



Muthengi v Nairobi Hospital Limited & another; Nairobi Hospital Limited (Plaintiff to the Counterclaim); Muthengi & another (Defendant to the Counterclaim) (Civil Suit 238 of 2016) [2024] KEHC 9490 (KLR) (Civ) (31 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9490 (KLR)

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

CIVIL

CIVIL SUIT 238 OF 2016

CW MEOLI, J

JULY 31, 2024

BETWEEN

JAPHETH MBITI MUTHENGI PLAINTIFF

AND

THE NAIROBI HOSPITAL LIMITED 1ST DEFENDANT

LEE FUNERAL HOME LIMITED 2ND DEFENDANT

AND

THE NAIROBI HOSPITAL LIMITED .. PLAINTIFF TO THE COUNTERCLAIM

AND

JAPHETH MBITI MUTHENGI DEFENDANT TO THE COUNTERCLAIM

DARIUS MBALU KIVUVO DEFENDANT TO THE COUNTERCLAIM

JUDGMENT

1. Japheth Mbiti Muthengi, (hereafter the Plaintiff) filed this suit on 08.09.2016 against The Nairobi Hospital Ltd and Lee Funeral Home Ltd (hereafter the 1st & 2nd Defendant/Defendants, respectively). Seeking inter alia a permanent injunction to restrain the Defendants whether by themselves, their directors, servants, agents or otherwise howsoever, from continued detention of the corpse, remains of the late Rachael Kalimi Matheka (hereinafter the deceased), as security for payment of hospital bill and mortuary fees incurred; an order directing the Defendants whether by themselves their servants or agents to forthwith unconditionally release, deliver to the Plaintiff the corpse, remains of the deceased



for burial; a declaration that it is contrary to public policy and health to detain a corpse or remains of the dead as security for payment of a debt, hospital bill and mortuary fees; and costs of the suit.

2. The gist of the Plaintiff's case as pleaded was that his wife Rachael Kalimi Matheka (deceased) upon successfully delivering a child at the 1st Defendant developed complications requiring admission for further treatment. However, after one month of hospital care at the 1st Defendant's premises the deceased passed away on 22.07.2016. Whereupon, the 1st Defendant, allegedly without prior authorization from the Plaintiff and or any family member, unilaterally transferred the deceased's body to the 2nd Defendant's establishment. It was further averred that the 1st Defendant presented a medical bill of Kshs. 4,392,102.00/-, in respect of which the 2nd Defendant demanded "clearance" from the 1st Defendant before it could release to him the remains of the deceased.
3. On its part, the 1st Defendant maintained that the clearance would only grant upon payment of the pending bill of Kshs. 4,392,102.00/-, hence detaining the remains of the deceased as security for payment of the said debt. That his attempts to engage with the 1st Defendant bore no fruit. Therefore, his claim against the Defendants was the unconditional release of the remains of his late wife for burial, since the Defendants had not claimed any right to bury the deceased.
4. On 08.03.2017 the 1st Defendant filed a statement of defence and counterclaim. Denying the key averments in the plaint and asserting that while it did not insist on payment of Kshs. 4,392,102.00/- before the release of the deceased's body, it did enter into a discharge agreement/undertaking with the Plaintiff and one Darius Mbalu Kivuvo facilitating the release of the deceased's body upon part payment of the outstanding bills. By its counterclaim against the Plaintiff and Darius Mbalu Kivuvo, the 1st Defendant sought inter alia that the Plaintiff's suit be dismissed with costs and judgment be entered in its favour for the sum of Kshs. 3,011,022/-; interest on at court rates from the date of filing of the counterclaim; and costs of suit.
5. The gist of the 1st Defendant's averments in its counterclaim was that by a written agreement dated 05.09.2016 the Plaintiff and Darius Mbalu Kivuvo jointly and severally guaranteed to settle the deceased's outstanding medical bill owing to the 1st Defendant. Pursuant to which the Plaintiff paid a sum of Kshs. 1,800,000/- on 20.09.2016, leaving the outstanding sum of Kshs. 3,011,022/-. That subsequently, the Plaintiff and Darius Mbalu Kivuvo entered into a discharge agreement/undertaking acknowledging their obligation to pay the 1st Defendant. However that in breach of the said agreements the duo failed, neglected and or refused to make payments on the outstanding amount of Kshs. 3,011,022/- which the 1st Defendant claimed by the counterclaim.
6. The Plaintiff filed a reply to defence and defence to the 1st Defendant's counterclaim generally reiterating the contents of his plaint and joining issues with the 1st Defendant's defence. Meanwhile denying the key averments in the counterclaim while admitting his execution of the two (2) separate agreements dated 05.09.2016 and 20.09.2016. But asserting that the two (2) agreements were signed under duress and coercion, and are therefore illegal and unlawful, hence he was under no obligation in law to honor them.
7. The 1st Defendant thereafter filed a reply to the Plaintiff's defence to the counterclaim by denying averments therein and joining issue with the Plaintiff's defence. The 1st Defendant subsequently moved the Court via a motion dated 05.09.2019 seeking inter alia that the Plaintiff's reply to defence and defence to counterclaim dated 27.03.2017 be struck out. Kamau, J who heard the motion allowed it by a ruling delivered on 18.11.2019. This therefore was formed the state of pleadings prior to hearing of the 1st Defendant's counterclaim. It is apposite too to note at this juncture that the Plaintiff,



Lee Funeral Home Ltd and Darius Mbalu Kivuvo (the 2nd Defendant to the counterclaim), did not participate in the trial despite service. Consequently, the hearing of the suit proceeded *ex parte*.

8. During the trial, Majid King'ala testifying on behalf of the 1st Defendant, as DW1 identified himself as a Credit Officer with the 1st Defendant. Having adopted his witness statement dated 11.03.2024 as his evidence-in-chief, he produced the bundle of documents in the 1st Defendant's List of Documents dated 06.03.2017 and bundle of documents in the Supplementary List of Documents dated 13.03.2024 as DExh.1-4 and DExh.5-17 respectively. All in support of the counterclaim. He urged the Court allow the counterclaim as prayed.
9. At the close of the trial 1st Defendant filed submissions. Counsel opened his submissions by reference to the ruling delivered on 18.11.2019, by which the Court struck out the Plaintiff's reply to defence and defence to counterclaim. And the fact that despite service, the Plaintiff failed to attend the hearing of the main suit. Citing Order 12 Rule 3 of the Civil Procedure Rules counsel argued that given the *ex parte* hearing of the main suit and counterclaim, the Plaintiff's suit stood dismissed.
10. Addressing the 1st Defendant's counterclaim, he contended that based on DW1's oral and documentary evidence in support of the counterclaim, the total amount due to the 1st Defendant stood at Kshs. 4,822,622/-. Asserting that even though the amount pleaded is less than that sum, the Plaintiff has not been taken by surprise and, in any event, the amount claimed for services rendered has not been disputed. Therefore, the higher amount claimed ought to be awarded. The Court of Appeal decision in Joseph Amisi Omukanda v Independent Electoral and Boundaries Commission & 2 Others [2014] eKLR was called to aid in the latter regard. The Court was thus urged to dismiss the Plaintiff's suit and allow the 1st Defendant's counterclaim as prayed.
11. The Court has considered the pleadings, record, the evidence as well as the submissions by the 1st Defendant. The question for determination is whether the 1st Defendant has established its counterclaim on balance of probability, and if so, what reliefs ought to be granted. The parties' pleadings represent the parties' claims or defences and their respective positions in a dispute. The Court of Appeal in Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, held that: -

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

12. Further, the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The decision of the Court of Appeal in Karugi & Another v Kabiya & 3 Others (1987) KLR 347 is pertinent here: -

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal



proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

13. The respective pleadings by the parties have been captured above. The record confirms that on 18.11.2019 Kamau, J struck out the Plaintiff’s reply to defence and defence to the 1st Defendant’s counterclaim. The undisputed facts as can be gleaned from the plaint and counterclaim are that the deceased was admitted to the 1st Defendant’s facility for purposes delivery, which was successful. However, she subsequently developed complications requiring her admission for further treatment at the 1st Defendant’s facility, but unfortunately passed away on 22.07.2016. Her remains later being transferred to the 2nd Defendant facility.
14. It is further undisputed that the 1st Defendant presented a bill of Kshs. 4,392,102.00/- to be settled prior to the release of the deceased’s body. In respect of the said bill, the Plaintiff and Darius Mbalu Kivuvo admittedly executed two (2) discharge agreement/undertakings dated 05.09.2016 and 20.09.2016 concerning settlement of the outstanding bill, having paid a sum of Kshs. 1,800,000/-. Therefore, the court must determine whether the 1st Defendant is entitled to judgment in the sum of Kshs. 3,011,022/- being the balance claimed on the strength of the executed discharge agreement/undertakings dated 05.09.2016 and 20.09.2016 (hereafter the agreements) . The claim therefore being one based on contract.
15. The role of the court in adjudicating over disputes between contracting parties is settled. In National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, the Court of Appeal held that ;-

“A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties.”

16. It is useful to reproduce in part the relevant facets of the executed agreements dated 05.09.2016 (DExh.3) and 20.09.2016 (DExh.4). The relevant clauses of DExh.3 read as follows; -

“Whereas

“1. Rachael Kalimi Matheka of admission number 231983 was admitted on 23rd June 2016 and until her demise on 22nd July 2016.

2. The patient delivered a healthy baby Racheal Kalimi Matheka who was admitted as number 231991.
3. The said patient together with the baby incurred a medical bill and related charges at the Hospital amounting to Kshs. 4,811,002/= as at 5th September 2016 excluding the doctor’s charges. The patient had made a deposit of Kshs. 100,000 leaving a balance of Kshs. 4,711,022/-. Details of the said medical bill are as shown in the annexed inpatient final bill.

Now this agreement witnesseth as follows;-

4. That the guarantors have agreed to pay Kshs. 1,800,000/- on 5th September 2016 which the hospital will acknowledge receipt of leaving a balance of Kshs. 2,911,022/-.



5. That the guarantors hereby acknowledge, confirms and takes full responsibility to settle the said outstanding amount of Kshs. 2,911,022/-.
 6. That on 10th October 2016, the guarantors will present themselves to the Hospital's Credit Control Department and agree on the way forward and structure a payment plan for the outstanding amount.
 7. The Hospital has released the deceased's body unconditionally but the guarantors have guaranteed to settle the outstanding amount in accordance with this agreement.
 8. The Hospital has waived any requirement for them to have a security document and it has relied on their representation that they do not have any security documents to present to the hospital.
 9. The guarantors have warranted that they will abide by the agreement and present themselves on the said dates after which they shall structure a payment plan to be effected by themselves after it is accepted by the Hospital.
 10. That the guarantors are aware that should they not settle the said amount within the payment plan, they will be held criminally liable.
 11. If the guarantors shall fail to settle the debt as stipulated in this agreement, the Hospital may give to them or their personal representatives or assigns a fifteen (15) days' notice in writing requiring them to complete the payment before the expiration of such notice.
 12. If the guarantors or their personal representative fail to comply with the said notice, the hospital shall be entitled to do;-
 - a) to immediately commence proceedings by way of summary proceedings under Civil Process and/or
 - b) attach any of the movable and/or immovable assets or any assets in which the guarantors may have interest, including the one listed hereinabove within the Republic of Kenya.
 13. That parties have agreed and executed this agreement voluntary and without coercion; and the guarantors have read and understood the same having been explained to them and sought the necessary independent legal advice thereof." (sic)
17. The pertinent clauses in DExh.4, state as follows;-
- "Whereas
- "1.
 2.
 3. The said patient together with the baby incurred a medical bill and related charges at the Hospital amounting to Kshs. 4,811,002/- as at 5th September 2016 excluding the doctor's charges. The patient had made a deposit of Kshs. 100,000 leaving a balance of Kshs. 4,811,022/-. Details of the said medical



bill are as shown in the annexed inpatient final bill. The guarantor has also guaranteed to settle the doctor fees which is amounting to Kshs. 1,055,000/-. In that case the total outstanding bill will be Kshs. 5,866,022/=

Now this agreement witnesseth as follow;-

4. That the guarantors have agreed to pay Kshs. 1,800,000/- on 5th September 2016 which the hospital will acknowledge receipt of leaving a balance of Kshs. 4,066,022/-.
5. That the guarantors hereby acknowledge, confirms and takes full responsibility to settle the said outstanding amount of Kshs. 4,066,022/-.
6. That on 20th October 2016, the guarantors will present themselves to the Hospital's Credit Control Department and agree on the way forward and structure a payment plan for the outstanding amount." (sic)

18. Comparing DExh.3 and DExh.4, the only variation between the former and latter is at Clause 3, 4, 5 & 6 of the latter. There was no indication from DW1 whether DExh.4 was an addendum to DExh.3, given the sums pleaded as owing to the 1st Defendant in the counterclaim. Reading the contents DExh.3 and DExh.4 together, it appears to the court that the latter was intended as a further agreement and/or addendum to the former. Undoubtedly, both were duly executed by the Plaintiff and Darius Mbalu Kivuvo. Clause 12(a) of both DExh.3 and DExh.4 authorized the 1st Defendant to commence civil proceedings in the event the Plaintiff and Darius Mbalu Kivuvo failed to settle the amount owing to the 1st Defendant, upon service of a fifteen (15) days' notice in writing to the Plaintiff and Darius Mbalu Kivuvo or their personal representatives or assigns. See clause 11.

19. What is the sum owing and is the 1st Defendant is entitled thereto? As earlier observed, the 1st Defendant's counterclaim sought judgment in the sum of Kshs. 3,011,022/- with interest at the Court's rate from date of filing the counterclaim until payment in full. As held in *Wareham t/a A.F. Wareham (supra)*, cases are tried and determined on the basis of the pleadings, and it is trite that parties are bound by their pleadings. In *North Kisii Central Farmers Limited v Jeremiah Mayaka Ombui & 4 others [2014] eKLR* the Court of Appeal after discussing relevant precedent reiterated this position by stating that; -

“The complaint running through the submissions by the learned counsel for the appellant in this appeal was that the learned judge wrote and delivered a judgement on issues that were not pleaded in the plaint and which were therefore not be before the learned judge for determination.

.....One of the issues for determination on appeal in the case of *Abdul Shakoor Sheikh v Abdul Najeid Sheikh Civil Appeal No. 161 of 1991 (ur)* was the complaint that the trial judge dealt with an issue which was not properly before him as it had not been pleaded in the plaint. It was also contended in that appeal that in making this part of the order dependent on a non-existent appeal the judge grossly erred in that he granted a relief which had not been sought. This court differently constituted agreed and held that a plaintiff is not entitled to reliefs which he has not specified in his statement of claim as pleadings play a very pivotal role in litigation. The court cited a quote from the authors *Bullen and Leake (12th edition)* page 3 under the rubric *Nature of Pleadings*:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which the parties can prepare and present



their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

20. In concluding, the Court stated that: -

“It was held in the case of *Galaxy Paints Co. Limited v Falcon Guards Limited* [2000] 2EA 385 that the issues for determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgement on the issues arising from the pleadings or such issues as the parties framed for determination. It was further held that unless pleadings were amended parties were confined to their pleadings. This position had been taken in the earlier case of *Gandy v Caspair* [1956] EACA 139 where it was held that unless pleadings were amended parties must be confined to those pleadings. It was further held that to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record.

In a judgement delivered recently by this Court on 14th February, 2014 in *Romanus Joseph Ongombe & others v Cardinal Raphael Ochieng Otieno & others (Kisumu) Civil Appeal No. 20 of 2011 (ur)* it was held that a judgement whose basis was on issues not founded on the pleadings was a nullity. This Court proceeded in that case to remit the matter to the High Court for retrial.

The position flowing from all the previous judgements we have considered herein is that a judgement must be based on issues arising from the pleadings and the trial judge is not at liberty, as the trial judge in the case leading to this appeal did, to depart from the pleadings or the case before the court to write and deliver a judgement on issues that are not before the court. The difference would of course be where the parties introduce an unpleaded issue in the course of the trial and leave that issue for the court to decide. The court would in that event be entitled to make a necessary finding - See *Odd Jobs Mubia* [1970] EA 476 where it was held that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for a decision.

The appellants complaint in this appeal is basically that the learned judge delivered a judgement on issues that were not pleaded, and which were not before the court. We agree. The learned judge adopted a path of doing what she perceived to be “justice” to the parties but in the event she erred by departing from the general rule that issues for determination in a suit generally flowed from the pleadings and the learned judge could only pronounce judgment on the issues arising from the pleadings.”

21. The trial of the suit herein proceeded *ex parte* in the absence of the Plaintiff and or his counsel. By its counterclaim, the 1st Defendant’s claimed the sum of Kshs. 3,011,022/- (See Para. 21 of the 1st Defendant’s counterclaim). However, through DW1’s witness statement, the 1st Defendant claimed the sum of Kshs. 4,822,622/- as owing while DExh.4 reflects the sum of Kshs. 4,066,022/-. Evidently, there is a discrepancy between the pleaded sum of debt owed and the evidence by DW1. The 1st Defendant’s counsel asserting in his submissions an exception to the rule that parties are bound by their pleadings, and that the Plaintiff has not been taken by surprise by the sums now sought, in respect of undisputed services rendered. In support of the claimed amount for service rendered in its facility the 1st Defendant has relied on DExh.5-17 being invoices from its facility and doctors who rendered services to the deceased and her newborn baby.



22. This suit is premised on breach of contract, specifically DExh.3 and DExh.4, by the Plaintiff and Darius Mbalu Kivuvo. DW1's witness statement reveals that the deceased's body was released on 24.09.2016, a matter not in controversy. The debt sums specifically pleaded was Kshs. 3,011,022/- and not Kshs. 4,822,622/- or Kshs. 4,066,022/-. The court does not accept the application in this instance of the decision in Joseph Amisi Omukanda (supra) cited by the 1st Defendant in justification of the exception to the rule that parties are bound to their pleadings. The exception was also stated in *Odd Jobs vs Mubia* [1970] EA 476.
23. The key reason in this case for the court's rejection of the 1st Defendant's assertion of the exception to the rule that parties are confined to their pleadings are, firstly, the Plaintiff not having participated in the trial had no notice during the trial of these new sums now sought by the 1st Defendant. Secondly, for the exception to apply the disputing parties must introduce an unpleaded issue at the trial and so to speak invite the court to determine. Thus, despite the services rendered being disputed by the Plaintiff, the exception asserted is not tenable in this case. Besides, inexplicably, the 1st Defendant did not seize the opportunity to amend its counterclaim filed in 2016 prior to the hearing in 2024. The facts obtaining in Joseph Amisi Omukanda (supra) are therefore distinguishable from the facts herein.
24. The 1st Defendant at para. 20 of his counterclaims averred that "Despite acknowledging their obligation to pay the first defendant, the plaintiff and Darius Mbalu Kivuvo have in breach of the agreement failed, neglected and or refused to make payment of the outstanding amount of Kshs. 3,011,022/- to the first defendant". According to Anson's Law of Contract, 28th Edition at Pg. 589 - 590, "Every breach of a contract entitles the injured party to damages for the loss he or she has suffered". Reviewing the uncontroverted oral and documentary evidence (DExh.1-17), the court is satisfied that the 1st Defendant has established the claim for Kshs. 3,011,022/- in respect of services rendered to the deceased and her newborn baby while admitted at the 1st Defendant's facility (see DExh.5-17). Moreover, DExh.3 and DExh.4 comprise admissions of indebtedness by the Plaintiff and Darius Mbalu Kivuvo. As indicated however, the 1st Defendant is only entitled to judgment in the pleaded sum of Kshs. 3,011,022/- against the Plaintiff and Darius Mbalu Kivuvo.
25. In the result, the court will dismiss Plaintiff's suit against The Nairobi Hospital Ltd and Lee Funeral Home Ltd the costs being awarded to the 1st Defendant, while allowing the 1st Defendant's counterclaim against the Plaintiff and Darius Mbalu Kivuvo. Accordingly, judgment is hereby entered for the 1st Defendant against the Plaintiff and Darius Mbalu Kivuvo, jointly and severally for the sum of Kshs. 3,011,022/-, with interest at court rates, from the date of filing of the counterclaim, until payment in full. The costs of the counterclaim are similarly awarded to the 1st defendant, with interest from the date of this judgment, until full payment.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31ST DAY OF JULY 2024.

C.MEOLI

JUDGE

In the presence of:

For the 1st Defendant/ Plaintiff in counterclaim: Mr. Amwayi h/b for Mr Mwihuri

For Plaintiff/ Defendant in Counterclaim: N/A

For Darius Mbalu Kivuvo -Defendant in counterclaim: N/A

C/A: Erick

