Co-operative Bank of Kenya Ltd & another v Nyarega (Civil Appeal 530 of 2018) [2024] KEHC 7080 (KLR) (Civ) (11 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7080 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 530 OF 2018

DKN MAGARE, J

JUNE 11, 2024

BETWEEN

CO-OPERATIVE BANK OF KENYA LTD ..... 1ST APPELLANT

GEORGE MUIRURI T/A LEAKEY AUCTIONEERS ..... 2ND APPELLANT

AND

PERIS K NYAREGA ..... RESPONDENT

(Being an appeal arising from the Ruling of the Honourable A. N. Makau, SRM, delivered in Milimani CMCC No. 8387 of 2009 on 8th October, 2018)

JUDGMENT

1. This is an appeal from the ruling of the Hon. A. N. Makau, SRM, given in Milimani CMCC 8387 of 2019 on 8/10/2018. When this matter was placed before me, I thought that the matter is an appeal from the final judgment, only to be told it is an appeal from a ruling. The lower court file is in 2 volumes. This file itself is a study in bulk file management.

2. The Appellant filed a Memorandum of Appeal dated 2/11/2018. The same is prolixious, unseemly, and argumentative. The number of grounds filed were argumentative and do not meet the good practice set out in Order 42 Rule 1 as doth: -

> " 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 in regard to rule 86 of the Court of Appeal rules (which is pari materia with Order 42 Rule 1) 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..."

1. Further in 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. 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.

5. 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."

6. The duty of the first appellate Court was discussed 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."

7. 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..."

8. 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."

9. The appeal arises from dismissal of the Appellant's application dated 26/4/2018 and allowing of the Respondent's application dated 8/5/2018. The appeal has been in our courts for the last 6 years and not proceeding for one reason or the other. The same fate turned up during the hearing of the appeal. I had to give directions firmly.

Pleadings

10. The dispute arose from a dispute over Kshs. 300,000/= in January – February 2009. The same was secured via a chattel mortgage for certain household items and a motor vehicle as additional security.

11. According to the Respondent, the security was never registered under the Chattel Mortgages Act Cap. 28. This Act was repealed by Movable Securities Act. However the repealed Act was not applicable to the dispute herein.

12. The said household goods were attached on 2/12/2009 by the Appellants together with motor vehicle Reg. No. KAT 047Q. They stated the actions were null and void. Particulars of breach and illegalities were pleaded. The Respondent sought the following prayers:-

a. A permanent injunction to restrain the Defendants or their authorized agents, servants or workers from proclaiming and attaching the plaintiff's properties in purported recovery of the loan.

b. A mandatory injunction compelling the Defendants or their authorized agents, servants or workers to return the plaintiff's properties and any other properties removed from her premises on 2nd December, 2009.

c. Damages for wrongful attachment.

d. Costs of the suit.

e. Any other or further relief as the Honourable Court may deem just and fit to grant.

13. An application dated 7/12/2009 was filed on the same day via Chamber Summons pursuant to Order XXXIX Rule1, 2, 3 and 9 of the repealed Civil Procedure Rules 2000. Certain orders were issued, which are not directly in issue in this matter, or are they?

14. Thereafter on 21/12/2009 an application was made seeking to set aside orders dismissing the application dated 21/12/2009. This application had been opposed by an affidavit sworn by Madeline Mugane though not signed.

15. A defence was filed on 17/12/2009 by the 1st and 2nd defendants. They admitted that the securities were not registered but the Respondent had come to court with unclean hands.

16. The Respondent stated that she paid 252,000/= leaving 84,000/= out of the total sum of Ksh 336,000/=. She was wondering where on earth, the defendants got the figure of 182,000/= as the balance. It was her case that Elan Auctioneers were instructed to recover 279,904/= on 4/5/2009 and on 5/6/2009 instructed Leakeys Auctioneers for 182,904/=. She stated that she only paid 41,000/= in the intervening period. The balance remained unpaid as at 7/12/2009 when a sum of Kshs.59,000/= had been paid on 17/8/2009 and 19/10/2009.

17. On 23/6/2010 a mandatory order of injunction was issued by Hon. S.A. Okato. On 12/8/2010 a consent was recorded withdrawing application of 2/8/2010. The application filed on 2/8/2010 was for committal of the MD of the Respondent due to disobedience of the orders hitherto given on 28/6/2010 (is it 23/6/2010?).

18. On 4/5/2012 an application to amend the plaint was filed. This was after the Auctioneers Licensing Board found the auctioneers, George Njoroge Muiruri T/a Leakeys Auctioneers guilty of attaching goods not proclaimed. The amended plaint was filed including:-

a. Goods not returned and not inventoried.

b. Goods attached and not returned.

c. Goods returned while damaged.

19. Issues for determination were filed. On 26/4/2018 the appellants sought to set aside interlocutory judgment entered on 11/1/2013 and against the 2nd defendant on 28/7/2013. This was supported by the affidavit of Venessa Lwila, and advocate of the High Court practicing in the firm of J.K. Kibicho & Co. Advocates.

20. The Respondent replied to the same. They replied stating that the delay in challenging interlocutory judgment was 5 years too late. They stated that the application was baseless as the Board had found the auctioneers guilty.

21. An application dated 8/5/2018 was filed seeking to fast track the suit. This was opposed. Parties filed submissions. Defendant filed submissions on 15/8/2018. The court made its ruling on 8/10/2018 dismissing the application to set aside and directed the suit to proceed to formal proof. The proceedings indicate that no minutes for entry of appearance or defence were noted.

22. There appears that on 3/7/2012 the Respondent applied and the Appellants had no objection to amendment on the amount of the plaint. The amended plaint was to comply with Order 3 Rule 5 of the Civil Procedure Rules. There was a request for judgment against the 1st Defendant which was entered on 11/2/2013 and against the 2nd Respondent on 19/7/2013.

23. The first time the issue of formal proof came up was before Hon. L. Kassan, SPM as he then was, rendered that the matter had been served for formal proof.

Analysis

24. This is a case of a kettle calling a pot black. The case relates to service of process and failure to file defence. The one document that both parties did not address the court is Summons to Enter Appearance. When the Respondent filed suit, she filed together with an interlocutory application. An amended plaint was filed on 16/7/2012. It was served on J.K. Kibicho & Company Advocates.

25. I have perused the file and noted that summons to enter appearance, though drafts were in the file, they were never issued. I have seen several Notices of Change of Advocates. However, there are no summons to enter appearance.

26. The defendant sought to set aside the ex-parte judgment. Their main reason being that they had filed defence. There is already a defence dated 16/12/2009. This defence does not appear to be on record. The affidavit of service related to the service of Amended Plaint. There is no affidavit of service on record on service of summons to enter appearance.

27. The Respondent stated that the defence filed on 17/12/2009 was filed out of time and as such the defence is not valid. They stated that the court cannot breathe life to a dead defence. With the above admission it is clear that there was a defence filed and validly so. There can be no request for judgment without striking out the defence. Filing of an amended Plaintiff does not change two aspects:

    i. There was a defence on record.

    ii. There was no affidavit of service on service of the summons to enter appearance.

    iii. There are no summons to enter appearance ever issued.

28. In the circumstances, all proceedings purportedly to request for judgment after a defence is filed are a nullity. The filing by the defendant was enough. Absence from the court file is not the business of the Appellant. The Respondent knew that there was a defence. The request for judgment was therefore a nullity and stealing a match on the Appellant. What then do we do with such a nullity in terms of irregular judgment? In Macfoy vs. 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."

29. The judgment are entered is incurably defective. Nothing can same it from its own ignominy.

30. The court has no option other than setting aside the ruling. In lieu thereof the application dated 8/5/2018 is dismissed with costs of Kshs.15,000/= to the Appellant. The application dated 26/4/2018 is allowed with costs of Kshs.15,000/= to the Appellant.

31. The court forgot to address two crucial issues other than the one raised herein. This is the defence that was apparent from the affidavits and the defects in the proceedings.

32. The appeal is allowed with cots of Kshs.130,000/= to the Appellant. Further the court directs that the court below takes submissions and confirms if summons to enter appearance were ever issued. If not then the entire suit in the court below is a nullity.

33. The Respondent shall file evidence of issuance and service of valid summons within 1 year from the date of filing suit. Should the Respondent fail to do so, the suit shall stand struck out with no order as to costs.

Determination

34. In the circumstances I make the following order:

    a. The appeal is merited. I set aside the Ruling and order of Hon. A.N. Makau, on 8/10/2024. In lieu thereof I substitute with the following orders:

        i. The application dated 8/5/2018 is dismissed with costs of Kshs.15,000/=.

        ii. The application dated 26/4/2018 is allowed. The defence is properly on record.

        iii. The Appellant shall have costs of Kshs.130,000/= for the appeal.

    b. The Respondent shall file in the lower court within 30 days, evidence of issuance and service of summons to enter appearance within 1 year of filing suit. Failure to do so, the suit in the lower court shall stand struck out with no order as to costs.

    c. In the event summons were issued, the matter shall proceed before a court, other than Hon. A. N. Makau and be concluded by 7/7/2025.

    d. This file is closed.

DATED, SIGNED AND DELIVERED 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 by parties

Court Assistant - Jedidah