



**Bingwa Sacco Society Limited v Ngatia (Civil Appeal E318 of 2023)
[2024] KEHC 8748 (KLR) (Civ) (15 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8748 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E318 OF 2023

DKN MAGARE, J

JULY 15, 2024

BETWEEN

BINGWA SACCO SOCIETY LIMITED APPELLANT

AND

CHRISPUS KARIMI NGATIA RESPONDENT

JUDGMENT

1. The appeal arises from the Judgement and Decree of the Cooperatives Tribunal delivered on 23/3/2023 in Nairobi Cooperatives Tribunal Case No. 608 of 2019. The court allowed the case in favour of the Respondent who was the Claimant.
2. The Appellant being aggrieved preferred 5 grounds in the Memorandum of Appeal. I have perused the 5 paragraph Memorandum of Appeal. It is prolixious, repetitive, and unseemly. The proper way of filing an appeal is to file a concise Memorandum of Appeal without arguments, cavil or evidence. The rest of the King's language should be left to submissions and academia. Order 42 Rule, 1 provides as doth: -

“Form of appeal –

1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.



3. The Court of Appeal had this to say in regard to Rule 86 (which is pari materia with Order 42 Rule 1) 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 September 19, 2018 raise only two issues...”

4. Further in *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR , the court of appeal observed that : -

“Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross V. Hezekiah Kiptoo Kimue & 4 others*, Civil Appeal No. 223 of 2013, this Court stated:

“The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.”

5. The Memorandum of Appeal raises only one issue, that is; the leaned magistrate erred in finding for the Respondent against the weight of evidence produced in court.
6. The rest of the grounds are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the Magistrate’s court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.
7. In the Statement of Claim dated 1/10/2019, the Claimant sought a refund of Kshs. 2,848,173.78 with costs and interest at court rates.



8. The Respondent claimed that the Appellant caused the claimed amount to be fraudulently, unlawfully and irregularly withdrawn from the Respondent's account and without the Respondent's authority. The Respondent particularised the claim on fraud as follows:
 - a. Causing unauthorised withdrawals.
 - b. Use of unstamped cash withdrawal vouchers.
 - c. Forging the Plaintiff's signature.
 - d. Using unauthorised but similar vouchers to effect withdrawals.
 - e. Repetition of same serial number vouchers.
9. The Appellant entered appearance and filed Defence denying the allegations in the claim and inviting the Respondent to prove the assertions.

Evidence

10. The Respondent testified as CW1 and adopted his witness statement and bundle of documents dated 1/10/2019 and filed on 9/10/2019. On cross examination, it was his case that he never took a loan with the Appellant. It was his confirmed case that the withdrawal form for Kshs. 100,000/- was not his signature and that the withdrawal forms were not his.
11. On the part of the Appellant, it called one Faith Mugo was testified in court. She relied on her witness statement and documents dated 15/11/2020 and filed on 17/11/2020. On cross examination, it was her case that the loan application forms had not been changed and that the application forms produced in pages 7 and 8 of her bundle of documents were however different. She also confirmed the inconsistencies in the forms. The witness did not give a reason why there were inconsistencies.
12. The Tribunal considered the case and allowed the Respondent's claim for Kshs. 2,848,173.78.

Submissions

13. The Appellant filed submissions in support of the appeal and submitted that the tribunal erred in failing to consider the inconsistencies in the evidence of the Respondent. It was submitted in this regard that there was no expert witness to prove the allegations of forgery and the Respondent's evidence was not corroborated.
14. They relied among others on the case of *Alice Wanjiru Rubiu v Messiac Assembly of Yaweh* (2021) eKLR to canvass the submission that the Respondent had not proved the case as required under Sections 107, 108 and 109 of the *Evidence Act*.
15. Further, it was submitted the tribunal failed to make an adverse inference against the Respondent's failure to call an expert witness on the alleged forged signatures. They relied on *David Katana Ngomba v Shafi Grewal Kaka* (2014) eKLR.
16. I was urged to allow the appeal.
17. The Respondent submitted that the tribunal correctly appraised the facts and evidence before it and arrived at the correct decision. It was submitted that the Respondent discharged his burden of proof. Reliance was placed on Section 107 of the *Evidence Act*.
18. It was further submitted that the Respondent particularized and proved fraud on the part of the Appellant. They relied *inter alia* on *Benson Wandera Okuku v Israel Were Wakho* (2020) eKLR.



Analysis

19. The issue is whether the Tribunal erred in its finding that the Respondent had proved his case as against the Appellants to the required standard.
20. This being a first appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. 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. Therefore, it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.
21. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
22. 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.”
23. The Court is to bear 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.
24. 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...”
25. On the burden of proof, Section 107 (1) of the [Evidence Act](#), Cap 80 Laws of Kenya provides that:

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.



26. In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the *Act*.”

27. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau –vs- George Thuo & 2 Others* [2010] 1 KLR 526 stated that:

“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.”

28. Similarly, Lord Nicholls of Birkenhead in *In Re H and Others (Minors)* [1996] AC 563, 586 held that;

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”

29. Furthermore 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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the 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 lose because the requisite standard will not have been attained.”

30. The court has perused the evidence produced in the tribunal. It appears that the tribunal correctly found that the Respondent had not clearly particularized and proved the manner in which the Appellant’s agents and/or servants could have fraudulently withdrawn the monies from the Respondent’s account. The tribunal however based its decision on the inconsistencies and irregularities in the evidence said to have been produced by the Appellant. In my view, this was in error.



31. The need to prove and the burden of proof of such allegations of forgery, fraud, falsehood or dishonesty was elaborated by the court in *Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another* [2016] eKLR where the court stated that –

“It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the case *Central Bank of Kenya Ltd -vs- Trust Bank Ltd & 4 Others* [26] the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary civil case. The burden of proof lies on the applicant in establishing the fraud that he alleges. In *Belmont Finance Corporation Ltd. v. Williams Furniture Ltd* [27] Buckley LJ said:

“An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word ‘fraud’ or the word ‘dishonesty’ must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity.”

In *Armitage v Nurse* [28] Millett LJ having cited this passage continued:}}

“ In order to allege fraud it is not sufficient to sprinkle a pleading with words like “willfully” and “recklessly” (but not “fraudulently” or “dishonestly”. This may still leave it in doubt whether the words are being used in a technical sense or merely to give colour by way of pejorative emphasis to the complaint.”

In *Paragon Finance Plc v D B Thakerar & Co* the court stated that it is well established that fraud must be distinctly alleged and also distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud. The burden is always on the claimant to prove fraud on the part of the Respondent. The standard of proof where fraud is alleged is high. Though it is the same civil standard of proof on a balance of probabilities, it is certainly higher than the ordinary proof on a balance of probabilities but lower than proof beyond reasonable doubt. It all depends on the nature of the issue and its gravity. Evidence of especially high strength and quality is required to meet the civil standard of proof in fraud cases. It is more burdensome: (see also the cases of *Mpungu & Sons Transporters Ltd -v- Attorney General & another*. In *Jennifer Nyambura Kamau v Humphrey Nandi*, the Court of Appeal, Nyeri, emphasized that fraud must be proved as a fact by evidence; and, more importantly, that the standard of proof is beyond a balance of probabilities.’

32. The initial evidentiary burden was on the Respondent who alleged unauthorized withdrawal and fraud and forgery. The Tribunal therefore contradicted itself in finding that the Respondent had not particularized and proved fraud but had proved his case merely on the basis of inconsistencies in the Appellant’s evidence.



33. Similarly, the court finds that the Respondent had the duty first to prove loss before proving negligence or breach of bank-customer contract with the Appellant. This would be simply by establishing that the withdrawals from the Respondent's account were occasioned by employees or agents of the Appellant and were not sanctioned by the Respondent. This should have been proved by the evidence that the signatures on the withdrawal vouchers were not appended by or with the authority of the Respondent or by tendering genuine vouchers.

34. To the contrary, in his testimony, the Respondent confirmed that he had not produced any withdrawal slips or documents which in his evidence were genuine as to contradistinguish with the ones alleged to have been forged. In *Ragbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR the Court of Appeal stated thus:

“When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given.”...

...First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.”

35. It follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case. Therefore, the burden is not on the Plaintiff, or the Defendant, it is on the party who alleges.

36. Further, in *Evans Nyakwana -vs- Cleophas Bwana Ongaro* [2015] eKLR it was held that:

“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 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

37. Therefore, the Respondent failed to prove allegations levelled against the Appellant and the decision of the Tribunal was therefore against the weight of evidence.

38. The appeal is thus merited.

Determination

39. In the upshot, I make the following orders:

- a. Judgement and Decree of the Tribunal dated 23/3/2023 is set aside.
- b. The case in Nairobi Cooperatives Tribunal Case No. 608 of 2019 is dismissed with costs.



c. The Appellant shall have costs of the Appeal assessed at Kshs. 135,000/=.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 15TH DAY OF JULY, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Wachira for the Appellant

Ms. Kabaillah for the Respondent

Court Assistant – Jedidah

