Hardev Singh t/a Sandu Builders & Contractors v Mbindyo (Civil Appeal E021 of 2024) [2024] KEHC 11829 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11829 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E021 OF 2024

TW OUYA, J

SEPTEMBER 30, 2024

BETWEEN

HARDEV SINGH T/A SANDU BUILDERS & CONTRACTORS .... APPELLANT

AND

JUDY NZULA MBINDYO ALIAS JUDY KALINGA ..... RESPONDENT

(Being an appeal against the judgement and decree of the Hon. M. Thibaru (Adjudicator) delivered on 22nd January, 2024 in Machakos SCCC No. E515 of 2023)

JUDGMENT

Background

1. Hardev Singh t/a Sandhu Builders & Contractors, (hereinafter the Appellant), the Claimant before the lower Court, initiated suit by way of a statement of claim dated 27th October, 2023 as against Judy Nzula Mbindyo alias Judy Kalinga, the Respondent before the lower Court, (hereinafter the Respondent) claiming judgment in the sum of Kshs.1,000,000/; interest on the forestated sum from date of judgment until payment in full; and costs & interests until payment in full.

2. The claim arose when on or about the 12th September 2018, the Respondent approached the Appellant and instructed him to begin construction works in respect of flats (hereinafter the flats) wherein the latter was to initially put up a perimeter wall around the property where the flats would be built. That at first, the parties hereto did not execute an agreement however the Appellant began the said works in question on accord of the good and long-standing family relationship between the parties meanwhile as at May 2019 the Appellant had done the perimeter wall and started construction on the main flat up to the first slab. It was averred that on 27th May, 2019 the Respondent wrote an email stating that it was appropriate that a certificate be prepared for the works done so far upon which as soon as a financing agreement was in place, she would settle the amount due, without delay.

3. That a Certificate of Valuation to tune of Kshs, 4,109,750/- in respect of the amount due to the Appellant was prepared on 18th June, 2019 whereafter the latter generated invoices for the Respondent's settlement. It was further averred that the Respondent made staggered payments leaving an outstanding balance of Kshs. 383,750/- accruing interest at 13% per annum thereby leaving a balance of Kshs. 1,267,531/- whereas the Appellant was willing to forfeit Kshs. 267,531/- of the said balance. That as a consequence of the Respondent's actions, the Appellant has continued to suffer prejudice and loss due to the former's breach of contract.

4. The Respondent filed a response to the statement of claim deny various facets of the claim however admitted that the sum due as at 30th December 2022 was Kshs. 376,000/- of which she has repeatedly asked the Appellant to collect the settlement cheques nevertheless has failed to do so therefore any prejudice occasioned is of the Appellant's own making.

5. At the hearing, both parties called evidence in support of the averments in their respective pleadings. In its judgment, the trial Court entered judgment in the sum of Kshs. 377,750/- in favour of the Appellant with interest from the date of judgment and costs of the claim.

6. Aggrieved with the outcome therein, the Appellant preferred the instant appeal challenging the finding by the trial Court on the following grounds in his memorandum of appeal dated 31st January 2024, as itemized hereinunder: -

> " 1. The Hon. Adjudicator/RM erred in law and fact by finding that there were no sufficient grounds advanced by the claimant on why he should be awarded interest as claimed.
>
> 2. The Hon. Adjudicator/RM erred in law and fact by finding that in the demand letter of 29th May 2023, the claimant was ready to receive payment without interest.
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> 3. The Hon. Adjudicator/RM erred in law and fact by finding that the Claimant did not state the date when interest started accruing and on what amount.
>
> 4. The Hon. Adjudicator/RM erred in law and fact by finding that the claimant had not provided any breakdown of the amount paid to help the Court reach a correct figure of the outstanding balance.
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> 5. The Hon. Adjudicator/RM erred in law and fact by failing to award interest on the principal sum due of Kshs. 383,750 from the date of the invoice. i.e. 20th June 2019 until payment in full as pleaded by the Claimant." (sic)

7. In light of afore-captioned itemized grounds of appeal, the Appellant prays that:

> " 1. The appeal be allowed.
>
> 2. The judgment of the Small Claims Court dated 22nd January 2024 be set aside in its entirety.
>
> 3. The Hon. Court does find that the Claimant is deserving interest on the principal sum due at commercial rate of 13% accruing from the date of the invoice. i.e. 20th June, 2019 until payment in full as pleaded.
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> 4. The Hon. Court does find and order that the Respondent pays the claimant Shs. 1,000,000 as pleaded.

5. The Respondent to bear costs of the appeal and the suit at the lower Court.

6. Such other or further reliefs, orders and remedies as this honorable Court may deem just and expedient." (sic)

8. Directions were taken on disposal of the appeal by way of written submissions to wit parties were given ample opportunity to file the same. As at 24th July, 2024, only the Appellant had complied with directions on filing of submissions. The Court has duly considered them.

Submissions

9. The Appellant's submissions turn on the singular issue, whether interest ought to have been awarded on the total outstanding sums of Kshs. 377,750/- from the date of invoice on 20th June, 2019. Counsel began by contending that all through the parties' engagement, the Appellant had repeatedly sought for interest from the Respondent on any balance accruing at commercial rates on accord of the fact that the agreement between them was commercial in nature. While calling to aid the provisions of Section 26 of the *Civil Procedure Act*, the decisions in Vimalvelji Shah v Chema africa Ltd [2015] eKLR and Ramji Ratma & Company Limited v Attorney General [2020] eKLR it was summarily posited that the trial Court had the powers to award the Appellant interest on the principal outstanding sum of Kshs. 377,750/- as from 20th June, 2019. Lastly, on costs of the appeal, counsel relied on Section 27 of the *Civil Procedure Act* and the decision in Cecilia Karuru Ngavu v Barclays Bank of Kenya & Another [2016] eKLR to submit that this Court has discretion to determine who ought to be liable to pay costs and interest. The Court was thus urged to allow the appeal as lodged.

Disposition And Determination

10. The Court has considered the memorandum of appeal, the record of appeal and the original lower Court record. It would be apt to observe at this juncture that this is a first appeal and specifically one from the Small Claims Court. Section 38 of the *Small Claims Court Act* prescribes the nature of appeals that lie from the said Court to the High Court by providing that; -

> "(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."

11. In ordinary appeals, the first appellate Court will only interfere with a finding of fact made by a trial Court when such finding was based on no evidence, or if it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 278. Nevertheless, by dint of Section 38 of the *Small Claims Court Act* this is no ordinary first appeal and it would be remiss if this Court were not at the outset, to satisfy itself that the appeal before it falls within the purview of Section 38 of the *Small Claims Court Act*. In considering its mandate on a second appeal, that is on points of law only, the Court of Appeal in Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR, distinguished between matters of law vis-à-vis matters of fact by stating that: -

> "I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined

to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see Selle and Another v Associated Motor Boat Company Ltd and Others [1968] EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two 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."

12. Black's Law Dictionary, 9th Ed. Pg. 1067 defines; -

> " Matter of fact as: A matter involving a judicial inquiry into the truth of alleged facts and Matter of law as: A matter involving a judicial inquiry into the applicable law."

13. The Court of Appeal in its subsequent decision in Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others [2014] eKLR while addressing the question whether a memorandum of appeal on a second appeal raised factual issues and the distinction between a matter of fact and matter of law, observed that; -

> " One of the best expositions on the distinction between the two is to be found in the judgment of Denning J in the English case of Bracegirdle v Oxley(2) [1947] 1 ALL E.R. 126 at p 130;
>
> "The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road *Traffic Act*, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them."

14. The Court of Appel continued to state that: -

> " That reasoning has been adopted in this jurisdiction. In A.G. v David Murakaru[1960] EA 484, for instance, Chief Justice Ronald Sinclair sitting with Rudd J. adverted to the factual foundations of legal questions by stating that an appellate court restricted to determining questions of law may yet quite properly interfere with the conclusion of a lower court if the same is erroneous in point of law. This is the case where that lower court arrives at a conclusion on the primary facts that it could not reasonably come to. Such a conclusion or decision becomes an error in point of law. See also Patel v Uganda [1966] EA 311 and Shah v Aguto[1970] EA 263.
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> There is no denying from the cases we have referred to, that in not a few cases the determination of whether a particular complaint on appeal a question of law is or of fact

is not always a very straight-forward one, not least because the determination of whether a lower court drew the correct legal conclusions inevitably entails an examination of the factual basis of the decision. That reality has with it the inherent danger that legal ingenuity may attempt to dress-up and camouflage purely factual issues with the borrowed garb of "legalness." This is what the majority of this Court had in mind in M'riungu And Others v R [1982-88] 1 KAR 360 when it stated, (per Chesoni AJA) at p366;

"We would agree with the views expressed in the English case of Martin v Glyneed Distributors Ltd (t/a MBS Fastenings) [1983] 1 CR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial of first appellate court unless it is apparent that; on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad law."

15. Applying the dicta in Bashir Haji Abdullahi (supra) – which this Court takes due cognizance of the fact that it was an appeal arising from an election dispute – to the grounds of appeal in the instant matter, the same would appear to exemplify "an attempt at legal ingenuity to dress-up and camouflage purely factual issues with the borrowed garb of "legalness" in a bid to escape the strictures of Section 38 of the *Small Claims Court Act*. It is manifestly evident from the memorandum of appeal that all the grounds of appeal, the Appellant elected to use the trouble-inviting pair of words, so to speak, "law and fact" in the face of a plain and straight-forward statutory exclusion of matters of fact pursuant to Section 38(1) of the *Small Claims Court Act*. Even for arguments sake, if the inclusion of the pair of words "in fact" in the said grounds presented in the memorandum of appeal was erroneous, a resolute examination of the grounds of appeal, undoubtedly reveals his intent. The grounds raised therein, challenge the lower Court's inferences and decision on "facts" and not exclusively on the "law".

16. That said, a perfunctory review of the record of appeal and submissions before this Court, the key thrust of the Appellants' case is that he was entitled to interest on the sums owing by the Respondent whereas the trial Court erred in failing to award the interest despite edicts of statute and case law on the issue. Indeed, the lower Court after considering the respective parties' pleadings and evidence relied on in support of the averments, stated in its decision that; -

> " 4. I have carefully analyzed the evidence on record and the pleadings and the submissions by both the parties. The facts of the case are not disputed the issue for determination are: how much the respondent owes the claimant, whether the claimant is entitled to the interest claimed and who is entitled to costs.
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> 5 ....
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> 6 ....
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> 7. Both the claimant and the respondent have not provided any breakdown of the amount paid to help the Court reach a correct figure of the outstanding balance. They have all thrown different figures at the Court to make a decision. I will therefore go with the figure in the demand notice being Kshs. 377,750/= and enter judgment for that sum in favour of the claimant with interest from the date of filing.
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> 8. On whether the claimant is entitled to the interest claimed, first, the claimant does not state as from when the interest is being calculated and on what amount. He has simply thrown figures at the Court. Further, the case of

> Vimalveji Shah v Chemafrica Ltd [2015] eKLR quoted by the claimant on interest is distinguishable from this current case because that case involved a loan which would automatically earn interest. I am therefore not convinced that the claimant has advanced sufficient grounds on why he should be awarded the interest as claimed.
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> 9 ....
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> 10. Judgement is therefore entered in favour of the claimant in the sum of Kshs. 377,750/= with interest from the date of filing and costs." (sic)

17. Palpably, the foregoing determination was arrived at upon analysis of the factual material presented before the trial Court. By the grounds itemized in memorandum of appeal, the Appellant is inviting this Court to re-evaluate the trial evidence, contrary to the provisions of Section 38(1) of the *Small Claims Court Act* and to make contrary findings thereon. As held in Bashir Haji Abdullahi (supra) an appellate Court faced with a situation of this kind is at liberty to strike out any grounds of appeal that are non-compliant while retaining the grounds that are compliant. In this case, having reviewed the Appellant's grounds in the memorandum of appeal, the Court is inclined to strike out grounds 1, 2, 3, & 4 for the tacit invitation contained therein to this Court to address factual issues. Therefore, it is only grounds 5 in the memorandum of appeal which appear to raise issues of law that can be entertained on this appeal.

18. Now to address the singular ground of appeal that appears to challenge an issue of law in respect of the trial Court's decision, pertinent to determining the issues before this Court are the pleadings which formed the basis of the Appellant's cases before the trial Court, See Court of Appeal decision Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91 and resultant impugned decision. This Court had earlier outlined the gist of the Appellants' pleadings and relevant facets of the impugned decision, as such it serves no purpose restating the same at this juncture. Further, having equally identified what the dispute before the trial Court gyrated on, the key question for determination is whether the trial Court's findings on the issue of interest as claimed by the Appellant, was well founded.

19. It would be germane to note that the applicable law as to the burden of proof is found in Section 107, 108 & 109 of the *Evidence Act*. Whereas, it is well trodden that the same is on a balance of probabilities meaning that the Court will assess the oral, documentary and real evidence advanced by a party and decide which case is more probable. See Court of Appeal decision in Mumbi M'Nabea v David M.Wachira [2016] eKLR. Hence, the duty of proving the averments contained in the claim lay squarely on the Appellant. In Karugi & Another v Kabiya & 3 Others [1987] KLR 347 the Court of Appeal stated that: -

> " [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. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. 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." (Emphasis added)

20. The foregoing notwithstanding, it serves as a useful reminder to restated that this Court is estopped from considering factual issues in light of the injunctive provisions of Section 38(1) of the *Small Claims Court Act*. That said, it is not in dispute that the Respondent contracted the Appellant in respect of construction services of flats. To the foregoing end, at the heart of the dispute was the oral contract between the parties and interest on the balance owing as unpaid to the Appellant. The role a Court plays while adjudicating a dispute between contracting parties is well settled in the of-cited decision of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR and this Court does not purpose to re-invent the wheel. In Karugi (supra) it was equally settled that the party with legal burden must adduce evidence which in the absence of rebuttal evidence convinces the Court that on a balance of probabilities a claim has been proved.

21. With the foregoing legal proposition in mind, the trial Court in its judgment after reviewing oral and documentary evidence, arrived at the determination that Kshs. 377,750/- was the amount owing to the Appellant on accord of the agreement between the parties. As to the question of interest, the trial Court was of the view that the Appellant did not state when interest was to be calculated and at what amount. It therefore arrived at the conclusion that the Appellant is not entitled to interest as claimed however proceeded to award interest on the adjudged amount from date of filing the claim. As to the statutory edict on interest, the same is provided for under Section 26 of the *Civil Procedure Act*, that state; -

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.

22. And on its applicability, the Court draws guidance from the Court of Appeal the decision in CFC Stanbic Limited v John Maina Githaiga & Another [2013] eKLR, wherein the superior Court while addressing the question of interest rate which was not specifically provided for by contracting parties observed that:-

> " Sections 26 and 27 of the *Civil Procedure Act*, [CPA], lay down the law relating to the grant of interest and the setting of effective dates thereof. The said provisions provide that the court has a wide discretion to grant interest and to determine the effective dates of payment of such interests.
>
> In Shah v Guilders International Bank Ltd, [2003] KLR, the Court of Appeal regarding S 26 (1) of the CPA held:
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> "This section, in our understanding, confers upon the court the discretion to award and fix the rate of interest to cover three stages, namely:
>
> (1) the period before the suit is filed;
>
> (2) the period from the date the suit is filed to the date when the court gives its judgment; and

(3) from the date of judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion, fix.

We further understand these provisions to be applicable only where the parties to a dispute have not, by their agreement, fixed the rate of interest payable. If by their agreement the parties have fixed the rate of interest payable, then the court has not discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable, or fraudulent."

Accordingly, the High Court should in its discretion award and fix the rate of interest payable.

Regarding the issue of the commercial rate of interest applicable and the total amount of interest payable this could only, in our view, be proved with evidence. From the record, the respondent did not produce any documentary evidence to show the contractual rate of interest applicable. Accordingly, the interest payable would, therefore, be discretionary as provided for by S 26 of the CPA and subject to evidence produced to support the claim..."

23. At the risk of repetition, the trial Court in its wisdom made a finding that the Appellant was not entitled to interest on the outstanding sum and as a consequence did not address itself as to when interest would start accruing on the outstanding sum. The Appellant through his submission before this Court has submitted that the trial Court had the powers to award the Appellant interest on the principal outstanding sum of Kshs. 377,750/- as from 20th June, 2019. However, a review of the material relied on before the trial Court, it is manifest that there was no agreement as to the question of interest however a formal demand in respect of the outstanding balance of Kshs.377,750/- was only made on 29th May, 2023. Here, the Court agrees with the rendition in Fagan JA in Union Government v Jackson & others [1956] (2) SA 398 (AD) at 411C–412A as cited with approval in Ramji Ratma & Company Limited v Attorney General [2020] eKLR that a claimant is entitled to interest on "..... a tempore morae falling on a debtor who fails to pay the sum owing by him on the due date." As at 29th May, 2023 a formal demand was made to the Respondent for payment of the balance whereas the latter failed to make the said remittance leading to the claim before the trial Court. Consequently, the Appellant was entitled to interest on the sum of Kshs. 377,750/- as from as from 29th May, 2023 and the trial Court was in error when it failed to award the same.

24. The result is that the Appellant's appeal partially succeeds solely on the question of interest therefore warranting the setting aside of the trial Court's decision on the issue and awarding interest on the sum of Kshs. 377,750/- at Court's rate.

Determination

i. This Appeal partially succeeds.

ii. The Judgement and or Decree in Machakos SCCC No. E515 OF 2023 delivered on 22nd January, 2024 is hereby set aside in the following terms:

a. Judgment is hereby entered in favour of the Appellant as against the Respondent for the sum of Kshs. 377,750/-

b. Interest is assessed at the Court's rate and is payable of the sum of Kshs. 377,750/- from 29th May, 2023 until payment in full.

iii. Costs of the appeal are awarded to the Appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF SEPTEMBER, 2024

ROA 14 days.

HON. T. W. OUYA

JUDGE

For Appellant Ms Munyoki Holding Brief For Dr. Musau

For Respondent N/A

Court Assistant Martin Korir