Barasa v Bucker (Civil Appeal E277 of 2023) [2024] KEHC 8417 (KLR) (8 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8417 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E277 OF 2023

DKN MAGARE, J

JULY 8, 2024

BETWEEN

ARTHUR HAYOFU BARASA ..... APPELLANT

AND

SAAD ABDULRAHMAN SHEIK BUCKER ..... RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and decree of the Hon. Gambia Ndungu given on 22/9/2023 in Mombasa Small Claim No. E297 of 2023. The appellant was the claimant in the small claims court.
2. The Appellant filed a suit vide a statement of claim dated 19th May, 2023 seeking for the following prayers against the Respondent: -
    a. Judgement against the Respondent in the sum of Kshs. 200,000/=;
    b. Interest on (a) above; and
    c. c) Costs of the Claim and interest at Court rates.
3. The respondent filed a counter claim for sum of Kshs. 516,125/=.
4. The counterclaim was allowed and the Appellant's case dismissed. This was the genesis for the appeal herein. The appellant filed an appeal and set forth the following grounds:-
    a. Whether the learned trial magistrate/adjudicator erred in holding that the claimant/appellant was in breach of contract with the respondent for failing to deliver on quality work and having used substandard materials when there was no evidence to support the decision of the learned trial magistrate/adjudicator?
    b. Whether the learned trial magistrate/adjudicator failed to note that the respondent contracted another contractor before the contractual period between the claimant/appellant and the respondent without notice and knowledge of the claimant/appellant?

c. Whether the learned trial magistrate/adjudicator failed to note that by the respondent hiring or engaging other workers to finish work before the end of the contract period and notice to the claimant/appellant, the respondent was in breach of contract?

d. Whether the learned trial magistrate/adjudicator failed to note that the claimant/appellant had proved his case on a balance of probabilities?

e. Whether the learned trial magistrate/adjudicator erred in law and fact by arriving at a conclusion that the counterclaim against the claimant/appellant was merited when there was no evidence in support of such contention?

f. Whether the learned trial magistrate erred in law and fact in his finding that the claimant never complied with honouring his end of obligations under the contract when there was no evidence adduced in court in support of this contention?

g. Whether the learned trial magistrate/adjudicator erred in law and fact by dismissing the claimant/appellant's suit with costs when it should have been the reverse of that decision?

h. Whether the learned trial magistrate/adjudicator failed to consider the evidence of the respondent's witness and the valuation report and therefore arriving at a wrong decision?

i. Whether the learned trial magistrate/adjudicator erred in law and fact by failing to consider the whole contract produced in court?

1. The grounds are prolixious and unseemly. This is contrary to Order 42 Rule 1 of the Civil Procedure Rules, which provides as doth: -

> " 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."

6. 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..."

7. 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."

8. The respondent stated that the court did not err. The Appellant on the other hand stated that the court erred in law and in fact.The appellant erroneously submitted that the duty of the first appellate court is well settled in the case of Abok James Odera T/A A.J Odera & Associates –Vs– John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR.

9. However, they forgot to submit that in Small Claims Court, the Appellate court is also the final court. They submitted that the valuation report had the terms of reference for engagement of Nyange Integrated Consultants Ltd was for, "assessing the extent of work done by the contractor and any unfinished work and advise on cost of completing the works." There is no evidence that the firm was hired to determine the quality of materials used or quality of work done.

10. This being an Appeal from the Small Claims Court, the duty of the court is circumscribed under section 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.

11. 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."

12. 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)."

13. 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."

14. 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."

15. The claim relates to entirely facts and evidence that is no issue of law raised. The court below, has discretion under section 32 of the small claims court on evidence. The said section provides as follows: -

(1) The Court shall not be bound wholly by the Rules of evidence.

(2) Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trust worthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.

(3) Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that Court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.

(4) The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.

(5) All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.

(6) For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.

(7) An Adjudicator may require any written evidence given in the proceedings before

16. Regarding the question of costs, the court is enjoined to award costs where there is success only and decline in any other case. Section 33 of the *Small Claims Court Act* provides as follows: -

(1) The Court may award costs to the successful party in any proceedings.

(2) In any other case parties shall bear their respective costs of the proceedings.

(3) Without prejudice to subsections (1) and (2), the Court may award to a successful party disbursements incurred on account of the proceedings.

(4) Except as provided in subsection (2), costs other than disbursements, shall not be granted to or awarded against any party to any proceedings before a Court.

17. None of the 9 grounds of Appeal raise questions of law. The decision is based on the evidence on record. There is no room for evaluating evidence in a small claims court. It cannot be said that the decision was based on no evidence.

18. In the circumstances, the appeal is dismissed with costs of Kshs.65,000/-

Determination

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

a. The appeal lacks merit and is accordingly dismissed with costs of Kshs.65,000/- payable within 30 days. In default execution to issue.

b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 8TH DAY OF JULY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Nyamboge for the Appellant

Mr. Mwai for the Respondent

Court Assistant – Jedidah