Daisy Nkonge t/a Leoras Furnished Services v O'Maroro (Civil Appeal E1031 of 2022) [2024] KEHC 9799 (KLR) (Civ) (23 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9799 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1031 OF 2022

DKN MAGARE, J

JULY 23, 2024

BETWEEN

DAISY NKONGE T/A LEORAS FURNISHED SERVICES ..... APPELLANT

AND

ANNE O'MARORO ..... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of trial court delivered on 15/11/2022 by Hon. D.S. Aswani, Resident Magistrate in Milimani SCCCOM No. 5957 of 2022.

2. The Appellant filed this appeal and preferred 14 grounds in the Memorandum of Appeal dated 20/12/2022. The grounds are unnecessarily winding, repetitive and argumentative. Order 42 Rule 1 requires that the memorandum of appeal be concise. The same 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."

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 19th September 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:
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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."The Appellant challenged the finding of the trial court on the finding that there was an agreement between the parties as pleaded in the Plaint and which the Appellant breached.

Pleadings

5. The Respondent instituted Commercial Suit No. E5957 of 2022 seeking judgment for Kshs. 339,665/- with interest at court rates.

6. The Respondent claimed that she was an estate agent providing service to the Appellant at an agreed commission.

7. It was averred in the statement of claim dated 21/9/2022 that the commission in respect of the tenant one Tobi Olatokubo on the Appellant's furnished Ivory Terraces Close was agreed at one month's rent less service charge and the commission in respect of a tenant by the name Nathalie Brunet on Breezes, Rhampta Road was 10% of the monthly rent collected.

8. The commission was on the basis of pleadings filed in the trial court. The Respondent pleaded Kshs. 339,665/- constituted as follows:

    a. Tobi Olokakubo 3 Bed rooms furnished Ivory Terraces Terrace Close- Ksh. 273,000/=

b. Nathalie Brunet, 2 Bed room Furnished Apartment at the Breezes Rhapmta Road Kshs. 66,665/=

9. The Appellant filed a defence denying the averments in the claim. More particular it was denied that the Respondent was ever an estate agent for the Appellant. That in fact the Respondent was not a registered agent.

Evidence

10. The parties agreed to proceed by way of documents under Section 30 of the *Small Claims Court Act*. The section provides as follows: -

> " Subject to agreement of all parties to the proceedings, the Court may determine any claim and give such orders as it considers fit and just on the basis of documents and written submissions, statements or other submissions presented to the Court."

11. The court considered the case and rendered its finding that the Respondent had proved his claim against the Appellant to the required standard and allowed it.

Submissions

12. The Appellant reiterated the grounds in the Memorandum of Appeal in his submissions dated 15/10/2023 and submitted that the lower court was wrong in its finding as there was no agency or contract proved.

13. Reliance was placed on Section 18 of the *Estate Agents Act* to submit that the Respondent was not registered as an agent. They also relied inter alia on Ali Hassan Omar v Board of Trustees National Social Security Fud (2014)e KLR.

14. On the part of the Respondent, it was submitted that the learned magistrate correctly established that there was a contractual relationship between the Appellant and the Respondent in respect of the services for which a commission was payable. They relied on authorities which I have considered. They urged me to dismiss the appeal.

Analysis

15. The appeal is on the ground that the learned adjudicator erred in finding in favour of the Respondent. This is addressed by three grounds of appeal.

16. The main question is whether the suit was improperly before the small claims court. The main ground is that the Respondent breached Section 18 which provides as follows: -

    1. After the expiration of six months from the commencement of this Act or such further period as the Minister may, by notice in the Gazette, allow either generally or in respect of any particular person or class of persons:-

        a. no individual shall practice as an estate agent unless he is a registered estate agent;

        b. no partnership shall practice as estate agents unless all the partners whose activities include the doing of acts by way of such practice are registered estate agents;

        c. no body corporate shall practice as an estate agent unless all the directors thereof whose duties include the doing of acts by way of such practice are registered estate agents.

2. Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding two years or to both."

17. The said Act is said to be an Act of Parliament to provide for the registration of persons who, by way of business, negotiate for or otherwise act in relation to the selling, purchasing or letting of land and buildings erected thereon; for the regulation and control of the professional conduct of such persons and for connected purposes.

18. What do estate agents do and what is their role? Section 2 of the Act defines the work of an estate agent as: -

> " practice as an estate agent" means the doing, in connection with the selling, mortgaging, charging, letting or management of immovable property or of any house, shop or other building forming part thereof, of any of the following acts-
>
> (a) bringing together, or taking steps to bring together, a prospective vendor, lessor or lender and a prospective purchaser, lessee or borrower; or
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> (b) negotiating the terms of sale, mortgage, charge or letting as an intermediary between or on behalf of either of the principals;

19. 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.

20. The duty of the court is to defer to the findings of fact of the adjudicator and analyse the matter for issues of law. 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.

21. 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)."

22. 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."

23. 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."

24. The main issue for determination in this case is whether the trial court erred in law in allowing the Respondent's suit.

25. 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.

26. 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."

27. 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.....'"

28. The Appellant filed a memorandum of appeal on memo dated 20/12/2022. The same was filed out of time without leave. The same ought to be struck out. In the unlikely event that I am wrong, the question in issue is whether there was an estate agency agreement. That is a question of fact that the court determined in the negative.

29. The question of jurisdiction or illegality was not raised. It relates only to section 18 of the *Estate Agents Act* but the Appellant failed to place herself within the ambit of that Act. This was not in the defence dated 13/10/2022.

30. A party cannot raise issues not in the defence. The defence filed was a mere denial. In the case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, the Court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in he appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

31. The court cannot deal with issues that are not pleaded. Equally, submissions are not evidence. In Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held that:

> "As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.

32. No issues can arise from submissions. There was no single point of law raised in the pleadings.

33. The court was duty bound to read the relationship and interpret it as such. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKL, 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 was held in Housing Finance Co. of Kenya Limited vs. Gilbert Kibe Njuguna Nairobi HCCC No. 1601 of 1999:;
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> > "Courts are not foras where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract."

34. Therefore, the appeal is unmerited and consequently, it is dismissed with costs. Section 27 of the *Civil Procedure Act* provides as follows: -

> "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

3. The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

35. In the circumstances, the appeal is dismissed with costs of Ksh 65,000/-.

Determination

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

    a. The Appeal is dismissed in limine.

    b. The Respondent shall have costs of the appeal assessed at Kshs. 65,000/=

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 23RD DAY OF JULY, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Jedidah