Musuya Investment Limited & another v Martin (Civil Suit E132 of 2023) [2023] KEHC 21032 (KLR) (26 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21032 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT E132 OF 2023

DKN MAGARE, J

JULY 26, 2023

BETWEEN

MUSUYA INVESTMENT LIMITED ..... 1ST APPELLANT

JOSEPHAT MWAMBIRI ..... 2ND APPELLANT

AND

BEATRICE ACHIENG MARTIN ..... RESPONDENT

JUDGMENT

1. The appeal is a straightforward one. It arose from the decision of the adjudicator, Gatambia Ndungu in the small claims case no. E239 OF 2023. The claim is for loss of user only. I gave directions for hearing of the appeal and both parties filed concise submissions.

2. Given the nature of the decision, the court's powers are limited to points of law only. However, the duty of the court at appeal level is as held in the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this court is dealing with the understanding on the points of law involved. In that case the court of Appeal stated as doth: -

> " This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

3. The appellant Field a 9-paragraph memorandum of appeal. It is repetitive and long winded. It should be concise. Under order 42 rule 1 of the Civil Procedure Rules, a memorandum of appeal should not be argumentative. The said provision states as doth: -

> " Form of appeal
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> (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.
>
> (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."

4. The Court of Appeal had this to say in regard to rule 86 (which is pari mateira 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:
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> "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..."

5. Further in Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that: -

> " 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."

6. The memorandum of appeal raises only one issue, that is,

> " The court erred in finding that it had no jurisdiction to hear and determine the case before him."

7. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the magistrate's court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.

8. In the case of Shah Shah=vs= Mbogo (1968) EA 930, the Court of Appeal stated as follows: -

> " For myself I like to put in the words that a court of Appeal should not interfere with the exercise of the discretion unless he 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 three has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

9. I am alive to the fact that this is a final Appeal. Therefore, the duty on the court is enormous. This is because, whichever, this court decides, the parties have to find a way of living with it.

10. Appeals from Small Claims court to this court are on points of law only. However, what constitutes a point of law is not defined. Nevertheless, this court is bound by antecedent findings to settle what a point of law is. It also needs to settle what a point of law is not.

11. Starting on what a point of law is not, I am guided by section 32 of the *small claims court Act*. It provides as doth: -

> " Exclusion of strict Rules of evidence
>
> (1) The Court shall not be bound wholly by the 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.
>
> (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.

12. This means that though the *Evidence Act* is a law, noncompliance with that Act is not a point of law. That notwithstanding, the *Evidence Act* is not wholly excluded. There are certain presumptions that must be made. The status of sections 107 to 112 of the *Evidence Act* is different from other procedural sections.

13. The aspects like the burden of proof, are not really issues of just the *Evidence Act* but goes to the root of civil proceedings whether under the Criminal Procedure Code or the *Civil Procedure Act* and Rules. Section 107,108 and 109 of the *Evidence Act* provide as follows: -

> " 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."

14. In particular, section 109 places the burden of proof on whoever wishes the court to believe a fact. This thus means that whosoever asserts, proves. This is so when the particular facts are exclusively within the knowledge of the person asserting.

15. Under section 112 of the *Evidence Act*, 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."

16. Ordinarily, the duty of the first appellate court is to re-evaluate and assess the evidence and make its own conclusions. The appellate court keeps at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. However, appeals from the small claims court are different. This is the first and last Appeal.

17. It is an appeal on points of law. This then takes the same turn as an appeal to the court of appeal, where the court gives defference to finding of fact. Only when the findings of fact are based on no evidence will that be seen as a point of law.

Appellant's submissions

18. The appellant field submissions dated 5/7/2022. They challenge the issue of loss of user in two different aspects.

19. The first one being that the 95 days were too long for loss of user. The same should be per the period of repairs as estimated by the valuation professionals.

20. In this case they posit that 8 days are sufficient. The second limp is that the same were not particularised nor specifically pleaded. They rely on the authority of Ndugu Transport Company Limited & another v Daniel Mwangi Waithaka Leteipa [2018] eKLR, where the court held as doth: -

> " What emerges from these decisions is that the correct position in law in this jurisdiction is that a claim for loss of user is a special damage claim. Not only must it be specifically proved, it must also have been specifically pleaded in the plaint. It is thus evident that a claim for loss of user which was not only not pleaded but was not specifically proved, cannot stand. To allow it without proof would require that the court takes a figure, as it were, from nowhere and uses it as a basis for calculating the claim. The court cannot, as occasionally resorted to in a claim for general damages, "do the best it can" and make an award on a claim that was neither pleaded nor proved-see David Bagaine v Martin Bundi [1997] eKLR."

21. They also rely on the court's decision in the case of Gachanja Muhori & Sons Limited & another v Catholic Diocese of Machakos [2014] eKLR, where, B. Thuranira Jaden, held as doth: -

> " On the loss of user, I agree with the Appellant's submission that the same is a special damage claim and must be specifically proved. Although Kshs. 3,000/= per day was pleaded in the plaint for loss of user, for 90 days, no receipts were produced to support thereof. The claim for the loss of user must therefore fail. Damages for loss of use of motor vehicle if proved can only be assessed for a reasonable period. This should be the period during which the motor vehicle could have been assessed and repaired (See David Bagine case supra).
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> Without the motor vehicle assessor's report, it is difficult to tell what duration it would take to repair the motor vehicle. The evidence of PW2 that the spare parts were difficult to get at CMC is hearsay as nobody from CMC testified to that effect. The award of loss of user for a period of 90 was therefore not based on any cogent evidence."

22. In the case of Kenya Power & Lighting Company Limited v Quentin Wambua Mutisya t/a Bondeni Wholesellers [2018] eKLR, the Court, G V ODUNGA held as doth: -

> " In this case the Respondent's business was one of preparing and selling minced meat. He produced records from his said business which were admitted in evidence by consent. Based on the said evidence I am not prepared to interfere with the finding of the Learned Trial Magistrate on that issue. In this respect I agree with the decision in Nkuene Dairy Farmers Cooperative Society Ltd & Another vs. Ngacha Ndeiya [2010] eKLR, that:
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> "...special damages in a material damage claim need not be shown to have been actually incurred. The claimant is only required to show the extent of the damages and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the value of repairs was given with some degree of certainty...In the result we agree with Mr. Charles Kariuki that the Assessor's report was sufficient proof and the failure to produce receipts for any repairs done was not fatal to the respondent's claim. We dismiss this appeal with costs to the respondent."

23. In arriving at this decision the Court relied on Bowen, LJ's holding in Ratcliffe vs. Evans [1892] 2QB 524 where he held that:

> " The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

24. In the case of Peter Njuguna Joseph and EARS vs. Anna Moraa Civil Appeal number 23 of 1991, where it was held that:

> " Special damages must be pleaded with particularity and must be strictly proved. Loss of income is special damages, which must be pleaded and proved."

25. Lastly, they relied on the case of Eliud Maniafu Sabuni v Kenya Commercial Bank [2002] eKLR, where, justice A.G RINGERA, held as follows: -

> " Finally, although it may be cold comfort to the plaintiff, I desire to state that I am not holding that the plaintiff did not suffer any consequential loss for non user of his motor vehicle (the evidence is abundant that he did): what I am holding is that he has not proved the exact quantum of such loss to the degree of proof required of special damages. In the result I must reject his claim for loss of income."

26. The claim by the respondent appears weak. The loss of user is seen from the prism of the financial constraints of the Respondent that may have delayed repairs. Loss of user is a legal provision and the method of calculating or arriving at the quantum of the said damages, is a matter of law. The court has no discretion in adjudicating the case for loss of user. The evidence is already dealt with. If the court finds certain facts, this court has to proceed as if the same are true.

27. One fact that is not disputed is that the vehicle required 8 days to repair. The other fact is that the Respondent took their time to repair. One fact that is not clear, what was the purpose of payment of 325,000? There are no extenuating factors that will mean that the loss of user is extended briefly. The court had jurisdiction to treat the award of loss of user as general damages.

28. In respect of material claims, the claim is already quantified and as such the court proceeds to strict proof as required in the authority of David Bagine vs Martin Bundi (1997) eKLR

> " We must and ought to make it clear that damages claimed under the title "loss of user" can only be special damages. That loss is what the claimant suffers specifically. It can in no circumstances be equated to general damages to be assessed in the standard phrase "doing the best I can". These damages as pointed out earlier by us must be strictly proved. Having so erred, the learned judge proceeded to assess the same for a period of nearly three years. There the learned judge seriously erred. Damages for loss of user of a chattel can be limited (if proved) to a reasonable period which period in this instance could only have been the period during which the respondent's lorry could have been repaired plus some period that may

have been required to assess the repair costs. There was no evidence before the learned judge of what period the vehicle would have needed for repairs or for assessment of repair costs."

29. In the case of Jackson Mwabili v Peterson Mateli [2020] eKLR, Justice E. C. Mwita stated as doth: -

> " I do not think a taxi could be hired at Kshs 300/= a day unless it was for a short distance. The respondent wanted to be compensated from the time he hired the taxi after the accident to the time his suit was concluded. The law as laid down in the authorities is that a plaintiff should act reasonably and mitigate this loss. Courts have generally allowed a short period of about six months which would be reasonable to have the vehicle repaired.

30. In the respondent's case, this court will accept that he spent a reasonable amount to hire a taxi. Having failed to amend his pleadings to harmonise the amount pleaded and that in his testimony, an amount of Kshs. 2000/= per day would be appropriate in the circumstances. The court would also accept a period of six months as reasonable to have had the vehicle repaired and released for use. That would work out to Kshs. 60,000/= per month and Ksh. 360,000/= for six months."

31. I am unable to agree that a sum of 3,500/= was necessary to travel to and from. It is unreasonable to hire the most expensive taxi in town and ask to be paid. Those are factors which increase cost to the insuring public. Though 8 days for repair were given, the Respondent took a while to repair the vehicle. I cannot understand how one could be asking that he pays 325,000/= for car hire instead of repairing the vehicle,

32. The appellant has a duty to mitigate their losses. The court must also take cognizance to the fact that the fuel element is also removed from his expenses while awaiting repair. These repairs were not done, within a requisite period but eventually were. Had they proved their case on loss of user, 8 days could have sufficed. No more.

33. In the case of South Nyanza Sugar Company Ltd v Donald Ochieng Mideny [2018] eKLR, D.S. MAJANJA. Stated as doth:-

> " The respondent's claim was for the failure to harvest the plant crop. This was not controverted. According to Clause 1, the contract between the appellant and respondent was to remain in force for a period of 5 years or until one plant and two ratoon crops of sugar cane are harvested. It is thus clear, that the appellant breached the contract by failing to harvest the plant crop. As to the consequence of breach, I reiterate what I stated in Consolata Anyango Auma v South Nyanza Sugar Company Limited MGR HCCA 53 of 2015 [2015] eKLR that:
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> (15) The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the

time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR)).

34. The repair estimate was Ksh. 278, 400 for the accident occurred on 12/8/2022. The repair was on 19/8/2022. The same lasted 8 days. The invoice no. 60 was for hire of a saloon between to 5/8/2022-7-11 2022. The invoice is dated 7/11/2022. It is not accompanied by payment. There was no evidence for the said payment. Payments in the republic of Kenya are though ETR invoices. The court erred in law in making an award without evidence.

35. I note that the vehicle was towed on 14/10/2022 to the garage. This means two months were wasted doing absolutely nothing. It is not possible to use Ksh. 332,500 to hire a saloon car for 95 days, which required only Ksh. 278, 400 to repair in 8 days.

36. The most useful period is between 19/8/2022 to 27/8/2022 when the vehicle ought to have been repaired. It was not repaired. The court had no basis to award loss of user. Not because it was not suffered, because it was not proved. The court thus entered Judgement for Ksh. 332, 500 on the basis of no evidence. It is an error of law.

37. As a matter of law, a police abstract is given free. There can be no award for the same. If any money was paid, it was for illegal purposes. A sum of 200 is equally set aside.

38. I therefore set aside the award of Ksh. 332, 500 for loss of user. The claim is untenable. Consequently, the total sum of Ksh. 660, 200 and substitute it with Ksh. 327,900.

Determination

39. In the circumstances, I have come to the inevitable conclusion that the Appeal is merited and I therefore make the following orders: -

    a. I set aside the judgement on quantum in its entirety and in lieu thereof substitute with the following: -

    i. Cost of repairs Ksh 278, 400

    ii. Towing charges Ksh. 4,500

    iii. Loss of user NIL

    iv. Valuation of Ksh. 4, 500

    v. Police abstract NIL

    vi. Total Ksh. 327, 900

    b. Costs of Ksh 40,000/= to the Appellant.

    c. The Respondent to have costs of this court and the court below.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 26TH DAY OF JULY 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- Brian