Omoke v Tamarind Management Ltd (Civil Appeal 180 of 2022)
[2023] KEHC 17525 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEHC 17525 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 180 OF 2022

DKN MAGARE, J

APRIL 27, 2023

BETWEEN

MORORA OMOKE ..... APPELLANT

AND

TAMARIND MANAGEMENT LTD ..... RESPONDENT

JUDGMENT

1. This is an appeal arising from the judgment of the Small Claims court at Mombasa given by Hon V Muthoni on September 28, 2022 in SCC Civil Case No E055 of 2022. The appeal was opposed.

2. Appellant is an advocate of the High Court of Kenya. He filed suit in person. He filed suit against the Respondent stating that he went for a dhow cruise organized by the respondent. He was served with Sea Food valued Ksh 5,500/= He started having a stomach upset and travelled back.

3. The court on evaluating evidence believed the defendant. It was the discretion of the Court. The court was correct in its appreciation of the evidence. The court is not bound by strict Rules of evidence. Section 38 of the *Small Claims Court* states as follows:-

> " 38.
>
> (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 discretion of the court is sacrosanct. Unless, the discretion is exercised in a manner that is not judicious, then, this court cannot interfere. In any case, it is only when the court wrongly exercises discretion that it becomes a matter of law.

5. In the case of *Mbogo and Another vs Shah* [1968] EA 93 where the Court stated:

> "...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."

6. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, the Supreme Court posited as doth: -

> "[70] The meaning of "a question of law" and "a question of fact" was further explicated in the English case, Bracegirdle v Oxley (2) [1947] 1 All ER 126 [at p 130, per Lord Denning]:
>
> "The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deduced by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road Traffic Act, 1930, s 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them."

7. This court is entitled to consider matters of law only. It is however not blind to the facts. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [*supra*], the supreme court posited as doth: -

> "(92) It is not for this Court to issue edicts to the Court of Appeal on how it should exercise its jurisdiction. The process of evaluating evidence is not a mechanical one; and we agree with learned counsel, Mr Muthomi, that in considering "matters of law", an appellate Court is not expected to shut its mind to the evidence on record. We are unable, thus, to hold that, by the mere fact of having considered matters of fact, the learned Judges of Appeal acted in excess of jurisdiction. To so hold, would place inappropriate fetters on the inquiry-scope of the appellate Judges, as they determine whether an election was held in conformity with the principles of the Constitution."

8. I find the adjudicator having analyzed the evidence correctly. The questions raised in this appeal are all questions of fact for which this court has no jurisdiction to adjudicate.

9. The issue before this court is whether, the adjudicator decided the case on no evidence. I do not find any error of Law in the analysis by the adjudicator. There was no evidence of causation and as such there is no error on part of the adjudicator.

10. The appellants claim, as correctly held was at least speculative. The court also correctly found that there was no nexus between alleged negligence and the stomach issues. It is highly improbable that there was any negligence, given that there was only alleged stomach upsets for the two people who were together to the excursion to the exclusion of the rest who were in the dhow cruise.

11. The upshot I find the Appeal is bereft of merit and as such the same is dismissed with costs of Kshs 50,000/= to the Respondent pursuant to Section 33 of the *Small Claim Act*.

12. The expert evidence was worthless. It is a review of evidence of the other reports. The appellant had bacterial infection which he did cannot be attributable to the Respondent. It is mysterious that the Appellant was not treated at the Coast where he allegedly suffered. The treatment was sought 3-5 days after the cruise, in Nairobi.

13. The only correction is that the court below is enjoined under Section 33 of the *small claims court* to award costs to a successful party. Respondent having been a successive party under Section 33 of the *Small Claims Court Act* is entitled to costs. The court thus is supposed to have awarded the Respondent costs. Consequently, the Respondent is entitled to costs of Ksh 25,000/= in the small claims court. The Appellant to pay the same within 15 days, in default execution to issue.

Determination

14. The court makes the following orders: -

    a. The Appeal is dismissed with costs of Ksh 50,000/=

    b. The Appellant to pay costs of Ksh 25,000/= to the Respondent, being costs in the small claims court.

    c. Costs to be paid within 30 days, and in default, execution do issue.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 27TH DAY OF APRIL,2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Morara Omoke, the appellant

Ms Nasimiyu for the respondent

Court Assistant - Firdaus