Wanjiru v Munga (Civil Appeal E759 of 2021)
[2024] KEHC 9804 (KLR) (Civ) (29 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9804 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E759 OF 2021

DKN MAGARE, J

JULY 29, 2024

BETWEEN

SIDI WANJIRU ..... APPELLANT

AND

ANN MUNGA ..... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of trial court delivered on 17th September 2021 by Hon. A.M. Obura Senior Principal Magistrate in Milimani CMCC No. 1079 of 2018.

2. The Memorandum of Appeal, however, is a classical study on how not to write a memorandum of appeal. The Appellant filed a prolixious 7 paragraph argumentative memorandum of appeal filed on 22/3/2021. The grounds are argumentative, unseemly and do not please the eye.

3. Order 42 Rule 1 that requires that the memorandum of appeal be concise. The same provides as doth: -

> " 1. Form of appeal –
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> 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."

4. 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..."

5. 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."

6. The memorandum of appeal raises only one ground, that is: the learned magistrate erred in law and fact in allowing the Respondent's claim without evidence.

7. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time.

Pleadings

8. Vide the Plaint dated 20/2.2018, the Respondent instituted the suit in the lower court seeking a mandatory injunction, Kshs. 450,000/- in refund, Kshs. 713,190/- general damages and costs and interest.

9. The claim arose from an alleged agreement in which the Appellant permitted the Respondent to construct a house on the Appellant's property valued at Kshs. 910,590/=.

10. It was also pleaded that after completion of the one-bedroom house, the Appellant unlawfully distressed against the Respondent on account of an outstanding debt of Kshs. 203,000/-.

11. The Appellant entered appearance and filed a defence denying the averments in the Plaint. The Appellant however admitted that the Respondent owed her Kshs. 203,400/-.

Evidence

12. During the hearing, the Respondent testified as PW1. She relied on her witness statement dated 20/2/2018 and bundle of documents of the same date which she produced in evidence.

13. It was her case on cross examination that she admitted owing the Appellant Kshs. 203,000/-. She testified that she was forced to sign the agreement.

14. The Appellant, DW1 also testified in court relying on the witness statement and bundle of documents dated 11/4/2018. She testified that the Respondent asked her to keep her property when the Respondent left for Switzerland. That the Respondent was to give her Kshs. 10,000/ per month and the property was kept for over a year.

15. On cross examination, it was her case that the Respondent was to pay Kshs. 203,000/- within 90 days. That it is herself who built the property and not the Respondent. Further, she testified that she paid for the Respondent's materials used.

16. It was her case on cross examination that she was the owner of the property where the construction was to take place. Further, that there was nothing in writing to show that the Respondent would construct for her. That the construction started before the date of the documents and the invoice was raised before the construction.

17. The court considered the case and rendered its judgment on 5/11/2021. In the judgment the court held that the Respondent had proved her claim against the Appellant to the required standard and allowed it.

18. Aggrieved, the Appellant lodged a memorandum of appeal hence this appeal.

Submissions

19. The Appellant filed submissions dated 7/3/2024. It was submitted that the Appellant did not prove her case. It was thus submitted that this court was duty bound to review the evidence and arrive at its own finding. They cited Mbogo v Shah (1968) EA 15.

20. The Respondent does not appear to have filed submissions.

Analysis

21. The issue that falls for this court's determination is whether the trial court erred in allowing the Respondent's claim.

22. 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. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.

23. In the case of Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123, the Court stated as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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 the 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

24. The learned magistrate established that the Respondent proved on a balance of probabilities that she spent Kshs. 916,590/- to construct the house. The Respondent pleaded that she had receipts worth Kshs. 916,590/-. Receipts are special damages that should not only be specifically pleaded but also strictly proved.

25. Therefore, with special damages, the rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find their proof. It is not based on estimates. The Court of Appeal in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177 where it was stated that:

> " The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

26. Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved. This court's task thus entails whether the lower court awarded special damages that were not pleaded and/ or proved.

27. Regarding proof of loss, while it is true that it is trite law that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.

1. The court has perused the evidence relied upon to prove Kshs. 916,590/-. I note that the documents are not receipts. They are delivery notes. The documents therefore establish that building materials were delivered but do not prove the cost of the materials. While dealing with the same issue in EP Communications Limited v East African Courier Services Ltd (2019) eKLR, Gikonyo, J stated as follows:

   The evidence shows that a business relationship exited between the parties herein. There is also evidence that goods were supplied to the Respondent during the business relationship

on credit. However, two issues abound: were the goods alleged to have been supplied actually supplied and received? And were they paid for by the Respondent? The Appellant produced LPOs, and delivery notes. The purpose of an invoice is that it is issued by a seller to to request for payment for purchase....a delivery note is prove of delivery of goods...

29. Therefore, the Respondent had the burden to prove the allegations in the Plaint. On this subject, Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

30. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

31. It follows that the initial burden of proof lies on the Plaintiff. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail fi no evidence at all were given as either side."

32. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

33. Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

34. In Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
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> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
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> This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained."

35. Consequently, in my reevaluation, I find no basis for the finding by the lower court that the Respondent had incurred Kshs. 915,590/- towards the construction of the house. The amount was clearly not proved. It would be expected that the Respondent produced actual expense incurred in the purchase of building materials and labour. A delivery note is not enough and would not strictly prove an expense of construction materials and labour as pleaded in the Plaint.

36. The Court of Appeal cited the judgment by Lord Goddard CJ. in Bonham Carter v Hyde Park Hotel Limited (1948) 64 TLR 177), that:

> [The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it.
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> in Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell), Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

37. I therefore find basis to disturb the finding of the lower court. The same is set aside.

Determination

38. In the circumstances, I make the following orders:

    a. The Appeal is allowed.

    b. Judgment of the lower court in Milimani CMCC No. 1079 of 2018 delivered on 5/11/2021 is set aside and substituted with an order dismissing the suit with costs.

    c. The Appellant shall have the costs of this appeal assessed at Kshs. 55,000/-.

DELIVERED, DATED AND SIGNED AT NYERI, ON THIS 29TH DAY OF JULY, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Jedidah