



REPUBLIC OF KENYA



Bandari Savings and Credit Sacco Society Ltd. v Mwinyi & another (Civil Appeal 7 of 2023) [2024] KEHC 6999 (KLR) (11 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6999 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 7 OF 2023
DKN MAGARE, J
JUNE 11, 2024**

BETWEEN

BANDARI SAVINGS AND CREDIT SACCO SOCIETY LTD. APPELLANT

AND

MWIDANI KOMBO MWINYI 1ST RESPONDENT

FRANCIS MURURU 2ND RESPONDENT

JUDGMENT

1. This is an appeal from the decision of the Co-operative Tribunal. Hitherto I had struck out the Appeal for being filed out of time. Unknown to me the Appellant had gotten leave vide Misc. 246 of 2022. Unfortunately, that was not annexed to the record. Parties consisted to revert to the Appeal.
2. The Appellant filed a humongous 11 –odd grounds of appeal some of which are incomplete. It is not necessary to regurgitate the same herein. The memorandum of Appeal offends Order 42 Rule 1 of the Civil Procedure Rules which provides as 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.



3. 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...”

4. 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.”

5. 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.

6. 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 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.”



7. 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.”

8. 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.

9. 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...”

10. 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.

Appellant’s submissions

11. Filed submissions dated 21/6/2023. They stated that the 1st Respondent guaranteed the 2nd Respondent a loan of Kshs. 2,800,000/=. The 2nd Respondent defaulted on the loan leaving employment without clearing. The Appellant activated the guarantee and deducted Kshs. 275,167.33 from the 1st Respondent on 6/11/2019.

12. The 1st Respondent had guaranteed the 2nd Respondent Ksh. 470,000/= against which the 2nd Respondent was given a loan of 2,00,00/=. The 2nd Respondent left without clearing their obligation.

13. They resulted in deduction of Kshs. 275,165.33. The tribunal entered judgment for Kshs. 275,167.55 for deductions irregularly deducted. They addressed the duty of the court.



14. It was their case that the contract of guarantee allowed deduction. This quoted the relevant clause as doth: -

“We, the undersigned, acting as guarantors for the loan required on page 1 of this Agreement, understand and agree, that all shares, interest and deposits with Bandari Co-operative Savings and Credit Society and owned by us are hereby pledged as security for the said loan or such part of it as may be granted. In the case of default in repayment by the loanee, the Treasurer is hereby authorized to deduct any balance, interest and costs appertaining to the aforementioned loan from the securities hereby pledged. Should the loan guaranteed not be granted, this guarantee automatically becomes null and void. We are members of Bandari Co-operative Savings and Credit Society, employed on permanent terms and each of our individual shareholdings are not less than one third of the loan guaranteed.”

15. They stated that 2nd Respondent could not have qualified for the loan applied for had the 1st Respondent not guaranteed him in terms of Section 33(4) of the Sacco Society Act..

16. They stated that the court re- wrote the contract between the parties. They prayed that the Appeal be allowed.

17. On the other hand, the 1st Respondent stated that the 2nd Respondent defaulted and Kshs. 275,165.33 was deducted from all guaranteed. He stated that the 2nd respondent was not informed before deducting. They stated that whoever alleges must prove.

18. They stated that service of Notice is importance otherwise no cause of action arises.

Analysis

19. This is a fairly straight forward matter. The 3 appealed guaranteed the 2nd respondent. He defaulted. The Appellant deducted the amount on the guarantee. The default is admitted. The guarantee is provided under Section 33(4) of the Societies Act. It provided ass doth:-

(4) Where security is required with respect to a loan, the Sacco society may accept as security against any loan, an endorsement by a guarantor or co-guarantor, assignment of an interest in real or personal property, deposits or wages of the borrower or any collateral as may be prescribed by the Authority.

20. The 1st Respondent was raising a question of the form of Notice. It is completely unnecessary. The appelland had already executed the guarantee and indebtedness settled.

21. If there were issues only damages could have arisen, if no notice was given. The nature of contract was circumscribed. The 1st respondent knew that the day will come. It has come. Their claim is from the 2nd Respondent for the amount of guarantee paid.

22. It is not the duty of the court to relieve parties of their lawfully undertaken obligations. The parties have co- guaranteed each other. Default has occurred. I note that notice, though not necessary has occurred. In the circumstances the Appellant was not at fault.

23. It is not the duty of the tribunal or the court to re-write contracts between parties. In National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR as follows: -

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.



There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain”.

24. I cannot in the circumstances, find fault with the Appellant. There was no case against the Appellant. The end result is that commends itself is that the tribunal relied on irrelevant factors, and as a result fell into error. The judgment is indefensible. It calls for setting aside. In lieu thereof I dismiss the case against the Appellant with costs to the Appellant. Orders against the 2nd Respondent shall remain.

Determination

25. The upshot of the foregoing, is that I make the following orders:-
- a. The appeal is merited and is accordingly allowed.
 - b. The judgment and Decree given on 28/7/2022 against the Appellant is hereby set aside, in total. In lieu thereof. I substitute the same with an order dismissing the 1st respondent’s case against the Appellant with costs of Kshs. 65,000/= for the Appeal.
 - c. The Appellant shall have costs for the suit in the court below.
 - d. This appeal file is closed.
 - e. The order does not affect any orders made against the 2nd respondent.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JUNE, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for parties

Court Assistant – Jedidah

