Kikenni Properties Limited v APA Insurance Limited & another (Civil Appeal E070 of 2021) [2023] KEHC 22180 (KLR) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 22180 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E070 OF 2021

F WANGARI, J

FEBRUARY 24, 2023

BETWEEN

KIKENNI PROPERTIES LIMITED ..... APPELLANT

AND

APA INSURANCE LIMITED ..... 1ST RESPONDENT

MOMBASA SPACE LIMITED ..... 2ND RESPONDENT

(Being an appeal from the Ruling and Order Hon. Francis Kyambia, Chief Magistrate (CM) delivered on 18th of May, 2021 in CMCC No. 1045 of 2019 at Mombasa Chief Magistrates Court (Formerly Mombasa HCCC. 134 of 2014)

JUDGMENT

1. This is an appeal against the ruling delivered by Honourable Francis Kyambia, Chief Magistrate on 18th May, 2021. The appellant being dissatisfied with the said ruling has preferred this appeal.
2. The appellant preferred the following four (4) grounds of appeal in urging this court to set aside the ruling and orders made on 18th May, 2021: -
    a. The learned magistrate erred in fact and in law in failing to consider the fact that the Appellant did not close its case on the 20th of March, 2021 and had reserved its right to call an additional witness.
    b. The learned magistrate erred in law in holding that Order 11 of the Civil Procedure Rules or any other provision of the Civil Procedure Rules or any pre-trail direction precluded the appellant from calling Robin Nixon to testify.
    c. The learned magistrate decision was inconsistent with the applicable principle that additional evidence should be allowed after a trial begins and pretrials are completed as set out in the case

of Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another [2019] eKLR where the court stated;-

> "It seems to me that a reading of the above cases the principles elaborated upon is that the discretion of the court is not fettered on admission of additional evidence after the trial has commenced and the plaintiff case has been heard fully. When considering the additional evidence in my view a careful inquiry by the court ought to be made into the nature of the evidence as to its relevance, materiality facts in issue, admissibility and the strength of the evidence sought to be introduced within the trial... There is no greater duty for the court than to deliver substantive justice as provided for under Article 159 2(d) at the end of it all."

d. The learned magistrate erred in fact and in law in failing to give any weight to the fact that the adjournment sought could not unduly prejudice the Respondents who had yet to commence their cases while declining the adjournment substantially harmed the Appellant.

3. Directions were taken and the appeal was disposed of by way of written submissions where all parties duly complied and relied on various decisions in support of their rival positions.

4. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the Trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga & Another (1988) KLR 348).

5. I have carefully perused and understood the contents of the pleadings, proceedings, ruling, grounds of appeal, submissions and the decisions referred to by the parties. To be able to ascertain whether the ruling ought to stand or otherwise I will carefully revisit the record.

6. The Appellant vide an amended plaint dated 5th March, 2019 and filed on 10th March, 2019 sought for a sum of Kshs. 10,000,000/= from the 1st Respondent in respect of a performance bond together with costs and interests. The 2nd Respondent in the Lower Court file was sued as a third party. The matter was defended and pre-trials having been done, the matter was fixed for hearing. The matter was heard on 18th March, 2021 when the Appellant's witness by the name Nicholas Charles Allen testified.

7. After cross examination and re-examination, the Appellant's Counsel sought for an adjournment and the same was granted and a further hearing date was fixed for 18th May, 2021. On the said date, Counsel for the Appellant sought for an adjournment on the grounds that he could not procure his witness on grounds that he was old.

8. Counsel for the 1st and 2nd Respondents opposed the application for adjournment on grounds that the Appellant had filed a list of witnesses which did not disclose any other witness other than one Nick Allen. The Trial Court having considered the application for adjournment and the responses thereto delivered a ruling declining adjournment. It is that ruling that precipitated the present appeal.

Appellant's submissions

9. The appellant submitted that when the matter came up for hearing on 10th March, 2021, the matter proceeded but the Appellant's case was not disclosed. The matter was then adjourned to 18th May, 2021. The Appellant submitted that in its list of witnesses, it had reserved the right to call an additional

witness. On 18th May, 2021, the Appellant made an application to adjourn the matter on account of unavailability of the additional witness, one Robin Nixon. The said witness was the project architect in the matter that gave rise to the suit and his testimony was to be limited to correspondence that he had issued and which correspondence had been admitted into evidence without any objection from the Respondents.

10. Relying on the case of Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another [2019] eKLR, the Appellant submitted that court's discretion to allow additional evidence is not fettered by the closure of the Plaintiff's case or the lack of service of witness statements during pre-trial. The Appellant posited that the paramount consideration ought to be materiality of the evidence sought to be adduced, admissibility and strength of such evidence.

11. The Appellant contended that the said evidence was admissible as the Appellant's bundle of documents including the evidence the additional witness was to testify on had been admitted into evidence without any objection by the Respondents. At any rate, the calling of the additional witness to produce the said correspondence was intended to inure compliance with the rule of evidence to wit a document ought to be produced by its maker. It was thus the Appellant's submissions that having met the threshold for adducing additional evidence as set out by this Court, the Appellant ought to call its additional witness, one Robin Nixon to testify before the subordinate court. Further reliance was placed on the case of Thomas Ngarachu Ngugi & 5 Others v John Wilfred Wanyoike & 6 Others [2019] eKLR for the proposition that it is always in the best interest of justice that parties be allowed to place before the court all the evidence available so long as it is relevant. This is because the main duty of the Court is to do justice to the parties.

12. Citing the case of Mbogo & Another v Shah [1968] EA 93 at 96 cited in Linear Coach Company Limited v Alhusnain Motors Limited & Another [2013] eKLR, the Appellant submitted that the appellate court is entitled to interfere with a subordinate court's exercise of discretion of the subordinate court has misdirected itself in some matter and as a result arrived at a wrong decision. Further solace was sought in the cases of Raindrops Limited v County Government of Kilifi [2020] eKLR and Hangover Kaakwacha Hotel Ltd v Philip Adundo & Leonard Adundo T/A Hangover Kaakwacha Hotel [2022] eKLR for the proposition that in giving precedence to procedural law requiring filing and exchange of list of witnesses and list of documents prior to hearing as opposed to doing substantive justice, the subordinate court erred in law and clearly arrived at a wrong decision. It therefore urged that the appeal be allowed.

1st Respondent's submissions

13. For the 1st Respondent, it was submitted that pre-trial directions and conferences are an essential part of the preparation of a case for final hearing as courts are concerned to prevent surprise and trial by ambush and unnecessary applications for adjournment by making that the pleadings are in proper order and all affidavit evidence is filed and served in a timely manner. The case of Concord Insurance Co. Ltd v NIC Bank Ltd [2013] eKLR was cited for the proposition of the centrality of pre-trial discovery. Further, the case of Oracle Productions Ltd v Decapture Ltd & 3 Others [2014] eKLR was quoted wherein it was held that the true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at the trial.

14. The 1st Respondent gave a history of the case stating that it was filed in the year 2014 and seven (7) years down the line, the Appellant was yet to perfect its case. They submitted that the Appellant's only witness as per the pleadings lodged, one Nicholas Charles Allen testified and produced all the documents as set out in the Appellant's list of documents thus the only thing was closing of the Appellant's case there being no more listed witnesses to call or further documents to be produced.

15. Citing the case of Kenfreight (E.A) Ltd v Benson K. Nguti [2019] eKLR, the 1st Respondent gave a definition of what judicial discretion is. The 1st Respondent argued that there was no evidence before this Court that the learned magistrate in exercising his discretion either misdirected himself in the matter and as a result arrived at a wrong decision or that it is manifest from the case as a whole that the learned Magistrate has been clearly wrong in the exercise of his discretion and that as a result, there has been injustice to warrant interference by this Appellate Court. The 1st Respondent urged the court to dismiss the appeal with costs.

2nd Respondent's Submissions

16. The 2nd Respondent gave a genesis from when the suit was filed in 2014 to the hearing on 10th March, 2021. According to the 2nd Respondent, on the said 10th March, 2021, the Appellant called Nick Allen, the only witness mentioned in his list of witnesses to testify. There was no other name mentioned nor any statement by any other person other than Nick Allen. The 2nd Respondent submitted that it was immaterial that the witness they intended to call was merely to testify on the documents. It was something the Appellant were aware and they cannot now seven (7) years down the line make an application to call a witness who was never mentioned as a witness nor statement filed in court after the principal witness testified. In the 2nd Respondent's view, the introduction of new witnesses would not only be prejudicial but an affront to the rules of procedure which calibrate the manner in which parties are supposed to conduct litigation.

17. The 2nd Respondent cited the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 6 Others [2013] eKLR for the proposition that Article 159 of *the Constitution* as well as the Oxygen Principles which commands courts to seek to do substantial justice were ever meant to overthrow or destroy rules of procedure and create an anarchical free for all in the administration of justice. The 2nd Respondent thus prayed for the appeal to be dismissed with costs.

Analysis and Determination*

18. After considering the pleadings, proceedings, submissions and the law, I find that there is only one (1) issue for determination: -

    a. Whether the Learned Magistrate exercised his discretion judiciously in disallowing the adjournment.

19. The crux of the appeal is the trial court's refusal to allow the Appellant's an adjournment to call its witness. As was held in the case of Thomas Ngarachu Ngugi & 5 Others v John Wilfred Wanyoike & 6 Others (supra), each case must be considered on its own peculiar circumstances taking into account all the factors including the stage at which the trial has reached. It is not in dispute that though the matter had been filed way back in 2014, the matter was first heard on 10th March, 2021 and from the record, the Appellant did not formally close its case on that day since it sought for an adjournment.

20. On 18th May, 2021, the Appellant's Counsel sought for an adjournment on the grounds that he could not procure the attendance of his witness. The reason for the physical non-attendance was due to the witness' age. The trial court exercising its discretion and upon hearing all parties disallowed the adjournment. The reasons proffered by the court was that calling that witness would amount to trial by ambush. Was this discretion exercised judiciously? In answering this question, it is imperative to consider the conduct of the Appellant.

21. First, it is indisputable that the Appellant's witness who testified, one Nicholas Charles Allen produced all the documents filed by the Appellant. As it were, all the documents filed by the Appellant forms

part of the trial court's records. The question that bogs this court is, if all the documents including correspondences that the said witness was to come and produce had been produced by Nicholas Charles Allen, what role was this other witness coming to play? At paragraph 12 of the Appellant's submissions, this fact is admitted and it defeats logic on why this other witness was required again to produce that which had been produced.

22. Secondly, I agree with the Respondents that this case having been filed in 2014, long after the Civil Procedure Rules, 2010 had come to force, it was the Appellant's duty to ensure that compliance with Order 11 of the said Rules was done. The Appellant had seven (7) years to do so. It was not the Appellant's submissions that the said Robin Nixon had just joined the Appellant's company in 2021. As was held in the persuasive authority of Oracle Productions Limited (supra) as cited by the 1st Respondent, the true purpose of discovery is to level the litigation field, expedite hearing, reduce costs and allow parties to gauge the case they will face at trial. Clearly, the Appellant's actions do not accord with this holding.

23. Thirdly, though an adjournment was sought and granted on 10th March, 2021, the Appellant did not give any reasons why it had sought the said adjournment. From the record, there was no intimation whatsoever that the Appellant was intending to call another witness. If indeed the Appellant was desirous of calling another witness on 18th May, 2021, it had well over two (2) months to file a further list of witnesses and witness statements for the said witness or witnesses. Therefore, the issue that the Appellant did not close his case on 10th March, 2021 does not change the fact that there was no intimation of why the adjournment was sought.

24. Fourth, on 18th May, 2021, the Appellant did not disclose the name of the witness it was to call and interestingly, the Appellant's Counsel stated as follows; "...I am praying for adjournment. I am unable to procure the attendance of the witness I was expecting..." (page 494 of the Record of Appeal). The name of this witness was not disclosed, his witness statement had not been filed. It had not been submitted that he was an expert to bring him to the exceptions of Order 3 Rule 2 (2) (c). If this witness was to be present, how was he to proceed without disclosure by the Appellant? This is a classic example of trial by ambush and the Trial Magistrate quipped as much.

25. Fifth, the name of the witness, Robin Nixon was only disclosed during submissions. It has been said time and again that submissions cannot take the place of evidence. In Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR, the Court of Appeal held as follows;

> "...Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented..."

26. The Appellant has cited a plethora of authorities in aid of its case but as earlier noted, each case is dealt with based on its own peculiar circumstances. In Pinnacle Projects Limited, a witness statement had already been filed and all that remained was leave to admit it out of time when the objection was raised. Therefore, that case is not comparable to the present one. In Thomas Ngarachu Ngugi & 5 Others, the application in issue sought to call certain public officers to come and produce certain public documents. Though the said documents were not in the Plaintiff's list, they were yet to be produced. This authority is equally not comparable as what is sought to be done in the present case is production

of documents which has already been done. In Hangover Kaakwacha Hotel Ltd, the case had not yet started and thus the court was entitled to allow the application.

27. Article 159 2(d) mandates courts and tribunals to ensure that justice shall be administered without undue regard to procedural technicalities. Does this oust the rules of procedure? I am afraid, they do not. Without the rules of procedure, there will be chaos in the administration of justice. As was held in Nicholas Kiptoo Arap Korir (supra) as cited by the 2nd Respondent, Article 159 was never meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free for all in the administration of justice.

28. In Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR, the Court of Appeal had the following on Article 159 of *the Constitution*; "...We do not consider Article 159 (2) (d) to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation..." Based on the principle of stare decisis, I must show deference to the Court of Appeal's holding.

29. I thus return a finding that the Learned Magistrate exercised his discretion judiciously in disallowing the application for adjournment thus arriving at a correct and sound decision. Having found as above, I do find the appeal lacking in merit and the same is hereby dismissed.

30. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -

    a) The Appeal is hereby dismissed;

    b) The Respondents are awarded the costs of this appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF FEBRUARY, 2023.

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F. WANGARI

JUDGE

In the presence of:

For the Appellant.....

For the 1st Respondent.....

For the 2nd Respondent.....

Court Assistant.....