



**Mwadime t/a Mwadime Enterprises v Kenya Power & Lighting Company & another
(Civil Appeal 102 of 2022) [2023] KEHC 27537 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 27537 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 102 OF 2022
F WANGARI, J
OCTOBER 27, 2023**

BETWEEN

ERIC GODWIN MWADIME T/A MWADIME ENTERPRISES APPELLANT

AND

KENYA POWER & LIGHTING COMPANY 1ST RESPONDENT

GLOMALLY INVESTMENTS LIMITED 2ND RESPONDENT

(Being an Appeal against the Ruling/Order of Hon. G. Kiage Senior Resident Magistrate delivered on 8th July, 2022 in Mombasa SRMC No. 105 of 2018)

JUDGMENT

1. This is an appeal from the ruling of the Learned Senior Resident Magistrate Hon. G. Kiage in Mombasa SRMC 105 of 2018 given on 8th July, 2022.
2. The Appellant being dissatisfied with the said ruling preferred the present appeal and raised four (4) grounds of appeal which are set out as follows: -
 - a. That the Learned Magistrate erred in law and in fact in finding that the cause of action in the suit was solely tortious and in finding that the 2nd Respondent had been enjoined after expiry of time.
 - b. The Learned Magistrate erred in law and in fact in disregarding evidence that the relationship between the Appellant and the 2nd Respondent was contractual and in finding that the suit against the 2nd Respondent was not based on contract.
 - c. The Learned Magistrate erred in law and in disregarding stare decisis.
 - d. The Learned Magistrate erred in law and in fact in ordering the Appellant to bear the costs of the application.



3. The Appellant thus prayed that Appellant’s appeal be allowed in whole, the trial court’s ruling be varied and/or set aside and that the Appellant be awarded costs of the appeal as well as the subordinate court’s costs.
4. 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.
5. This was aptly stated in the cases of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters v Sunday Post Limited* [1985] EA 424 where in the latter case, the 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...”

6. In *Livestock Research Organization v Okoko & another* (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling), Justice R. E. Aburili, J. held as follows;

In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that

: “[A]n appeal to this Court from a trial by the High 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 allowances in this respect”

7. Directions were taken that the appeal be canvassed by way of written submissions. Both the Appellant and the 2nd Respondent duly complied by filing detailed submissions together with decided cases in support of their rival positions.

Analysis and Determination

8. I have considered the appeal lodged, the submissions filed both for and against, the authorities cited as well as the law and I discern the following issues for determination: -
 - a. Whether the Trial Magistrate erred in sustaining the preliminary objection dated 1st March, 2022 and dismissing the notice of motion dated 18th February, 2022;
 - b. If the answer to (a) is in the affirmative, what reliefs and/or remedies should the court issue?
 - c. Who bears the cost?
9. In answering the first issue, a consideration of the two (2) applications would be necessary. Both the notice of motion and the preliminary objection were all filed by the 2nd Respondent. The application dated 18.2.2022 sought to strike out the amended plaint said to have been purportedly amended on the 25.1.2018 and allegedly filed on the 25.1.2018. On the other hand, the preliminary objection dated



1.3.2022 notified the Appellant that his suit was time barred having been filed on 1.10.2018 thus offended the provisions of section 4 (2) of the *Limitation of Actions Act*.

10. The 2nd Respondent submitted that the Appellant in his replying affidavit had admitted that the amended plaint was filed on 1/10/2018 yet the cause of action had arisen on 28.1.2015, the same was time barred. The 2nd Respondent's reason was that the claim as against it was based on tort and not contract and as such, the same ought to have been instituted within a period of three (3) years. On the Appellant's part, it was submitted that the claim against the 2nd Respondent was based on contract and thus the period ought to be six (6) years hence he was perfectly in order to institute the suit as against the 2nd Respondent within six (6) years from the date of damage.
11. Upon considering the rival submissions, the trial court making reference to paragraph 6 of amended plaint concluded that there was no mention of contract or breach of obligation arising out of a contractual relation. Therefore, the Appellant's claim being based on tort and having instituted the same against the 2nd Respondent outside the statutory time limit, the same was incompetent since no leave had been sought. The trial court sustained the preliminary objection and proceeded to strike out the Appellant's suit against the 2nd Respondent with costs. Having found as above, he concluded that it served no practical purpose to deal with the application dated 18.2.2022. It is this ruling that precipitated the present appeal.
12. A cursory look at the initial plaint dated 25th January, 2018 shows that the suit was only against the 1st Respondent and was filed on 26th January, 2018. At page 5 of the Record of Appeal, there is an amended plaint now incorporating the 2nd Respondent. It is indicated to have been amended on 25th January, 2018 and filed on the same day. Curiously, it is equally dated 25th January, 2018 and then crossed to show that it has been amended. This is the practice when it comes to amendments. Now a consideration of the subsequent pleadings is what raises serious eyebrows on this amended plaint said to have been filed on 25th January, 2018.
13. The initial and only Defendant then, who is the 1st Respondent herein entered appearance on 17th April, 2018 and filed its statement of defence dated 11th May, 2018 on even date. Paragraph 4 of the said defence is instructive. It states as follows: -

“ 4. In the alternative and without prejudice to the foregoing, the Defendant avers that if the Plaintiff suffered any loss and or damage as a result of any fire that razed the Plaintiff's timber yard to the ground on the material date, then the same was not caused by any negligence and or lack of care on the part of neither the Plaintiff nor the Defendant but by a defect and fault in the electricity supply transformer and or overhead electronic supply cables installed, owned, controlled, maintained and or managed by a third party known to the Plaintiff, the Kenya Power Ltd and whose acts and omissions neither the Plaintiff nor the Defendant are liable nor vicariously liable since they are outside the control and or management of both the Plaintiff and the Defendant. The Defendant shall thus seek to have the Plaintiff's suit as against it struck out and or dismissed with costs in limine since it does not disclose any cause of action as against the Defendant since the above facts are supported by the Plaintiff's own documents.

14. This averment alone leaves no doubt that at the time of filing its statement of defence, the 1st Respondent confirmed that the 2nd Respondent was not yet a party to the suit. It referred to the 2nd Respondent as, “...a third party known to the Plaintiff, the Kenya Power Ltd...” On 25th May, 2018, the Appellant file the pre-trial questionnaire which captured the parties as the Appellant and the 1st Respondent only (page 58 – 59 of the Record of Appeal). The parties as they were initially were



- replicated at pages 60 – 63 and 65 - 84 of the Record of Appeal. As late as 1st November, 2019, almost two (2) years after the suit was filed, the parties as of 25th January, 2018 were the same (page 84 of the Record).
15. The 2nd Respondent filed its statement of defence dated 4th December, 2020 on 15th December, 2020. It was later amended on 24th March, 2022 where at paragraph 10, it was pleaded as follows:
- “ 10. In the alternative and without prejudice to the foregoing, the 2nd Defendant avers that the Plaintiff’s suit against the 2nd Defendant, instituted on 1st October, 2018 is time barred by virtue of the provisions of the Limitation of Actions Act, Cap 22 and shall the earliest possible opportunity raise a preliminary objection to this effect.
16. This amended statement of defence had been preceded by the two (2) applications forming the trial court’s ruling on 8th July, 2022 and the substratum of this appeal. Another interesting facet to these proceedings is the request for judgement dated 30th October, 2018. It is followed by an affidavit of service sworn by one James Maina Mwangi and filed on 18th October, 2018. At paragraph 2 of the said affidavit, the deponent deponed as follows: -
- “ 2. That on the 15th day of October, 2018, I received copies of plaint dated 25/01/2018 and copies of summons dated 3/10/2018 from the firm of M/S Wachenje Mariga & Company with instructions to serve them upon the 2nd Respondent.
17. Interestingly, the process server does not make mention of any amended plaint but a plaint. Even if he had (which in any way he did not), the question that literally begs for an answer is, if the plaint was dated 25/1/2018, what explanation justifies summons to be signed on 3/10/2018? I shall revisit this question later in the judgement. The typed proceedings of 26/1/2018 at page 325 of the Record leaves no doubt that the initial plaint was filed on 26/1/2018/. It is only on 1/10/2018 that the Appellant states that they had filed an amended plaint which they wished to serve the 2nd Respondent. In his replying affidavit and submissions, the Appellant confirmed that the amended plaint had been filed on 1/10/2018.
18. Having summarized the above salient facts, I now turn to answer the first issue. The Appellant submitted that his claim was based on tort and contract and the court was referred to paragraph 6 (a) – (e) of the amended plaint. The decisions in *South Coast Project Ltd v Kenya Power & Lighting Co. Ltd* [2016] eKLR and *Leo Investments Ltd v Trident Insurance Company Ltd* [2014] eKLR were cited in support of the Appellant’s position.
19. For the 2nd Respondent, it was submitted that for argument’s sake, even if leave to amend had been granted on 3rd September, 2018 as averred in the Appellant’s replying affidavit, the purported amendment of 1/10/2018 offended the provisions of Order 8 Rule 6 of the Civil Procedure Rules for reasons that it was filed out of time and thus the order for amendment ceased to have effect on 17/9/2018. The decisions in *Fredrick M. Waweru & Another v Peter Ngure Kimingi* [2007] eKLR and *Mary Wangari Kiarie v Safaricom (K) Limited* [2021] eKLR were relied on to support the 2nd Respondent’s submissions.
20. Was there a proper amended plaint on record? To answer this question, the initial plaint as per the record was filed on 26/1/2018. As per the Appellant’s averments in the replying affidavit dated 25th February, 2022, leave to amend the plaint was sought on 3/9/2018 and it was granted. He proceeded and filed the amended plaint on 1/10/2018. Without belaboring this point, at page 12 to 17 of the Record of Appeal, what is clearly exhibited is an amended plaint dated 25/1/2018, amended on the



same date and then filed on the same date. Even if it was to be accepted to be correct, it is not supported by a verifying affidavit.

21. Further to the foregoing, it is not possible to amend any pleading before the initial pleading has been filed. This alone answers the question, there was no proper amended pleadings on record. What is on record is a document titled “amended pleadings” whose authenticity cannot be ascertained by anyone other than the authors. Without castigating the Appellant, I hold that this is abuse of court process in its unadulterated form.
22. Abuse of process is defined as the unjustified or unreasonable use of legal proceedings or process to further a cause of action by an Applicant or Plaintiff in an action. It is a claim made by the Respondent or Defendant that the other party is misusing or perverting regularly issued court process (civil or criminal) not justified by the underlying legal action.¹ In *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No. 25 of 2002 [2009] eKLR the Court of Appeal while considering this term cited with approval the Court of Appeal in Abuja, Nigeria in the case of *Attahiro v Bagudo* 1998 3 NWLL pt 545 page 656, where the said court stated thus: -

“...the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...”

23. By backdating the alleged amendment, it leaves no doubt that the Appellant realized that his claim was time barred and this must have been elicited by the 1st Respondent in paragraph 4 of its statement of defence which I have highlighted above. The only way to circumvent the process was to interfere with the records by backdating the document to fit his otherwise ulterior motive. This court cannot countenance such conduct and in future such conduct shall attract dire consequences. I believe with the introduction of the e-filing system, such individuals who wish to arm-twist the court into issuing orders they do not deserve have been cut to size.
24. Before penning of on this part, I had pointed elsewhere in this judgement that I shall address the issue of a pleadings being filed in January, 2018 and summons signed in October of the same year. Order 5 Rule 1 (2) of the Civil Procedure Rules is categorical and provides as hereunder: -

Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.

25. Therefore, the summons even though signed were irregular as they were issued way out of the time stipulated by the Rules and this further adds to the arm-twisting as alluded above.
26. Having noted as above, even if the alleged amended pleadings was proper, could it stand the tests of Order 8 Rule 6 of the Civil Procedure Rules? I am afraid not. It provides as follows: -

Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or, if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period.”

¹ https://en.wikipedia.org/wiki/Abuse_of_process Accessed on 25th October, 2023 at 1713hrs



27. This is assuming that such leave was sought for and it was granted. The proceedings of 3/9/2018 both typed and handwritten makes no mention of such an application. Be that as it may, even if it was, the Rules are clear that if no period is specified, the same must be done within fourteen (14) days. This means if such an application was made and granted, the last day to make the application was 17/9/2018 taking into account computation of time under *Interpretation and General Provisions Act*. The alleged amendment is said to have been made on 1/10/2018, thirteen (13) days out of time and no evidence of extension provided. Even on this limb, the Appellant would still have failed.
28. For academic purposes, even if extension had been granted and the alleged amended plaint admitted as properly on record, was the Appellant's course of action in tort, contract or both? The Appellant had referred the trial court to paragraph 6 (a) – (e) of the alleged amended plaint. I say alleged because the court has made a determination on this document. Without going to the enumerated particulars, I shall just reproduce paragraph 6 thereof. It reads as follows: -
6. The said fire was unlawfully and wrongfully started by the negligence or breach of duty of care on the part of the 2nd Defendant on the 1st Defendant's demised premises and the fire escaped and spread thereby causing extensive damage to the Plaintiff's adjoining premises. (Emphasis added)
29. There is no doubt that negligence is a tort. For one to prove negligence, there are four requirements and/or elements. These were well enunciated in the case of Caparo Industries PLC v Dickman [1990] 1 ALL ER 568 and Chun Pui v Lee Chuen Tal [1988] RTR 298 which highlighted the determinants of negligence as follows: -
- “The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused.”
30. I thus have no hesitation to hold that breach of duty of care falls under the general rubric of negligence and is just but one of the four elements. To this end, I have no doubt in my head that the Appellants claim fell under tort and was governed by section 4 (2) of the *Limitation of Actions Act* which provides thus: -
- An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:
31. The only recourse for a party who finds itself in such a hole is to seek for leave under section 27 of the *Limitation of Actions Act* but must satisfy the requirements thereunder that the material facts which the said party intends to rely on were entirely out of its reach. Without such, leave shall not be granted. I am equally alive that even if leave is granted, the application being *exparte* in nature is still subject to challenge at trial.
32. In *Analect Kalia Musau v Attorney General & 2 Others* [2020] eKLR, the Court of Appeal while addressing itself on the issue of limitation cited with approval the East Africa Court of Appeal decision in *In the Matter of Iga v Makerere University* [1972] E.A. 62 where it was held thus: -
- “...The limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time-barred, the court cannot grant the remedy or relief...The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, and no grounds of exemption are shown in the plaint, the plaint must be rejected.” (Our emphasis). The learned Judge in this appeal, no



doubt did not err when she determined whether, by operation of the law, she had to down tools for want of jurisdiction...”

33. Thus, my determination on the first issue is that the trial court properly analyzed the issues before it and came to the correct conclusion which I affirm. Having sustained the preliminary objection, the other application seeking to strike out the plaint was rendered moot. On the second issue, the only relief or remedy that needs to be considered is costs.
34. On the issue of costs, a careful reading of Section 27 indicates that it is trite law that they follow the cause or event as described by Sir Dinshah Fardunji Mulla in his book The Code of Civil Procedure, 18th Edition, 2011 reprint 2012 at 540. It is that costs must follow the event unless the court, for some good reasons, orders otherwise. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exist some other good reasons and or cause for not awarding costs to the successful party. Having dismissed the appeal, it would be onerous to condemn the Appellant to pay costs and, in the circumstances, I order that each party to bear own costs.
35. Flowing from the above, I proceed to make the following disposition: -
 - a. The appeal is hereby dismissed on terms that the ruling delivered on 8th July, 2022 is upheld.
 - b. For avoidance of doubt, the 2nd Respondent’s name is struck out from any further proceedings.
 - c. Each party to bear own costs.
 - d. Considering that this was a ruling from an interlocutory application, I note that the matter is yet to be fully heard and determined. For this reason, I direct that the file be placed before the trial court for full hearing and determination within thirty (30) days from the date hereof.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 27TH DAY OF OCTOBER, 2023.

.....
F. WANGARI

JUDGE

In the presence of:

Mr. Mugambi Advocate h/b for Mr. Wachenje Advocate for the Appellant

N/A for the 1st Respondent

Mr. Okello Advocate for the 2nd Respondent

Barille, Court Assistant

