe. The strict rules of evidence do not bind the Court below. This is on the basis of Section 32 of the [Small Claims Court](#), which 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.”

10. I have not seen a single issue of law being raised by the Appellant. It is not enough to cite very complicated Latin terms. They must be a fair and correct issue of law. The court cannot be faulted that it reached a decision on no evidence. The Small Claims Court is the queen when it comes to evidence. I have evaluated the same and noted that the court exercised its discretion correctly. In *Mbogo vs Shah* 1968 EA 93 the court held thus: -

“The duty of this court in an appeal against the exercise of that discretion is not to interfere unless the Judge has exercised his or her discretion wrongly in principle or perversely on the facts of the case.”

11. The decision is a proper one. The upshot of the foregoing is that the Appeal lacks merit and is consequently dismissed with costs of Kshs.55,000.00 to the Respondent.

12. This is informed by the fact that costs follow the event. The event herein is the dismissal of the Appeal in favour of the Respondent.

13. 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.”

### **Determination**

14. The upshot of the foregoing is that I make the following orders: -

- i. The Appeal herein lacks merit and is consequently dismissed with costs of Kshs.55,000/- payable within 30 days.
- ii. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 15<sup>TH</sup> DAY OF MARCH, 2024.**

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Wambui for the Appellant

No appearance for the Respondent

Court Assistant – Ms. Thaithi

