Directline Assurance Company Limited v Musyoki (Civil Appeal E129 of 2022) [2024] KEHC 8972 (KLR) (Civ) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8972 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E129 OF 2022

DKN MAGARE, J

JULY 25, 2024

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED .... APPELLANT

AND

BEATRICE MWIKALI MUSYOKI .... RESPONDENT

JUDGMENT

1. This appeal arises from the Ruling and Order of Hon. D.W. Mburu, Senior Principal Magistrate delivered on 11/2/2022 in Milimani CMCC No. E9352 of 2022.
2. The Ruling arose from the application dated 23/8/2021 that the Defendant's defence be struck out and judgement be entered for the Plaintiff in the manner prayed in the plaint.
3. The Appellant was the Defendant and the Respondent was the Plaintiff in the court below.
4. The defence was said to be vexatious, scandalous and a mere denial disclosing no cause of action.
5. The Memorandum of Appeal, however, is a classical study on how not to write a Memorandum of Appeal. The appellant filed a prolixious 8 paragraph mammoth and argumentative memorandum of appeal filed on 8th March 2022. The grounds are argumentative, unseemly and do not please the eye.
6. Order 42 Rule 1 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."

7. The Court of Appeal had this to say in regard to rule 86 (which is pari mateira 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..."

8. 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."

9. The Appellant filed a defence dated 12/8/2021 stating that the Plaintiff is not a third party, no statutory notice was issued, nor notice of this declaratory suit was served upon the defendant. They also denied insuring motor vehicle registration number KBJ 511DF. Therefore, it was their case that they were not liability to satisfy the judgment in Thika CMCC No. 1147 of 2016.

10. The Respondent on the other hand filed application in which it was averred that the defence by the Appellants raised but mere denials because the statutory notice was duly served.

11. It was their case that liability was not repudiated. That statutory notice dated 1/11/2016 was received by the Appellant on 2/11/2016 and a copy was annexed. It was further stated that the decree was for Kshs. 3,330,380 with costs of Kshs. 333,950.

Analysis

12. I have perused the record of appeal, submissions and authorities relied upon by the parties in support and opposition to their respective cases.

13. The issue for determination is whether the lower court erred in striking out the defence and entering judgement for the Respondent.

14. The court notes that Respondent annexed the defence filed in the primary suit through the firm of Kairu & McCourt Advocates. At page 9 there is a letter dated 14/3/2017 for the Respondent to be examined at the Appellant's Medical department, Hazina Towers, 18th floor, by Dr. Jennifer Kahuthu who prepared a medical report dated 27/4/2017.

15. The Court of Appeal in the case of *DT Dobie & Company (Kenya) Ltd vs. Muchina* (1982) KLR laid the principles applicable in considering whether or not to strike out pleadings which were enunciated and summarized as follows:-

    a. The Court should not strike out suit if there is a cause of action with some chance of success;

    b. The power to strike out suit should only be used in plain and obvious cases and with extreme caution;

    c. The power should only be used in cases which are clear and beyond all doubt;

    d. The Court should not engage in a minute and protracted examination of documents and facts; and

    e. If a suit shows a semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward."

16. On triable issues, in *Patel vs. E.A Cargo Handling Services Ltd* (1974) EA 75 at p.76 Duffus P. held that "a triable issue is an issue which raises a prima facie defence and which should go to trial for adjudication."

17. Further, in *Five Forty Aviation limited v Tradewinds Aviation Services Limited* [2015] eKLR the Court of Appeal, citing its previous decisions stated as follows:-

> " We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel v E.A. Cargo Handling Services Ltd [1974] E.A. 75 at page 76 Duffus P. said: "In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as Sheridan, J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

18. The quest to striking out pleadings is premised on Order 2 rule 15 (1)(d) of the *Civil Procedure Rules* which provides as follows:

> “(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
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> (a) It discloses no reasonable cause of action or defence in law; or
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> (b) It is scandalous, frivolous or vexatious; or
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> (c) It may prejudice, embarrass or delay the fair trial of the action; or
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> (d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

19. In discerning the meaning of the stated Order 2 Rule 15 of the *Civil Procedure Rules* in *Transcend Media Group Limited v Independent Electoral & Boundaries Commission (IEBC)* [2015] eKLR the court stated as follows:

> A pleading is an abuse of the process where it is frivolous or vexatious or both. What is vexatious, the Learned Judge held that a matter is said to be vexatious when
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> (i) it has no foundation; or
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> (ii) it has no chance of succeeding; or
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> (iii) the defence (pleading) is brought merely for purposes of annoyance; or
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> (iv) it is brought so that the party’s pleading should have some fanciful advantage; or
>
> (v) .where it can really lead to no possible good and a matter is frivolous if
>
> (i) it has no substance; or
>
> (ii) it is fanciful; or
>
> (iii) where a party is trifling with the Court; or
>
> (iv) when to put up a defence would be wasting Court’s time; or
>
> (v) when it is not capable of reasoned argument.
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> See Bullen & Leakey and Jacobs *Precedents of Pleading* (12th Edn.) at 145.

18. In this case, the defence filed was a classic case of an evasive defence. The defence satisfied the grounds upon which a defence may be struck out as disclosing no cause of action or being a mere denial. The Appellant was served with the statutory notice and defended the primary suit and appointed doctors. It defended the said suit to the end. I cannot see a notice served in accordance with Section 12 of the *Insurance (Motor vehicle Third Party Risks) Act*. It provides as doth:

(1) Any person against whom a claim is made in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 shall, on demand by or on behalf of the person making the claim, state whether or not he was insured in respect of that liability by any policy having effect for the purposes of this *Act* or would have been so insured if the insurer

had not avoided or cancelled the policy and, if he was or would have been so insured, give such particulars with respect to that policy as were specified in the certificate of insurance issued in respect thereof under section 7.

(1A) The insurer shall, upon being served with the statutory notice and documents, admit or deny liability for the claim or judgment by a notice in writing to the person or persons presenting the claim or judgment.

(1B) The claimant or judgment debtor or his representative shall upon receipt of the admission of liability shall allow the insurer a period of not more than sixty days to settle the claim or judgment out of court and both the insurer and the claimant or judgment debtor or his representative commit to arbitration or mediation during that period before resorting to court.

(2) If, without reasonable excuse, any person fails to comply with the provisions of this section, or willfully makes any false statement in reply to any such demand as aforesaid, he shall be guilty of an offence.

18. Consequently, the lower court was correct in striking out the Defence. The Appellant is thus bound to settle the decree within the bounds of the law.

18. Section 5 of the *Insurance (Motor Vehicle Third Party Risks) Act* CAP 405 stipulates as doth: -

5. Requirements in respect of insurance policies

...Provided that a policy in terms of this section shall not be required to cover –

...

iv) Liability of any sum in excess of three million shillings, arising out of a claim by one person

20. The limit is thus Kshs. 3,000,000/-. This applied to general and special damages. It does not apply to costs. Costs are a creature of Section 27 of the *Civil Procedure Act* as doth:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

21. Therefore, the cost of Kshs. 333,950/= are due and awardable. Secondly, out of Kshs. 3,330,380/=, a sum of Kshs. 3,000,000/= as statutory amount is due and payable by the Appellant.

22. As regards interest, Section 26 of the *Civil Procedure Act* provides as doth:

(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate

as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.

23. Ipso facto, the sum of Ksh. 3,000,000/- must attract interest. The passing of Section 5(b)(vi) of *Cap 405* did not anticipate that there could be rogue insurance companies that would look for every hook to hang on to delay meeting their liability. To exempt such an insurance company from paying interest would be tantamount to encouraging misbehavior. However, the sum is not homogenous. The first sum is paid for special damages which attract interest from the date of filing the suit and then general damages attract interest from the date of the judgement. These dates refer to the primary suit.

24. In the circumstances, the Appeal is devoid of merit.

Determination

25. In the upshot, I make the following orders: -

a. The Appeal is dismissed.

b. For the avoidance of doubt, the Appellant is bound to satisfy the decree in Thika CMCC No. 1147 of 2016 as follows:

i. Special damages

ii. General damages

Total – Ksh. 3,000,000/=.

c. Costs in the primary suit of Kshs. 333,950/=

d. Special damages will attract interest at court rates from 21/2/2017 being the date of filing the Amended Plaint in the suit in Thika CMCC No. 1147 of 2016

e. General damages will attract interest at court rates from 18/2/2021 being the date of Judgment in Thika CMCC No. 1147 of 2016.

f. The Appellant shall pay costs of the Appeal assessed at Kshs. 235,000/- to the Respondent.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 25TH DAY OF JULY, 2024.

KIZITO MAGARE

JUDGE

Judgment delivered through Microsoft Teams Online Platform.

In the presence of: -

No appearance for parties

Court Assistant – Jedidah