Best Cars Limited t/a Impact Motors v Omoke & another (Civil Appeal E409 of 2023) [2024] KEHC 9594 (KLR) (Civ) (23 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9594 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E409 OF 2023

CW MEOLI, J

JULY 23, 2024

BETWEEN

BEST CARS LIMITED T/A IMPACT MOTORS ..... APPELLANT

AND

DICKSON MORARA OMOKE ..... 1ST RESPONDENT

ESABEL GATHIGIA ..... 2ND RESPONDENT

RULING

1. The Preliminary Objection dated August 4, 2023 filed by Dickson Morara Omoke and Esabel Gathigia (hereinafter the 1st and 2nd Respondent/Respondents) is the subject of this ruling. From the record, the history of the matter is that the Respondents filed a statement of claim dated 14.12.2022 in Nairobi Milimani Sccc No. E7883 of 2022 (hereinafter the lower court claim) against Best Cars Limited t/a Impact Motors (hereinafter the Appellant), Esther Waheto Kiara, Benmack Ragot and Kate Njogu seeking *inter alia*, general damages in the sum of Kshs. 500,000/- for breach of contract, mental anguish and pain, unnecessary inconvenience, emotional distress and loss of legitimate expectation. They also sought special damages in the sum of Kshs. 400,000/-; a declaration that the Appellant, Esther Waheto Kiara, Benmack Ragot and Kate Njogu misrepresented a faulty motor vehicle to be in perfect working condition and of merchantable quality, this constituting a breach of the sale agreement between the parties; and costs of the claim.

2. The Appellant, Esther Waheto Kiara, Benmack Ragot and Kate Njogu filed a response dated 23.12.2022 to the Respondents' statement of claim denying the key averments therein. The claim proceeded to hearing during which both parties called evidence. The lower court judgment was delivered on 25.05.2023 in favour of for the Respondents against the Appellant for the sum of Kshs.

400,000/-, interest at Court's rate from the date of filing of the claim and costs. The claim against Esther Waheto Kiara, Benmack Ragot and Kate Njogu was dismissed with costs.

3. Aggrieved with the outcome, the Appellant preferred this appeal challenging the judgment on the following grounds: -

> " 1. That the learned Adjudicator erred in fact by failing to appreciate that the Respondent was consistent in the description of the motor vehicle unit sold to them by the Appellant in their pleadings.
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> 2. That the learned Adjudicator erred in fact in failing to appreciate that the description of the motor vehicle was a central issue to the determination of the case as relates motor vehicle known as KCK 790E Volkswagen model Golf.
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> 3. That the learned Adjudicator erred in fact in failing to appreciate the central term of the concept as relates to the "as is" principle in contract law and its application in the sale of goods.
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> 4. That the learned adjudicator erred in fact and in law by conflating the concept of "as is" prudential rule and principle of implied warranty in the judgment whereas the two are mutually exclusive.
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> 5. That the learned Adjudicator erred in fact and in law by failing to appreciate that the term "as is" prudential rule excludes any form of warranty whether express or implied where the buyer has had an opportunity to inspect the goods.
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> 6. That the learned Adjudicator erred in fact and law by observing, in their analysis and determination, that the contract for sale entered into between the Appellant and Respondent was a contract for sale by description.
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> 7. That the learned Adjudicator erred in law by failing to consider the provisions of Section 16(b) of the *Sale of Goods Act* in its entirety and failing to apply the same.
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> 8. That the learned Adjudicator erred in fact and law by failing to consider the merits of the submissions presented by both the Appellant and Respondents in their entirety.

4. The Respondents in response lodged their Preliminary Objection (PO) dated 04.08.2023 to the appeal on the grounds that the grounds of appeal are fully based on facts and therefore offends Section 38(1) of the *Small Claims Court Act* which provides that appeals to the High Court shall be on matters of law only; and that the appeal was filed in the wrong division of the High Court, and was therefore incurably defective.

5. The Appellant responded to the PO by way a replying affidavit dated 09.02.2023 sworn by Gerald Kangichu Mwatha, described as a director of the Appellant. Asserting that the PO was a non-starter, being based on wrong principles and interpretation of the law. He stated that a first appeal as a matter of right is premised on issues of fact and law and the Respondents' reliance on what he termed as the positivist interpretation of Section 38(1) of the *Small Claims Court Act* did not align with the common law jurisprudence that is well settled in our jurisdiction.

6. Further that the facts of the case considered in the lower Court require re-against the points of law on this appeal; that the appeal was duly filed before the High Court as required by *Small Claims Court Act* ; and that the matter of the appropriate division of the court could not render the appeal incurably defective that not being a jurisdictional question, and could be cured by an order of transfer to the appropriate division of the High Court. In summation, he asserted that the PO was not tenable and ought to be dismissed.

7. Directions were taken on disposal of the PO by way of written submissions. Counsel for the Respondents anchored his submissions on the of-cited decision of *Owners of Motor Vehicle "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 concerning want of jurisdiction to entertain the appeal. Asserting that the appeal offends Section 38 of the *Small Claims Court Act*, counsel called to aid the decisions in *Oduor & 3 others v Magistrates and Judges Vetting Board & another* (Civil Appeal 457,458,466 &475 (Consolidated) of 2018) [2021] KECA 92 (KLR), *Omundi v Lama Fresh Produce Limited* (Civil Appeal E040 of 2022) [2022] KEHC 13681 (KLR) and *West Media Limited v Catherine Naliaka t/a Everexcelling Ventures* (Commercial Appeal E037 of 2023) [2023] KEHC24701 (KLR). He argued that appeals from the Small Claims Court were of a special nature and strictly limited to matters of law only.

8. Taking issue with the various grounds in the Appellant's memorandum of appeal, counsel submitted that parties are bound by their pleadings, and there was no room for the Appellant to amend the grounds of appeal, the applicable timelines for amendment having lapsed. Therefore, the appeal as presented was incompetent for not raising issues of law only. It was further contended that in determining appeals from the Small Claims Court, this Court is not permitted to re-evaluate the evidence on record making its own conclusion as in ordinary appeals.

9. Hence, the Court is barred from venturing into matters of fact and evidence while considering the instant appeal. Concerning the second limb of the Respondents PO, counsel cited Section 11 of the *High Court (Organization and Administration) Act* to summarily argue that the present appeal arises from a commercial dispute involving the sale of a motor vehicle and therefore ought to have been filed before the Commercial Division of the High Court. In conclusion the Court was urged to allow the PO as lodged.

10. The Appellant's counsel submitted that this being a first appeal, both points of fact and law ought to be considered by this Court. While citing Section 38 of the *Small Claims Court Act*, counsel argued that the Appellant's memorandum of appeal raises both points of fact and law that were overlooked by the lower Court and that the appellate Court ought not restrict itself to the points of law only while disregarding the points of facts raised. Asserting that it is settled jurisprudence that a first appeal canvasses both points of facts and law, counsel argued that the Respondents PO is premised on a positivist's interpretation of the statutory provisions which this Court ought not condone. The decision in *Itakura v Odera* (Civil Appeal E009 of 2022) [2022] KEHC 3120 (KLR) was cited in the latter regard.

11. Further citing the case of *Greyhound Company Ltd v Globetrotter Agency Limited* (Civil Appeal E024 of 2022) [2024] KEHC 313 (KLR) counsel contended that errors in law and fact as raised in the grounds of appeal are intertwined, hence the Respondents PO was frivolous. And in the event the Court was persuaded by the Respondents' objection, it had the option of disregarding the grounds relating to matters of fact and considering only the points of law raised. Which may not be possible as points of law raised were pegged on misapprehension of facts.

12. Regarding the second limb of the PO, counsel stated that the court has power to order the transfer of the appeal to the relevant division of the High Court. That in compliance with Section 38 of the *Small*

Claims Court Act, the instant appeal was properly filed before the High Court hence no jurisdictional question arises from the second limb of the PO. The Court was urged to dismiss the PO with the consequences.

13. The Court has considered the submissions by the respective parties in respect of the PO. As rightly contended by the Appellant, this the first and only appeal allowed from decisions of the Small Claims Court. Section 38 (1) of the *Small Claims Court Act*. Section 38 of the *Act* in its entirety provides that; -

> " (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."

14. The Respondent's objection essentially challenges the Court's jurisdiction to entertain the appeal before it. A challenge to the Court's jurisdiction to entertain proceedings is a primordial matter as observed by Nyarangi. JA (as he then was) in the locus classicus, *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1. In *Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors* (1969) EA 696, Law JA. stated concerning the nature of a preliminary objection that:-

> " So far as I am aware, 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, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....
>
> A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law which is argued 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop."

15. Later, Ojwang J (as he then was) in the case of *Oraro v Mbaja* (2005) KLR 141, reiterated the foregoing by stating that: -

> " A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, 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.
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> Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence."

16. The Court of Appeal in *Kigwor Company Limited v Samedy Trading Company Limited* [2021] eKLR cited with approval the decision of the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR where the latter court emphasized that:

> "(16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (See Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 14 of 2014, [2014] eKLR)."

17. Evidently, the first limb of the PO raising as it does, a pure point of law on jurisdiction satisfies the definitions above. In an ordinary appeal, the first appellate Court will only interfere with a finding of fact made by a trial Court when such finding was based on no evidence, or if it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. However, as correctly asserted by the Respondent, this being an appeal brought pursuant to Section 38(1) of the *Small Claims Court* is no ordinary first appeal. An appeal on matters of law to this court from the Small Claims Court is the only appeal allowed. *Black's Law Dictionary*, 9th Ed. Pg. 1067 defines matter of fact and matter of law as follows; -

> "Matter of fact as: A matter involving a judicial inquiry into the truth of alleged facts and Matter of law as: A matter involving a judicial inquiry into the applicable law."

18. The question of what constitutes matters of law vis -a- vis matters of fact has been considered by the Court of Appeal in relation to its mandate in second appeals. The Court of Appeal in *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR, distinguished between matters of law and matters of fact by stating that: -

> "I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see Selle and Another vs. Associated Motor Boat Company Ltd and Others (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two 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."

19. The Court of Appeal in its subsequent decision in *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* [2014] eKLR while addressing the question whether a memorandum of appeal on a second appeal raised factual issues, and the distinction between a matter of fact and matter of law, observed that; -

> "One of the best expositions on the distinction between the two is to be found in the judgment of Denning J in the English case of Bracegirdle Vs. Oxley (2) [1947] 1 ALL E.R. 126 at p 130;

"The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road Traffic Act, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them."

20. The Court of Appeal concluded by stating that: -

" That reasoning has been adopted in this jurisdiction. In A.G. Vs. David Murakaru [1960] EA 484, for instance, Chief Justice Ronald Sinclair sitting with Rudd J. adverted to the factual foundations of legal questions by stating that an appellate court restricted to determining questions of law may yet quite properly interfere with the conclusion of a lower court if the same is erroneous in point of law. This is the case where that lower court arrives at a conclusion on the primary facts that it could not reasonably come to. Such a conclusion or decision becomes an error in point of law. See also Patel Vs. Uganda [1966] EA 311 and Shah Vs. Aguto [1970] EA 263.

There is no denying from the cases we have referred to, that in not a few cases the determination of whether a particular complaint on appeal a question of law is or of fact is not always a very straight-forward one, not least because the determination of whether a lower court drew the correct legal conclusions inevitably entails an examination of the factual basis of the decision. That reality has with it the inherent danger that legal ingenuity may attempt to dress-up and camouflage purely factual issues with the borrowed garb of "legalness." This is what the majority of this Court had in mind in M'Riungu and Others Vs. R [1982-88] 1 KAR 360 when it stated, (per Chesoni AJA) at p366;

"We would agree with the views expressed in the English case of Martin v Glyneed Distributors Ltd (t/a MBS Fastenings) [1983] 1 CR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial of first appellate court unless it is apparent that; on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad law."

21. Here, the Appellant argues that this being a first appeal, the Court ought to consider both issues of fact and law and not accept the so-called positivist interpretation of Section 38 of the *Small Claims Court Act* urged by the Respondents. Besides, that errors in law and fact raised in the memorandum of appeal are intertwined and inseverable. The Respondents' answer being that appeals from the Small Claims Court are of a special nature and strictly limited to matters of law only.

22. The Appellant's argument above appears to be premised on the provisions of Section 65(1)(b) of the *CPA* providing that a first appeal from the subordinate Court to the High Court can be on both questions of law and fact. The provision cannot be applied in the manner suggested by the Appellant so as to defeat express provisions of the *Small Claims Court Act*, which establishes the special Court known as the "Small Claims Court". Section 38 (1) expressly provides for the singular right of appeal to the High Court from the latter court and confines the said right to matters of law only. The provision is informed by certain policy considerations which the court need not delve into.

23. Applying the dicta in Bashir Haji Abdullahi (supra) to the grounds of appeal, it would appear that they are so fashioned as to escape the stricture of Section 38 (1) of the *Small Claims Court Act*. Error in fact is cited in three (3) out of the eight grounds of appeal, while in four (4) out of the eight grounds of appeal the trouble-inviting words, "erred in fact and in law" are used. The issues raised therein clearly challenge the lower Court's inferences and decisions on facts rather than on the law, contrary to Section 38(1) of the *Small Claim Courts Act*. As rightly argued by the Respondent, parties are bound by their pleadings and here, seven (7) out the eight (8) grounds of appeal invite the Court to interrogate factual and evidentiary material canvassed before the lower Court.

24. The lower Court decision exhibits the fact that the learned adjudicator's determination was arrived at upon analysis of the factual material presented before it in respect of "the 'as it is concept", "the description of the model of the vehicle", "Section 16 of the *Sale of Goods Act*" and the "contract of sale". Questions similarly raised in the Appellant's memorandum of appeal. As held in Bashir Haji Abdullahi (*supra*) an appellate Court faced with a situation of this kind is at liberty to strike out any offensive grounds of appeal (here grounds that offend Section 38(1) of the *Small Claims Court Act*), while retaining those that are compliant. A matter equally acknowledged by the Appellant. In this case, the court having reviewed each of the Appellant's grounds of appeal, finds offensive and will strike out grounds 1, 2, 3, 4, 5, 6 & 8 while retaining ground 7 in the memorandum of appeal.

25. Regarding the second limb of the Respondents PO, Section 38(1) of the *Small Claims Court Act* provides that an appeal from the Small Claims Court be preferred in the High Court. Divisions of the High Court created pursuant Section 11 of the *High Court (Organization and Administration) Act*, are merely administrative and do not add to or take away the primary constitutional and statutory jurisdiction of Judges of the High Court deployed in such Divisions. Here, the appeal was properly filed before the Civil Division of the High Court which exercises supervisory and appellate jurisdiction over subordinate courts and tribunals. More so being the Division administratively responsible for hearing certain civil appeals arising from such courts, including Small Claims Courts as well as certain tribunals. Therefore, the second limb of the objection is without merit and must fail.

26. In conclusion, the Respondents' preliminary objection has partially succeeded and is upheld. Accordingly, grounds 1, 2, 3, 4, 5, 6 & 8 of the appeal are struck out, leaving ground 7 of appeal to be canvassed at the hearing of the appeal in accordance with directions to be hereafter given. The costs of the PO are awarded to the Respondents.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 23RD DAY OF JULY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: N/A

For Respondents: Mr. Omoke

C/A: Erick