Kenya Women Microfinance Bank v Imaana (Legal Representative of the Estate of Gitonga Cyprian Mwimbi - Deceased) & 2 others (Civil Appeal E013 of 2024) [2024] KEHC 12230 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 12230 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E013 OF 2024

DKN MAGARE, J

SEPTEMBER 26, 2024

BETWEEN

KENYA WOMEN MICROFINANCE BANK ..... APPELLANT

AND

KAREA FLORENCE IMAANA (LEGAL REPRESENTATIVE OF THE ESTATE OF GITONGA CYPRIAN MWIMBI - DECEASED) ..... 1ST RESPONDENT

JOHN KAGUO WANGO'NDU ..... 2ND RESPONDENT

PURITY WANGUI GACHUIRI ..... 3RD RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and Decree of Small Claims Court delivered on 20/7/2023 by Hon. Ismael Stanley Imoleit, Adjudicator in Nyeri SCCCC No. E174 of 2022.
2. The appeal is premised on the grounds that:
    a. The learned magistrate erred in law and fact in finding that the Appellant had not substantiated its case to the required evidentiary burden of proof.
    b. The learned magistrate erred in law and fact in rewriting the contract between the parties.
    c. The learned magistrate erred in law and fact in disregarding the principles of natural justice and denying the Appellant a fair hearing.
    d. The learned magistrate erred in law and fact in making a decision that was contrary to the law.

Pleadings

3. The 1st Respondent instituted Small Claims Case against the 2nd Respondent seeking judgment for Kshs. 884,000/- with costs and interest at court rates.

4. The 1st Respondent claimed that he entered into a sale agreement with the 2nd Respondent for the sale of the 2nd Respondent's motor vehicle Registration No. KCG 726T for which the 1st Respondent paid Kshs. 680,000/- on 27/2/2018.

5. It was averred in the statement of claim dated 5/10/2022 that upon receipt of the purchase price, the 2nd Respondent was to deliver the motor vehicle within 30 days under clause 4 of the agreement. That he instead took a loan with the motor vehicle.

6. The 2nd Respondent filed a Memorandum of Appearance and Defence dated 14/10/2022 denying the averments in the claim and praying the claim be dismissed as frivolous.

7. By consent of the parties, the court entered judgment on 14/11/2022 for the 1st Respondent for Kshs. 790,000/-. It was also ordered by consent that the impugned motor vehicle be grounded at the CCIO's Office grounds for a period of 4 months from the date of the order and the keys be handed to the said office.

8. The court also issued an order restraining the repossession of the motor vehicle unless and until the orders are varied. It is not clear why there were restraining orders. They may or may not have been directed to the appellant. There is something odd about the orders. However, it is not issue in the current matter.

9. Subsequently on 10/1/2023, the learned magistrate, upon further consent of the parties varied the order dated 14/11/2022 only to the extent that the motor vehicle was to be deposited at the Nyeri Law Court's precincts. Subsequently, the Appellant filed a Notice of Motion application dated 14/3/2023 seeking the following reliefs:

    a. That Kenya Women Microfinance Bank be enjoined in the proceedings as Interested Party (sic).

    b. That the motor vehicle registration No. KCG 726T be released to the Interested Party.

    c. Costs be provided for.

10. The application was premised on the grounds on its face and the supporting affidavit of Francis C. Miracho, the applicant's Operations Officer as follows:

    a. The Appellant had a legal, equitable and financial interest in the motor vehicle.

    b. The Appellant had advanced a loan to the 2nd Respondent for Kshs. 976,000/- and the motor vehicle was used as security.

    c. The loan was outstanding at Kshs. 1,067,359.91 and was due and owing.

    d. The Appellant was a joint owner of the motor vehicle.

11. In his response to the application dated 5/6/2023, the 2nd Respondent stated that the purported loan and the contents in the exhibits were fraudulent and an abuse of the court process.

12. The court considered the application and rendered its Ruling on 20/7/2023 in which the court dismissed the application and directed that the motor vehicle be released to the estate of the deceased claimant. Aggrieved, the Appellant lodged a Memorandum of Appeal hence this appeal.

Submissions

13. The Appellant filed submissions dated 15/8/2024. It was submitted that under the Moveable Property Security Rights Act, Section 91(2) a prior security would remain effective between the parties despite the fact that its creation had not complied with the Act. In this regard, it was submitted that the court erred in not finding that the Appellant's right in the motor vehicle had been first established.

14. They further submitted that the learned magistrate's ruling amounted to depriving the appellant the right to be heard. That the order would deprive them the right to object against attachment under Order 22 Rule 51 of the Civil [procedure Rules.

15. On the part of the Respondents, they did not file submissions.

Analysis

16. The issue that falls for this court's determination is whether the lower court erred in disallowing the Appellant's application.

17. 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.

18. 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 vs. 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."

19. 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.

20. 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 vs 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 versus Bernard Munene Ithiga (2016) eKLR)."

21. 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 Vs 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 vs 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 vs David Marakaru (1960) EA 484."

22. In Peter Gichuki King'ara Vs 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."

23. The main issue for determination in this case is whether the trial court erred in law in dismissing the Appellant's application.

24. A point of law is similar to a preliminary point of law but has a broader meaning. Justice prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of Oraro vs Mbaja [2005] eKLR:

> " I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

25. The Appellant prayed that the motor vehicle Registration Number KCG 726T be released to the Appellant. The appellant did not seek to be enjoined as a defendant. They did not seek or be a plaintiff or defendant. They did not seek to set aside the orders.

26. Furthermore, the Applicant did not seek to set aside the Consent order dated 14/11/2022 and 10/1/2023 that entered judgment for the 1st Respondent in the tune of Kshs. 790,000/- and directed the motor vehicle to be deposited at the Nyeri Law Courts. The effect of the order was that the Respondents had admitted the claim of having breached the agreement of sale of the motor vehicle and as such had accepted to pay Kshs. 790,000/- to the 1st Respondent in settlement of the claim. Indeed,

in the pleadings, the 1st Respondent prayed for refund of money had and received in respect of the purchased motor vehicle.

27. The claim sought is not in the plaint or defence. The Appellant was seeking to be a third party.

28. In the case of Methodist Church in Kenya v Fugicha & 3 others (Petition 16 of 2016)[2019] KESC 59 (KLR) (23 January 2019) (Judgment) eKLR Neutral citation: [2019] KESC 59 (KLR), the supreme court stated as follows: -

> This court, in Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others , Petition No 12 of 2013 [2014] eKLR, thus observed of interveners, or interested parties: (14) Black's Law Dictionary , 9th Edition, defnes 'intervener' (at page 897) thus:
>
> > 'One who voluntarily enters a pending lawsuit because of a personal stake in it'; [and defnes 'interested party' (at p 1232) thus:] 'A party who has a recognizable stake (and therefore standing) in a matter....'
> >
> > "(18) Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause..." 43. 44. 45. 46. 47. 48. 49. It thus emerges quite plainly that the High Court can join interested parties to proceedings, where necessary. That is why in Meme v Republic [2004] 1 EA 124; [2004] 1 KLR 637, the High Court observed that a party could be enjoined in a matter on the basis of certain considerations viz: (i) joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings; (ii) (iii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law; joinder to prevent a likely course of proliferated litigation."

29. An interested party cannot seek substantial orders. They cannot make a claim or counterclaim. As much as the Appellant may have issues to be heard, they are not parties. The court in Ngumbao & 2 others v District Land Registrar Uasin Gishu & another; Wainaina (Interested Party) (Environment & Land Case 74 of 2015) [2022] KEELC 15390 (KLR) (20 December 2022) (Ruling) held as follows: -

> " On the first issue, it is clear that the Applicant had been allotted plot 154. It is also clear that there was erroneous amalgamation of plot 154 which was erroneously given to Julius Chesoi Chepkieny. This fact has been confirmed by correspondence from the Land Adjudication and Settlement Officers. It is therefore necessary that the status of the Applicant as an interested party be converted from that position to that of a Defendant because in law, an interested party's participation in a suit is passive in nature. An interested party cannot be granted substantive reliefs.

30. By allowing the prayer there will be two competing orders, one to hold the suit vehicle in court and another to release to the Appellant. The Appellant did not bother to be joined to the suit as a party.

It should be remembered that cases belong to parties. In Methodist Church in Kenya v Fugicha & 3 others (Petition 16 of 2016) [Supra] the supreme court stated as doth: -

> What should we make of a cross-petition fashioned as such? Yet this court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the court. We did remark, in Francis Karioki Muruatetu & another v Republic & 5 others, Sup Ct Pet 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs *41*, *42*): Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us. Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the court will always remain the issues as presented by the principal parties, or as framed by the court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the court. That stake cannot take the form of an altogether a new issue to be introduced before the court" [emphasis supplied]. In like terms we thus observed in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others , Civil Appeal No 290 of 2012* (paragraph *24*): A suit in court is a 'solemn' process, 'owned' solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it.
>
> 14. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings." 55. 56. 57. 58. 59. Against such a background, the trial court ought not to have entertained issues arising from the cross petition by the interested party, especially in view of article 163(7) of *the Constitution* which provides that 'All courts, other that the Supreme Court, are bound by the decisions of the Supreme Court." Moreover, this cross-petition did not comply with rule 15(3) of the Mutunga Rules which speaks to a respondent filing a cross-petition; and it was also not in conformity with rule 10(2) of these rules. Rule 10(3) cannot also be invoked as the replying affidavit of the interested party does not fit any of the descriptions contained therein.

31. In distinguishing the import of a defendant and an interested party in pleadings, Munyao J. had the following to say in Marigat Group Ranch & 3 others v Wesley Chepkoiment & 19 others [2014] eKLR:

> " There is indeed no clear-cut provision in the *Civil Procedure Act*, Cap 21, or Civil Procedure Rules, 2010, making allowance for a party to be enjoined into proceedings as an interested party...
>
> It should be appreciated that an interested party is not strictly plaintiff or defendant. The contest in a suit is between plaintiff and defendant and if any person has a claim over the

subject matter, then such party needs to apply to be enjoined and considered as plaintiff or defendant, and not as interested party. An interested party would be a person who has a close connection to the subject matter of the suit yet not claiming any rights over it.....

In this case, the applicants want to be enjoined as interested parties and be allowed to file defence and counterclaim to the suit. Clearly, they do not just want to come into these proceedings as "interested parties" but as defendants with a counterclaim. Caution needs to be exercised when a party wants to join proceedings as defendant. This is because the court would not want to impose a party upon the plaintiff unless it will not be prudent to determine the matter without such party being defendant. ..... But where the plaintiff has chosen to assert his rights against certain defendants and not others, the court should be slow in imposing other defendants upon him, for each person has a right to choose against whom to assert his claims against. The plaintiff could have his genuine reasons as to why he does not wish to proceed against other persons, and issues of costs will also be involved. This is not to say that in an appropriate case, the court cannot insist that a certain person be made defendant irrespective of the protestations of the plaintiff; it all depends on the circumstances of the case, but the plaintiff's choice on whom he has chosen to sue, ought to be given paramount, though not absolute, consideration."

32. A consent order, such as the one entered herein is binding inter se. It is not binding on a third party or on interested party. If the Appellant has security, they are entitled as of right to repossess the said motor vehicle. Only a court dealing with a suit between the Appellant and their customer can deal with the issue inter se. A consent order is a contract between parties and does not bind nonparties. The Court of Appeal set out grounds upon which consent judgment may be set aside in the case of Board of Trustees National Social Security Fund v Michael Mwalo [2015] eKLR as follows;

> " The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court."

33. In effect a consent judgment is a judgment in personum and not in rem. It does not bind the Appellant. The Appellant was thus not a necessary party. Nothing in the primary suit stopped them from filing a suit of their own. The judgment in the court below is between the respondents and binds only the respondents. It cannot mean that the repossession talked of relates to the Appellant.

34. In this court's view, the Appellant's woes were of its own creation. As early as 1/11/2022, the lower court issued an order of even date directing the Appellant herein to provide information regarding the outstanding balance on the impugned loan, the exact date when the 2nd Respondent defaulted and the reasons for delay in auctioning the motor vehicle. It is not the Appellant's case that the said order was not served upon it.

35. The Appellant approached the wrong forum as an interested party and not a party. The court is unable to handle their case from their position as interested parties. Any other capacity will have changed the whole scenario.

36. It is a cardinal rule of the thumb that parties are bound by their pleadings. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> > ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
> >
> > ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

37. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

38. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....'"

39. The court cannot act on evidence, even where it is established, in the absence of pleadings. This is more so in a matter of this nature where an appeal lies as a matter of law. In the recent presidential Election Petition, the Court of Appeal of Nigeria sitting as the election court, in Peter Gregory Obi & another versus Senator Bola Ahmed Tinubu & INEC & 3 others consolidated with petitions no. 4 and 5 both of 2023, stated as doth: -

> " In Belgore Versus Ahmed (2013) 8 Nwlr (Pt.1355) 60 the complaint against averments in the petition that were unspecific, generic, speculative, vague, unreferable(sic), omnibus and general in terms. The Apex court specifically held as follows: -
>
> > "Pleadings in an action are written statements of the parties wherein they set forth the summary of material facts on which they rely on in proof of this claim or his defence as the case may be, and by means of which real matters [in] controversy between the parties are to be adjudicated are pleaded in a summary form. They must nevertheless be sufficiently specific and comprehensive to elicit the necessary answers from the opponent.

40. Therefore, the Appellant herein did not seek to assert its substantive rights in the lower court. It did not plead that the previous adverse orders be set aside and did not come in as a defendant. The learned magistrate could not have done any better than dismiss the application. I see no manner in which the Appellant was condemned without a hearing when the Appellant was given an opportunity to be heard and presented all that was its case in a passive capacity as an interested party.

41. I therefore find no basis to disturb the finding of the lower court.

Determination

42. In the upshot, I make the following orders:

    a. The Appeal is dismissed in limine.

    b. The 2nd and 3rd Respondents shall have costs of Kshs. 30,000/- for the appeal.

    c. The 1st Respondent shall have disbursements of Kshs. 10,000/=.

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: -

Gathara Mahinda for the Appellant

1st Respondent in person

Muthoni Muhoho for the 2nd and 3rd Respondents

Court Assistant – Jedidah