Mwangi v Kihiu (Civil Appeal 16 of 2023)
[2023] KEHC 18643 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 18643 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 16 OF 2023

DKN MAGARE, J

APRIL 28, 2023

BETWEEN

FLORENCE WANJIKU MWANGI ..... APPELLANT

AND

GEORGE KIHIU ..... RESPONDENT

JUDGMENT

1. The Appellant filed Appeal on 9/2/2023 from the decision of Viola Muthoni, the adjudicator of the Small Claims Court given on 20/12/2022 in Mombasa Small Claims Suit No. E185 of 2022. Florence Wanjiku Mwangi= vs= George Kihiu.

Duty of the court

2. The appeal from the small claims court is on issues of law only. This is pursuant to Section 38 of the Small Claims Court. It provides as doth:

> "-38. (1) A person aggrieved by the decision or an order Appeals. 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."

3. What constitutes, points of law, has been settled. In the case of 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 stated 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 demeanor – is an issue of law."

4. The issues of failure to exercise discretion is equally a point of law. In the case of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR, the court stated as doth: -

> " 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).

5. In Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others, (2014) eKLRthe 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.

6. Even on the normal legal lingua, a point of law must clearly arise out of the pleadings. In case of appeal, it should arise out of the memorandum of appeal visavis the pleadings in the court below. In the case Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696: -

> " A preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose off the suit. Examples are an objection to the jurisdiction of the court."

7. In other words, though not seen as a preliminary point, they must as of necessity arise out of the pleadings. They must hold true, to the law or implication of the law. This includes deciding on basis of no evidence, based on a nullity, failing to exercise discretion which the court clearly has, failing to take up jurisdiction which the court has or taking jurisdiction the court does not have or otherwise reaching a decision which no reasonable person could have reached given the evidence and pleadings.

8. In the case of of Macfoy v United Africa Co. Ltd [1961] 3 All E.R. (the Macfoy case) in which Lord Denning held that:

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad, you cannot put something on nothing and expect it to stay there. It will collapse."

9. It also means if a judgment is based on a nullity, it must as a matter of law be set aside.

10. In the locus classicus case of Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, Justice Nyarangi, JA as then he was stated as doth: -

> "Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:
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> "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

11. In the case of Mombasa Law Society v Attorney General & another [2021] eKLR, justice E k Ogola, held as doth:- regarding the jurisdiction of the small claims court.

> " In R vs Big M Drug Mart Ltd (supra), the Court stated that both purpose and effect are important in determining constitutionality. The purpose of the *Small Claims Court Act* is to deal with matters of a lower subject value in a cost effective way. In all rationality, the costs of appealing to the Court of Appeal would defeat the purpose of the Act in question. My view is that the Act has not limited the right of a litigant to Appeal to the Court of Appeal, instead it has considered the economic right of a common citizen.
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> 30. In the 1979 case of Njeru Vs Republic, Miller JA and Wicks CJ held that "It is well established that there is no right of appeal apart from statute, either it is expressly granted by statutory authority or it is not. There is no right of appeal by mere implication or by inference."

12. The right of appeal is thus limited to what section 38 of the *Small Claims Court Act* provides.

> " Regarding evidence, the court is bound by section 32 of the *Small Claims Court Act*, which provides as doth: -
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> "32. Exclusion of strict Rules of evidence
>
> (1) The Court shall not be bound wholly by the Rules of evidence.
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> (2) Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though

the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.

(3) Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that Court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.

(4) The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.

(5) All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.

(6) For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.

(7) An Adjudicator may require any written evidence given in the proceedings before the Court to be verified by statutory declaration.

13. The court cannot make decisions on fact. However, the court cannot be completely blind to the facts. The rules on pleadings are also to be takne into consideration. Parties are bound by their pleadings. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, the court, A. C. Mrima, had this to say: -

> " 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: -
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> ".....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.....
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> ...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

Analysis

14. The appeal raised 8 grounds are purely points of fact and evidence. The Appellant did not testify. They purported to rely on the evidence on record. The actual position is that the Appellant had been missing in action. The Respondent is the only one who testified. He admitted no part of the claim. Ms Charo for the claimant proposed to proceed by way of filed documents. The concurrence of the Respondent was not recorded or obtained. The Respondent testified on the issue of the spending of money given.

15. It is his evidence that he paid for the cargo but there was delay in issuance of the bill of lading. This is a document of title that enables parties to clear cargo. The Appellant did not pay for demurrage or the cargo. It could even had been Auctioned.

16. The clearing agent has no duty to pay taxes and demurrage which are statutory statements. The claimant having not testified there was nothing for the court to rely on. On failure of a party to testify this court and the Court of Appeal have settled on the consequences. In the case of Trust Bank Limited V Paramount Universal Bank Limited & 2 others [2009] eKLR, THE court had this to say : -

> " The 2nd and 3rd Defendants closed their cases without calling a witness. It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. The 2nd Defendant and 3rd Defendant's defence were unsubstantiated and remained mere statements. In the same vein failure to adduce any evidence meant that the evidence adduced by the Plaintiff against the 2nd and 3rd Defendants was uncontroverted and therefore unchallenged. In Autar Singh Bahra And Another Vs Raju Govindji Hccc No. 548 of 1998(UR) Mbaluto J. held:
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> "Although the Defendant has denied liability in an amended Defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff in support of the Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."

17. The Respondent's evidence was uncontroverted and as such the court was bound to make a decision, as it did. I could have been surprised otherwise on merit.

18. Consequently, there is no other order open to me except dismissal of the Appeal for lack of merit.

Determination.

19. The upshot is that the Appeal herein is bereft of merit and is dismissed with costs of 45,000/= payable in 30 days failing which execution do issue.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 28TH DAY OF APRIL 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for the appellant

No appearance for the respondent

Court Assistant – Firdaus