Stanley Muluvi Kiima t/a Mutunga & Company Advocates v Ndigirigi (Civil Appeal E997 of 2022) [2024] KEHC 7007 (KLR) (Civ) (11 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7007 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E997 OF 2022

DKN MAGARE, J

JUNE 11, 2024

BETWEEN

STANLEY MULUVI KIIMA T/A MUTUNGA & COMPANY ADVOCATES ..... APPELLANT

AND

ALLAN MUTHUI NDIGIRIGI ..... RESPONDENT

JUDGMENT

1. This is an appeal from the decision of the Hon E.M. Kagoni given on 1/12/2022 in Milimani CMCC 4217 of 2015 wrote a mini- novel consisting of 44 grounds of appeal on font 12 spacing 1.0. The memorandum of appeal consists of 9 pages.

2. I have noted one of the complaint is that the lower court disregarded their submission. Whichever way this case goes someone will make a similar complaint to the Court of Appeal. The submissions herein consists of 15 pages with unreadable font. The Respondent is equally guilty, filing 9 pages with many paragraphs in a font that is probably 8. The same cannot be repeated herein due to Judicial economy. The parties lost on the meaning of concise.

3. For the reasons given, I shall not regurgitate the submissions. The grounds of appeal on the other hand flout every Rule in the book. Order 42 Rule 1 of the *Civil Procedure Rules* 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.

4. 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..."

5. 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."

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 *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

   An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider

the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

8. 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."

9. 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 Other*s [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."

10. 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.

11. 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..."

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

> " 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."

13. 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.

14. 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."

15. 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.

16. 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.

17. 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 doth 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..."

18. 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.

19. 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.

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

21. 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.

22. 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.

23. The appeal herein is a study of what never should be.

24. The Respondent filed suit on 23/7/2018 stating that they identified a piece of land being Kajiado/Kapulei North 2713 being sold by Edward Daniel Ngugi. The parties attended before the Stanley Kiima.

25. They stated that respondent directed deposit of Ksh. 485,000/= to the seller and be paid half of fees. The Respondent's wife was to proceed. A sum of Ksh. 4,000,000 /= was to be transferred to the seller's account and Ksh. 365,000/= was given in cash and 118,650 to the firm to facilitate transfer.

26. A sum of Ksh. 365,000/= was handed to the seller and a cheque for Ksh. 118,650/= was given to the Appellant. The Appellants are said to have refused to forward documents. The Respondents blamed the Appellants for breach breach of their duty of care.

27. The Respondent sought a sum Ksh. 4,993,650/= from the Appellant being the money that was transferred to the seller through account No. 07101947790 at Equity bank and cash of Ksh. 365,000/=. The appellant filed defence and state that the suit should be struck out since:

    a. The respondent commissioned the search and was not prepared to lose the property with lengthy due diligence

    b. The Respondent ignored the Appellant's independent advise and proceeded with the transaction.

    c. The Respondent himself came with a search and the parties sogned an agreement

    d. The Appellant drafted an acknowledgement since the parties had already paid each other out there.

    e. They stated that the respondent came to their offices with the vendor with the search and the Respondent had already paid Ksh. 485,000/=

28. The Appellant drew an acknowledge slip. The appellant was duly advised but the respondent proceeded and paid. The plaintiff sought and was granted leave to amend plaint. An amended Defence was filed on 22/2/2026. The amendment was to change the plurality of the Appellant.

29. After hearing suit the court awarded Ksh. 4,968,650/=, interests and costs. It is in respect of the judgment delivered on 1/2/2022 that an appeal was preferred. The court ordered that the sum of Ksh. 25,000/= being legal fees cannot be refunded.

30. Only one issue arises whether the Appellant breached his duty of care.

Evidence

31. PW1 testified on 22/3/2022. He adopted his lengthy statement dated 21/7/2015. In it he narrated how the he relied on the advice of the appellant. He stated he identified a piece of land. They agreed to use the same advocates. He took a copy of search, applied for a search on 6/3/14. He stated that he

paid Ksh. 485,000/= after Mr. Kiima approved. He went to his bank and withdrew 485,000/=. On 27/7/2014 he write to LSK.

32. On cross examination he stated that he was shown land by the seller and a broker Kinyua. They agreed on the sale price. The seller claimed he had no lawyer.

33. He was asked the 2 correct questions:-

    i. Search

    ii. Selling the land.

34. He discovered the documents he gave the advocates were not genuine. In reexamination he stated that the deposit was after search was conducted. He stated that the balance was paid. The 2nd witness testified but only to state that they identified land. She blatantly lied that the instructions on payment were from the Appellants, though she was not present when Ksh. 485,000/= was paid.

35. The appellant testified and stated that Respondent did his own search. The Respondent declined. The only money he received was 185,000/= to process title. He stated that the acknowledgment was done after fact.

36. The acknowledgment was done on 11/3/2024 while the agreement was on 11/4/2024. He stated that he was refunded conveyance fees.

37. The witness stated that he was not given any money to handle.

38. The Appellant filed lengthy submissions repeating the pleadings and testimony in extensio. He stated that damages were unproven. He relied on the case of Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] eKLR, for the burden of proff, where the court of Appeal [O'KUBASU, GITHINJI & WAKI, JJ.A] posited as hereunder: -

    We have carefully examined the evidence on record from the two eyewitnesses but are not satisfied that the learned Judge made a balanced view of it. He did, as he was entitled to, believe the evidence of one of them but he did not state why he could not believe the other eye witness. Indeed he did not refer to that evidence at all other than simply reproducing it.... It was submitted by Mr. Mburu, learned counsel for the respondents that the onus was on the appellant to prove her case and it never shifted to the respondent. We agree with that proposition.

    As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the *Evidence Act* Cap 80, which provides:

    "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."

39. The Respondent filed submissions dated 10/2/2024. They prayed that the security deposited by the Appellant's insurers be released to them. It was their case that fees of Ksh. 118,650 had been paid but the Appellant failed to secure a transfer. The respondent is said to have relied on the Appellant 100%.

40. They relied on the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR, where the court of Appela posited as follows: -

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

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

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

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

41. It was their case that the Appellant was under obligations arising out of the retainer to be skillful and careful. They relied on the case of Stevenson versus Roward 1830 6 All ER 668.

Analysis

42. It must be remembered that the tort of negligence is due to breach of duty of case. It does not cover voluntary assumption of risk, of filing or stupid behaviour.

43. In this case the court went into a written agreement and admitted parole evidence. First the sale agreement was dated 11/4/2024. This is what written evidence says. By parity of reasoning a payment on 11/3/2014 cannot be pursuant to the agreement. It falls outside the agreement.

44. The appellant is not bound by payments made before his professional services were sought. It is irrelevant what discussion was. Parole evidence cannot be admitted to oust written one. Section 97 (1) of the *Evidence Act* provides that: -

    1. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

45. In *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd* (2017)eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

46. From the evidence two sets of money were paid to the appellant: -

    i. Ksh. 118,650/=

    ii. Ksh. 25,000/=

47. The court correctly stated that Ksh. 25,000/= is payable. The court erred in respect of Ksh. 118,650/= whether or not the money is refundable, is a dispute between an advocate and it cannot be recovered as a civil debt.

48. The last aspect is Ksh. Ksh 4,000,000/= and Ksh. 365,000/= making a total of Ksh. 4,365,000/=. The later amount of Ksh. 365,000/= were paid in cash. The appellant did not receive the money. The appellant could not trust the advocates with the money. He cannot hold them liable for money lost on his own frolics.

49. The acknowledgment at page 28 is an amalgam of payments. They were not and cannot be said to have been sanctioned by the appellant. The Respondent decided to breach his agreement by paying cash to the fraudster. The appellant cannot control how an adult is conned. A man who decides to have bliss in ignorance cannot run to this court alleging wrong doing.

50. There was no breach of contract or negligence on part of the appellant. The sum of Ksh. 485,000/= was paid on 11/3/2014. The appellant in a case where was to act for both parties. He had a duty to pass information from one party to another. There was thus no breach of contract. The Respondent should pursue the fraudster. He is the one who sourced him, did a fraudulent search and turned up in the Appellant's office.

51. In the circumstances, I allow the appeal and set aside the judgment in the court below. In lieu thereof I dismiss the suit in the lower court. The appellant shall have costs in the court below. However, I decline to give him costs for unnecessarily having convoluted memorandum of appeal and submission.

52. The court cannot reward such prolixious work. The Appellant was simply to raise a concise memorandum of Appeal but went ahead to write a novel. It is not that the Appellant does not deserve costs but the inconciseness is anathema to good pleading and fast determination of cases.

53. 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.

54. In the circumstances, the Appellant does not deserve costs.

Determination

55. The upshot of the foregoing is that I make the following orders: -

    a. the appeal is allowed, judgment in CMCC 4217 of 2018 is set aside and in lieu thereof the court substitutes with an order dismissing the suit in the court below.

    b. The Appellant shall have costs of the suit in the court below.

    c. Each party to bear their own costs in the Appeal.

    d. The file is closed.

e. Right of Appeal 14 days.

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. Kinyanjui for the Appellant

Mr. Chege for the Respondent

Court Assistant – Jedidah