



Planet Electronics Limited v Total Kenya Limited (Civil Appeal E157 of 2018) [2023] KEHC 27539 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 27539 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E157 OF 2018
F WANGARI, J
SEPTEMBER 29, 2023**

BETWEEN

PLANET ELECTRONICS LIMITED APPELLANT

AND

TOTAL KENYA LIMITED RESPONDENT

(Being an appeal against the decision contained in the Judgment and Decree to be extracted therefrom given by Honourable J. Kassam dated 24th of July 2018 in Mombasa CMCC 1422 of 2004, Total Kenya Limited V Planet Electronics limited)

JUDGMENT

1. The Appellant filed the Memorandum of Appeal dated 7th September, 2020. The Appellant stated that the learned Magistrate erred in fact ad law by entering judgment in favour Respondent (the Plaintiff in the lower court), despite there being no documentary evidence in support of their claim. The appeal was disposed of by way of written submissions.
2. The Appellant complied by filing its submissions. From the record, no submissions were filed by the Respondent. The issue for determination is; “whether the respondent proved their case on a balance of probability”
3. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep 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.
4. 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 it 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.”

5. The duty of the 1st Appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows; -

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... 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.”

6. The Court is to bear in mind that it neither saw nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

7. In the case of *Peters vs Sunday Post Limited* [1985] EA 424, court therein rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

8. The Respondent/Plaintiff filed a plaint dated 5/1/2004 seeking for a judgment against the Appellant/Defendant for Ksh. 868,816.21 being money due to them after supplying petroleum products to the Appellant at their request. The date of incurring the debt is not pleaded.

9. The Appellant filed Defence on 14/7/2004. The Defence as filed was a general denial that there is no money owing to the Plaintiff. This is not a proper defence. In the case of *Raghibir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR, where the court of Appeal stated as doth: -

“The main object of this rule and [order vi rule.14] is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in *Thorp v Holdworth* (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible”, (underling supplied).

I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant’s defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a).”



10. In the Plaintiff's witness statement, the Respondent pleaded that the debt arose between 1998 and 2000. The Appellant is stated to have been supplied with petroleum products worth Ksh. 1,260,670.51. They paid Ksh. 250,078.30 and obtained credit note for Ksh 132,776 leaving a balance of 868,816.21, being the amount claimed.
11. Truth be told, both sets of pleadings are not the best that could be done. They made the trial of the case unnecessarily scanty and unpalatable.
12. The Appellant filed the Defence witness statement dated for 4th April 2012. The witness stated about the demand letter from the Plaintiff. He did not touch on the fuel alleged to have been supplied.
13. The proceedings indicate that the matter was adjourned for 12 years continuously. It is till 14/6/2016 when the matter proceeded for hearing after the court stamped its authority. Christopher Mwangi testified for the Respondent and produced various documents. He produced exhibits including a memo dated for 4.11.1998.
14. He stated that the Respondent, subsequently, engaged a debt recovery agent. The agent indicated that the Appellant needed a credit on Ksh 132,776.70. This credit note was given leaving the aforesaid balance. Several exhibits were produced in support of the plaintiffs claim. For the defence, Rahimbaksh Ashraf adopted his statement dated 19.9.2016. that he was an accountant. He was unable to explain about the said sum of Ksh. 868, 816.21.
15. Upon hearing the evidence, the court entered judgment for the respondent Kenya Shillings 868, 816.21. This resulted in the current appeal. Though there are small amounts, this is a claim for a liquidated claim. The respondent's claim was for a specific amount. This is a claim for an amount already expended and it is specified. There was need for the Appellant to be very particular regarding the claim. A general denial cannot suffice.
16. The claim is said to be a balance over a debt. There are payments made, as from the statement. The Appellant did not explain any of them. In the defence, the Appellant states as follows: -
 - a. The Defendant denies that it owes the alleged sum of 868, 816.21 alleged or at all and put the plaintiffs to strict proof thereof
 - b. The defendant reserves the right to amend its defence upon supply of further particulars
17. These particulars were not sought, though the plaintiff supplied them. The Defence is not a proper defence. Order 2 Rule 4 of the Civil Procedure Rules provides as follows: -

“ 4. Matters which must be specifically pleaded

- (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
 - (a) which he alleges makes any claim or defence of the opposite party not maintainable;
 - (b) which, if not specifically pleaded, might take the opposite party by surprise; or
 - (c) which raises issues of fact not arising out of the preceding pleading.



- (2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.
- (3) In this “land” includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land.

18. Given that the defence was drawn in year 2004 the former *Civil Procedure Act*/ Rules applied it is essentially the same. In Eng. S. R. Manga Vs Board of Trustees of N.S.S.F Milimani HCCC No. 674 Of 2004, the learned Judge observed:

“As stated above the function of particulars is to ensure clearness and prevent surprise at the trial. Pleadings should therefore state those facts which will put the Defendant on their guard and tell them what they will have to meet when the case comes up for trial. They should sufficiently indicate to the opponent the nature of the evidence required by them

19. Essentially, where there is a claim for debt, there must be specific answers, that is, whether the debt was never incurred, or was incurred but paid and set out particulars of payment, there was partial payment or at all. Details must be given. It is not enough to say that is not due or you do not owe. The defence of such a nature ought to be pleaded to avoid surprises.

20. It should be remembered that parties are bound by pleadings. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, justice A C Mrima stated as follows;

“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 & Anor. 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: -

“.....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.....

...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.”

12. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to



travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

19. Going through all the documents, I did not find any error of fact and law thereof. The findings of the court that the debt was due and owing to the sum of Ksh 868,816.21 was in order since the documents supplied and admitted are sufficient to show the debt due on part of the Appellant. It is not enough to allege that the Appellant do not owe the Respondents. Consequently, the defence evidence that there were various companies fueling, is an afterthought. It does not answer the pleadings already filed by the Appellant.
20. On the issue of costs, the same follows the event. This is what section 27 of the *Civil Procedure Act* decrees. However, this court has discretion to either award or not award any costs. Though the Appeal has no merit, I do not approve of the indolence which unnecessarily delayed a simple matter for a period of 14 years. I do not find them befitting costs. Each party shall bear their own costs.
21. The upshot of the foregoing is that I make the following orders: -
 - a. This appeal is hereby dismissed in limine.
 - b. Each party to bear their costs.
 - c. Given the delay in prosecuting the suit, the order for interest in the lower Court shall run from the date when judgement in the lower court was delivered.
 - d. Costs in the lower course shall be as ordered by that court.
 - e. The file is closed

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF SEPTEMBER, 2023.

.....
F. WANGARI

JUDGE

In the presence of;

Aisha Advocate for the Appellant

N/A by Respondent

Barile, Court Assistant

