Eleser Limited v The Ark Limited (Civil Appeal E023 of 2023)
[2024] KEHC 6176 (KLR) (13 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6176 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E023 OF 2023

DKN MAGARE, J

MAY 13, 2024

BETWEEN

ELESER LIMITED ..... APPELLANT

AND

THE ARK LIMITED ..... RESPONDENT

(Being an appeal from the Judgment of Hon. E. M. Gaithuma (RM) delivered on 17/3/2023 in NYERI SCC COMM. E008 OF 2023)

JUDGMENT

1. An appeal from the entire judgment and decree of the Resident Magistrate Hon. Gaithuma in Nyeri SCC. Comm. E008 of 2023 delivered on the 17th March, 2023 founded on the following grounds:

    a. That the learned magistrate erred in law and in fact in failing to consider and/or disregarding the entirety of the evidence tendered by the Appellant thereby arriving at an erroneous conclusion.

    b. That the learned magistrate erred in law and in fact in failing to take into account relevant considerations and in taking into account irrelevant considerations.

    c. That the learned trial magistrate erred in law by misapprehending, misapplying and/or disregarding principles of law to wit estoppel and set off thereby arriving at an erroneous conclusion.

    d. That the learned trial magistrate erred in law in exercising her discretion in a manner that was not judicious as regards costs and damages.

    e. That the learned magistrate erred in law and in fact in failing to consider the binding authorities by the Appellant.

Submissions

2. Parties adopted their submissions in the small claims court. They do not raise any question of law.

Analysis

3. This being an Appeal from the Small Claims Court, the duty of the court is circumscribed under 38(1) of the *Small Claims Court Act* which provides as doth:

> "(1) A person aggrieved by the decision or an order Appeals. of the Court may appeal against that decision or order to the High Court on matters of law.

4. The duty of the court is to defer to the findings of fact of the adjudicator and analyse the matter for issues of law. The issues of law are either due to the subject matter or the finding of law by the court. In the case of *Mbogo and another v Shah* [1968] EA 93, the court of Appeal stated as doth:

> "...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."

5. However, an Appeal of this nature is on points of law. It can be pure points of law or mixed points of law but points of law it is. An appeal on points of law is akin to a second appeal to the court of Appeal. The duty of a second Appeal was set out in the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR: -

> " 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: *Stanley N. Muriithi & another v Bernard Munene Ithiga* (2016) eKLR)."

6. Then what constitutes a point of law? In the case of *Patrick Sosio Lekakeny v Tomito Alex Tampushi & 3 others* [2018] eKLR, J.M. Bwonwonga J as he then was, addressed the issue of a point of law as follows: -

> " In the case of *Bracegirdle v Oxley and Cobley* [1947] KB 349, Lord Denning gave the following guidance:-
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> > "The question whether determination by a tribunal on point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are references deduced on a process of reasoning from them. The determination of primary facts is always a question fact. It is essentially a matter for tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depends on them. The conclusions from those facts are sometimes conclusions of fact

and sometimes of law.....the court will only interfere if the conclusions cannot reasonably be drawn from the primary facts....."

16. There is further guidance in the Court of Appeal in *Mwangi v Wambugu* (1984) KLR 453, in which that court pronounced itself as follows:-

> "A court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

7. In *Twahir Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others*, (2014) eKLR, the court stated as hereunder: -

> " 4. Although the phrase 'a matter of law' has not been defined by the Elections Act, it has been held in *Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 Others*, Malindi Civil Appeal No. 39 Of 2013 (Court Of Appeal), (Okwengu, Makhandia & Sichale, JJA) of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing *Bracegirdle v Oxney* (1947) 1 All ER 126. See also *Khatib Abdalla Mwashetani v Gedion Mwangangi Wambua & 3 Others*, Malindi Civil Appeal No. 39 Of 2013 (Court Of Appeal), (Okwengu, M'inoti & Sichale, JJA) of 23.01.2014 following *AG v David Marakaru* (1960) EA 484."

8. In *Peter Gichuki King'ara v Iebc & 2 Others*, Nyeri Civil Appeal No. 31 of 2013 (Court of Appeal) (Visram, Koome & Odek, JJA) of 13.02.2014, the court of Appeal held as follows: -

> " It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanour – is an issue of law."

9. The main issue for determination in this case is whether the Trial Court erred in law in dismissing the Appellant's suit. A point of law is similar to a preliminary point of law but has a broader meaning.

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.

10. The timelines for small claims are punishing. It is therefore imperative that the case facing Parties be clear and succinct. Mere allegations will not count. Parties must know that it is a court of law and not a kangaroo court or a baraza. Pleadings are therefore paramount. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, A C Mrima stated as follows: -

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

11. 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....."

12. The court found that interest was not agreed and damages were not proved. However, the court granted nominal damages exgratis. This may set out a bad precedent where damages are not proved and are actually not due and the court awards nominal damages. The award for damages for non- breach of contract are an illegality. They cannot be left to stand.

13. In *Macfoy v United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

14. Upon finding that there was no breach the court was bound to dismiss the suit. There is yet no liability without fault in this country. We cannot let it be introduced though some *ex gratia* payments. In the case of Justice C Meoli stated as hereunder in respect of liability without fault:

> "20. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the Evidence Act. The duty of proving averments contained in the plaint on a balance of probabilities lay squarely on the Respondent. In *Karugi & Another v Kabiya & 3 Others* [1987] KLR 347 the Court of Appeal stated that:
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> > "The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."
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> 21. The same court stated in *Eastern Produce (K) Ltd v Christopher Atiado Osiro* [2006] eKLR, that the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant. The court in that case cited the famous decision of *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* [1991] 2KAR 258 where the Court of Appeal, reiterating the foregoing stated that:
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> > "There is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

15. Breach of contract attracts special damages. They must be particularized and specifically proved. In the case of *David Bagine v Martin Bundi* [1997] eKLR, the court of Appeal stated as follows: -

> "It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v Jackson M. Nyambu t/a sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sahbani v City Council of Nairobi* (1982-88) IKAR 681 at page 684: "....special damages in

addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:

> "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

16. The special damages were not proved. However, the award of nominal damages was without basis in law. It is accordingly set aside. This is because there can be no general damages for breach of contract. They can be ascertained. In

27. As a general rule general damages are not recoverable in cases of alleged breach of contract-see Court of Appeal decision in K*enya Tourism Development Corporation v Sundowner Lodge Ltd* 2018 eKLR. The reason for such was explained by the court in the case of *Consolata Anyango Ouma v South Nyanza Sugar Co. Ltd* (2015) eKLR as follows:

> "The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see *Kenya Industrial Estates Ltd v Lee Enterprises Ltd* NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, *Kenya Breweries Ltd v Natex Distributors Ltd* Milimani HCCC No. 704 of 2000 [2004] eKLR). The measure of damages is in accordance with the rule established in the case of *Hadley v Baxendale* (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & Others* NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, NRB CA Civil Appeal No. 192 of 92 (UR) and *Charles C. Sande v Kenya Co-operative Creameries Ltd*, NRB CA Civil Appeal No. 154 of 1992 (UR))".

28. The general damages awarded by the trial court in this case were in the nature of special damages that were neither pleaded, quantified nor proved. The award of Kshs. 50,000/= was therefore wrongly awarded.

29. A claimant for general damages for breach of contract who does not prove that he suffered loss is all the same entitled to damages, though nominal. In the Anson's Law of Contract, 28th Edition at pg 589 and 590 the law is stated to be that:-

> " Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal".

17. There is no other question of law. It is the case therefore that once payment was made in 2015, that marked the end of the matter.

18. In exercise of my inherent jurisdiction, I set aside the payment of nominal damages without breach. Nominal damages are given where there is a breach but there are no damages.

19. The rest of the grounds are pure questions of fact that the court has no jurisdiction to deal with. However, much it may be tempting, durinction cannot be invoked by craft. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court stated as doth: -

> "This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

20. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists.

21. In the circumstances the appeal lacks merit and is accordingly dismissed subject to the correction referred above.

Determination

22. The upshot of the foregoing is that I make the following orders: -

    a. The Appeal lacks merit and is dismissed with costs of Ksh 55.000/= to the Respondent.

    b. The court had no jurisdiction to make an ex gradia order for payment of Ksh 20,000/=. The same is set aside. If payment the same shall be paid, in default execution do issue.

    c. The small claims case stands dismissed with no order as to costs.

    d. Both files are closed.

DELIVERED, DATED AND SIGNED AT MOMBASA, VIRTUALLY ON THIS 13TH DAY OF MAY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Kariuki for the Respondent

No appearance for the Appellant