



**Coastline Safaris v Maseki (Civil Appeal E095 of 2022)
[2025] KEHC 2741 (KLR) (5 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2741 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E095 OF 2022
DKN MAGARE, J
MARCH 5, 2025**

BETWEEN

COASTLINE SAFARIS APPELLANT

AND

CATHERINE NJERI MASEKI RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of trial court delivered on 17th September 2021 by Hon. J.B. Kalo, Chief Magistrate in Mombasa CMCC No. 37 of 2014. This is a second matter arising from the same suit. I determined HCCA No 209 of 2022, which is now reported as Coast Bus (Mombasa) Limited v Maseki & another [2024] KEHC 8234 (KLR).
 1. The file was returned only to discover that there was a related appeal, pending after I returned the lower court file. Therefore, it is important to apologize to the parties for lapses in this matter. The matter was heard on 17.4.2024. The judgment date was slated for 4.6.2024. However, I received my letter of transfer on 20.5.2024 to the Nyeri High Court to report on 3.6.2024. We placed mechanisms for transferring all pending decisions to Nyeri for judgment writing. All matters received were concluded, and files were returned to Mombasa.
3. Subsequently, the parties made a routine inquiry sometime in October 2024. I enquired about the whereabouts of this file. Unbeknown to all parties, the file had remained in Mombasa as it did not have a lower court file. The file was forwarded to me on 4.11.2024 vide a letter dated 31.10.2024. It did not have the lower court file. I slated it for mention on 21.1.2025 to see if the lower court file had been availed. Meanwhile, the Deputy Registrar of this court requested, via a letter dated 11.11.2024, the whereabouts of the lower court files. The lower court file was sent to Nyeri on 22.1.2025 and received on 24.1.2025. I fixed this date on 21.2.2025 for judgment today. The inconvenience caused by systemic lapses is regretted. We take solace in the syllogism that an act of the court should prejudice no one, *actus curiae reminem gravabit*.



4. The Memorandum of Appeal dated 1.07.2022 raised a prolixious 10 grounds of appeal with 7 sub-grounds, making them 17 grounds. Setting out such a humongous number of grounds is neither necessary nor advisable.
5. The issues raised in the memorandum of appeal are:
 - i. The cause of action was time-barred.
 - ii. Leave was improper and contrary to section 27 of the *Limitation of Actions Act*. should be rescinded.
6. The rest of the issues are ancillary, repetitive, prolixious, and a waste of judicial time. There was no issue relating to the quantum of damages and liability. Thus the memorandum of appeal offends Order 42 Rule 1 of the Civil Procedure Rules which provides as follows:

“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.

7. The Court of Appeal had this to say about compliance with Rule 86 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 anyway 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...”

8. 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.”

Pleadings

9. The pleadings and proceedings in this case are a study of resilience, persistence, and the power of not giving up. The primary suit was filed on 19.08.1998 against Hajash Metsa T/a Coast Bus Services of P.O. Box 99755 Mombasa in the High Court of Kenya at Mombasa as HCCC 88 of 1998. The plaintiff sought damages arising from an accident involving the then-defendant’s vehicle, registration number KAA 996U, Nissan bus on 7.4.1996. At the time the claim was filed, it was within time. The firm of Mwangi Njenga entered an appearance on 1.10.1998 for Hajash Metsa T/a Coast Bus Services.
10. The Appellant filed a defence on 2.10.1998 stating that they were strangers to the suit, the Respondent was not a passenger, was not injured, did not suffer special and general damages, and the particulars of negligence were also denied. Summons for direction under then Order LI rule 2 were fixed on 10.3.1999.
11. Compliance documents were filed indicating that Coastline Safaris, insured by United Insurance Company Ltd., owned the bus. The court took judicial notice that the insurance company burst sometime later. The Respondent was introduced as one of the passengers who suffered injuries. On 4.8.2000 the Respondent filed an application to amend the plaintiff to specifically plead the special damages of Ksh. 753,957/= instead of Ksh.1,600/=. Leave was granted. The Respondent paid Ksh. 37,905/= as further court fees on 1.12.2000. The particulars of injuries were also amended.
12. On 11.6.2002, after the second medical examination, the Respondent sought to amend the Amended Plaintiff to include further medical expenses. The firm of Fadhil Kilonzo took over from the firm of Mungatana & Company Advocates on behalf of the Respondent on 9.5.2005. A subsequent search showed that the vehicle was owned by Coastline Safaris and CFC bank. On 30.3.2006, Mohammed Ajaz Mirza appointed Kishore Nanji Advocate to act for him. On the Notice of Appointment, he does not indicate his role in the case. The application dated 11.6.2002 was withdrawn on 23.10.2006 and another filed to change the name from Hajash Metsa T/a Coast Bus Services to Coastline Safaris. The leave was granted and filing done on 27.11.2006. Summons to enter appearance were sent to Coastline Safaris.
13. On 11.9.2007 the Respondent sought leave to file suit out of time and admit the re-amended plaintiff out of time. The grounds were that they had now established the correct name of the defendant. The company is owned by the same proprietor, Mohammed Ajaz Mirza. Kishore Nanji subsequently filed the defence and raised the question of limitation and substitution 11 years later.
14. The Respondent changed advocates to M/s Muniyithia & Company Advocates on 7.5.2010. They sought to extend time as leave granted hitherto had lapsed. This was done, and a further re-amended plaintiff was filed on 6.6.2012, and a sum of Ksh. 39,340/= was paid. An amended defence was filed on 27.11.2013. The suit was subsequently transferred to the lower court as CMCC 37 of 2014. The matter was heard, and judgment was delivered.



Analysis

15. 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.
16. In the case of Mbogo and Another vs. Shah [1968] EA 93 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.”
17. The duty of the first 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 judges in their usual gusto, held as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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.”
18. The Court must remember that it has neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, the documents still speak for themselves. The observation of documents is the same as that of the lower court, as parties cannot read into those documents matters extrinsic to them.
19. In the case of Peters vs Sunday Post Limited [1958] EA 424, 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...”
20. The issue is a question of law: whether the suit was filed out of time. After Judgment in the primary suit was delivered on 2/6/2022, an application vide the Notice of Motion dated 25/8/2022 under certificate of urgency was filed on the same date. It was supported by the affidavit of Mirza Mohamed Ajaz seeking to preclude the 1st Respondent and Ndutumi Auctioneers from attaching the goods per the proclamation notice. The said Mirza Mohamed Ajaz was stated to be one of the Directors of the Objector/Appellant. He annexed CR12 indicating the Directors as follows:
 - a. Zarar Anwar of P.O. Box 82414 Mombasa- Director
 - b. Mohamed Ajaz Mirza -Director/Shareholder P.O. Box 82414 Mombasa- 99 shares
 - c. Shafina Ruhi Mirza Shareholder P.O. Box 82414 Mombasa - 1 share
21. The court below dismissed the application, and an appeal was filed vide Mombasa HCCA 209 of 2022. I decided on the same and dismissed the appeal in limine. I found that Mirza Mohamed Ajaz,



Coastline Safaris, and Coast Bus Services are one and the same entity. In the case, reported as Coast Bus (Mombasa) Limited v Maseki & another [supra] I held as follows:

It is the court's considered view that Coast Safaris is a trade name of the 2nd Respondent. It has not changed. The court below was thus correct in dismissing the Objection. I, therefore, find no basis to disturb the finding of the lower court. I direct the auction to proceed.

There is no separate registration for the defendant and objector. From the history of the case, the defendant has always acted through the same director, who has now changed to an objector.

22. The suit was filed against Coast Bus Safaris. Leave to file the suit out of time was indeed granted. This was caused by the Appellant, who kept mutating. I find absolutely no material to differentiate the judgment debtor from the Objector. However, at no time did the original defendant change. They kept changing from Coast Bus Service to Coast Safaris. However, the registration was a matter wholly within the knowledge of the Appellant. Section 112 of the *Evidence Act* places the burden of proof on the person with special knowledge. The said section states as follows:

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

23. Failure to produce evidence that the Appellant was not the same as Coast Bus Services, or at least there is a separate registration, means that the court must make adverse inference. In the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, Justice G V Odunga as then he was stated as doth:

41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:

“Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:

‘In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.’

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108, the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”

24. The Respondent stated the advocate failed to ascertain ownership. The police stated that the vehicle was owned by Coast Bus Safaris. The last amendment was made by consent, changing the defense from Coast Bus Services to Coastline Safaris. This was on 16.11.2021. This means that from the very beginning, the parties were using Coastline Safaris and Coast Bus Services interchangeably. I, therefore, find that leave to file out of time was unnecessary, given that the same defendant was used from the very beginning.

25. The court did not err at all. The Appeal filed lacks merit and is accordingly dismissed. 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.
26. The Supreme Court 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.

27. The costs follow the event. The Respondent is entitled to costs.

Determination

28. In the upshot, I make the following orders:-
- a. The appeal has no merit and is accordingly dismissed.
 - b. The Respondent shall have costs of the appeal of Kshs. 251,000/-.

**DELIVERED, DATED AND SIGNED AT NYERI, ON THIS 5TH DAY OF MARCH, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Mulongo for the Appellant

Ms. Umara for the Respondent

Court Assistant – Michael

