Githaiga v Ciuma (Civil Appeal E024 of 2024)
[2024] KEHC 12344 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 12344 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E024 OF 2024

DKN MAGARE, J

SEPTEMBER 26, 2024

BETWEEN

CATHERINE MUMBI GITHAIGA ..... APPELLANT

AND

KAREN CIUMA ..... RESPONDENT

(Being an appeal from the Judgment of Hon. Evelyn Gaithuma (Adjudicator) in Nyeri SCC COMM No. E462 of 2023 delivered on 9th May, 2024)

JUDGMENT

1. This is an appeal from the decision of Hon. E. Gaithuma given on 9/5/2024 in Nyeri Small Claims Case No. E462 of 2023.
2. The Appellant set down the following grounds:-
    a. That the learned Adjudicator erred in law and in fact in dismissing the Appellant's claim.
    b. That the learned Adjudicator erred in law and in fact when she arrived to a conclusion that was not supported by law or the evidence on record.
    c. That the learned Adjudicator erred in law when she disregarded the evidence on record and finding that the claimant had not proved her claim on a balance of probabilities.
    d. That the learned Adjudicator erred in law and fact in making a judgment that was contradictory in that on issue one she finds that the debt is acknowledged and then in issue 2 finds that the same debt has not been proved.
    e. The learned Adjudicator erred in law and in fact by ignoring the submissions filed by the Appellant's counsel and making findings that were not supported by the evidence adduced or the pleadings on record.

Analysis

3. This being an appeal from the Small Claims Court, the duty of the court is circumscribed under 38 of the *Small Claims Court Act* which provides as doth:

   (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.

4. The duty of the court is to defer to the findings of fact of the adjudicator and analyse the matter for issues of law. The issues of law are either due to the subject matter or the finding of law by the court. In the case of Mbogo and Another v Shah [1968] EA 93, the Court of Appeal stated as doth:

> "...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."

5. However, an appeal of this nature is on points of law. It can be pure points of law or mixed points of law but points of law it is. An appeal on points of law is akin to a second appeal to the Court of Appeal. The duty of a second appeal was set out in the case of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR: -

> "This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the 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. (See: Stanley N. Muriithi & Another v Bernard Munene Ithiga [2016] eKLR)."

6. Then what constitutes a point of law? In Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others, [2014] eKLR, the court stated as doth: -

> "4. Although the phrase 'a matter of law' has not been defined by the *Elections Act*, it has been held in Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 Others, Malindi Civil Appeal No. 39 Of 2013 (Court Of Appeal), (Okwengu, Makhandia & Sichale, JJA) of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing Bracegirdle v Oxney [1947]1 All ER 126. See also *Khatib Abdalla Mwashetani Vs Gedion Mwangangi Wambua & 3 Others, Malindi Civil Appeal No. 39 of 2013* (Court Of Appeal), (Okwengu, M'inoti & Sichale, JJA) of 23.01.2014 following AG v David Marakaru [1960] EA 484."

7. In Peter Gichuki King'ara v Iebc & 2 Others, Nyeri Civil Appeal No. 31 Of 2013 (Court Of Appeal) (Visram, Koome & Odek, JJA) of 13.02.2014, the court of Appeal held as follows: -

> "It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction

of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanour – is an issue of law."

8. This arose from a claim from 2015. The court found as a fact that this was not proved. The only one question of law is whether there was an acknowledgment that was given. Indeed there was an acknowledgment that was pleaded for Kshs.150,000/=. There is no acknowledgment for the pleaded sum of either 562,000/= or 412,000/=.

9. The court found that the claim is not supported by evidence. There was no question of law relating to the facts. The adjudicator was satisfied on the lack of proof. It was not a question based on no evidence. In Peters v Sunday Post Limited [1958], it was held that:-

> "Apart from the classes of cases in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the court of appeal) of having the witnesses before him and observing the manner in which their evidence is given... Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself, and appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears form the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question....it not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be show to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

10. The Appellant cannot posit that the matter was decided on no evidence. Further a party cannot in law, treat communication over 20,000/= and rent as acknowledgment of the actual debt. Consequently, there is no admission of the debt. The acknowledgment relate to the money it was speaking of and not the debt as pleaded. Guardian Bank Limited v Jambo Biscuits Kenya Limited [2014] eKLR held that:-

> " The principle applicable in judgment on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of Order 13 Rule 2 of the Civil Procedure Rules is not one which requires copious interpretations or material to discern. It must be plainly and readily discernible. In such clear admission, like J.B. Havelock J stated in the case of 747 *Freighter Conversion LLC v One Jet One Airways Kenya Ltd & 3 Others HCCC No. 445 of 2012*, there is no point in letting a matter go for a trial for there is nothing to be gained in a trial. See the case of Botanics Kenya Ltd Ensign Food (K) Ltd Hccc No. 99 of 2012, where Ogola J gave a catalogue of other cases which amplified this principle. These cases are: Choitram v Nazari [1984] KLE 327 that;-
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> "...admissions have to be plain and obvious as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning." Chesoni Ag. JA went on to add that:-
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> "...an admission is clear if the answer by a bystander to the question whether there was an admission of facts would be 'of course there was". Cassam v Sachania [1982] KLR 191 –
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> "The judge's discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment"

11. The claim did not meet the threshold. The Appeal, equally did not meet the criteria for errors of law. It is thus clear to the court that the appeal lacks merit as there are no errors of law shown to exist.

12. Before departing I note that the appeal is alleged to be on errors of law and fact. The court has no jurisdiction over facts. In the circumstances, I find that the appeal is not merited and is dismissed.

13. On costs, this court has discretion. Having filed an unmeritorious Appeal, the court should not reward the Appellant. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law,

constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

14. In the circumstances, the Respondent is awarded costs of 30,000/=.

Determination

15. The upshot of the foregoing is that I make the following orders: -

    a. In the circumstances, I find that the appeal is not merited and is dismissed in limine.

    b. The Appellant shall bear costs of Kshs.30,000/= for the appeal.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF SEPTEMBER, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for the Appellant

Wamboi Mwai for the Respondent

Court Assistant – Jedidah