



REPUBLIC OF KENYA



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**Mayoyo v Gatiba & another (Civil Appeal 178 of 2018)
[2024] KEHC 2704 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2704 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 178 OF 2018
SM MOHOCHI, J
MARCH 7, 2024**

BETWEEN

ISAAC MAYOYO APPELLANT

AND

FRANCIS NDACHA GATIBA 1ST RESPONDENT

KENYA WOMEN FINANCE TRUST 2ND RESPONDENT

*(Appeal from a ruling of Hon.R. YATOR- SRM, Molo Law Courts
in MOLO CMCC No. 334 of 2016 delivered on the 18.10.2018.)*

JUDGMENT

Introduction

1. The Appellant instituted a Civil Case at Molo, CMCC No. 334 of 2016 vide a plaint dated 26th November, 2016 whereby he sought orders declaring him as the true owner of Motor Vehicle Registration Number KBN 651H. In response, the 2nd Respondent filed a statement of defence dated 14th December, 2016 where it denied the averments made in the plaint vehemently.
2. The 1st Respondent participated in the trial Court proceedings as 1st Defendant until the 29th June 2017 and ever since his counsel has not appeared, including in this Appeal where the 1st Respondent has elected not to participate.
3. The Appellant set the matter for hearing and based on that, the Appellant's 1st witness testified on 24th May, 2018 where he disowned the signatures on the loan documents. Counsel for the Appellant (then plaintiff) made an application to stand down the Appellant to allow them to take the documents to an examiner. Counsel for the 2nd defendant prayed for leave to file a supplementary list of documents which was granted.



4. The 2nd Respondent filed a supplementary list of documents on 14th July, 2018 where after the matter came for mention to confirm the filing. Counsel for the Appellant failed to show up in Court when the matter was fixed for mention but the Court was satisfied that there was compliance and issued a hearing date on 26th July, 2018.
5. On the 26th July, 2018, counsel for the Appellant failed to attend Court. The Appellant further filed an application dated 26th July, 2018 seeking various orders including an order that:

Pending hearing and determination of this suit, this honourable Court be pleased to order the OCS Molo Police Station to surrender loan application form documents from KWFT allegedly signed by the plaintiff in his capacity as a guarantor for forensic examination of the signatures therein.
6. In response to the above stated application, the 2nd Respondent filed grounds of opposition dated 24th August, 2018 opposing the Application, Hon. R. Yator proceeded to deliver her ruling on the application on 18th October, 2018 dismissing the application.

The Appeal

7. Being aggrieved by the Ruling dated 18th October 2018 the Appellant filed this present appeal citing the following grounds in his memorandum of appeal:
 - i. That, the learned magistrate erred in law and fact, in failing to appreciate and find that, the Appellant was deserving the orders sought in the application dated 26th July 2018 in the best interest of justice.
 - ii. That, the learned magistrate erred in law and fact, in dismissing the Appellant's application dated 26th July 2018 without due regard of the Appellant's claim seeking orders that the OCS Molo Police Station do surrender loan application form documents from the 2nd Respondent annexed in its list of documents for forensic examination of the said documents to confirm with certainty whether the said documents were signed by the appellant in his capacity as a guarantor.
 - iii. The learned magistrate erred in law and fact, in failing to evaluate, consider and determine all the issues raised during the trial of the matter necessitating the application dated 26th July 2018.
 - iv. That, the learned magistrate erred in law and fact, in failing to appreciate that the 2nd Respondent had delayed in serving the appellant with its list of documents promptly which included the loan application documents from the 2nd Respondent hence an ambush on appellant at the trial of the suit.
 - v. That, the learned Magistrate erred in law and fact, in failing to take into account circumstances that necessitated prayers in the application dated 26th July 2018.
 - vi. That, the learned magistrate erred in law and fact, in failing to take into account and consider the appellant's submissions before making the decision complained of hence erroneous decision



8. This Appeal was admitted on the 25th April 2023 after a prolonged period of preparation of the Record of Appeal, parties were directed to file written submissions of which the Appellant complied on the 10th May 2023 while the Respondent complied on the 26th July 2023.

The Appellants Case

9. The Appellant submits that, when the matter took off to hearing before the Trial Court on 24th May 2018 it became evident and apparent that the 2nd Respondent had not served its list of documents upon the Appellant's counsel. And that it is upon service of the 2nd Respondent's list of documents that it became apparent that the Appellant disputed the signature appearing in the loan application form as his hence the need for conducting of forensic examination in an attempt to confirm whether the signature appearing on the loan application form was his signature.
10. The Appellant submits that, at the time of lodging a complaint at Molo Police Station, the DCIO wrote a letter dated 19th March 2015 produced as Pexh 4 in page 14 of the record of appeal to the 2nd Respondent that the said office sought to be furnished with amongst other documents the 2nd Respondent's loan application form or agreement together with all other claim supporting documents in respect to its transaction with the 1st Respondent, only for the 2nd Respondent to decline to furnish the office of the DCIO Molo Police Station with the said documents hence grinding investigations to a halt.
11. Further, the Appellant submits that, efforts by the Investigating officer Godwins Odhiambo to secure documents from the 2nd Respondent purportedly served by the Appellant as a guarantor through a Court order in MOLO MISCELLANEOUS CRIMINAL APPLICATION NO 42 OF 2015 never bore any fruits.
12. The Appellant submits that, the question this Court should grapple with is, would it not be in the wider interests of justice if the disputed documents are subjected to forensic examination to establish whether the signatures appearing therein belong to the appellant and a report filed in Court?
13. The Appellant submits that, that justice must not only be done but must be seen to be done. That the 2nd Respondent has not demonstrated to Court in what way it stands to suffer prejudice should the disputed documents be subjected to forensic examination and a report tabled in Court.
14. Reference is made to the case of Continental Butchery Limited Vs Nthiwa (1978) KLR where the Court held that:-
- “A party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary there has been discovery and oral evidence subject to cross-examination.”
15. The Appellant submits that, It is now not in dispute that he is entitled to a fair and proportionate disposal of suit pursuant to Sections 1A, 1B and 3A of *Civil Procedure Act* and Article 159(2) (d) of constitution promote tenets of substantive justice and that continued efforts by the 2nd Respondent of not availing loan application forms allegedly signed by him at the time of police investigations and trial of this suit only goes a long way to demonstrate the signatures purported to belong to him are forgeries and fraudulent.
16. The Appellant submits that, the overriding objective of Section 1A of the *Civil Procedure Act* is to promote overriding objective of the Act and Rules there under to facilitate the just proportionate and affordable resolutions of disputes governed by the Act and Section 1A (2) of the said Act enjoins the



Court in the exercise of its powers under the Act or in the interpretation of any of its provisions to seek to give effect to the overriding objectives specified in subsection (i). Subsection 3 thereof declares that a party to civil proceedings or an advocate for such party is under a duty to assist the Court to further the overriding objectives of the Act. Section 1B(I) of the Act obliges the Court in the furtherance of overriding objectives specified in Section 1A to handle all matters presented before it for purposes of attaining the following aims: -

- a. the just determination of proceedings;
 - b. efficient disposal of the business of the Court;
 - c. efficient use of available judicial and administrative resources.
17. The Appellant submits that, it is now not in dispute that his application before the Trial Court was meant to assist Court to further the overriding objectives in a quest to ascertain whether loan application forms sought to be relied on by 2nd Respondent bore the Appellant's signatures and that no prejudice will be occasioned on the 2nd Respondent should the Court allow the plaintiff's application in the wider interests of justice and in furtherance of the overriding objectives.
18. The Appellant attacks the grounds of opposition to the application giving rise to the impugned ruling calling them inept, frivolous and without merit. The Appellant urges that his Appeal has merit and should be allowed in the wider interests of justice.

Respondents Case

19. The 2nd Respondent affirms that, the Court was right when it noted that:
- “Firstly, I would point out that the OCS, Molo police station is not a party to these proceedings and as such orders cannot issue against a stranger to these proceedings”.
20. The 2nd Respondent submits that; it is also imperative that parties who require the Court to issue orders in their favor be specific as to what they want the Court to award them. That the Appellant's application was merely a fishing expedition where the Appellant used a blanket word seeking the prayers "loan application documents signed by Appellant (the plaintiff) in his capacity as the guarantor for forensic examination of the signatures therein.
21. The 2nd Respondent submits that, it is trite law that parties who plead must plead with specificity and seek specific prayers of what they want. Having blanket prayers leaves the Court in a dilemma on whether to grant the prayers and if it were to grant. As it was held in the case of Kenya Airports Authority V Mitu Bell Welfare Society & 2 others [2016] eKLR while citing Malawi Railways Ltd, - S- Nyasulu [1998] MWSC 3:
- “As the parties are adversaries, it is let 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 or 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 of the 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".

22. The 2nd Respondent submits that, the Trial Court saw through the smoking screen and flagged the application dated 26th July, 2018 as a defective one where the application was seeking to compel a stranger to deliver documents given to them by the 2nd Respondent yet the stranger to the proceedings was not a custodian of the documents. The Appellant wanted the Court to aid their indolence in discovery but the Court is not created for such purposes. That in its ruling, the Court stated that:

“Secondly, the documents said to be with the O.C.S are said to be from KWFT, and as such, I find that the O.C.S is not the legal custodian of those documents and has no legal capacity to issue them to the applicant.”

23. The 2nd Respondent contends that, the application giving rise to the impugned ruling of the Trial Court was vexatious, considering the rules of evidence and taking into account that the document produced were part of the record. To confirm authenticity of documents, the Appellant had the leeway to bring an expert to their opinion. Part 9 of the Evidence Act provides for expert opinions where it states in Section 48 that;

- i. When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.
- ii. Such persons are called experts.

24. The 2nd Respondent submits that, the Appellant was seeking to be provided with the documents that they already possessed by virtue of the documents being on record and which service was never contested. It is on record that the Plaintiff's advocates were served with the loan documents that they were seeking to be provided with in the defective application on 15th December, 2016 which illustrates that, the Appellant had ample time to investigate the said documents. That the prayers sought in the defective application are therefore what is commonly referred to as moot.

25. The 2nd Respondent contends that, by presenting the application as is, what the Appellant was doing, was swaying the Court into their side by seeking that the Court aids them in proving their case. By dragging the Court into the arena of parties, the action could infringe on the defendant's right to fair hearing where Article 50 of the Constitution of Kenya (2010) provides that: Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.

26. The 2nd Respondent submits that, application before Court was unsupported by any evidence illustrating that the documents tendered were forged and therefore the present application is meant to



delay the suit contrary to the overriding objectives of this Court under Section 1A, 1B and 3A of the Civil Procedure Act. The Civil Procedure Rules provide that:

“Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”

27. The 2nd Respondent contends that, it is trite law that he who asserts must prove, the Appellant sought to drag the Court into their side to prove the documents tendered are forged against Section 107 of the Evidence Act. As is exemplified in the case of Alice Wanjiru Ruhio Vs Messaic Assembly of Yahweh [2021] eKLR;

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the Court to take action; thus a claimant must satisfy the Court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence”

28. That it was not the position of Court to aid either parties to prove their suit, since Section 109 of the Evidence Act is strict that: The burden of proof as to any particular fact lies on the person.

“He who wishes the Court to believe in its existence. unless it is provided by any law that the proof of that fact shall lie on any particular person”.

29. That the Appellant was the initiator of the suit hence he ought to have conducted thorough investigations to confirm authenticity of the documents presented before they set the suit down for hearing.

30. That the prayer being sought was an equitable relief pegged on Court discretion and no particular provision of the law to back it. It was inevitable that the same was to be denied since equity does not aid the indolent as cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties.

31. The 2nd Respondent submits that, the Appellant ought to have evidence of forgery but not seek the Court assistance in getting the evidence. As it was held in the case of Benjoh Almalgamated Limited & Another V Kenya Commercial Bank Ltd [2014] eKLR:

“A claimant in equity is bound to prosecute his claim without undue delay. This is in equity aids pursuance of the principle which has underlain the statutes of limitation the vigilant, not the indolent' or delay defeats equities'. A Court of equity refuses its aid to stale demands,



where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay (laches). "

32. The 2nd Respondent submits that, ordinarily costs follow the event, as provided for under Section 27 of the *Civil Procedure Act*. That in entering Judgment against the Appellant, the 2nd Respondent prays for the costs of the Appeal.
33. That the Appellant sought orders against the OCS, Molo Police Station to surrender loan application forms from the 2nd Respondent, signed by himself as a guarantor, for forensic examination of the signatures.
34. That the Court found the prayers in the application to be absurd as the Appellant failed to explain why the OCS was involved and lacked specificity in their request. The Court emphasized that orders should not be granted indiscriminately based solely on the "interest of justice" claim. The OCS, Molo Police Station was not a party to the proceedings, and the Court cannot issue orders against a stranger to the case. The 2nd Respondent rely on this position and seek that this Court does not deviate from the same.
35. That the Appellant's application giving rise to the impugned ruling lacked specificity, making it difficult to grant the prayers. The Court explained that parties must plead with specificity, and the Court's role is to adjudicate on the matters raised in the pleadings. The 2nd Respondent ask this Court to make a finding that the magistrate's Court was not in a position to award a prayer that was vague and therefore the Court was correct in dismissing the application.
36. That the OCS was not the legal custodian of the documents sought, and the Appellant's attempt to compel them to deliver the documents was not valid and application lacked evidence to prove that the documents were forged, and the Court asserted that the burden of proof lies with the party making the claim. The Court held that it was not its role to aid either party in proving their case, and the appellant should have conducted thorough investigations before initiating the suit.
37. That the prayer sought by the Appellant's application giving rise to the impugned ruling was an equitable relief without a specific legal provision to support it, leading the Court to deny the request. The 2nd Respondent thus prays for the Appeal to be dismissed.

Analysis & Determination

38. This Court notes that the substratum of this Appeal is that, the Appellant sought the Trial Court's aid, by filing an Application pursuant to Order 51 Rule 1 seeking interlocutory compulsive orders of production of documents belonging to the 2nd Respondents by the Officer Commanding Police Station (OCS) Molo, Police Station.
39. The impugned Ruling under Appeal correctly finds that, the affidavit supporting the application and the grounds on the face of the application, the Appellant did not explain in what capacity the OCS was being brought in and the Court declined to issue such compulsive orders against a non-party to the proceedings.
40. This Court concurs with the Trial Court on the question of issuing orders to strangers to the proceedings and further note that such strangers are equally entitled to a hearing before such orders are issued.
41. Order 1 Rule 10(2) of the Civil Procedure Rules provides as follows:

“(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court



to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.(Emphasis mine)”

42. The provisions of Order 1 Rule 10(2) state that joinder of a party can be made “at any stage of the proceedings”. “Proceedings” are defined in Black’s Law Dictionary Ninth Edition at page 1324 as “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment”. A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the Court effectually and completely adjudicate upon and settle all questions involved in a suit.
43. Similarly, the main purpose for joining a party as a Defendant under Order 1 Rule 3 of the Civil Procedure Rules is to claim some relief from the said party, and therefore such joinder can only be made during the pendency of a suit. As this Court has declined to set aside the judgment herein, there is no suit pending before this Court, and the Applicants cannot therefore be joined as parties at this stage.
44. Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules set out decrees/orders that are appealable as a matter of right. Under Section 75 of the Civil Procedure Act, an appeal shall lie as of right from the following orders: -

“An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the Court making such order or of the Court to which an appeal would lie if leave were granted—

- (1)
 - (a) an order superseding an arbitration where the award has not been completed within the period allowed by the Court;
 - (b) an order on an award stated in the form of a special case;
 - (c) an order modifying or correcting an award;
 - (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
 - (e) an order filing or refusing to file an award in an arbitration without the intervention of the Court;
 - (f) an order under section 64;
 - (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
 - (h) any order made under rules from which an appeal is expressly allowed by rules.
- (2) No appeal shall lie from any order passed in appeal under this section.”

On the other hand, Order 43 of the Civil Procedure Rules lists those orders from which appeals would lie as a matter of right. The Order provides:



“1. (1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75 (1) (h) of the Act—

- (a) Order 1 (parties to suits);
 - (b) Order 2 (pleadings generally);
 - (c) Order 3 (frame and institution of suit);
 - (d) Order 4, rule 9 (return of plaint);
 - (e) Order 7, rule 12 (exclusion of counterclaim);
 - (f) Order 8 (amendment of pleadings);
 - (g) Order 10, rule 11 (setting aside judgment in default of appearance).
 - (h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);
 - (i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
 - (j) Order 19 (affidavits);
 - (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
 - (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
 - (m) Order 24, rules 5, 6 and 7 (legal representatives);
 - (n) Order 25, rule 5 (compromise of a suit);
 - (o) Order 26, rules 1 and 5(2) (security for costs);
 - (p) Order 27, rules 3 and 10 (payment into Court and tender);
 - (q) Order 28, rule 4 (orders in proceedings against the Government);
 - (r) Order 34 (interpleader);
 - (s) Order 36, rules 5, 7 and 10 (summary procedure);
 - (t) Order 39, rules 2, 4 and 6 (furnishing security);
 - (u) Order 40, rules 1, 2, 3,7 and 11 (temporary injunctions);
 - (v) Order 41, rules 1 and 4 (receivers);
 - (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);
 - (x) Order 45, rule 3 (application for review);
 - (y) Order 50, rule 6 (enlargement of time);
 - (z) Order 52, rules 4, 5, 6 and 7 (advocates);
 - (aa) Order 53 (judicial review orders).
- (2) An appeal shall lie with the leave of the Court from any other order made under these Rules.



- (3) An application for leave to appeal under section 75 of the Act shall in the first instance be made to the Court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.
- (4) Save where otherwise expressly provided in this rule, “order” includes both an order granting the relief applied for and an order refusing such relief.”

45. In the Case of Isaac Mbugua Ngirachu v. Stephen Gichobi Kaara [2021] eKLR the Court considered a similar Appeal and stated

“From the reading of the provisions of the above Order 43(1) it is clear that it sets out the orders from which appeals would lie as a matter of right; and at Order 43(2) which is couched in mandatory terms and provides that any appeal from orders not listed in Order 43(1)(1) ‘shall ‘only lie with the leave of the Court (emphasis mine); Section 75 of the Act then states that such leave to appeal shall be made to the Court of first instance and can be made orally at the time the order is made or within fourteen days from the date of such order; and Order 43(4) expounds on the order which includes an order granting the relief applied for or an order refusing such relief;

46. It is not in dispute that the genesis of the Appeal emanates from the Appellant’s application pursuant to Order 51 Rule 1 of the Civil Procedure Code which clearly lies outside the ambit of the orders set out in Order 43 Rule 1(1); and upon perusal of the Court Record of Appeal, it does not reflect any leave to appeal being sought or obtained by the Appellant before he filed the instant Appeal.

47. The consequence of failure to seek leave of the Court to file an Appeal is elaborated by the Court of Appeal in its decision of Nyutu Agrovat vs Airtel Networks Ltd [2015] eKLR; wherein a five (5) judge bench held that;

“Where there was no automatic right to appeal as stipulated under Section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules then the appellate Court had no jurisdiction to hear or determine an appeal unless such leave was first sought and obtained”

48. It therefore flows from the above decision, that the omission in this instance touches on jurisdiction of the Court; and this Court is guided by the aforesaid decision which also held that

“.....the right to appeal is conferred by statute and cannot be inferred.”

49. Jurisdictional issues are not matters that fall in the category of procedural technicalities and it is this Courts considered view that the invoking of the provisions of Article 159(2)(d) cannot salvage the instant appeal as jurisdiction goes to the root of the matter and without jurisdiction this Court or any other Court can do nothing more than down its tools; as was held in Owners of Motor Vessel ‘Lilian S’ vs Caltex Oil (K) Ltd (1989) KLR.

50. This Court is satisfied that the Appeal is incompetent before this Court the same is dismissed with costs to the Respondents.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAKURU

ON THIS 7TH DAY OF MARCH 2024.



MOHOCHI S. M.

JUDGE

