**Bass Group Ltd & another v Reuben & another (Sued as the Administrators and Personal Representatives of the Estate of the Late Carlos Khamisi Shadrack - Deceased) (Civil Appeal E096 of 2021) [2023] KEHC 21995 (KLR) (31 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21995 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CIVIL APPEAL E096 OF 2021**

**DKN MAGARE, J**

**AUGUST 31, 2023**

**BETWEEN**

**BASS GROUP LTD ..... 1ST APPELLANT**

**AFRO MEAT COMPANY CO LTD ..... 2ND APPELLANT**

**AND**

**SAID KARISA REUBEN ..... 1ST RESPONDENT**

**LYDIA ZAWADI KARISA ..... 2ND RESPONDENT**

**SUED AS THE ADMINISTRATORS AND PERSONAL REPRESENTATIVES OF THE ESTATE OF THE LATE CARLOS KHAMISI SHADRACK - DECEASED**

***(Sued as the Administrators And Personal Representatives of the estate of the late CARLOS KHAMISI SHADRACK(Deceased))***

## JUDGMENT

1. This is an appeal from the ruling given 13th October 21 in Mariakani SPMC 340 of 2019 by the honorable S K Ngii in respect of the ruling for Stay and payment by instalments. There is no appeal from the judgement and decree of the court. The application had also been allowed and not dismissed.

2. Subsequent to the allowing of the application, the Appellant filed another application for stay pending appeal. The same was expressed to be made under Order 42 Rule 6, Order 7 Rule 22, Order 22 Rule 22 and Order 51 Rule 1 of the *Civil Procedure Rules*. The same was allowed on 15/12/2021 and the appellant was allowed to deposit in court, a sum of Kshs 523,405/ =being 10% of the decretal sum.

3. The appeal has been pending for hearing since then. I was invited for service week in Malindi. I perused the court file and noted that the entire 2023 has been spent on deciding what to with ceasing to act. The said application was filed and no step was taken to fix the same for hearing.

4. The court gave directions on hearing of this matter. Submissions and the record of Appeal were to be filed by 15/8/2023. No submissions were filed despite an order the file before 15th August 2023. I called out the matter on Monday morning. Only the Respondent attended and was not keen on filing submissions and as such did not wish to file. I therefore set today as the judgment day. Shortly thereafter the Appellant turned seeking an adjournment to fix an application to cease acting for hearing.

5. I directed that the matter already has a judgment day. It was my considered view that there are no timelines for ceasing to act. The application to cease acting ought to have been prosecuted when filed. The advocate on record remains as such till the order to cease acting is made. The application is not that the instructions were withdrawn but there are no instructions. A matter cannot remain in court ad infinitum waiting for a party to exercise mercy and compassion on the court and move it.

6. The reason for ceasing to act were certain aspects, which I presume is payment of fees. I had already fixed the matter for Judgement today when the Appellant logged in. he did not have anything useful to add, except that they wish to cease acting. The application to cease acting was filed on 8/5/2023 but no action was done at all. I abhor, the use of the Application to cease acting as an adjournment tactic. This aspect is now spent. There are other newer tactics to adjourn the matters. The faster the parties adapt the better.

7. I perused the file to see the nature of the Appeal. I then realized that the trial court issued an order of stay upon stay. The effect of staying a stay order is to lift the order. It is not issuance of stay. The court thus had no jurisdiction to ask that a sum of Kshs. 461, 971 be deposited in court. The court gave the Appellant a slap on the wrist. The appellant is riding on this and do not want to lose the same and as such are involving the court in a reed dance, obfuscating the issues and ensuring the case delays as much as possible.

8. It is important to note that when an application for stay is issued, it is staying the stay not the judgment. There was no appeal from the judgment. The court has no jurisdiction to stay a decree that is not subject of an appeal unless it is an application to set the same aside. Unfortunately, in this case it was stayed on stated that 10% of the amount paid. This has encouraged the appellant to take their sweet time.

9. The appeal before the court is based on the following grounds: -

    a. The trial Court erred in law and in fact in failing to appreciate the defendant's Application dated 10th September 20121 brought by the Appellants thereby reaching a wrong conclusion.

    b. The trial Court erred in law and in fact in that the granting prayers with which were not sought.

    c. The trial Court erred in law and in fact in failing to consider the entirety of the issues as set out in the Defendant's application dated 10th September 2021.

    d. The trial Court erred in law and in fact by granting the application in the manner the same was granted as it amounted to dismissing the application without due regard to the Applicant's financial position.

    e. The trial Court erred in law and in fact in by failing to appreciate the Appellant's Submissions in the entirety.

10. It is noted with concern that the Memorandum of appeal is repetitive and too wordy. A memorandum of appeal should be as concise as possible. Raisng one ground several times does not add value other than annoyance to litigation. Order 42, rule 1 of the *Civil Procedure Rules* provides as follows; -

(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."

11. The court of Appeal had this to say in regard to rule 86 (which is pari materia 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..."

12. 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."

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

> " The trial Court erred in law and in fact in erred in failing to properly exercise its discretion.

14. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The question to be dealt with thus is the exercise of discretion. The issue of considering submission is mundane and not an issue since the appeal to this court is by a retrial. It is not an issue that can be dealt with independently.

15. In the case of *Albert Yawa Katsenga v Kenya Revenue Authority*, Nairobi ELRC No 713 of 2018, the Court held that:

> " The rule provides circumstances under which this Court can grant orders for review and this include circumstances as indicated, in the Applicant's position, review sought on the account of an error on record because the Court failed to consider their submissions which had been filed, indeed, the time of writing this judgement, the Respondent's submissions had not been filed. They were also not on record. That notwithstanding, this Court considered the evidence of the Respondents on record and also considered the law and facts in arriving at Court's determination. Failure to consider the submissions of the Respondents does not in mv view prejudice the Respondents at all since all facts and the law in this case was considered. There is therefore no valid reason for me to consider a review order as sought."

16. My understanding this is all the appellant is raising is that the court erred in exercise of its judicial discretion. The duty of the Appellate court was settled in the case of *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123, this principle was enunciated thus:

> " ...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..."

17. What then was the discretion of the court. This was an application to pay by installment. The court had discretion whether or not to allow the payment by installments. However, the size of the installments, in other words the quantum was within the discretion of the court. The court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in *Kemfro Africa Ltd v Meru Express Servcie v A.M Lubia & another* 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

18. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance v British Columbia Electric Co Ltd, in the decision of Henry *Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages :-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure

of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

19. For the appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure. The same applies to payment by installments. It is not enough to show that I could have awarded a different figure in terms of installments. The court heard the case and determined quantum. Payment by installment is not a right but a discretionally order. The appellant cannot set the installments they wish to pay.

20. The duty of the court is to find the most optimum installments that could be awarded in settlement of the decretal sum. The court in its wisdom, found that paying half the decretal sum upfront and installments of 200,000/= was proper. If it was this court sitting, I could have come up with a different figure. However, the question is whether I can substitute the court's discretion with mine.

21. Had I been sitting, I will have dismissed the application. However, the court in its infinite wisdom ruled in favour of the Appellant. I do not find any improper exercise of discretion. The court considered that 100,000/= will take over 49 moths, 4 years to complete. The court found the proposal on the face of it unreasonable. The claim was also undefended and a life was lost. The court also found the financial constraints unsubstantiated.

22. The applicants were amenable to pay half and pay by installments, then the court gratuitously exercised discretion in favour of the undeserving Appellants. The court is now being vilified for being gratuitous

23. The parties confirmed to the court that the decretal sums have not been paid since judgment was delivered. Had the Applicant been paying amounts they were asking, they will have by now depleted a huge chunk of the decretal sum.

24. I note that stay was sought after the orders of 13/10/2021 had lapsed. The appellant did not comply with the orders given as a condition for stay and payment by installment. The orders will thus have lapsed as I dismiss the appeal.

25. I have said enough to show that the Appeal has no merit. There is nothing in the court ruling that shows the court exercised its discretion in a manner that is not judicious.

26. In the circumstances, the appeal begs to be dismissed and I accordingly oblige. I dismiss the appeal with costs. Section 27 of the *Civil procedure Act* provides as doth; -

"Costs

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

27. In order to conclude this matter, it is necessary to indicate the costs at the time of delivery of judgment. Though the Respondent may be entitled to a higher amount based on the subject matter, they had not made an application to dismiss. The nature of work done is minimal. In the circumstances, and balancing the interests of justice a sum of 105,000 is sufficient. The same shall be payable within 30 days, in default execution to issue.

28. Determination

29. In the end, I find no merit in the appeal. I make the following orders: -

    a. The appeal is accordingly dismissed with costs of Kshs 95, 000/= payable within 30 days.

    b. In default, execution do issue.

    c. The orders of stay pending Appeal are hereby lifted.

    d. For avoidance of doubt, the orders given on 13th October 2021 were not complied with by 13th November 2021, hence the order for payment by installments lapsed. Execution should therefore proceed forthwith in the lower court.

    e. The file is closed.

**DATED, ISSUED AND DELIVERED AT MALINDI, VIRTUALLY 31ST DAY OF AUGUST THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY-THREE.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:

Matara for the Respondent

Malombo for the Appellant

CA Jungo