Kenya Red Cross Society (Emergency Medical Plus Services) v Toyota Kenya Limited (Civil Appeal E825 of 2021) [2024] KEHC 7645 (KLR) (Civ) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7645 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E825 OF 2021

DKN MAGARE, J

JUNE 20, 2024

BETWEEN

KENYA RED CROSS SOCIETY (EMERGENCY MEDICAL PLUS SERVICES) ..... APPELLANT

AND

TOYOTA KENYA LIMITED ..... RESPONDENT

(Being an appeal from the Ruling and Order of Hon. Selina N. Muchungi - SRM in Milimani CMCC No. E2444 of 2021, delivered on 10{{^th}} December, 2021)

JUDGMENT

1. This is an appeal from the Ruling and Order of the Hon. Selina N. Muchungi, SRM given on 10/12/2021 in Nairobi Milimani CMCC E2444 of 2021. The Respondent was the plaintiff.

2. The Appellant filed a 10 paragraph Memorandum of Appeal. The same is prolixious and unseemly contrary to Order 42 Rule 1 of the Civil Procedure Rules, which provides as hereunder: -

> " 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:
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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..."

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:
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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."

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 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. 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 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. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019)eKLR , Justice D.S Majanja held as hereunder:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

11. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

12. The foregoing was settled in the cases of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph *8*: -

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

13. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

14. The court of Appeal, pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages."

15. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as hereunder regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

16. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

17. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. The award is simply not justified from evidence.

18. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

19. 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.

20. 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

21. Vide an application dated 13/9/2021, the Appellant sought to set aside exparte judgment. They blamed the delay in entering appearance on their advocates. They also stated that the court lacked jurisdiction as the contract had an arbitration clause. They stated that the amendments were also done unproceedurally.

22. The judgment entered was said to be irregular and ought to be set aside ex debito justitiae. The application was made on 13/9/2021 while judgment had been entered on 7/9/2021. The suit was filed on 2/3/2018.

23. What was annexed was a draft memorandum of appearance, service and maintenance agreement, amended plaint dated 17/5/2021 and Board Resolution. The claim in the amended plaint had been changed from Kshs. 2,864,521.17/= to Kshs. 5,161,102.92/=.

24. The plaint indicated that parties agreed that the amount due was Kshs. 2,864,521.17/=. They state that invoices have been updated to Kshs. 5,161,102.92/=. This was the amount claimed.

25. Memorandum of appearance was filed on 3/8/2021. A request for judgment was made on 27/11/2021. There was a demand letter filed was for Kshs. 37,520,922.74/= on 29/3/2017. They relate to disputes in 2016. The Appellant filed defence on 30/8/2021 as prayed. I have not seen formal proof proceedings on the file.

26. The Appellant filed submissions stating that the plaintiff was served with an amended plaint on 1/10/2021. The said amendments were irregular. They instructed and as such did not deal. Another was subsequently instructed. They state that at the time of appearance, the Respondent had moved to have judgment entered. They blame this on oversight.

27. They state that there was an arbitration clause as such the court lacks jurisdiction. They relied on Section 6(1) of the *Arbitration Act*. The application is said to have been made on 8/9/2021. This was said to be in compliance with Section 6. Reliance is placed on the decision in Adrec Limited –v- Nation Media Group Limited [2017] eKLR where the court held that:

> " Any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration."

28. In the case of Eunice Soko Mlagui –v- Suresh Parmar & 4 others [2017] eKLR, the court stated:

> " Section 6 of the *Arbitration Act* is a specific provision of a statute that provides for stay of proceedings and referral of a dispute to arbitrating where parties to the dispute have entered into an arbitration agreement. The conditions under which the court can stay proceedings and refer a dispute to arbitration are prescribed by section 6 and in our view, the purpose of that provision is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution. We do not therefore find anything in the provision that can be described as derogating or subverting the constitutional edict as regards alternative dispute resolution. The provision, for example, of section 6 which requires parties to make an application for referral of a dispute to arbitration at the earliest opportunity and before taking any other action, or those that require the court not to refer a dispute to arbitration if the arbitration agreement is null and void, or is incapable of being performed, or if there is no dispute capable of being referred to arbitration, cannot

be described as inconsistent with the constitutional principle of promoting alternative dispute resolution because the court is also obliged to take into account the equally important constitutional principle that justice shall not be delayed, by for example sending to arbitration a non-existent dispute, or allowing a party who has otherwise elected to pursue proceedings in the court, to belatedly purport to opt for arbitration."

29. They stated that an application made after filing of defence ought to be rejected. They relied on Section 10 of the *Arbitration Act* and on Kenya Pipeline Company Limited –vs- Datalogix Limited and Another Nairobi HCCC No. 490 of 2004 [2008] 2 EA 193, where warsame, J (as he then was) held:

> "It is clear from the reading of section 6(1) that the decision to refer the matter to arbitration is left to the discretion of the court and the court must give effect to terms of the contract which provide for arbitration and as a matter of course the court has a duty to honour the plea of the parties so as to give effect to the wishes of the parties and their contractual relationship. Arbitration is a modern way of resolving disputes quicker, amicably and in a friendly environment and manner. It is for that reason that the court would always endeavor to encourage parties to resolve their disputes through arbitration. It is against public policy to deprive parties of their choice and hinder their attempt to resolve their disputes through arbitration ... Our system of law and dispute resolution should not countenance the existence and continuation of two parallel processes in respect of the determination of an issue arising between the same parties or parties claiming under them over the same subject matter."

30. In the case of Yes Housing Co-operative Society Limited v Kenneth Onsare Maina [2020] eKLR; Justice GV Odunga held that:

> "It follows that this court is not just under a duty to enforce a contractual clause binding the parties to refer their disputes to arbitration but is under a constitutional obligation to promote that mode of dispute resolution. In my view it would amount to an abdication of its judicial duty if the court were to shirk that duty and decline to refer a matter to arbitration simply because a party believes that the applicant's case is unmerited and is bound to fail. Whether or not the case is unmerited is for the arbitrator to determine ...
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> Under section 12(4) of the *Arbitration Act*, where parties fail to reach an agreement as provided for in the arbitration clause mandating that the dispute be referred to arbitration, the High Court is given jurisdiction, upon application by any party, to give effect to the agreement referring the dispute to arbitration. In the present application I hold that the defendant is entitled to have the dispute with plaintiff determined by arbitration pursuant to the said clause 15 of the Agreement and I therefore direct that all further proceedings in this case are hereby stayed and the dispute herein is hereby referred to Arbitration."

31. in Titus Kitonga & Another –v- Total Kenya Limited & Another [2018] eKLR Justice G.L. Nzioka stated that:

> "In my considered opinion, the law is settled that an arbitration clause in contract between the parties is considered as independent, separate, and severable from the main contract. The doctrine of separability recognizes the arbitration clause in a main contract as a separate contract, independent and distinct from the main contract. The essence of the doctrine is that the validity of an arbitration clause is not bound to that of the main contract and vice versa. Therefore, the illegality or termination of the main contract does not affect

the jurisdiction of an arbitration tribunal based on an arbitration clause contained in that contract. The obligation to resolve all disputes by arbitration continues even if the main obligation or indeed the contract expires or is vitiated."

32. On setting aside they relied on the case of Patel –v- E.A. Cargo Handling Services Ltd [1974] EA 75 where the court held that:

> " The court has a very wide discretion under the order and rules and there are no limited and restrictions on the discretion of the Judge except that if the judgment is varied, it must be done on terms that are just."

33. The predicament is stated to be due to the failure by advocate. They referred to Harris J In Jesse Kimani –v- McConnel [1966] EA 547 555 where the court stated that:

> " Among other matters, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the Judgment which would not or might not have been present had the Judgment not been ex-parte and whether or not it would be just and reasonable to set aside or vary the Judgment, upon terms to be imposed."

34. In Sebel District Administration –v- Gasyali [1968] EA 300, 301-302 which is illustrative of the manner of the discretion vested in the court, to guide the court among other factors:

> " The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think it should always be remembered that to deny the subject a hearing should be the last resort of a court."

35. To crown it they relied on the case of Philip Chemwolo & Another –v- Augustine Kubende (1982-1988) KAR 103, Ceneast Airlines Limited v Habib Bank A G Zurich eKLR and Patrick Mutunga Mwilu & 10 others –v- Mary Katua & 2 Others (2012) eKLR for the proposition that an advocate's mistakes should not be visited on a litigant since the advocate's only loses costs unlike a litigant who has a higher stake in the suit and that the courts must guard a litigant from such losses. The court in allowing an application to set aside judgment rendered itself thus:

> " Although there was a blunder on the part of the Appellant's advocate, the Appellant who is the higher stakeholder than his advocates in the case had no contribution to the blunder at all. The foregoing fact coupled with the duty of the court to sustain matters and determine them on merit, I find that it would be unjust to lock out such a litigant from prosecuting his case."

Analysis

36. The case brings to the fore the core understanding of the core of award of damages and proceedings related to arbitration. Lack of knowledge relating to Arbitration sometimes leads to parties living in blissful ignorance. The converse is also true, that arbitration is not a point of law but a question of fact. Section 6(1) and (2) of the *Arbitration Act* provides as follows:-

    1. A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance

or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds— (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration. (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined. (3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

2. Ipso facto, a court can proceed with a matter subject to arbitration without falling foul of the Arbitration clause. Once, arbitration is lawfully refused, the clause on arbitration falls. However, there is no requirement under the Civil Procedure Rules that a draft defence must be annexed to the application for setting aside.

37. Therefore there are 3 issues to be determined:-

a. Whether the arbitration clause is applicable in this matter.

b. Whether the Judgment was regular.

c. Whether the Appellant had a defence to the claim.

38. The three issues, each one of them, can dispose off the matter. However, falling of one ground does not affect the other.

39. In regard to arbitration, there is no need to file a draft defence. The Memorandum of Appeal and an application for stay must be filed simultaneously. Without doing so, arbitration falls. A person wishing to get stay must not file the two documents separately.

40. Secondly, failure to arbitrate does not amount to usurpation of jurisdiction. There can thus be no preliminary objection on jurisdiction.

41. A preliminary law, has to be on non-disputed facts in its constitution. It cannot be based on disputed facts or argumentative postulations.

42. The Court is not involved with questions of fact. In hearing a preliminary objection, this court proceeds on an understanding that what is pleaded is true. It is what the English common law used to call a demurrer. The locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd [1969] E.A. 696, made this pertinent observation. It said: -

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop".

43. In a Tanzanian case of Hammers Incorporation Co. Ltd Versus The Board Of Trustees of the Cashewnut Industry Development Trust Fund, the Court of Appeal, (Rutakangwa, N. P. Kimaro and S. S. Kadage JJA), sitting in Dar Es Salaam in their decision given on 17/9/2015 regretted that the practice of raising preliminary objection that was frowned upon by the Court of Appeal in Kampala in the Mukisa biscuit case(Supra) still persists. They stated as doth: -

> " It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the "improper practice" never stopped. Neither

did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in Karata Ernest & Others –V- The Attorney General, Civil Revision No. 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the MUKISA BISCUIT case (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate."

44. In the case of Martha Akinyi Migwambo v Susan Ongoro Ogenda [2022] eKLR, justice Kiarie Waweru Kiarie, summarized the preliminary objection nicely as seen from two of the judges in Mukisa Biscuit Manufacturing Co. Ltd(supra): -

> " A preliminary objection must be on a point of law. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969)EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:
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> ....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.
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> At page701 paragraph B-C Sir Charles Newbold, P. added the following:
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> A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...."

45. A Tanzania Court of Appeal sitting in Dar es Salaam, in Karata Ernest & Others vs *Attorney General (Civil Revision No. 10 of 2020*) [2010] TZCA 30 (29 December 2010),(Luanda, J.A. , Ramadhani, C.J. , Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

> " At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists o f a point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.

46. Justice prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of Oraro vs Mbaja [2005] eKLR:

> " I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the

> processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

47. It is therefore my view that a preliminary objection must be based on current law, and be factual in its constitution. It cannot be based on disputed facts or facts requiring further enquiry. In determining a preliminary objection therefore only 3 documents are required in addition to *the constitution*. The impugned law, the plaint and preliminary objection. If you have to refer to the defence, then the preliminary objection is untenable.

48. The preliminary objection herein is based on the question whether a person can be held liable for orders in personum issued in a case they are not parties.

49. In that regard, an application dated 13/9/2021. Though there is said to be a Preliminary Objection dated 22/9/2021, I cannot see the same. Not that the physical document is not there, but the document does not raise any issue of law. Issue of locus is a question of fact. It is unnecessary waste of the court's time.

50. It must be remembered that courts must decide cases without undue regard to technicalities. The court rightly found that the Appellant had locus. However, it is not a decision on a preliminary objection but legal verbiage to fill blank spaces and involve the court in circuitous circumlocutory permutations without any reasonable prospect of bringing end to the case.

51. I therefore find that an application for stay pending arbitration must be filed at the same time as the memorandum. The application dated 13/9/2021 is not an application under Section 6(1) of the *Arbitration Act*. The application dated 8/9/2021 is an application for stay of proceedings pending arbitration. It was served on 26/9/2021. Judgment was entered and subsequently Decree issued. The court has not made a decision on the said application.

52. The court below should peruse the file and confirm whether the Memorandum of Appearance and the application were filed at the same time. If so, the court will have no option other than allow the application dated 8/9/2021.

53. Secondly for the application dated 13/9/2021, it is a defence to state and prove that the application dated 8/9/2021 had been filed. Requiring the Appellant to file a defence, will be taking away a defence they have. It is fettering discretion. The court was plainly wrong in failing to have regard and protect arbitration proceedings.

54. On the issue of service, I find that the Appellant were served. When the defence is lack of jurisdiction, it is proper for the Applicant to put his house in order before entering appearance and filing an application under Section 6(1) of the *Arbitration Act*.

55. In the circumstances I find the failure to enter appearance excusable. The issue of the fatalities related to amendment. I shall dismiss the same in limine. A party who has not filed defence cannot raise questions on the adequacy of the opposing side's pleadings.

56. The next issue is whether the Judgment is regular. The claim relates to several invoices. It is in the nature of repairs and fuel or materials used and not paid for. It is not a liquidated claim. It is a claim for pecuniary loss. Order 10 Rule 4-7 6-8 states as follows: -

1. Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

2. Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

57. In the circumstances, the Respondent was obligated to tender evidence on the special loss. In the case of DAVID BAGINE vs MARTIN BUNDI [1997] eKLR, the court of Appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
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> "Plaintiffs must understand that if they bring actions for damages it is for thm to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

58. In the case of Swalleh C. Kariuki & another v Violet Owiso Okuyu [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -

> " In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
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> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

59. In the circumstances the Respondent was under duty to prove the said amount.

60. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. 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."

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

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> "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."

62. Section 107 of the *evidence act* provides as follows: -

107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person

63. In a nutshell, there was a duty to prove by way of formal proof.

64. In the case of Samson S. Maitai & Another -vs- African Safari Club Ltd & Another [2010] eKLR, the High Court in trying to defining Formal Proof stated thus:

> " ..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

65. In the circumstances the Judgment entered was irregular. The court must set the same aside ex debito justitiae. An irregular judgment must be set aside ex debito justiceae. A distinction exists between a default judgment that is regularly entered and one which is irregularly entered.

66. The difference between the two was elaborated in detail by the Court of Appeal in CA No. 6 of 2015 James Kanyita Nderitu vs. Marios Philotas Ghika & Another [2016] eKLR, where it was held that:-

> "....In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his Memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer, whether in the whole it is in the interest of justice to set aside the default judgement, among others."

67. In the circumstances the court finds that the Appeal is merited. I do not find it necessary to the rest of the issues.

68. The appeal is accordingly allowed.

69. As for costs, they are provided for under Section 27 of the *Civil procedure Act* follows: -

(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.

70. 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."

Determination

71. I make the following orders:-

a. The appeal herein is merited. I allow the same, set aside the Ruling given on 10/12/2021 and in lieu thereof I make the following orders:-

i. The ex-parte Judgment entered in Nairobi CMCC E2444 of 2021 is set aside.

b. The Ruling dated 10/12/2021 is set aside in total. In liue thereof I make the following substitute orders:-

i. Matter shall proceed for hearing of the application dated 18/9/2021 and if the court finds that it was filed on the same day with the Memorandum of appearance, allow the same, otherwise to dismiss the same.

ii. If the said application is dismissed the Appellant to file defence within 15 days of dismissal of the said application.

c. The Appellant shall have costs for the application dated 13/9/2021.

d. The Appellant shall have costs of Kshs. 175,000/= for the Appeal.

e. The file in the court below shall proceed before a court other than Hon. S. Muchungi.

f. The matter be fixed for directions on 20/7/2024 before the lower court.

g. This file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20TH DAY OF JUNE, 2024.

Judgement delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Ali Ahmed for the Appellant

Ms. Sophie Akello for the Respondent

Court Assistant – Jedidah