Barrack v Amimo t/a Blissful (Civil Appeal E101 of 2024)
[2025] KEHC 12 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KEHC 12 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E101 OF 2024

DKN MAGARE, J

JANUARY 10, 2025

BETWEEN

EUNICE AWUOR BARRACK ..... APPELLANT

AND

PHILISTER AMIMO T/A BLISSFUL ..... RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of the Honourable W C Keter delivered on 1.5.2024 in Kisii SCCCOM E053 0F 2024.The Appellant was a Claimant in the Small Claims Court.

2. The Appellant filed a claim dated 7.3.2024 against the Respondent claiming a sum of Ksh. 200,000/ = money had and received on an online chama. She paid Ksh. 1,302,400/- but was not paid whole amount. She earned interest which was not paid. She prayed for a sum of Ksh 200,000/=. She posited that one Vivian was paid part of her savings and she refused to refund. The Appellant annexed discussions on WhatsApp messaging service confirming discussions among the three parties.

3. The Appellant followed up with the Respondent and Vivian Otok but in the end sued the Respondent. The Respondent in her defence stated that there was an arrangement for Vivian Otok to be paid. There appears to have been a separate agreement between Vivian Otok and the Appellant. The Respondent stated that she wired Ksh 82,000/= to Vivian Otok on instructions of the Appellant. According to her, she discharged her mandate and paid all the interest and principal sum of Ksh 1,220,440 from the money raised. There was communication from the Appellant that Vivian Otok had not sorted the Appellant out.

4. The court heard the parties on a preliminary objection, which the court rightfully dismissed in limine on the basis of the decision in Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd [1969] E.A. 696, where the court held as follows:

> " A preliminary objection must be on a point of law. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969) EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:
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> > "…. A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."
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> > At page701 paragraph B-C Sir Charles Newbold, P. added the following:
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> > A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion…."

5. The parties agreed that the matter was to proceed by way of documents as provided under section 30 of the small claims act. The court thereafter delivered its judgment and dismissed the claim. The Appellant Appealed and set forth the following grounds: -

   i. That the learned trial Magistrate erred in law in failing to properly analyze both the documents/ conversations produced by the Appellant and the Respondent thereby arrived at a wrong decision and/or conclusion in his judgement.

   ii. That the learned trial Magistrate failed to note and consider that the contract was strictly between the Appellant and the Respondent and not Vivian Otok severally mentioned in deciding the matter.

   iii. That the learned trial Magistrate erred in law and fact by failing to consider that and/or make any payments to anyone, the said Vivian Otok being a stranger to the dismissing the appellant's suit.

   iv. That the learned trial Magistrate failed to note and consider that the preliminary Respondent had failed prove by way of evidence that she was instructed to direct

   v. That the learned trial magistrate failed to note that the Respondent was the Appellant was a member and thus there was no way the Respondent could give the appellant's money to a third party without any consultation and permission from the Appellant.

   vi. The learned trial learned magistrate erred in law and fact in failing to appreciate the long-established principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to balances owed to the appellant by the respondent.

   vii. The learned trial magistrate erred in law and fact in failing to appreciate as follows:

      a. That the claimant's, pleadings and the evidence tendered in support thereof was capable of sustaining the award prayed for in her claim.

viii. That the learned trial judge misdirected himself on the applicable law and principles, in the evaluation of evidence adduced and thereby arrived at a wrong decision in his judgement.

6. The matter proceeded by way of submissions. The Appellant filed submissions on 11.12.2024. Unfortunately, she annexed various documents to them, which this court cannot refer to at this level as they are neither evidence nor pleadings. This aligns with the long-established tradition that evidence must be tendered. Submissions are essentially a marketing tool and not pleadings. Mwera J, as he then was, in discussing the role of submissions, stated that they are a course by which counsel or litigants direct the court's attention to the points of the case that should be given the closest scrutiny in order to firmly establish a claim, as seen in the case of Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993:

> " Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

7. Submissions are not, strictly speaking, part of the case, and the absence of submissions may not necessarily prejudice a party. Their presence or absence does not, in any way, prejudice the case, as held in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held that:

> " As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

8. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

9. The Appellant stated that the judgment was erroneous as she had adduced water tight evidence. She raised five questions, all of which are questions of fact. The Respondent is said to have authorized a bank to pay her money, leaving 82,000/=. She was of the view that there was no connection between Vivian Itok, the Respondent and the Appellant. She was said to be vicariously liable for the actions of Vivian Itok,. She again stated that Vivian Itok, was an employee of the Respondent.

10. The Respondent filed submissions and supported the decision. They also prayed for costs. They stated that the doctrine of privity of contract dictates that only parties to a contract can sue or be sued on matters pertaining to that contract. She posited that this principle was upheld in Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] eKLR, where the Court of Appeal stated as doth:

> " As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or discharge the parties from liability." The principle was further reinforced in City Council of Nairobi & Wilfred Kamau Githua T/A Githua Associates v Nairobi City Water & Sewerage Co Ltd (2013) eKLR, where the Court of Appeal emphasized that a contract cannot confer rights or impose obligations on strangers to it.

11. The Respondent posited that non-joinder of a necessary party can impede the court's ability to effectively and completely adjudicate a matter. They relied on the case of Departed Asians Property Custodian Board v Jaffer Brothers Ltd [1999] 1 EA 55, the East African court held:

> " A clear distinction is called for between non-joinder and misjoinder of parties. In the former, the suit is liable to be struck out."

12. To them, the absence of Vivian Otok, prevents this court as the first and final appellate court from issuing a binding and enforceable judgment concerning the actual debtor, thereby rendering the instant suit/appeal defective.

Analysis

13. The main issue for determination in this case is whether the adjudicator erred in law in dismissing the Appellant's case. This will only be on the basis of matters of law. This being an Appeal from the Small Claims Court, the duty of the court is circumscribed under 38 of the *Small Claims Court Act* which provides as doth:

    (1) A person aggrieved by the decision or an order Appeals of the Court may appeal against that decision or order to the High Court on matters of law.

    (2) An appeal from any decision or order referred to in subsection (1) shall be final.

14. However, an Appeal of this nature is on points of law. It can be pure points of law or mixed points of law but points of law it is. An appeal on points of law is akin to a second appeal to the Court of Appeal. The duty of a second Appellate court was set out in the case of M/s Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR: -

> " This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below-considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR)."

15. What, then constitutes a point of law? In Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others, (2014) eKLR, the court stated as doth: -

> " 4. Although the phrase 'a matter of law' has not been defined by the *Elections Act*, it has been held in Timamy Issa Abdalla Vs Swaleh Salim Swaleh Imu & 3 Others, Malindi Civil Appeal No. 39 Of 2013 (Court Of Appeal), (Okwengu, Makhandia & Sichale, JJA) of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing Bracegirdle vs Oxney (1947) 1 All ER 126. See also Khatib Abdalla Mwashetani Vs Gedion Mwangangi Wambua & 3 Others, Malindi Civil Appeal No. 39 Of 2013 (Court Of Appeal), (Okwengu, M'inoti & Sichale, JJA) of 23.01.2014 following AG vs David Marakaru (1960) EA 484."

16. A matter of law is similar to a preliminary point of law but has a broader meaning. Justice prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of Oraro vs Mbaja [2005] eKLR:

> " I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

17. The timelines for small claims are punishing. It is therefore imperative that the case facing the parties be clear and succinct. Mere allegations will not count. Parties must understand that this is a court of law, not a kangaroo court or a baraza. Pleadings are therefore paramount. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, 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 & Ano. 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: -
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> > ".....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."

18. 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. The court was duty bound to read the documents and interpret then as such. The documents filed by the Appellant support the Respondent's case. The court cannot add evidence to documents. The pleadings in the Appellant's case remind the court of the injunction in the holy bible, in Luke 15:8 as doth:

Or suppose a woman has ten silver coins and loses one. Doesn't she light a lamp, sweep the house and search carefully until she finds it?

20. Losing a silver coin, one sweeps the house in which they lost them, not the nearest neighbour's house, simply because it is cleaner or within reach. The court found on evidence, that the Appellant was seeking a refund, rightfully from Vivian. The decision was on basis of evidence on record, which was agreed upon under section 30 of the Small Claims Act. There was no impugning of the evidence tendered. It cannot thus be said that the decision was on basis of no evidence. Documents are supposed to speak for themselves. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR , the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

21. The limit on appeals to questions of law, is telling. Only questions of law are entertained. On the other hand, a party must stick to the case before the court. The case was for money had and received. The story changed to a total of Ksh. 200,000/= being 82,000/= being money had and received and interest. The Ksh 82,000/= was sent to Vivan Otok. She was not sued and the money never went to the respondent did not receive the same. Where does the claim of money had received arise from? The money was acknowledged to have been had and received by Vivian Itok, who is not party to the suit. The court cannot make an order against non-party. The Appellant acknowledged that Vivian was paid. There was a discussion whether or not the Approval was given. The court, on evidence found it was an agreed course. The finding by court cannot be faulted on question of evidence or fact. The Appellant knew that it is Vivan Otok who had received the money. Whether she was entitled to receive or not, is a question of evidence, which is not before the court. In any case, it is a question that the court could not determine in absence of Vivian being a party.

22. The matter had proceeded by way of section 30 of the small claims act. The said section provides as follows:

> Subject to agreement of all parties to the proceedings, the Court may determine any claim and give such orders as it considers fit and just on the basis of documents and written submissions, statements or other submissions presented to the Court.

23. The use of documents can only succeed if there is not dispute on the authenticity of the documents. It is clear that the money was paid out to Vivian Otok. The said person was not sued. The court cannot be said to have entered judgment on basis of no evidence. There is thus no matter of law raised. The Appeal is accordingly dismissed.

24. Award of costs in this court are governed by section 27 of the *civil procedure act*. They are discretionally. The Supreme Court has set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

25. The Appellant was acting in person. She lost the case on the basis of non-joinder of Vivian Otok. She has already lost some money, though not at the hands of the Respondent. In the circumstances, each party shall bear its costs.

Determination

26. In the end, I make the following Orders:

    i. The Appeal lacks merit and is accordingly dismissed.

    ii. Each party shall bear costs for the Appeal.

    iii. The file is closed.

DELIVERED, DATED AND SIGNED AT KISII ON THIS 10TH DAY OF JANUARY, 2025.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Appellant in person

M/s Ragot & company Advocates for the Respondent

Court Assistant – Kiptum