



**Wambugu v Securicor Security (K) Ltd & another (Civil Appeal 61 of 2018) [2024] KEHC 4717 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4717 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL 61 OF 2018  
DKN MAGARE, J  
MAY 2, 2024**

**BETWEEN**

**SOFIA MUTHONI WAMBUGU ..... APPELLANT**

**AND**

**SECURICOR SECURITY (K) LTD ..... 1<sup>ST</sup> RESPONDENT**

**BENJAMIN GITONGA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This is an appeal from the Ruling and order of the Hon. W. Kagendo CM given on 28/9/2018 in Nyeri CMCCC 903 of 2006.
2. The Appellant filed suit vide a plaint dated 2/11/2006 on 8/12/2006. The same related to motor vehicle Registration No KAW 645 Toyota Pick up which was involved in a road traffic accident on 11/5/2004 as a result of which Ismael Macharia Osman died. The defendants filed defence on 2/2/2007 blaming motor vehicle registration KAG 412J. The deceased was said to be a pedestrian. The suit was said to be subject to a test suit. The matter was fixed for hearing and was adjourned from time to time.
3. On 29/7/2011 the Respondent sought to join Abedares as a third party. The matter kept being adjourned from 2006 until 2013.
4. The court dismissed the case *suo moto* on 15/7/2015 after issuance of notices. This woke up the Applicant ¾ years later to file an application dated 11/6/2018 to reinstate. It was opposed through an affidavit dated 11/7/2018. It was prosecuted through filing of submission.
5. The Appellant stated that the application transcended the deceased. Upon hearing the application, the court dismissed the same for want of merit. This is the subject of the appeal.



6. The Appellant failed 14 grounds of Appeal. I will not regurgitate the same herein. I note that the grounds are repetitive unseemly and sour sight to the eye for being argumentative. This is because Order 42 Rule 1 of the [Civil Procedure Rules](#) provides are hereunder: -

“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.

7. 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:

“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...”

8. 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:

“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.”

9. 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.
10. In the case of *Mbogo and another v 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 it 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.”
11. 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 v 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.”
12. The Court is to bear 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.
13. In the case of *Peters v 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...”
14. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v 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.

15. In *Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as hereunder: -

“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* (5<sup>th</sup> 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.”

16. 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.
17. In this case there was no hearing. Therefore, the court has a wider latitude. In the case of *Sugut v Jemutai & 3 others* (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment), Kiage JA, stated as follows: -

“I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; *Selle v Associated Motor Boat Co* [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified.

I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge. I think that this further widens our latitude for departure where necessary.”

18. The Appellant filed submissions on the same date of hearing, 11/3/2024. I granted the Respondent time to file submission by 22/34/2024. The appellant submitted that Article 50 (1) is the panacea to her problems. It is their case that there is an overriding objective in Article 159 and 50(1) of the *Constitution* to dispense justice that is expeditious fair, Just and proportional manner. This one the Respondent cannot oppose it.
19. The only question is whether this is in favour of the Applicant or not. They raised issue the way that the court considered the matter ad failed to accept the Respondents offer for 30,000/= as throw away costs.



20. It was the Appellant's case that notice was served upon Mbau Gitahi who were not on record. They state that the advocate, Wambugu Kinuthia had been struck out and as such could not be in a position to know the stauts of the case.
21. Lastly they stated that that the oft repeated mantra that 'litigation must come to an end', was misconstrued hence driving the Appellant from the seat of justice. She annexed 8 authorities which I have painstakingly read. Unfortunately, none is referred in the submissions.

### **Respondent's submission**

22. I have no sight of the Respondent's submissions.

### **Analysis**

23. Duty of the court. This is a matter where the court exercised discretion. If I have to upset discretion it must have been without basis, that the court was plainly wrong if the court fettered its discretion.
24. In spite of the submissions that 14 years the matter was in court was irrelevant, I find that They are actually very relevant. The suit was filed in 2006. The matter is in court upto now. The suit was dismissed 9 years after it was filed and the application made over 12 years after filing of suit. By any stretch of imagination, the delay was inordinate.
25. There has to be a real and cogent explanation for the delay. The striking out of Wambugu Kinuthia as an advocate cannot be said to have been clandestine. The client equally has a duty to follow up on their cases.
26. In the case of *Savings & Loan Limited v Susan Wanjiru Muritu* Nairobi (Milimani) HCCC No 397 of 2002, the court stated thus: -

“Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favor, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favor of such a litigant.”

27. In the case of *Duale Mary Ann Gurre v Amina Mohamed Mahamood & another* [2014] eKLR, Hon Justice Mutungi held as follows: -

“An advocate is the agent of the party who instructs him and such instructing client as the principal continues to have the obligation and the duty to ensure that the agent is executing the instructions given. In the case of litigation, the suit belongs to the client and the client has an obligation to do follow up with his Advocate to ensure the Advocate is carrying out the instructions as given. The litigation does not belong to the Advocate but to the client. If



the Advocate commits a negligent act the client has an independent cause of action against the Advocate.”

28. The Court of Appeal is clear from the case of *Tana and Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 others* [2015] eKLR in dismissing the appeal on similar grounds as the present appeal stated:

“...From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side. (See. *Halsbury’s Laws of England*, 4<sup>th</sup> Edn, Vol 44 at p 100-101) and also *Re Jones* [1870], 6 Ch. App 497 in which Lord Hatherley communicated the court’s expectations this way:

‘...I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned...’

Under this duty, counsel is unequivocally obliged to exercise candor and not aid a litigant in subversion of justice. Even though the determination of whether or not counsel has failed in this obligation is dependent on the circumstances of a case, as a custodian of justice, the court must always stay alive to the interests of both parties. This is of paramount importance. Thus, there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on a client...Hence, the mistakes of Mr. Mouko’s clerk became the mistakes of Mr. Mouko. This takes us back to the question, was the same excusable enough to warrant court’s favour?

In determining whether to exercise the discretion in a party’s favour, the court pays regard to the damage sought to be forestalled vis a vis the prejudice to be visited on the opposing party. In view of the age of this case and the timelines within which the appellant has acted, we take the view that the appellant has been less than candid with the court and that the appellant’s true intentions are the derailment of the suit.....The respondents were basically being held at ransom by the appellant’s laxity in having the matter laid to rest. .. As stated by this Court in the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

29. There was delay from 2013, why the matter was last substantively in court to 2018 when the application was made is a period after a period of almost 6 years. The client did absolutely nothing. There was no enquiry, no attendance in court or even complaint on delay of the case. Even during the hearing there is no evidence that she ever attended court even once.



30. In the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, the court stated as follows: -

“In cases falling outside the specific provisions quoted above. Farrel, J., adopted this view. Dalton, J., in Saldanha’s case purported to follow the decision of Windham m C.J. in *Mulji v Jadavji*, [ 1963] EA. 217, but all that case decided was that the courts inherent jurisdiction could not be invoked where an l alternative remedy had been available. In the instant case, it is clear that none of the specific provisions for dismissing suits applied to the suit the subject of this appeal. That being so, I do not see how the courts inherent jurisdiction can be said to be fettered, as no alternative remedy existed.”

31. In the circumstances, I do not find fault with the court in evidence of discretion. The offers in good faith by the Respondent was not unequivocal. In any case, it is not binding upon the court. The Court must be convinced with *raison d’ etre* for the delay.

32. Refuge had been sought in the case of *David Eyanae Ekai v Abdigani Omar Mohamed & 2 others* [2018] eKLR. In his decision, Justice S. M. Githinji took into consideration the unique circumstances of the case. the mistake was not the plaintiff’s making. The court stated as follows: -

“On this day it was made clear by the defendants advocate that she is the one who had advised that the plaintiff not to travel as she wished to amend the defence. There is evidence that the plaintiff was commuting from Lodwar to attend the case. It was sensible given the scenario for his advocate to do so and in my opinion it should have been easy for the trial court to understand and allow him a chance to be heard. Court’s discretion must be exercised upon reasons and judiciously. It should be exercised in a manner that ensures that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. The court held so in the case of *Lucy Bosire v Kehancha Div Land Dispute Tribunal and 2 others* [2013] eKLR. It’s unfair for the defendants to be the beneficiary of a court’s decision arising out of an advice given by their advocate to the advocate of the plaintiff, which made the plaintiff not attend court’s hearing on 15.9.2016.”

33. The two cases were worlds apart. There was no delay in the Eyanae case that could be attributed to the Plaintiff.

34. In the circumstances I find that the court exercised its discretion properly and dismissed the application dated 11/6/18 to reinstate the suit. The suit had been dismissed on 15/7/2015 the suit had been alive it still will have been dismissed twice over.

35. The issue on who was served, did not deal with the fact that there was no prosecution from 2006 till dismissal on 15/7/2015. These matters were and are always listed on Kenya Law for all and sundry. The Application was thus a bid to have a second bite on the cherry. I say No The courts cannot be saddled with stale suits

13. In the circumstances I dismiss the Appeal in limine. 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.

36. The matter was not fully heard. The Respondent has escaped liability due to want of prosecution. There was no joinder of any other party. Consequently, I shall order that each party bears its own costs.

### **Determination**

37. In the circumstances I make the following order as: -
- a. I find no merit in the Appeal and dismiss the same.
  - b. Each party bear its own costs.
  - c. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 2<sup>ND</sup> DAY of MAY, 2024.**

Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Wahome for Miss Muchiri for Respondent

Mr. Mahugu for the Appellant

Court Assistant- Brian

