Shoboh Wines Agencies Ltd v 7 Eleven Merchant Ltd & 3 others (Civil Case E064 of 2023) [2024] KEHC 6675 (KLR) (Civ) (13 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6675 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE E064 OF 2023

DKN MAGARE, J

MAY 13, 2024

BETWEEN

SHOBOH WINES AGENCIES LTD ..... APPELLANT

AND

7 ELEVEN MERCHANT LTD & 3 OTHERS & 3 OTHERS & 3 OTHERS & 3 OTHERS ..... RESPONDENT

JUDGMENT

1. This is an Appeal from the decision of Hon. C.A. Okumu adjudicator given in Nairobi Milimani SCCCOM/E6785/22 given on 3/3/2023. The hallmark of the memorandum of appeal is that the appeal appealed both in law and in fact. I need not set out the humongous 7 grounds of appeal.

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

        " 1. Form of appeal –

            1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

2. 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..."

3. 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."

4. 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.

5. This being an Appeal from the Small Claims Court, the duty of the court is circumscribed under 38 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.

(2) An appeal from any decision or order referred to in subsection (1) shall be final.

6. 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."

7. 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. Given that the second issues herein is a question of mixed facts and law, the court shall not delve into it. It is only useful when it is the only decisive point.

8. 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 versus Bernard Munene Ithiga* (2016) eKLR)."

9. Then what constitutes a point of law? In T*waher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others*, (2014) eKLR, the court stated as doth: -

> "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."

10. 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

Pleadings

11. The claimant filed a claim which arose between 31/3/202 to 20/4/222 for Ksh. 798,391. The claimant supplied goods worth 1,298,010. The claimant reposed goods worth 1,298,010. The claimant repossessed goods worth 229,177 and gave credit notes for this. The Respondents issued cheques for Ksh. 7,40,442. The cheques were returned unpaid. The claimant sought the total amount plus 7,200/ = for cheque bouncing charges.

12. The Respondents filed a response giving their address as 3210 – 006000 Ngara Road. They denied to have signed directors' guarantees. They admitted Ksh 173, 821 and Ksh. 103,821 and stated the same is for June and not as pleaded. They denied the amount of Ksh. 798,391.

13. The Applicants denied being in an alcoholic supply agreement. They nevertheless admitted to have had supplies. These are the kind of pleadings that are evasive and of no use to the party filing them. A party cannot approbate and reprobate. 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)."

14. The court made a decision on 3/3/2023. In that decision I need for retraining is apparent. The court veered off the tangent and ended making a decision with no evidence or pleadings. The adjudicator has a simple task under Section 32 of the *Small Claims Court*, which states that: -

> (1) The Court shall not be bound wholly by the Rules of evidence.
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> (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.

(5) All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.

(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."

15. The evidence requires in the small claims court is far less than the ordinary courts. Where the court go the idea of applying strict rules of evidence is beyond this court. By so doing the adjudicator fell into an error of law. It is noteworthy that the 60 days are not enough for the kind of demands the court was making of the Appellant.

16. Even in ordinary civil cases, the burden of proof is on a balance of probability. It is not absolute proof or proof beyond reasonable doubt. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau v. George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

17. In *Palace Investment Ltd v. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the judges of Appeal held that:

> " Denning J. in Miller v Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
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> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

18. Secondly the matter proceed under Section 30 of the *Small Claims Court Act*. The Section presumes that there is no evidential dispute, otherwise cross examination is necessary.

19. The court must use not only the law but logic. A party who admits that some money was due but has been paid then he has a duty to give a specific answer to the claim. A defendant or respondent cannot escape liability simply by stating that it does not owe. It has to give cogent raison d' etre why they do owe.

20. Finally, when parties have a joint defence, it is unnecessary to go into which one of them is liable. Joint defences denote common intent. Without a notice against a co-Respondent it is the legal duty of the court to find the Defendants jointly and severally liable. The court has no legal duty to determine liability between defendants who have no cross claim against each other.

21. By finding as a fact that the 1st Respondent issued cheques the court ought to have let the party discharge the burden on the purpose of payment. There being a directors guarantee in the agreement, the court was freed from going into directorships. The 3rd and 4th Respondents signed various documents. They also signed documents binding directors to directors guarantee. If they did so not as directors, the duty was on them to prove so. Section 112 of the *Evidence act* provides as follows: -

> " In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

22. In the circumstances the court failed to make a negative inference from the Respondents failure to explain then signing of the contract in issue.

23. Therefore, the court erred in coming up with an incomplete judgment. I set the same aside in its entirety. In lieu therefore, given the failure of the Respondents to give any account for payment of the debt that is virtually admitted to be partly paid, the court must and ought to enter judgment that was proved in the SCC.

24. The appellant's documents had proved that a sum of Ksh. 798,391 was due and owing. This amount was not rebutted. Having discharged their burden of proof the curt enters Judgment jointly and severally for Appellants against the 1st, 2nd 3rd and 4th Respondents.

25. The appellant shall have costs of Ksh. 65,000/= for the Appeal and Ksh. 30,000/= for the small claims court.

Determination

26. The upshot of the foregoing, I make the following orders: -

    a. I set aside the judgment and decree given on 3/3/2023. In lieu thereof I enter judgment for Ksh. 798,391/=.

    b. Costs of Ksh. 65,000/= to the Appellant for the appeal.

    c. Costs of Ksh. 30,000/= for the small claims court.

    d. The said amount of Ksh. 798,391 to attract interest from the date of filing in the small claims court.

    e. Both this file and the small claims court files are closed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA ON THIS 13TH DAY OF MAY, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

Miss Mbugua for the Appellant

Mr. Jengo for the Respondent

Court Assistant - Brian