Mattan Contractors Limited v Mwangi (Civil Appeal E006 of 2024)
[2024] KEHC 13311 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13311 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E006 OF 2024

DKN MAGARE, J

OCTOBER 30, 2024

BETWEEN

MATTAN CONTRACTORS LIMITED ..... APPELLANT

AND

JORAM KAMANGA MWANGI ..... RESPONDENT

JUDGMENT

1. This appeal arises from the Ruling in Miscellaneous Application No. 4 of 2017 delivered in SPM's Court at Karatina by Hon. F. Macharia, SPM.

2. The court has perused the 6 grounds in Appeal No. E006 of 2024. The respective 6 paragraph grounds of appeal, however, are a classical study on how not to write a Memorandum of Appeal. They are prolixious, repetitive, argumentative and unseemly. Order 42 Rule 1 requires that the memorandum of appeal be concise. The same provides as doth: -

> " 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.
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> (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."

3. 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:

"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..."

4. A memorandum of appeal needs to be more carefully and efficiently crafted by counsel. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed:

> " 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."

5. Therefore, the proper way of filing an appeal is to file a concise memorandum of appeal without arguments, cavil or evidence. The rest of the King's language should be left to submissions and academia.

6. The memorandum of appeal raises only one ground, that is: the learned magistrate erred in law and fact in extending time limit for filing the suit contrary to the provisions of Section 27 and 28 of the *Limitation of Actions Act*.

Pleadings

7. In Misc. Application No. 4 of 2017, the Respondent, by way of ex parte Notice of Motion dated 1st March 2017 sought extension of time within which to file the suit against the Appellant for the tort of negligence. The application was premised on material grounds set out on the face of it and the supporting affidavit of the Respondent sworn on the even date as follows:

    a. The Respondent was involved in a road traffic accident on 5/10/2013 while travelling in the appellant's motor vehicle.

    b. The Respondent only obtained the police abstract on 23/11/2016 after several unsuccessful visits to the police station.

    c. The Respondent obtained the medical report on 19/12/2016.

d. The Respondent had been in and out of hospital following the injuries suffered in the accident hence the delay in filing the suit.

Submissions

8. It was also submitted that the lower court erred in allowing the Respondent to file suit out of time contrary to Sections 27 and 28 of the *Limitation of Actions Act* that required an applicant who applies for extension of time to show that their failure to proceed in time was due to material facts of a decisive character that were at all times outside their knowledge. Reliance was placed among others on the case of Hellen Kiramana v PCEA Kikuyu Hospital [2015] eKLR where the Court held that the facts outside the knowledge of a Plaintiff are facts of a very decisive nature that the Plaintiff did not have opportunity to know.

9. The Appellant relied on the case of County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR, where the Supreme Court of Kenya held that:

> "It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as:
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> "The under-lying principles that a Court should consider in exercise of such discretion:
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> 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
> 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
> 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
> 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
> 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
> 6. Whether the application has been brought without undue delay; and
> 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

10. It was also submitted that the ruling was in bad form because the decision was recorded on the cover of the Court file but there was no formal record in the file.

11. The Respondent on his part filed submissions dated 16/8/2024. It was submitted that the Respondent properly obtained leave before filing the suit as required under Sections 27, 28 and 30 of the *Limitation of Actions Act*.

Analysis

12. The issue before this court is whether in the circumstances of this case, the trial court was justified in allowing the Respondent leave to file suit out of time.

13. There can be no appeal in respect of the leave to file an appeal out of time. This is an exparte order, which the Respondent has a duty to prove in the main hearing. Like all exparte orders, such order is not appealable. It can only be challenged in the main suit and not as a separate appeal. The extension of time is part of the issues to be canvassed in the main appeal. I do not find the need to have this appeal dealt with separately. It is a waste of judicial time.

14. Ex parte order cannot be taken to be final orders. In David Gicheru v Gicheha Farms Limited & another [2020] eKLR the Court held that:-

> " The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter..."

15. In John Gachanja Mundia v Francis Muriira & Another [2017] eKLR, A. MABEYA, stated as follows:

> 26. The view of this Court is that, a Defendant can only challenge the leave at the trial by way of cross-examination on the circumstances of late filing of the case. It is only after he successfully mounts such a challenge that the incidence of proof shifts back to the Plaintiff to defend the leave obtained exparte. This happened in the present case but the 1st respondent failed to discharge that burden. Ground number 1 succeeds.

16. Leave to extend time to file suit can only be challenged in the suit and the appeal arising from the main suit and not a separate appeal or proceedings to set aside leave. In the case of Nation Media Group Limited & 2 others v Margaret Kamene Wambua [2021] eKLR, the court observed, and I agree, that:

> The respondent was awarded Kshs.200,000 as damages. The appeal is not on quantum. I am satisfied that the trial court properly allowed the application for leave to file suit out of time. The appellant is within the law to challenge the order granting leave within this appeal. (See Mary Wambui Kabugu –v- Kenya Bus Services Ltd. Civil Appeal No. 196 of 1995). There was no requirement that the appellant must have filed an appeal first on the issue of extension of time before the suit was heard.

17. In the case of Amos Muthinja M'mungania v John Gaitho & another [2016] eKLR, F. Gikonyo stated as follows:

> In fact, the law is that matters of limitation of actions should be decided in the trial after the court has taken into account all evidence, circumstances and facts of the case especially those tendered by the plaintiff to bring the suit within the exception in Section 27 of the Limitations of Actions Act. Fortunately, this subject is replete with very clear judicial decisions which I need not multiply except cite the case of (1) Oruta vs Samuel Mose Nyamato [1984] KLR 990 (2)Transworld Safaris Kenya Ltd –vs- Somak Travel Ltd [1997] eKLR, (3)Mbithi vs Municipal Council of Mombasa & another. (1990 -1994) E.A. and (4) Divecon Ltd vs Shrinmkhana S. Samani. Therefore, I refuse to accept the proposition by the Appellant that the learned trial magistrate did not have jurisdiction to set aside the leave to file suit out of time herein. Indeed, I belong to the school of thought which posit that matters of limitation of actions should never be tried as preliminary objections or in a summary manner but at the trial upon the evidence of parties.

(7) I will add one more thing: that the requirement of the law (Order 2 rule 4 of the Civil Procedure Rules) that matters of limitation must be specifically pleaded in the defence underscores the intention of the law that limitation should become an issue for trial. See the case of Divecon Ltd vs Shirinkhanu S. Samani Civil Appeal No. 142 0f 1997, where the court quoted with approval the words of Gachuhi, J.A., the leading judge in the Oruta case (supra) thus:

''It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the *Limitation of Actions Act*..."

Accordingly, a proper understanding of Section 27 of the *Limitation of Actions Act*, the plaintiff bears the legal burden to show that material facts relating to his or her cause of action were outside the persons' knowledge. I have looked at the proceedings, as recorded by the trial magistrate. The explanation given by PW1 on this subject was that the advocate he had instructed to follow-up the accident claim cheated him that he had filed suit when he had not. He blamed the said advocate for the delay in filing the suit. He was cross-examined on this particular matter of limitations of action. Again he was re-examined by Mr. Kiogora on the issue of Limitation of Action. All that he did was to blame his advocate for the delay. The question I must ask myself is whether the reason for delay constitutes material fact for purposes of Section 27 of the *Limitation of Actions Act*. On this I find help in the words of Kwach JA (as he then was) in the case of Mbithi vs Municipal Council of Mombasa (Supra) that:

"Material facts are restricted to three categories of fact, namely,

(a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting the cause of action,

(b) the nature or extent of the personal injury so resulting; and

(c) the fact that personal injuries were attributable to the negligence, nuisance or breach of duty or the extent to which they were so attributable".

The judge went onto state that:

"It is not sufficient that the facts unknown to the plaintiff should be material within the above definition; they must also be of a decisive character; that is to say, they must be such that a reasonable person, knowing them and having obtained appropriate advice with respect to him, would have regarded them as determining that an action would have a reasonable prospect of succeeding and resulting in the award of damages sufficient to justify the bringing of the action. Finally, the plaintiff must prove that a material fact of a decisive character was outside his knowledge (actual or constructive)

18. Therefore, I am inclined to disallow the appeal as the opportunity to question the leave is in the main case, if the court allows the related appeal. The appeal, having no basis in law, is accordingly struck out. I say so also because by way of this appeal, there is no way for the court to properly determine the issue of service of summons as would arise from cross examination on the circumstances of late filing. I therefore find no basis to interfere with the discretion of the lower court allowing the Respondent leave to file suit out of time.

19. The costs are in the discretion of this court. This is informed by Section 27 of the *Civil Procedure Act* which provides as follows: -

(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.

20. 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.

21. Costs follow the event. In the circumstances the Respondent shall have costs of Kshs. 45,000/=.

Determination

22. In the circumstances, I make the following orders.

    a. The appeal is struck out.

    b. Costs of Kshs. 45,000/= to the Respondent.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 30TH DAY OF OCTOBER, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Masaba for the Appellant

Mr. Kaingu for the Respondent

Court Assistant – Jedidah