Ogweno v APA Insurance Company Limited (Civil Appeal E078 of 2022) [2024] KEHC 2578 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2578 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E078 OF 2022

DKN MAGARE, J

MARCH 7, 2024

BETWEEN

FLORENCE NYASUGUTA OGWENO ..... APPELLANT

AND

APA INSURANCE COMPANY LIMITED ..... RESPONDENT

JUDGMENT

1. This is an appeal from Kisii CMCC 244 of 2017. The Appellant was the defendant. In a rather, wordy, prolixious and unseemly 28 paragraph plaint the Respondent sought the following orders; - copy prayers 1-4

2. A defence was filed on 27/7/2017 with a counterclaim filed dated 20/7/2017. The Appellant reiterated that the Respondent is under obligation to compensate the Appellants about the policy No. P/AN 807/03205. They stated that the lorry was carrying a maximum load as was permitted under the policy.

3. The matter proceeded exparte. The Applicant sought to set the same aside. On 9/9/2022 the court declined to set aside the ex parte judgment. They resulted in another prollixious 12 paragraph memorandum of Appeal. The same is repetitive and imbued with evidence instead of contested facts and law. It is this application that is for hearing.

4. Order 42 Rule 1 of the Civil Procedure Rules provides are doth: -

> " 1. Form of appeal –
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> 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 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:
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> > "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. 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:
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> > "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.

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.

12. 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..."

13. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

14. 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 the overriding aim of giving effect to the expressed intentions of the parties when construing

a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

In Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005 the Court citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

"It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence."

15. The trial court and this court will similarly construct documents as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.

16. The duty of the court in this kind of matter is has been established. It is a duty laid out succinctly in The aspect of discretion was settled in Mbogo & Another vs. Shah [1968] E.A. 93 at page 96, where the legendary Sir Charles Newbold P elucidated the point in the most poignant way as hereunder: -

> " ...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice...."

17. The matter before the court relates to the exercise of discretion. In that respect, the court cannot substitute its own discretion with that of the court. The court below must have failed to properly exercise discretion. fettered its discretion or was clearly and plainly wrong. The appellant raises two issues: -

    a. The right/opportunity to be heard.

    b. Merit of the application to set aside.

18. In considering whether to set aside, the court will consider: -

    a. Reasons for non-attendance.

    b. Lengthy delay in applying to set aside.

    c. Prior conduct

    d. The irreparable loss.

    e. Whether it is fair just and expedient.

19. The court in its decision stated that in setting aside the court considers the following: -

    a. Failure to serve summons

    b. Sufficient cause.

20. This was the first misdirection. The issues of service of summons relate to exparte proceedings where there is no appearance. Further order 51 Rule is was irrelevant to the subject matter. That order relates to orders issued on an application ex parte. The subject matter was setting aside a hearing that took place exparte under order 12. Service was not applicable. In that connection, the only issue before the court was whether the applicant had placed enough material to set aside a regular judgment. It must and should be conceded that the matter proceeded regularly.

21. In the case of Mureithi Charles & another v Jacob Atina Nyagesuka [2022] eKLR, Justice G V Odungas as then he was stated as doth: -

> 29. In this case the defendant's failure to appear in court when judgement date was set is attributed to lack of notification and the fact that the Appellants' counsel was not present in court on that date due to engagements before the High Court in Makueni. Even if the absence of the Appellants was to be blamed on their counsel, as was appreciated by Apalloo, J. A (as then was) in the case of Philip Chemowolo & Another –vs- Augustine Kubede [1982-88] KAR 103 at 1040:
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> > "Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."
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> 30. That mistakes do occur in the process of litigation was appreciated by the Court of Appeal in Murai vs. Wainaina (No. 4) [1982] KLR 38 where it was held that:
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> > "A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of Justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of Justice themselves make mistakes which are politely referred to us erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule."

22. The appellant took the date by consent but did not attend court. In the circumstances, the court must be satisfied that circumstances exist that can make the court to set aside orders issued regularly. In other words, does the arch of justice lean? Towards maintaining the judgment or not.

23. In the case of David Kiptanui Yego & 134 others v Benjamin Rono & 3 others [2021] eKLR, Justice H A Omondi stated as doth: -

> " 22. The other matter to consider as whether to set aside or vary a judgment entered include whether the person seeking to set aside the judgment made an application to do so promptly and the reasons advanced for the setting aside the default judgment. In the case of, Law -v- St Margarets Insurance Ltd [2001] EWCA Civ 30, LTL, the Court of Appeal allowed judgment in default to be set aside despite the defendant's solicitors' procedural errors in failing to file an acknowledgment of service and in failing to ensure that the statement of

truth in relation to the evidence in support of the application was signed by the right person. The overriding objective required that the default judgment be set aside in order to enable the merits of the defence to be determined.

23. In the case of Rayat Trading Co. Limited -v- Bank of Baroda & Tetezi House Ltd [2018] eKLR the Court held that:

> "If the court sets aside a default judgment, it may do so on terms. In most cases the defaulting defendant will be ordered to pay the claimant's costs thrown away. In addition, the Court may consider imposing a condition that the defendant must pay a specified sum of money into court to await the final disposal of the claim."
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> In deciding whether to impose such a condition, the court will consider factors such as whether there was any delay in applying to set aside, doubts about the strength of the defence on the merits, and conduct of the defendant indicating a risk of dissipation of assets see, Creasey -v- Breachwood Motors Ltd [1993] BCLC 480). As to the amount, this is in the court's discretion, which should be exercised by applying the overriding objective. However, a condition requiring payment into Court of a sum that the defendant will find impossible to pay ought not to be ordered, as that would be tantamount to refusing to set aside see, M. V. Yorke Motors v Edwards [1982] 1 WLR 444 and Training in Compliance Ltd v Dewse (2000) LTL 2/10/2000)."

24. The court is not amused by the appellant's conduct, especially on filing of submissions. The Respondent had already filed submissions. However, the Appellant did not file submission by 7/12/2023 as they swore. No wonder the lower court was not amused by Counsel's conduct. Since these are one-sided submissions I shall intertwine them with the judgment.

25. The record is not impressive the Appellants Counsel started with an adjournment on 11/10/2018. The next hearing date was scuffed by the Respondents preliminary objection. Unfortunately, the preliminary objection took a greater part for the time. I however notice that at all times, Mr. Nyagesoa did not attend court by himself, he sent an advocate to hold brief. On 19/10/2022 the matter was adjourned at the instant of the Respondents advocates who stated that they deliberated on the matter and the defence Advocates were having difficulties getting in touch with their client's.

26. A date was given for 21/6/2021, where the parties agreed to take another date. On 25/10/2021 the Respondent's Counsel was not ready as his witness was reportedly indisposed. The matter was then fixed for hearing on 27/1/2022. On the date, the Respondent's witness testified. The respondent, unlike, in the past, where they had filed submissions opted to proceed by way of oral submissions.

27. Two things happened that made the judgment irregular. First, the Respondent closed their case. They did not move the court to close the defence case and dismiss it. the counterclaim. It left the counter claim there and the Defence case open. Ipso facto, the court could not deliver judgment before closure the defence.

28. If today, the defendant sets down the mater for hearing of the counter claim, what will stop them from doing so? The court cannot close the defence or dismiss the counter claim in the main judgment. It is done during the hearing. I therefore agree that the judgment wsa pre mature. Even if the court, could not set aside, proceedings, at least, it should have allowed the defence to proceed. Its defence to tender

its evidence in defence and in support of the counter claim. In a bid to steal a match on the defendant short cuts were taken.

29. Secondly, after the proceedings of 27/1/2022, there is no evidence on the record that the defendant was served with the judgment date. The court abetted an illegality by allowing the Respondents to argue orally in order to avoid the Appellant from being served for submissions. The court ordered that judgement was to be delivered on 25/2/2022.

30. There was no order that the defence be served. Between the hearing date and the date of judgment on 25/2/2022, there is no way the Appellant could have known the status of the file. The application dated 23/3/20 22 was filed less than a month after delivery of judgment. It is not inordinate delay. The next question is whether there are reasons for setting aside exparte proceedings. I have already established that the defence case and counter claim was never closed. They are alive. The only question is whether the proceedings should be set aside.

31. The explanation given is plausible. The Respondents advocate is based in Kisii while the Appellants advocate is based in Migori. The primary suit was filed in 2016 in Migori. I believe that Appellant's evidence that they sent Advocate to hold brief. What happened, only God knows. Given the patent irregularities, the proceedings cannot be sustained.

32. In the case of D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR, the court of Appeal, C B Madan JA stated as doth: -

> " Upon appeal:-
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> > "That is a very strong power, and should only be exercised in cases which are clear and beyond all doubt....the court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments."
> >
> > per Lindley L.J. ibi, p. 602.
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> > > "It has been said more than once that rule is only to be acted upon in plain and obvious cases and, in my opinion, the jurisdiction should be exercised with extreme caution."
> > >
> > > Per Lord Justice Swinfen Eady in Moore v. Lawson and Another (supra) at p. 419.
> > >
> > > > "It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised. and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved". per Lord Herschell in Lawrence v. Lord Norreys, 15. A.C. 210 at p. 219.

33. I am not prepared to drive the Appellant from the seat of justice. I therefore allow the Appeal.

Determination

34. In the circumstances I make the following orders: -

a. The appeal is allowed the judgment and decree I set aside,

   i. The order dismissing the notice of motion dated 23/3/2022 is set aside and in lieu thereof, substituted with an order allowing the Application

   ii. The matter to begin de novo.

   iii. In order to meet the ends of justice, the cause of Action having arisen in Migori, I transfer Kisii CMCC 244 of 2017 to Migori Chief Magistrate's Court for hearing de novo and final determination.

b. Each party to bear its own costs for the Appeal and the Notice of motion dated 23/3/2022.

c. The transferred suit be mentioned on 14/4/2024 in Migori chief magistrate's court for fixing the matter for hearing.

d. This file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF MARCH, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

M/s Nyagesoa & Co. Advocates for the Appellant

M/s O.M. Otieno & Co. Advocates for the Respondent

Court Assistant - Brian