Obaga v Agricultural Finance Corporation (Civil Appeal E019 of 2022)
[2024] KEHC 1122 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1122 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E019 OF 2022

DKN MAGARE, J

FEBRUARY 7, 2024

BETWEEN

VERONICA OBAGA ..... APPELLANT

AND

AGRICULTURAL FINANCE CORPORATION ..... RESPONDENT

JUDGMENT

1. This is an Appeal from the decision and order of the Hon D. O. Mac' Andere delivered on 24/2/2024 Kisii CMCC No. 22 OF 2019. It is an interlocutory Appeal. The court disallowed an objection to production of documents that were put on record at pretrial stage. The court relied on a decision of this court that was binding on it.

2. The Court was wrong to state that the parties have a right of Appeal. There is no right of appeal on decisions made under Order 17 of the *Civil Procedure Rules*. Under Order 43, if the *Civil Procedure Rule*, the Court only grants leave to appeal where there is no right of Appeal. The dispute herein related to production of 2 documents.

3. The Appellant filed a prolixious 8 grounds memorandum of Appeal. It is unnecessary to set them out herein verbatim.

4. The Appellant should file concise Memorandum of Appeal. Under Order 42 Rule, 1 provides are doth: -

> " 1. Form of appeal –
>
> (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.

5. The Court of Appeal had this to say in regard to rule 86 (which is pari mateira with order 42 Rule 1) 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..."

6. Further in *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."

7. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the magistrate's court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.

Duty of the First Appellate Court

8. 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.

9. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 where 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 is 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."

10. 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 law looks in their usual gusto, held by 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."

11. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. in the case of *Madara & 2 others v Chite & another* (Civil Appeal 111 of 2022) [2023] KEHC 24270 (KLR) (24 October 2023) (Judgment), I stated as follows: -

> "the Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them."

12. 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 document meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

13. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, 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..."

14. It is a sad affair that we are hearing this appeal. The same was completely unnecessary. I shall be dismissing the same shortly.

15. First improper admissions of rejection of evidence is not a ground of appeals Section 175 of the *Evidence Act* provides as doth: -

> " 175. Effect of improper admission or rejection The improper admission or rejection of evidence shall not of itself be ground for a new trial or for reversal of any decision in a case if it shall appear to the court before which the objection is taken that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received it ought not to have varied the decision."

16. Advocates have duty to help the court. It is anathema to Article 159(2). It is a duty flowing from the exercise of judicial authority as established under Article 159(2) of the *Constitution*. The said Article provides as doth: -

1. Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this *Constitution*.

2. In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

i. justice shall be done to all, irrespective of status;

(b)

ii. Justice shall not be delayed;

(c)

iii. Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

iv. Justice shall be administered without undue regard to procedural technicalities; and

v. the purpose and principles of this *Constitution* shall be protected and promoted.

17. The court ordered production of a document. If there was an error, it is an issue to deal with in the final analysis. Secondly, the documents were property admitted. The issue of making was severely modified through Order 11.

18. It is for the Defendant or the opposing side to make an objection within the requisite period. If no objection is raised that the time of pretrial conference or in any case, 15 days before the hearing the documents shall be admitted. I also note that the Respondent is a corporation. It will be unfair, to require that directors of the advocates who sign thousands of those documents to be attending court thought out the country.

19. Parties had agreed to file submission before 8/12/2023. None were placed on the court. File there is no phenomenon known as partial pretrial. Once a conferences is heed and the court is satisfied that the documents are in order, pre trial is concluded.

20. I therefore find and hold that the appeal is unmeritorious. I dismiss the same in *limine* with costs of 95,000/= to the Respondent payable in 30 days failing which execution do issue. I direct the mater in the lower court to proceed promptly until the conclusion.

Determination

21. The Court makes the following determination:-

    a. The Appeal herein lacks merit and is accordingly dismissed with costs of 95,000/= payable within 90 days in default execution do issue.

    b. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF FEBRUARY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Miss Obaga for the Appellant

No appearance for the Respondent

Court Assistant - Brian