



**Wesonga v Channan Agricultural Contractors (Civil Appeal 128 & 105 of 2018  
(Consolidated)) [2022] KEHC 12311 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12311 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL 128 & 105 OF 2018 (CONSOLIDATED)**

**PJO OTIENO, J**

**JULY 29, 2022**

**BETWEEN**

**CELESTINE O WESONGA ..... APPELLANT**

**AND**

**CHANNAN AGRICULTURAL CONTRACTORS ..... RESPONDENT**

*(Being an appeal from the judgment and ruling of Hon.  
C.C.Kipkorir SRM in Mumias Civil Case No. 240 of 2008)*

**JUDGMENT**

**Background of the Appeals**

1. The appellant, by way of a plaint dated June 25, 2008, sued the respondent at the Senior Resident Magistrate Court in Mumias for general and special damages in relation to an accident that he pleaded occurred on November 19, 2007. The respondent entered appearance on July 4, 2008 and subsequently filed their written statement of defence dated July 15, 2008. Hearing commenced on July 9, 2010 during which date two of the appellant's witnesses testified.
2. Through an application dated July 20, 2010, the appellant requested for leave to amend her plaint, an application which the trial court allowed on condition that the appellant pays the requisite court fees. It came to the attention of the trial magistrate when preparing for the judgment that the requisite court fees for the amended plaint was not paid and the appellant's counsel was unable to produce the receipt of payment. The court thus disregarded the amended plaint prompting the appellant to file an application dated March 17, 2018 seeking to have the amended plaint regarded by the court. That application was dismissed by the court in a ruling delivered on July 4, 2018. It that ruling that brought rise to Civil Appeal No 205 of 2018, which appears not to have been pursued although the Court did on May 5, 2022, direct that it be put together with this.



3. By a judgment delivered by the trial court on August 22, 2018, the appellant's suit was dismissed with costs to the defendant for the reason that the accident pleaded was not proved since the plaint indicated that the accident occurred on November 19, 2007 whereas the police abstract indicated the accident occurred on November 30, 2007. I consider the two appeals to be intertwined, from the submissions filed and therefore, I direct that the same be consolidated and heard together.
4. Aggrieved by this judgment, the appellant filed a memorandum of appeal dated September 19, 2018 giving rise to Appeal No 128 of 2018. The appeal is premised on the following grounds: -
  - a. That the learned trial magistrate erred in law and in fact in dismissing the appellant's case when she had proved the same on a balance of probabilities.
  - b. That the learned trial magistrate erred in law and in fact in disregarding the mandatory provisions of the Constitution, the Civil Procedure Act and all other relevant laws and arriving at her decision based on technicalities.
  - c. That the learned trial magistrate erred in law and in fact in disregarding the existence of the appellant's amended plaint and thus arriving at wrong verdict.
  - d. That the learned trial magistrate erred in law and in fact in biasing her decision on an original plaint which had been amended from to the detriment of the appellant's quest for justice.
  - e. That the learned trial magistrate's findings were against the interests of justice on an appellant who was seriously injured and still nursing injuries."

For its part the earlier appeal faulted the court for failure to appreciate the law on amendment and payment of court fees.

5. The appeals were canvassed by way of written submissions and each party has filed their respective submissions.

### **Appellant's Submissions**

6. It is the submission of the appellant that she was injured by a motor vehicle belonging to the respondent and that she suffered serious skeletal injuries which injuries are indicated in the P3 form and the medical report. She contends that the reason why her suit was dismissed by the trial court was because her plaint was not amended to rectify the date when the accident occurred. She argues that the trial court allowed her to amend the plaint which she did only that she failed to pay for the filing fees an issue she argues does not arise.
7. The Appellant lastly submits that all the documents produced that is; the P3 form, the police abstract and the medical report indicate that the accident occurred on November 30, 2007 and denying the Appellant justice on the technicality of a date would be harsh.

### **Respondent's Submissions**

8. It is the submission of the respondent that the appellant was granted leave to amend her plaint during which application she prayed that the amended plaint annexed to her application be deemed to be duly filed upon payment of the requisite fees. The respondent submits that failure by the appellant to pay the requisite fees within 14 days as per the rules on amendment contained in Order 8 rule 6 of the Civil Procedure Rules meant that the effect of the order died a natural death. They placed reliance on the case of Macfoy v United Africa Co Ltd (1961).



9. The respondent further submits that the appellant pleaded that the cause of action arose on November 19, 2007 and they are thus bound by those pleading with no liberty to lead evidence contrary thereto.

### Issue

10. This court has considered the grounds of appeal, the proceedings of the lower court and the submissions by both the appellant and the respondent and discerns the issue for determination to be whether the appellant proved her case against the respondent and thus ought to be awarded damages for injuries suffered following the pleaded road traffic accident involving Number KAP xxxC registered in the name of the respondent.

### Analysis

11. The appellant's two appeals centered on the issue of lack of admission of her amended plaint by the trial court. In fact the fate of the first appeal would determine that of the latter. The reason given by the trial court for the dismissal of both the appellant's application and the suit was the fact that the amended plaint was not filed on time contrary to the provisions of Order 8 rule 6 of the *Civil Procedure Rules* and the fact that the cause of action pleaded in the plaint did not match and could thus not be proved by the evidence in the police abstract.
12. Failure to pay the requisite fees to an application and/or a pleading renders it incompetent and the trial court was right to dismiss the amended plaint. This was the holding of Mativo J in *Mombasa Cement Limited v Speaker, National Assembly & another* [2018] Eklr where he observed as follows: -
  - “26. The filing of a civil case requires the payment of filing fees. It follows that failure to pay court fees renders the suit incompetent because there is no competent suit filed before the court. Whereas the court has inherent powers to allow a party who has not paid fees time to remedy the situation, where a party as in this case is afforded the opportunity to remedy the situation or demonstrate that he paid, and fails to remedy the situation or offers out rightly conflicting explanations as happened in this case which culminated in the above affidavit. In such circumstances as has happened in this case, the court is left with no option but to declare the suit incompetent and strike it off as I am compelled to in this case.” (Emphasis added)
13. This court has had the opportunity to peruse the amended plaint and I must state that even if the amended plaint was to be filed on time, the same would have not cured the issue of when the accident occurred since the amendment only addressed changes on the respondent's legal representative and not the date of the accident.
14. The appellant's appeal appears to be akin to requesting this court to determine the suit outside her pleadings. Pleadings are the bedrock upon which all proceedings arise from and any evidence that tends to contradict the pleadings ought to be rejected.
15. The position that parties are bound by their pleadings has been affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Another 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.”

16. The Court of Appeal in Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others (supra) further cited the decision of the Malawi Supreme Court of Appeal in Malawi Railways Ltd Vs. Nyasulu [1998] MWSA 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled “The Present Importance of Pleadings.” Published in [1960] Current Legal problems, at P174 whereof the author had stated;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “any other business” in the sense that points other than those specific may be raised without notice.”

17. This court just like the parties, is bound by the pleadings of the appellant and the evidence tendered in support of the pleadings which include PW1, the appellant herein, testifying that the accident occurred on November 19, 2007. This court being an uninterested umpire is bound to make a determination based on what is on record and in accordance with the law that pleadings be proved by evidence.
18. The police abstract produced by the appellant showed that the accident occurred on November 30, 2007. I share the findings of the trial court that the accident pleaded was not proved, and thus find that the evaluation of the evidence by the trial magistrate and conclusions made cannot thus be faulted. The decision was sound in law and naturally flowing from the evidence adduced.

### **Rendition And Final Orders**

19. Accordingly, for the reasons set out above, this court finds that Civil Appeal No 205 of 2018 and Civil Appeal No. 128 of 2018 lack merit and they are thus dismissed with costs to the respondent.



**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 29<sup>TH</sup> DAY OF JULY 2022.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:**

No appearance for the Appellant

No appearance for the Respondent

Court Assistant: Kulubi

