Nyakundi v Nzue (Civil Appeal E1055 of 2023)
[2025] KEHC 11000 (KLR) (Civ) (23 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11000 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1055 OF 2023

DKN MAGARE, J

JULY 23, 2025

BETWEEN

BOSIRE NYAKUNDI ..... APPELLANT

AND

HILDA MUTINDI NZUE ..... RESPONDENT

(Appeal from the ruling and order of Honourable Wamae E.M. Muindi given on 6.10.2023 in Nairobi Milimani SCCC No. E331 of 2023.)

JUDGMENT

1. This is an appeal from the ruling and order of Honourable Wamae E.M. Muindi given on 6.10.2023 in Nairobi Milimani SCCC No. E331 of 2023. The Appellant was the applicant in the Small Claims Court. The applicant filed an application to set aside judgment which was allowed. The court gave directions relating to setting aside and giving throw away costs. As part of the conditionalities, the court directed that half of the decretal sum be deposited in court.

2. Lengthy submissions were filed. It is however, not clear the utility of the deposit. It is thus not necessary to regurgitate the same herein.

3. Court was duty bound to read the documents and interpret then as such. The documents filed by the appellant support the respondent's case. The court cannot add evidence to documents. In *Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents

meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

4. The first ground is otiose. The limit on appeals to questions of law, is telling. Only questions of law are entertained. On the other hand, a party must stick to the case before the court. The case was for money had and received. The story changed to a total of Ksh. 200,000/= given on 25.9.2019, a balance thereof of Kshs 60,000/= is claimed.

5. This being an appeal from the Small Claims Court, the duty of the court is circumscribed under Section 38 of the *Small Claims Court Act* which provides as doth:

   (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.

6. However, an appeal of this nature is on points of law. It can be pure points of law or mixed points of law but points of law it is. An appeal on points of law is akin to a second appeal to the Court of Appeal. The duty of a second appellate court was set out in the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR as follows: -

   " 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)."

7. Then what constitutes a point of law? In *Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others,* (2014) eKLR, the court stated as doth:

   " 4. Although the phrase 'a matter of law' has not been defined by the *Elections Act*, it has been held 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 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing *Bracegirdle v Oxney* (1947) 1 All ER 126. See also *Khatib Abdalla Mwashetani v Gedion Mwangangi Wambua & 3 Others*, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, M'inoti & Sichale, JJA) of 23.01.2014 following *AG v David Marakaru* (1960) EA 484."

8. Notwithstanding the setting aside, the court ordered half of the decretal sum be deposited. What was the decretal sum where there is no judgment? The deposit of security is for stay. No stay was required. In absence of any application for stay and a decree, there was no half decretal sum to pay. The order was based on a decree that had been set aside. Reliance on a non-existent decree is a nullity. In *Macfoy v. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172(1) said;

   " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every

proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

9. In this instant, the throw away costs were sufficient to cover any inconvenience. The court should not unduly place bottlenecks to the access to justice. In the case of *Vros Produce Limited v Mwebi & 5 others* (Civil Appeal E053 of 2021) [2023] KECA 1327 (KLR) (10 November 2023) (Judgment), the court of appeal [SG Kairu, P Nyamweya & GV Odunga, JJA] posited as follows:

> There will be breach of this right where citizens, and especially marginalized groups see it as alien and do not access it; where the justice system is financially inaccessible; where individuals have no lawyers; where they do not have information or knowledge of rights; or where there is a weak justice system. A holistic approach to access justice therefore addresses both the opportunity for all litigants to access Courts, and also aims to achieve equality of outcomes by addressing the barriers faced by those trying to access the judicial system. The place of trial is therefore a key determinant of access to justice in this respect, as it not only impacts on the physical ability to access the court, but the costs of doing so, and the question of whether the costs unduly restrict access to courts will depend on the facts of each case. The main reasons why section 72 and 74 of the Criminal Procedure Act provide that the place of trial is where act giving rise to the offence was done or where the consequence of the offence ensued, is so as to ensure that the venue is convenient for all concerned, including the court, the witnesses, and the person accused persons, and also to avoid any unfairness, improper motive and abuse of power in the selection of the place of trial.

10. In the case of *Gakere v Njuguna* (Environment and Land Appeal E005 of 2022) [2023] KEELC 22306 (KLR) (14 December 2023) (Judgment), L.N. Gacheru J, held as follows:

> This Court will only interfere with the said discretion in very clear case that while the trial Court was exercising the said discretion, misdirected itself and arrived at a wrong finding. See the case of *Peter M Kariuki v Attorney General* (2014), where the Court held;
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> > " We have also, as we are duty bound to do as a first appellate court, reconsidered the evidence adduced before the trial court and re-evaluate it, to draw our own independent conclusion and to satisfy ourselves that the conclusion reached by the trial judge are consistent with the evidence."See also the case of *Mbogo & Another v Shah* (1968) EA 93, where the Court held;"... a Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice ..."
> >
> > 41. As this Court carries its Appellate role, it has a duty to delve at some length into factual details and revisit the facts and evidence as presented before the trial court and then analyses the same, evaluate it and thereafter make an independent decision. This Court cannot simply interfere with the discretionary powers of the trial court just because this is an Appeal. See the case of *Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others*

[2019] eKLR, where the Supreme Court had this to say about interfering with the appellate powers;

> "In reiterating the above position, we affirm that we would only interfere with the Appellate Court's exercise of discretion if we reach the conclusion that in exercise of such discretion, the Appellate Court acted arbitrary or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion than the Court of Appeal is not a reason to interfere with the Court's exercise of discretion."

11. In this case the court was capricious. It introduced an unnecessary battlement to setting aside. The condition was not sine qua non setting aside. It was unnecessarily burdensome. It did not go to the foundation of the application. In the circumstances, the said order is set aside. The rest of the orders remain.

12. Award of costs in this court are governed by section 27 of the *Civil Procedure Act*. They are discretionary. The Supreme Court has 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.

13. Costs follow the event. The order came from the court's own discretion and not the parties' fault. Each of the parties shall bear their own costs.

Determination

14. In the upshot, I make the following orders:

    a. The appeal is allowed in the following terms; the order to deposit half of the decretal dues pending determination of the case is set aside.

    b. Each party to bear its own costs.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 23RD DAY OF JULY, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Nyakiangana for the Appellant

Ms. Karimi for the Respondent

Court Assistant – Michael