Okumu v Nyakinyi & another (Civil Appeal E378 of 2022)
[2024] KEHC 7006 (KLR) (Civ) (11 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7006 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E378 OF 2022

DKN MAGARE, J

JUNE 11, 2024

BETWEEN

ALRED OCHIENG OKUMU ..... APPELLANT

AND

GEORGE NGARE NYAKINYI ..... 1ST RESPONDENT

REUBEN KERRE ..... 2ND RESPONDENT

JUDGMENT

1. This is an appeal from the decision of the hon. Caroline W. Ndumia given in Nairobi SCC Commercial E108 of 2022 ON 13/5/2022. The Appellant was the claimant in the matter. The Appellant filed 5 grounds of Appeal as follows: -

    a. That the Learned Adjudicator erred in law and fact by failing to evaluate, analyze and give due consideration to the totality of the evidence including documentary evidence adduced by the Claimant leading to an erroneous finding that the Claimant had not proved his case to the required standard.

    b. That the Learned Adjudicator erred in law and fact by failing to acknowledge that the Respondents had not filed a defense and did not adduce any evidence and thus the Claimant's evidence was unchallenged and uncontroverted.

    c. That the Learned Adjudicator erred in law and fact by failing to find and hold that in the absence of Defence to the Claim and any evidence by the Respondents contradicting the averments and evidence by the Appellant, the Appellant had proved his case against the Respondents.

d. That the Learned Adjudicator erred in law and fact by falling to fathom and put in consideration authorities cited in support of the Appellant's case.

e. That the Learned Adjudicator erred in law and in fact by dismissing the Appellant's without sufficient grounds.

2. The Appeal is on both law and fact. The Appeal on fact and evidence is untenable in view of the Provisions of Section 38(1) of the Small Claims Act.

3. This being an Appeal from the Small Claims Court, the duty of the court is circumscribed under 38 of the *Small Claims Court Act* which provides as doth:

1. A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.

2. An appeal from any decision or order referred to in subsection (1) shall be final.

4. The duty of the court is to defer to the findings of fact of the adjudicator and analyse the matter for issues of law. The issues of law are either due to the subject matter or the finding of law by the court. In the case of Mbogo and Another vs. Shah [1968] EA 93, the court of Appeal stated as doth:

> "...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."

5. However, an Appeal of this nature is on points of law. It can be pure points of law or mixed points of law but points of law it is. Given that the second issues herein is a question of mixed facts and law, the court shall not delve into it. It is only useful when it is the only decisive point.

6. An appeal on points of law is akin to a second appeal to the court of Appeal. The duty of a second Appeal was set out in the case of Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR: -

> " This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below-considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR)."

7. Then what constitutes a point of law? In Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others, (2014) eKLR, the court stated as doth:

> " 4. Although the phrase 'a matter of law' has not been defined by the *Elections Act*, it has been held in Timamy Issa Abdalla Vs Swaleh Salim Swaleh Imu & 3 Others, Malindi Civil Appeal No. 39 Of 2013 (Court Of Appeal), (Okwengu, Makhandia & Sichale, JJA) of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing Bracegirdle vs Oxney (1947) 1 All ER 126. See also Khatib Abdalla Mwashetani Vs Gedion Mwangangi Wambua & 3 Others, Malindi Civil Appeal No. 39 Of 2013 (Court

Of Appeal), (Okwengu, M'inoti & Sichale, JJA) of 23.01.2014 following AG vs David Marakaru (1960) EA 484."

8. In Peter Gichuki King'ara Vs Iebc & 2 Others, Nyeri Civil Appeal No. 31 Of 2013 (Court Of Appeal) (Visram, Koome & Odek, JJA) Of 13.02.2014, the court of Appeal held as follows: -

> " it was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanour – is an issue of law."

9. The main issue for determination in this case is whether the Trial Court erred in law in dismissing the Appellant's suit. A point of law is similar to a preliminary point of law but has a broader meaning. 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.

10. The timelines for small claims are punishing. It is therefore imperative that the case facing Parties be clear and succinct. Mere allegations will not count. Parties must know that it is a court of law and not a kangaroo court or a baraza. Pleadings are therefore paramount. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, A C Mrima stated as follows:

> " It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

11. The Appellant is of the view that in absence of evidence controverting the appellant's case then this court ought to have allowed her case. This is not a point of law. In any case before evidence is said to be getting uncontroverted there should be sufficient evidence. Not any kind of evidence qualifies in sufficient evidence The Court of Appeal in the case Charterhouse Bank Limited (under Statutory Management Vs. Frank N. Kamau (2016) eKLR had occasion to consider the burden of proof of the plaintiff where the defendant failed to adduce evidence. The court stated in that case:-

"We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified."

12. The claim is over rent arising from a partnership. The Appellant is said to be "owned" Kshs. 500,000/=. The documents by the Appellant were self-defeating.

13. I have not seen any evidence that was not controverted. In the normal way the duty lay on the Appellant. He failed miserably in discharging the same. 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."

14. Consequently, the Appeal is untenable. There is no single question of law raised. Consequently, It is dismissed with costs of Kshs. 65,000/= to the Respondent.

Determination

15. In the circumstance I make the following orders:-

    a. The Appeal lacks merit and is dismissed with costs of Kshs. 65,000/= payable in 30 days in default execution do issue.

    b. The file is closed.

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:

Mr. Macharia for the Appellant

No appearance for the Respondents

Court Assistant – Jedidah