Kahora v Ng'ang'a (Civil Appeal E956 of 2023)
[2025] KEHC 11888 (KLR) (Civ) (28 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11888 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E956 OF 2023

DKN MAGARE, J

JULY 28, 2025

BETWEEN

BENJAMIN KAROKI KAHORA ..... APPELLANT

AND

PETER KINUTHIA NG'ANG'A ..... RESPONDENT

(Appeal from the judgment and decree of Wendy Michemi (Chief Magistrate) in Nairobi CMCC No. 2689 of 2015)

JUDGMENT

1. This is an appeal from the judgment and decree of Wendy Michemi (Chief Magistrate) in Nairobi CMCC No. 2689 of 2015. The appellant was the 1st defendant in the lower court. The appeal herein is one that should never have been filed. It reminds of Shakespeare's muses in Romeo and Juliet:

> 'Tis but thy name that is mine enemy:
>
> By any other name would smell as sweet.
>
> What's in a name? That which we call a rose,
>
> Nor arm, nor face, nor any other part.
>
> What's Montague? It is not hand nor foot,

2. The contents of either pleadings are not in issue. The Appellant filed acres of submissions that he was not the owner of the suit motor vehicle. More specifically that his correct name was Benjamin Karoki Kahora and not Benjamin Kahara. The first question in the appeal is whether this is a justiciable question for the appellate court.

3. The only question raised in the defence was the negligence of the Respondent. In that respect, parties are bound to plead their cases fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

> " 11. 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: -
>
> ".....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."

4. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems. At p. 174 the learned author posited that: -

> 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 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 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."

5. In respect to the essence of pleadings, 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 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.....'"

6. Where a party is sued in a different name, he ought to file pleadings to that effect and give the correct name. The question of a different name arose during the testimony of the appellant. It is not one of the pleaded issues. The question is not even whether the party sued is not the one liable. It is a different name. The appellant did not explain, why out of 55,000,000 Kenyans he found it necessary to enter a suit where Benjamin Kahara was sued, only to claim that he is Benjamin Karoki Kahora and thus different from Benjamin Kahara, and should not be liable.

7. To conceptualize, contextualize and problematize the issue, the court will look at the simple ignominy and absurdity of the submissions. The Respondent sued Benjamin Kahara. Then Benjamin Karoki Kahora turns up and says, "Wait, I am not Benjamin Kahara". Such evidence and position reeks of mischief that can only be explained in the words of Odunga J, as he then was while describing evidence similar to one led by the appellant in Kioko Peter v Kisakwa Ndolo Kingóku [2019] eKLR. He lamented as follows:

In my view to marked such remarkable averments can only be taken to be meant to mislead the court. Parties and Counsel ought to give the court's some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in N vs. N [1991] KLR 685 he expressed himself in the following terms:

> " I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."

5. In the South African case of Matatiele Municipality & Others vs. President of the Republic of South Africa & others (1) (CCT73/05) (2006) ZACC 2: 2006 (5) BCLR (CC); 2006(5) SA 47 (CC) it was held that:

> " In my view a person who deliberately either by commission or omission misleads the court and the public that a particular state of affairs exist while knowing very well that that is not the position cannot be said to be open, candid and transparent. Dishonest in my view is an Act which is antithesis to transparency and vice versa..."

8. Without the name being in issue, the court was right. Regarding ownership, there was no dispute from the pleadings on the said vehicle. A party cannot make a general denial related to ownership. In the case of Syronda Limited Vs School Equipment Production Unit[2001] eKLR, the court posited as follows:

> What the defendant has done is to put forward a mere denial to the plaintiff's claim which, as the holding in the case of Magunga General Stores V. Pepco Distributors Limited (1987) 2 KAR 89, shows is not good enough. In that case the Court of Appeal stated:-
>
> "A mere denial is not a sufficient defence and a defendant has to show either by affidavit, oral evidence, or otherwise, that there is a good defence.

9. The submissions thus relate to a question that did not arise from pleadings. The court is satisfied that the appeal is untenable. It 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.

10. 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.

11. The respondent is entitled to costs. A sum of Ksh. 75,000/= will suffice.

Determination

12. In the upshot, I make the following orders: -

a. The appeal is not merited and is dismissed with costs of Ksh. 75,000/= to the Respondent.

b. 30 days stay of execution.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 28TH DAY OF JULY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Ongeri for the Appellant

Mr. Mwai for the Respondent

Court Assistant – Michael