Mutindwa Farmers Co-operative Society Ltd v Iriga Farmers Society Ltd & 2 others (Civil Appeal 594 of 2018) [2024] KEHC 9882 (KLR) (Civ) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9882 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 594 OF 2018

DKN MAGARE, J

JULY 30, 2024

BETWEEN

MUTINDWA FARMERS CO-OPERATIVE SOCIETY LTD ..... APPELLANT

AND

IRIGA FARMERS SOCIETY LTD ..... 1ST RESPONDENT

KIRIAINI FARMERS SOCIETY LTD ..... 2ND RESPONDENT

CO-OP HOLDINGS CO-OPERATIVE SOCIETY LTD ..... 3RD RESPONDENT

(Being an appeal from the Ruling of the Co-operative Tribunal at Nairobi in Tribunal Case No. 854 of 2016)

JUDGMENT

1. The appeal arises from the ruling and order of the Cooperatives Tribunal delivered on 6/6/2017 in Nairobi Cooperatives Tribunal Case No. 854 of 2015.

2. The Appellant preferred 20 grounds in the Memorandum of Appeal dated 18/12/2018. I have perused the 20 paragraph memorandum of appeal. It is prolixious, repetitive, and unseemly. The proper way of filing an appeal is to file a concise memorandum of appeal without arguments, cavil or evidence. The rest of the King's language should be left to submissions and academia. Order 42 Rule, 1 provides as doth: -

> " 1. Form of appeal –
>
> (1). Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
> (2) The memorandum of appeal shall set forth concisely and

under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

3. The Court of Appeal had this to say in regard to Rule 86 (which is pari materia with Order 42 Rule 1) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of Rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

4. Further in Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR , the court of appeal observed that : -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013*, this Court stated:
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> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

5. The memorandum of appeal raises only 2 issues, that is;

   a. The tribunal erred in failing to find that the suit had abated.

   b. The tribunal erred in consolidating CTC No. 854 of 2016 and CTC No. 708 of 2016.

6. The rest of the grounds are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the Magistrate's court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.

7. The statement of claim dated 15/12/2016 sought the following reliefs:

    a. Order that the members of the claimant who were previously members of the 1st and 2nd Respondents have an interest in properties of the 1st and 2nd Respondents that were acquired before the 1st and 2nd Respondent's membership split to form the claimant.

    b. The consequential property be shared with the claimant and or the members of the claimant who were previous members of the 1st and 2nd Respondents.

    c. An order directing how such property should be shared with the claimant and or members of the claimant who were previous members of the 1st and 2nd Respondents.

    d. Costs and interest of the suit.

8. It was averred that on 8/11/1996, by mutual consent the membership of the Appellant split. Famers of the 1st Respondent left and formed the 2nd Respondent. Further, that prior to the split, all the liabilities of the 1st and 2nd Respondents had been fully settled and numerous assets acquired which have not been shared.

9. The impugned Ruling arose from the Appellant's preliminary objection dated 23/1/2017 on the grounds that there was judgment in CTC No. 708 of 2016; the claim was time barred, and the tribunal had no jurisdiction.

10. The tribunal considered and dismissed the preliminary objection on 6/6/2017. Aggrieved, the Appellant filed this appeal.

Analysis

11. The court has considered the appeal and the submissions filed by the parties in relation to their positions. It is not for lack of consideration that the submitted authorities are not reproduced herein.

12. The issue is whether the Tribunal erred in dismissing the Appellant's Preliminary Objection.

13. This being a first appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. Therefore, it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.

14. In the case of Mbogo and Another v Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

15. The duty of the first appellate court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another v Associated Motor Board Company and Others [1968] EA 123, where the court in their usual gusto, held by as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

16. The court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

17. In the case of Peters v Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

18. I note that the tribunal found that it had jurisdiction under Section 77 of the Cooperative *Societies Act*. That on limitation of actions, the issue would be determined after examining evidence as there were no minutes and resolution to determine compliance under Section 30 of the Cooperative *Societies Act*.

19. It is my understanding that jurisdiction is everything. The court is bound to take jurisdiction where it has and down its tools where it does not have jurisdiction. My senior brother Nyarangi JA, as he then was, immortalized these words, in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR as follows: -

> " 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 down 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:
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> "By jurisdiction is meant the authority which a court as 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 decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist.

> Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

20. This means, that the court cannot assume jurisdiction that it does not have nor eschew jurisdiction if it has. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the supreme court stated as doth: -

> " This Court dealt with the question of jurisdiction extensively in the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

21. Section 81(1) of the Co-operatives *Societies Act* provides as follows:

> Any party to the proceedings before the Tribunal who is aggrieved by any order of the Tribunal may, within thirty days of such order, appeal against such order to the High Court: Provided that the High Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

22. In this case, I note that the court dismissed the objection on time of filing the appeal vide the ruling dated 17/11/2023. The issue is now mooted.

23. As to the claim. It is not in dispute that the claim arose in 1996. The claim as pleaded having risen on 8/11/1996 is time barred and is accordingly struck out.

24. The necessity of the 3rd Respondent to the proceedings appears not needful. In this regard, Order 1 Rule 10(2) of the Civil Procedure Rules provides thus:

> " The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendants, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

25. It is therefore clear from the above provision that the court may on its own motion or on application of any party to the proceedings order the striking out of a party whom the court finds was improperly joined. 1st Respondent has no claim against the 3rd Respondent. I strike out the 3rd Respondent from the proceedings. The effect of this is that the Ruling of the Tribunal dated 11/12/2018 declining to strike out the 3rd Respondent is set aside.

26. The Appellant lamented on consolidation of CTC No. 854 of 2016 and CTC No. 708 of 2016 as erroneous. I note that in CTC No. 708 of 2016, there was no appearance and in fact the matter

proceeded for formal proof. The court held in the case of Korean United Church of Kenya & 3 Others v Seng Ha Sang [2014] eKLR that:

> " Consolidation of suits is done for purposes of achieving the overriding objective of the *Civil Procedure Act*, that is, for expeditious and proportionate disposal of civil disputes. The main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action."

27. However, the Court observed in the case of Nyati Security Guards & Services Lrd v Municipal Council of Mombasa [2004] eKLR that:-

> " there was however situations where consolidation is undesirable....The other situation where consolidation is undesirable is where the plaintiffs in two or more actions are represented by different advocates. In such a situation, the hearing will be longer the purpose of saving time will be defeated.

28. The consolidation in this case was not proper as it could not advance the overriding object now that one matter had in fact proceeded to hearing by formal proof. Whereas consolidation may be done at any point, in this case, consolidation could not serve justice after formal proof proceedings. In Benson G. Mutahi v Raphael Gichove Munene Kabutu & 4 Others [2014] eKLR in which the Court analyzed the rationale in the Appellate decision in Ngumbao v Mwatate & 2 Others [1988] KLR 549 held as follows:

> " it is also clear from a reading of the Court of Appeal's decision in Ngumbao v Mwatate & 2 Others[1988] K.L.R. 549 that a part heard case can still be consolidated with a fresh case and parties who had testified can be recalled or the case can continue from the evidence earlier recorded. Therefore, the submissions of Mr. Muyodi that this case cannot be consolidated with Kerugoya ELC Case No. 809 of 2013 (OS) because it is part heard, does not find support in any case law and in any case, no case was cited for the proposition."

29. In the conclusion, the appeal partly succeeds.

Determination

a. Appeal against the Ruling of 6/6/2017 is dismissed as it was filed out of time.

b. The decision made on 11/12/2018 is set aside.

c. The 3rd Respondent is struck out of the suit, as no order is sought against them.

d. The consolidation of CTC 708 of 2016 is set aside.

e. The 1st Respondent has no claim against the 3rd Respondent.

f. The Tribunal to proceed with CTC 706 of 2018.

g. The claim as pleaded having risen on 8/11/1996 is time barred and is accordingly struck out with costs to the Appellant.

h. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 30TH DAY OF JULY, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Mbuthia for the Appellant

No appearance for 1st and 2nd Respondents

Mr. Okiring for 3rd Respondent

Court Assistant – Jedidah