



**Duncan Mindo t/a Mindo & Co. Advocates v Bernard Waithaka  
Gaturuku t/a Bensure Auctioneers & another (Civil Appeal  
60 of 2018) [2024] KEHC 6605 (KLR) (4 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6605 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL 60 OF 2018  
DKN MAGARE, J  
JUNE 4, 2024**

**BETWEEN**

**DUNCAN MINDO T/A MINDO & CO. ADVOCATES ..... APPELLANT**

**AND**

**BERNARD WAITHAKA GATURUKU T/A BENSURE AUCTIONEERS .... 1<sup>ST</sup>  
RESPONDENT**

**NEW REALITE LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment made by Chief Magistrate Hon. W.  
Kagendo in Nyeri CMCC No. 339 of 2010 delivered on 25th September, 2018)*

**JUDGMENT**

1. This is an appeal from the decision in Nyeri CMCC 339 of 2016 delivered on 25/9/2018 by the Hon. W. Kagendo as she then was. The appellant filed a memorandum of appeal and set out 13 grounds of appeal as follows:
  - a. That the learned magistrate misdirected herself both in law and facts and as a result came to a wrong conclusion on both facts and law.
  - b. That the learned trial magistrate failed to appreciate the fact that the question of arrears of rent was being canvassed upon in civil suit 284 of 2004 which was then pending in court and that the Appellant's failure to address the question of arrears of rent was because the same was being dealt with in the said suit.
  - c. That the learned trial magistrate failed to note that the proclamation by the 1<sup>st</sup> Defendant in the suit as the creditors was entered as the 2<sup>nd</sup> Defendant and not Kenya Commercial Bank



which the Appellant would owe arrears of rent and in the Notification of sale the creditor was said to be KCB Othaya.

- d. That the learned trial magistrate failed to take into account the Respondent's failure to take a third party notice if they were indeed acting for and on instructions of KCB in this particular action.
  - e. That the learned trial magistrate failed to appreciate the fact that there was no evidence adduced to prove arrears of rent.
  - f. That the learned trial magistrate went out of her way and considered matters that were neither pleaded nor put in evidence.
  - g. That the learned trial magistrate failed to appreciate the Respondent failed to reply to the 1<sup>st</sup> demand letter by the Appellant in connection with the attachment of goods in question.
  - h. That the learned trial magistrate erred in law in giving judgment in the counter-claim to the Respondents who were not entitled to be paid for the arrears of rent even if the same was due and payable and thereby dealing with the matter that are pending in civil suit No. 284 of 2004.
  - i. That the learned trial magistrate erred as the counter-claim was not proved and the trial magistrate was wrong in giving judgment in favour of the Respondent.
  - j. That the learned trial magistrate erred in law and in fact in making her decision without considering all the facts before her and ignored her paramount duty as well as her inherent powers of doing substantial justice in the matter having regard to all the circumstances of the case.
  - k. In her consideration of law and facts before her, the learned trial magistrate misdirected herself and erred in coming to her decision on wrong principles, thus worked hardship to Appellant that occasioned miscarriage of justice.
  - l. The learned trial magistrate's decisions are unfair and unjust and cannot be maintained as they are contrary to the interest of justice.
2. It is not fathomable how 13 grounds of appeal will address the questions raised in this case. The memorandum of Appeal should be concise and not unseemly, prolixious, repetitive and anathema to good reading as per Order 42 rule 1 of the [Civil Procedure Rules](#), which 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.

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. 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.

### **Duty of the first Appellate court**

6. 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.

7. 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.”

8. 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.”

9. The Court is to bear in 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.

10. 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...”

11. 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.”

12. For the appellate court, to interfere with the award it is not enough to show that the award is high or low or even that had I handled the case in the subordinate court, I would have awarded a different figure.

### **Pleadings**

13. The appellant filed suit stating that they have been tenants in Land Parcel No. Othaya/561/130/54/53 since 1987. They had disputes with KCB and auctioneers were instructed. They stated that there is also CMCC 284/2004. The 2<sup>nd</sup> Respondent was an agent for collection of debt.
14. On 15/4/2009 the 1<sup>st</sup> Respondent attached goods. He listed the goods which were trespassed upon, all valued at Kshs.229,800/= . They stated that there was also CMCC 7B of 2009. They claimed:



- a. Refund of goods worthy 529,800/=.
  - b. General damages for trespass.
  - c. Exemplary damages.
15. There was an amended plaintiff. The same added illegal distress, illegal trespass and an injunction.
  16. The 1<sup>st</sup> Respondent filed defence and stated that a sum of Kshs.175,966/= is due and outstanding. The 2<sup>nd</sup> Defendant stated that they were mere agents.
  17. Upon hearing the matter the court found that the case was without merit. This was on the basis of the obligation to pay rent to the Landlord. Wonders then started happening. In spite of pleading that they are advocates, the Appellant appealed to this court. The subject matter of the matter is rent and distress for rent. This is a strange language in the right court. Article 165(5) states:
    - (5) The High Court shall not have jurisdiction in respect of matters-
      - (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
      - (b) falling within the jurisdiction of the courts contemplated in article 162 (2).
  18. Other than lacking inherent merit the issue and question of distress for rent is within the province of the Environment and Land Court. The Appeal was filed in a court without jurisdiction In *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, Justice Nyarangi JA, as he then was stated as doth;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: “By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.”

19. This court cannot assume jurisdiction where it does not have. 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.”

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

20. This is not a question of a predominant question. *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR, the high court stated as doth: -

“105. Subsequent to the above decisions, our Courts have identified the correct approach to determine the appropriate superior Court to hear such hybrid cases. The Courts have resolved the issue by inquiring what the most substantial question or issue presented in the controversy is. For example in *Suzanne Butler & 4 Others v Redhill Investments & Another* the Court stated the test in the following words:

“When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.”

21. The case was thus wrongly filed in this court. The matters raised are not a subject for this court. In the circumstances I must down my tools. The appeal is accordingly struck out. The Respondents have spent money defending a baseless claim.
22. Consequently, the Appeal is not merited. The same is dismissed with costs. Section 27 of the *Civil Procedure Act* provides as follows in regard to costs.

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.



(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

23. 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.

24. Costs follow the event. The event in this case is the dismissal of the Appeal. Accordingly, I strike out the Appeal with cost of 120, 000/= to the respondents.

**DATED, SIGNED AND DELIVERED AT NYERI ON THIS 4<sup>TH</sup> DAY OF JUNE, 2024.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

Miss. Wangari for the Respondent

No appearance for Appellant

Court Assistant – Jedidah

