Osoro v Morwani (Civil Appeal E107 of 2023)
[2025] KEHC 9 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KEHC 9 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E107 OF 2023

DKN MAGARE, J

JANUARY 10, 2025

BETWEEN

MUSA OGARO OSORO ..... APPELLANT

AND

KEFA NYANTIKA MORWANI ..... RESPONDENT

(Appeal from the Ruling of the Hon. C.A. Ogweno dated and delivered on 8th August, 2023 in the Kisii Civil Suit NO.426 of 2020)

JUDGMENT

1. This is an appeal from the Ruling of the Hon. C.A. Ogweno dated and delivered on 8th August, 2023 in the Kisii Civil Suit No. 426 of 2020. The ruling related to an application for review. The original order to be reviewed was an order dismissing the suit for want of prosecution.

2. The suit was filed on 31.08.2020 it was a claim for Ksh 105,000/= being a balance out of a 200,000/= loan. Summons were issued on 1.9.2020 the Respondent entered Appearance on 8.12.2020 and filed defence on 16.5.2023, denying liability. On 6.6.2023, the Plaintiff Applicant made an application to reinstate the suit which was dismissed on 16.5.2023 for non-attendance.

3. A response was field on 15.6.2023 stating that the matter was slated for hearing on 16.5.2023, when the Appellant failed to appear and the suit was dismissed for want of prosecution. The said application was also said not to be dated or signed. I have perused the court file, the copy therein is dated and signed.

4. Hitherto, the matter has been in court for hearing. On 25.10.22, the plaintiff indicated that there was no settlement. They sought 14 days to request for judgment. On 6.12.2022, the parties took 90 days to negotiate. The court directed that the defendant had 30 days to file its pleadings and documents. The court placed the matter for pretrial on 24.1.2023, on that date the respondent indicated that they had made payment. On 24.1.2023, the respondent was given until close of business on 25.1.2023, to file pleadings. The matter was slated for mention on 28.2.2022, the court noted that the defence had

not filed defence. It is not clear how the matter was fixed for 16.5.2023, on the said date, the defence admitted the claim. They sought the matter to be referred to mediation. The matter was then placed aside to be heard. Mr. Masolo indicated he had one witness. The parties indicated that they required time to negotiate. Mr. Masolo indicated that the client is unable to join virtually. The court dismissed the matter for non-attendance pursuant to order 12 rule 1 of the Civil Procedure Rules.

5. The Appellant sought to have the suit reinstated. The reasons given was that the Appellant was in the platform but had a sick child in Nairobi. The court noted the Application in the court file is singed and stated it will consider the other issues.

6. The case court considered the Application and found that the same was not merited and dismissed the same on 11.11.2023, the court indicated that the ruling was for 8.8.2023, when it is actually dated 11.8.2023, the Appeal is indicated to have been for the ruling delivered on 8.8.2023 there is no minute on the file showing delivery. It is however, not in doubt which Ruling is being challenged. It is in respect of the application dated 6.6.2023.

7. This resulted in the Appeal. The Appellant set forth a myriad of grounds. They are as thus:

    1. The learned magistrate erred in law and fact by finding that the Appellant did not prove his case despite having been finished with evidence.

    2. The learned magistrate erred in law and fact declining to reinstate the case dismissed the case for non-attendance when both counsels were present and the plaintiff present virtually and cut off by failure in technology.

    3. The learned magistrate erred in law and fact by not considering the technological challenges that led to the Appellant's failure to appear as a witness virtually.

    4. The learned magistrate erred in law and fact by not giving the Appellants opportunity to be heard.

    5. The learned magistrate erred in law and fact by not punishing the Appellant based on issues beyond his control.

    6. The learned magistrate erred in law and fact by not allowing the Appellant to prosecute his case exhaustively considering the fact that it was based in a liquidated sum and not denied by the Respondent.

    7. The learned magistrate erred in law and fact by not taking into consideration the documentary evidence filed.

    8. The learned misdirected herself by not recording the true position of the case and real issues leading to the failure by the Appellant to appear virtually to testify.

    9. The learned magistrate misdirected herself by failing to accord the plaintiff time to prepare and seek proper network to testify virtually.

    10. The learned magistrate judgment is not as per the evidence produced hence unjustified.

8. The memorandum of Appeal is unseemly and contrary to Order 42 Rule 1 of the Civil Procedure Rules provides are doth: -

    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.

9. The Court of Appeal had this to say about compliance with Rule 86 now [88] of the Court of Appeal Rules, (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) 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:
>
> > " 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 any way 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..."

10. In the case of 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:
>
> > " 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."

11. The only question is whether the court was entitled to dismiss the suit of want of prosecution. The answer is short and candid. The court erred in law and in fact in dismissing the suit. Order 12 rule 1 of the civil procedure rules provides as follows:

> If on the day fixed for hearing, after the suit has been called on for hearing outside the court, neither party attends, the court may dismiss the suit.

12. Though it is true, the suit had been fixed for hearing, it was not ready for hearing. First the defence admitted that the debt was due and owing. Only issue was how they were to settle. The dismissal was contrary to order 3 rule 3 of the civil procedure rules. It provides as follows:

    1. If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.

    2. If the defendant admits any part of the claim, the court shall give judgment against the defendant upon such admission and shall dismiss the suit so far as it relates to the remainder except for good cause to be recorded by the court.

    3. If the defendant has counterclaimed, he may prove his counterclaim so far as the burden of proof lies on him

13. On the day fixed for hearing, the defecne advocate is stated to have said on record as follows:

    " Mr Kirianki, the claim is not denied. We propose the matter be referred to mediation."

14. Therefore, the only order available was to have was for the court to enter judgment on that admission. The referral to mediation was only in respect of the modes of payment. There was no avenue open for dismissal.

15. The second part was that the defence was filed on the same day, despite the court directing the same to be field by 25.1.2023, the filing meant that the court was to give directions regarding filing, either by striking out the defence or allowing for pleadings to close. Pleadings close under Order 2, rule 13 of the civil procedure rules as:

    > The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.

16. Having filed the defence, on the date of hearing, pleadings were to close on 31.5.2023, if the same was served on the date of filing. Consequently, the court was plainly wrong in dismissing the suit for want of prosecution. It is irrelevant why the Appellant was absent in view of the changed circumstances.

17. In any case, the court should have placed the matter aside to allow the advocate compose himself, get instructions and address the court. The reason given is plausible. It is not lost that these are the vagaries of online hearing. In this case, though the matter had delayed, almost all the delay was caused by the Respondent. I agree that the Appellant had plausible reasons for nonattendance.

18. The Appeal is merited in its entirety and is accordingly allowed. On costs, costs follow the event. The appellant succeeded. There is no minor success, even where it is razor thin, it is still success. The issue of costs is governed by Section 27 of the *Civil procedure Act*, which provides as follows:

    (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.

19. The court has discretion to award costs. In this case the court is guided by the Supreme Court, which 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.

20. In exercise of my discretion, which I must exercise judiciously and not capriciously or arbitrarily I find that the circumstances call for the respondent bears the highest culpa. In the circumstances, the Appellant deserves costs.

Determination

21. Consequently, I make the following orders: -

a. Appeal is allowed, the order of the court given either on 8.8.2023 or 11.8. 2023 declining to reinstate the suit, being Kisii Civil Suit NO.426 of 2020 is set aside.

b. The matter is transferred to the Small Calms Court, Kisii for hearing and final determination.

c. The matter involves only Ksh 105,000/= which has been admitted by the Respondent on the face of the record. The Small Calms Court to deal with the admission and proceed as appropriate with the suit.

d. The Appellant shall have costs of the Application dated 6.6.2023 in the lower court.

e. The Appellant shall have costs of this Appeal of Ksh 45,000/= payable within 30 days from the date hereof.

f. This 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:

J.M. Nyagwencha for the Appellant

G.M. Nyambati for the Respondent