



REPUBLIC OF KENYA



KENYA LAW
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**Ng'ang'a v Matheri (Civil Appeal 131 of 2023)
[2024] KEHC 6713 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6713 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 131 OF 2023
FN MUCHEMI, J
JUNE 6, 2024**

BETWEEN

GEOFFREY NJUGUNA NG'ANG'A APPELLANT

AND

JAMES NJOROGE MATHERI RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon R. Otieno (Adjudicator/RM) delivered on 27th October 2022 in Thika Small Claims Court Commercial Case No. E626 of 2022)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in Small Claims Court Commercial Case No. E626 of 2022, a claim that arose from breach of an agreement dated 23rd January 2020 as a result of which the appellant owed the respondent Kshs. 330,000/-. The trial court found that the appellant breached the agreement and entered judgment in favour of the respondent in the sum of Kshs. 330,000/- plus costs and interest.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 7 grounds of appeal condensed as follows:-
 - a. The learned trial magistrate erred in law by finding that the respondent had proved his case on a balance of probabilities;
 - b. The learned trial magistrate erred in law by determining the case when it ought to have been heard in the Rent Restriction Tribunal.
3. Parties put in written submissions to dispose of the appeal.



Appellant's Submissions

4. The appellant submits that the respondent instituted the claim in the subordinate court dated 25th August 2022 seeking recovery of Kshs. 330,000/- being rental arrears. The respondent alleged that the appellant rented his shop located at Ndunyu Chege Market, Gatanga Sub-county within Murang'a County. The respondent thereafter moved to the Small Claims Court in Thika where he lodged his claim culminating in the judgment dated 27th October 2022 entering judgment in favour of the respondent for the sum of Kshs. 330,000/-.
5. The appellant relies on Section 12(1) of the *Small Claims Court Act* and the case of *Christoffersen vs Kavneet Kaur Sehmi t/a The Random Shop (Civil Appeal No. E036 of 2022)* [2022] KEHC 14035 KLR (Commercial and Tax) (18 October 2022) (Judgment) and submits that a claim for recovery of rental arrears does not fall within the ambit of the jurisdiction of the Small Claims Court. As such, the trial court lacked jurisdiction to hear and determine the claim as filed.

The Respondent's Submissions

6. The respondent submits that the appellant has deviated from the grounds enumerated in his memorandum of appeal as the appellant did not raise the issue of the jurisdiction of the Small Claims Court. The respondent relies on the cases of *Palms Resort Limited vs Qureshi & 2 Others (Civil Appeal E167 of 2022)* [2023] KEHC 23644 (KLR) and *Malawi Railways Ltd vs Nyasulu* [1998] MWSC 3 and submits that parties are bound by their pleadings and since the appellant did not raise the issue of jurisdiction in his memorandum of appeal, his appeal ought to be dismissed.
7. The respondent submits that the jurisdiction of the Small Claims Court to hear and determine the dispute was agreed upon by both parties and if at all the same was an issue, it ought to have been addressed preliminarily at the trial court. That notwithstanding, the respondent submits that the claim arose from debt owed by the appellant as evidenced in the agreement in his list of documents namely An acknowledgement letter of debt dated 23rd January 2020.

Issue for determination

8. The main issues for determination are:-
 - a. Whether the Small Claims Court had jurisdiction to determine the claim.
 - b. If the court finds that the small claims court was possessed of the jurisdiction, it will proceed to determine the merit of the appeal.

The Law

9. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
10. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-



An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

11. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
 - a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the Small Claims Court had jurisdiction to determine the claim.

12. The law on the question of jurisdiction was enunciated in the case of *Owners of the Motor Vessel "Lilian S" vs Caltex Kenya Limited* [1989] KLR 1 where the court held:-

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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

13. Jurisdiction is a very fundamental issue that it can be raised at any time including on appeal. This principle was stated by the Court of Appeal in *Kenya Ports Authority vs Modern Holding* [EA] Limited [2017] eKLR as follows:-

We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on appeal, or even *viva voce* and indeed, even by the court itself provided that where the court raises it *suo motu* parties are to be accorded the opportunity to be heard.

14. From the foregoing, it is evident that the issue of jurisdiction as raised by the appellant on appeal is procedurally permissible.

15. On the source of jurisdiction, it was held in the case of *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & Others* (2012) eKLR that:-

A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

16. The jurisdiction of the Small Claims Court is provided in Section 12(1) of the *Small Claims Court Act* 2016 which provides as follows:-

Subject to this *Act*, the rules and any other law, the court has jurisdiction to determine any civil claim relating to-



- a. A contract for sale and supply of goods or services;
 - b. A contract to money held and received;
 - c. Liability in tort in respect of loss or damage cause to any property or for the delivery or recovery of moveable property;
 - d. Compensation for personal injuries; and
 - e. Set off and counterclaim under any contract.
17. On perusal of the Statement of Claim dated 25th August 2022, the cause of action arose from an acknowledgement of debt letter dated 23rd January 2020. The said agreement is clear in content that the appellant owed the respondent a sum of Kshs. 340,000/- being accumulated rent arrears for a shop he rented from January 2013 to 23rd February 2018. In the said agreement, the appellant proposed to be paying back the said amount in monthly installments of Kshs. 10,000/-. It is upon the breach of that agreement that the respondent instituted the claim in the small claims court. The cause of action arose from the recovery of the money owed to the respondent and not rent arrears as alleged by the appellant. Furthermore, the Magistrate/Adjudicator court was not called to determine whether there existed a landlord tenancy relationship between the parties or the issue of rent arrears. It is therefore my considered view that the cause of action falls under the category of a contract to money held and received. Thus, the Small Claims court had the requisite jurisdiction to entertain the claim.
 18. The appellant in his submissions did not address the grounds relating to the merits of the appeal but only raised the issue of jurisdiction. However, the appellant in his memorandum of appeal, the appellant raise grounds that go to the merits of the appeal. The respondent in his submissions addressed the merits of the appeal. I proceed to look at the merits of the said grounds.
 19. The appellant contends that the honourable Magistrate decided his case against the weight of evidence and that his evidence and submissions were not considered. The respondent on the other hand, submitted that he proved his case on the balance of probabilities based on the evidence he tendered before the magistrate's court.
 20. I have perused the record of appeal and noted that the respondent produced a letter dated 23rd day of January 2020, in which he acknowledged the debt of KShs.330,000/= that had arisen from accrued rent arrears. The appellant proposed two (2) payment plan options. In the first plan, the appellant proposed to pay the debt in installments KSh.10,000/= per month till payment in full. The second offer was to pay KSh.120,000 per year for a period of two years. The balance of KShs.90,000 was to be paid in the 3rd year.
 21. The evidence of the respondent was that through the said letter, the appellant admitted liability and offered two payment plans for repayment of the debt. The parties agreed on the first payment plan for paying KSh.10,000/= per month till full settlement of the claim. However, the appellant paid the first monthly installment but failed to comply as per the parties agreement. The advocate of the respondent issued a demand letter dated 29th September 2021 for payment of KShs.330,000/= which was not honoured prompting the filing of the claim in the small claims court.
 22. The appellant did not testify before the court and as such, the evidence of the respondent was not controverted.
 23. I have looked at the grounds of appeal and I am of the considered view that the appellant failed to establish any of them. The judgment of the Magistrate/Adjudicator was based on the evidence on record which proved the claim against the appellant on the balance of probabilities.



24. In conclusion, I find no merit in the appeal and I hereby dismiss it with costs.

25. It is hereby so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED AT THIKA THIS 6TH DAY OF JUNE 2024.

F. MUCHEMI

JUDGE

