Changa v Satari (Civil Appeal E018 of 2022)
[2023] KEHC 19129 (KLR) (27 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19129 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E018 OF 2022

DKN MAGARE, J

JUNE 27, 2023

BETWEEN

KABIBI KITSAO CHANGA ..... APPELLANT

AND

EMMANUEL K. SATARI ..... RESPONDENT

JUDGMENT

1. The appeal was filed on 9/2/2023 from the decision of 30/11/2023 by the Hon. Viola Muthoni in Mombasa SCCC No. E188 of 2022. The drafting of the memorandum of Appeal is most wanting. It is unfathomable how an argumentative appeal will settle any dispute.

2. The appeals to this court are on matters of law. Section 38 of the *small claims court Act* provides as follows: -

> "(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."

3. The points of law cannot be on the basis of argumentative disagreements of facts. In *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR, the Court of appeal Lamented as doth regarding an 18-paragraph memorandum of Appeal: -

> "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 any way 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. At the end of the day the issues raised were mired in the labyrinth of arguments and repetitive surmises and conjecture that are set of in the memorandum of Appeal that at the end of the day obfuscate the issues that it is practically impossible to know what the Appellant's true intention was.

5. The grounds of Appeal raised were: -

   a. That the leaned Trial Magistrate erred in law and in fact in holding that the Court cannot enforce the contract only on the basis of performance.

   b. That the leaned Magistrate erred in law and in fact in holding that the Respondent has impugned the agreement, stating that he was coerced into making it.

   c. That the Trial Magistrate erred in law and in fact in failing to make a determination on the issue placed before it by the parties and instead going off on tangent of its own.

   d. That the Trial Magistrate erred in law and in fact in inferring its own facts in complete disregard at the evidence before Court.

   e. Thatthe learned Magistrate erred in law and in fact in appreciation that assessment of the damage was done 3 months after damage.

   f. That the learned Magistrate erred in law and in fact in appreciation that the burden of proof in civil case was discussed in the ease of *D.T Dobie & Co. Limited v Wanyonyi Wafula Chebokati* [2014] eKLR where the Court cited with approval the case of *Miller v Minister of Pension* [1947]2 LL ER 372.

   g. That the learned Magistrate erred in law and in fact in disregarding that in deed the Respondent admitted and engaged local authorities and parties had been advised to engage ADR (Alternative Dispute Resolution) whereafter an agreement between parties were executed

   h. That the learned Magistrate erred in law and in fact in disregarding that in deed the Respondent admitted in his statement the existence ADR (Alternative Dispute Resolution) at the Chief's Office.

   i. That the learned Magistrate erred in law and in fact in holding that the report from Danmor Contractors Limited does not show that the materials were damaged.

6. The 9 grounds of appeal raise only one issue. The court failed to properly appraise the evidence and as a result reached an erroneous decision.

7. The decision is impugned on two aspects the first one being on evidence tendered and the burden of proof.

8. Regarding the burden of proof, it was incumbent upon, not the plaintiff but the party who alleges. Sections 107,108 and 109 of the *evidence act* posits as doth: -

> " 107. Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. Incidence of burden
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. Proof of particular fact
>
> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

9. The burden of proof is generally on the party who alleges. In this case it was the plaintiff. It was their duty to proof on evidence. The court analyzed the evidence and came to the conclusion she did.

10. It cannot be said to with no evidence. The court exercised its discretion on the evidence. That aspect of discretion was settled in *Mbogo & Another v Shah* [1968] E.A. 93 at page 96, where the legendary Sir Charles Newbold P elucidated the point in the most poignant way as hereunder: -

> " ...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice...."

11. Matters raised were within the special knowledge of the Appellant. He failed to come up with them and proof the same. Section 112 of the *evidence act* is binding on the parties. It states as doth: -

> " Proof of special knowledge in civil proceedings in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

12. The small claims court is bound not bound by strict rules of evidence. Section 32 of the small claims court posits as follows: -

> " 32 (1) The Court shall not be bound wholly by the Exclusion of strict Rules of evidence. Rules of evidence.
>
> (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 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. The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require. All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party. For the purposes of subsection (2), an Adjudicator is empowered to administer an oath. An Adjudicator may require any written evidence given in the proceedings before the Court to be verified by statutory declaration."

13. The appeal appears to be based on appreciation of the facts and not the law.

Duty of this court in small claims Appeal.

14. The evidence was thus the forte of the magistrate. The duty of this court is to deal with points of law. In the case of *M/s Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR, the court of Appeal stated as doth regarding the appeal on points of law: -

> " 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 v Bernard Munene Ithiga* [2016] eKLR).

15. This is in contradiction with the duty of the first appellate court. The duty of the 1st Appellant Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

16. An error of law was also determined in the case of In *Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others*, [2014] eKLR the court stated as doth: -

> " Although the phrase 'a matter of law' has not been defined by the *Elections Act*, it has been held in *Timamy Issa Abdalla v 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 v Oxney* (1947) 1 All ER 126."

17. The effect of the foregoing is that unless there is gross breach of rules of natural justice, an appeal over evidence is an appeal on fact. There is no single ground capable of succeeding. In the circumstances, I am bound, which I hereby do to dismiss the Appeal for lack of merit

Determination

18. I therefore make the following orders:-

    a. The Appeal is bereft of merit and is as such dismissed in limine

    b. Costs of Ksh 35,000/= to the Respondent.

19. The file is closed.

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

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for parties

Court Assistant - Brian