Muchiri v Boresha Maisha Self Help Group (Civil Appeal 48 of 2022) [2024] KEHC 2969 (KLR) (11 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2969 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL 48 OF 2022

DKN MAGARE, J

MARCH 11, 2024

BETWEEN

DANIEL MIGWI MUCHIRI ..... APPELLANT

AND

BORESHA MAISHA SELF HELP GROUP ..... RESPONDENT

(Being an appeal from the ruling of the Honourable Resident Magistrate Hon. E. M. Gaithuma delivered on 12/7/2022 in NYERI SCC COMM E047 OF 2022)

JUDGMENT

1. The appeal is a straight forward one. The appeal arose form the decision of Hon. E.M. Gaithuma, an adjudicator given in Nyeri SCC COMM EO47 of 2022 given on 12/7/2022.
2. The Appellant was dissatisfied with the judgment of adjudicator allowing the Respondent's claim in the Small claims court and filed a memorandum of Appeal dated 3/8/2022 and set forth the following grounds of appeal;
    a. That the learned magistrate erred in law and fact in denying the appellant legal representation thereby infringing on his constitutional rights.
    b. That the learned magistrate erred in law and fact in ignoring the appellant's evidence that he did not make the agreement as alleged.
    c. That the learned magistrate erred in law and fact in denying the appellant time to prepare for his case thereby denying him a fair trial especially on the issue of authenticity of the signatures in the said agreement.
    d. That the learned trial magistrate erred in law and fact in failing to appreciate that the respondent had not proved its case to the required standard on the existence of the alleged agreement.

e. That the learned magistrate erred in law and fact in ignoring the submissions by the appellant.

3. The parties appeared before me today, morning, and after hearing them directed the judgment be delivered at 2.30 P.m. This was because the Appellant admitted that they only had factual issues to raise.

4. The jurisdiction of a court is sacrosanct. A court cannot handle a matter it has no jurisdiction to do so. In *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, Justice Nyarangi JA, as he then was stated as doth;

> " With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what
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> I have already said is consistent with authority: "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order t

5. In this matter, the claim arose from the small claims court. Ipso facto, there is only one chance of Appeal to this court. It is an Appeal on points of law. In view of the provisions of section 38 of the *Small Claims Court Act*, which posits as doth: -

> " 38. Appeals (1) A person aggrieved by the decision or an order 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.

6. In the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR, the court of Appeal addressed the duty of a court considering points of law as doth: -

> " 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: S*tanley N. Muriithi & Another versus Bernard Munene Ithiga (2016)* eKLR).

7. In the case of *Mwita v Woodventure (K) Limited & another* (Civil Appeal 58 of 2017) [2022] KECA 628 (KLR) (8 July 2022) (Judgment), the Court of Appeal while referring to a second Appeal, which

is essentially on points of law and thus similar to the duty of the court under section 38 of the Small Claims Court, stated as doth: -

> " This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of *Stanley N. Muriithi & Another v Bernard Munene Ithiga [2016]* eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also *Kenya Breweries Limited v Godfrey Odoyo [2010]* eKLR in which it was held that:"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two 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."
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> 13. A cursory glance at the grounds of appeal in the appellant's memorandum of appeal shows that they relate primarily to questions of fact. The appellant was aggrieved by the finding of the first appellate court that he was not entitled to security costs. The third ground, which raises the question whether the interest on the payment made to the 1st respondent should run from the date of filing suit, not from the date of the hire purchase agreement between the appellant and the 1st respondent, is a matter of law."

8. Justice prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of *Oraro v 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. Whereas the judge was dealing with a preliminary point, it bears no difference with a point of law, in that the factual matrix must be taken to be admitted. The claim on the issues of facts raised are beyond the jurisdiction of this court.

9. The defence filed was that of a general denial. It is what was aptly referred to in the case of *Raghbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR, where the court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per *Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637).* This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
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> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the

appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

10. The claim relates to money had and received. The Appellant received a sum of Ksh 40,000/= from the Respondent to lease tea to them. He was not in a position to do so. He did not have tea of his own. He admitted in a rather casual manner this very fact.

11. By stating in the defence that they do not owe a sum of Ksh 40,000/=, they were evasive, whether they had repaid or were never given. It is a defence that did not answer the case before the court.

12. The only issue raised relate to evidence. The burden of proof is placed on whosever alleges. However, in small claims court the standard is different. Section 32 of the *small claims court* provies as follows: -

> " 32. Exclusion of strict Rules of evidence (1) The Court shall not be bound wholly by the Rules of evidence. (2) Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.
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> (3) Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that Court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.
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> (4) The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.
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> (5) All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.
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> (6) For the purposes of subsection (2), an Adjudicator is empowered to administer an oath. (7) An Adjudicator may require any written evidence given in the proceedings before the Court to be verified by statutory declaration."

13. Questions that are raised by the Appellant are wholly factual. Some of the questions raised do not have bearing on the case before the court. For example, not being accorded a hearing is not factually correct. The matter was fully heard inter partes. The issue of signatures are matters within the special knowledge of the Appellant. It is also an issue that ought to be specifically raised in the claim. A party cannot propose issues at the Appellate level. They must first be pleaded before being proved.

14. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, A C Mrima stated as follows: -

> "
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> " 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. v Stephen Mutinda Mule & 3 others (2014)* eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v 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."

15. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of *Raila Amolo Odinga & Another v 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……'"

16. Turning to the case in court, the Respondent, instead of filing a response, filed a memorandum of appearance and defence. There is no place for a memorandum of Appearance and defence under the *small claims Rules* under the *small claims court Act*. The Small Claims Act provides as doth: -

> "25. Response to claim
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> (1) The Registrar or other officer designated for that purpose shall cause to be served on the respondent a copy of the statement of claim.
>
> (2) The respondent shall lodge with the Court a written response to the claim, including any counter-claim or set-off, in the prescribed form, within fifteen days.

17. Due to the dictates of *the constitution*, I shall treat the defence as a response for purposes of this Appeal. Article 159(1) and (2) of *the constitution* provide as follows: -

> "(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—
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> a. justice shall be done to all, irrespective of status;

b. justice shall not be delayed.

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

d. justice shall be administered without undue regard to procedural technicalities; and.

e. The purpose and principles of this Constitution shall be protected and promoted.

18. The end result is that the appeal in all fronts is untenable. The claim remained unanswered by dint of pleadings that did not specifically deal with the claim of receipt of money. By setting up an alternative claim at the hearing about a loan in December 2021, the Appellant departed from his pleadings.

19. This case reminds me of the words of C B Madan when faced with a similar scenario over 40 years ago in the case of *N v N* [1991] KLR 685. The Learned Judge lamented as follows:

> " Parties and Counsel ought to give the courts 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 v N [1991]* KLR 685 when he expressed himself in the following terms:
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> "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."

20. In the submissions in the lower court, the question became whether the agreement was stamped by the leaves officer. It was their case that the agreement was invalid for purpose of leasing tea. The Appellant's case in the submissions was that the respondent had not established the case by producing evidence that there were tea bushes to be given. The Respondent was not under any such duty. They gave out their money and they want it back. There was no evidence that the debt was paid. A claim for money had and received can only be answered, not on the validity of the agreement but whether or not payment was refunded. In this case, the adjudicator, who is king, when it comes to facts, established so.

21. It was not necessary to refer to sections 107 to 109 of the *evidence Act*. The magistrate only needed to be convinced that the Respondent's evidence was credible or trustworthy.

22. The upshot of the foregoing is that I find no merit in the Appeal.

23. 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.

24. The order that commends itself is that costs follow the event and the event is finding this Appeal lacking in merit. I hereby dismiss the same with costs of Ksh 35,000/=.

Determination

25. In the circumstances the Court makes the following orders: -

    a. The Appeal herein lacks merit and is accordingly dismissed.

    b. Costs of 35,000/= in the Appeal herein.

    c. The file is closed.

Conclusion

DELIVERED, DATED and SIGNED at NYERI on this 11th day of March, 2024 Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:-

..... for the Plaintiff

..... for the defendant