



**Suntra Investment Limited v Mohamedali & another (Civil Appeal
E387 of 2022) [2024] KEHC 9787 (KLR) (Civ) (22 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9787 (KLR)

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

CIVIL

CIVIL APPEAL E387 OF 2022

DKN MAGARE, J

JULY 22, 2024

BETWEEN

SUNTRA INVESTMENT LIMITED APPELLANT

AND

MUSTAFA SHAUKATALI MOHAMEDALI 1ST RESPONDENT

ALIASGAR SHAUKATALI MOHAMEDALI 2ND RESPONDENT

*(Being an appeal from the ruling and orders issued on 27th May, 2022 by
Hon C.K Cheptoo, Principal Magistrate in Nairobi CMCC No. 9529 of 2018)*

JUDGMENT

1. This is an appeal from the ruling and orders issued on May 27, 2022 by Hon. C.K. Cheptoo, Principal Magistrate in Nairobi CMCC No 9529 of 2018.
2. Suntra Investment Limited was the Judgment-debtor in the lower court. The main decree is not in issue.
3. They set up the following grounds:
 - a. The learned magistrate erred in fact and in law by disregarding the principles of precedent, issue of estoppel, and res judicata by departing without lawful cause from the orders issued by Hon. S.G. Gitonga in a judgment delivered on 18th September 2019, obligating the Respondents to verify the value of their shares and dividends with Safaricom. The learned magistrate erred by embarking upon another process of issuing execution for an unverified sum.
 - b. The learned magistrate erred in fact and in law in disregarding the determinative effect of the Respondents' letter dated 8th September 2021 wherein Respondents admitted that they



would verify the value of their shares and dividends with Safaricom. That crucial evidence would have settled the dispute on the obligation to verify the value of dividends which was cast upon the Respondents.

- c. The learned magistrate erred in fact and in law in failing to find that the Respondents, in shifting the obligation to verify the value of their shares to the Appellant, were simply approbating and reprobating.
 - d. The learned magistrate erred in fact and in law in finding that the Respondents were not obligated to activate their dormant CDS accounts even though one cannot lawfully credit shares to an inactive CDS account.
 - e. The learned magistrate erred in fact and in law in ignoring the correspondence by the Appellant showing the efforts made towards compliance with the court orders and demonstrating the apparent unwillingness and refusal by the Respondent to cooperate to ensure that the judgment of the court is complied with.
 - f. The learned magistrate erred in fact and in law in failing to find that the execution proceedings were premature and misconceived as the Respondents had not furnished the Appellant with details of their active CDS account despite numerous requests to do so. Without these details, the Appellant would not have known in which account the shares as ordered by the court ought to be credited. Additionally, in absence of verification, it was impossible for the Appellant to pay an unknown sum.
 - g. The learned magistrate erred in fact and in law in relying on her own assumptions to arrive at findings that were not pleaded and which were inconsistent with the evidence on record.
 - h. The learned magistrate erred in fact and in law in misconstruing the evidence on record to find in favour of the Respondents.
4. The eight grounds are argumentative, prolixious, wordy and 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.

5. 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...”

6. 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.”

7. 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.
8. In the case of *Mbogo and another v 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.”

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 v 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.”



10. 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.

11. In the case of *Peters v 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. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v 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.

13. In a scenario where only documents are used, the court must defer to what is written as opposed to oral evidence. 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...”

14. There is, however wider latitude where it comes to affidavit evidence or where the court did not hear witnesses. In the case of *Sugut v Jemutai & 3 others* (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR) Kiage JA stated as doth: -

“I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; *Selle v Associated Motor Boat Co* [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence



or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge.”

Pleadings

15. The dispute was initiated by plaint dated 19/10/2018. The respondents sought the following prayers: -
 - a. An Order for the immediate return by the defendant of all the shares previously held by each of the Plaintiffs.
 - b. Or In The Alternative, damages in lieu of Order (a) above at the market rate value of the shares at the date of Judgment or at the time of the illegal sale but using whichever value is higher.
 - c. An Order that the defendant pays the unremitted dividends as from the year 2009 till the year of Judgment to each of the Plaintiffs at the dividend value for each of those years to be verified by Safaricom PLC.
 - d. General and Punitive damages to each Plaintiff for breach of fiduciary duty by the Defendant.
 - e. Interest on (c), (d) above for each Plaintiff at such rate as this Honourable Court may deem just and expedient.
 - f. Costs of this suit.
 - g. Such further or other relief as this Honourable Court may deem fit to grant.
16. The claim related to the sale of Safaricom shares without any instructions with regard to the alleged disposal of shares on the 9th of August 2017. The same were from shares Accounts of Mustafa S. Mohamedali - No B07/B-0000009867813/L1-0 and Aliasgar Shaukatali Mohamedali (account No B07/B-0000009869387/LI-0.
17. In their response, the defendant stated that defendant requested the Plaintiffs to avail their CDS account which the Plaintiffs did but the account was not active.
18. It was also averred that Safaricom PLC had not verified the dividend amount.
19. The court order on 18/9/2019 directed as follows: -
 - a. An immediate return by the Defendant of all the shares previously held by each of the Plaintiffs.
 - b. An order that the defendant pays the unremitted dividends as from the year 2009 till the date of filing suit to each of the plaintiffs at the dividend value for each of those years to be verified by Safaricom PLC.
 - c. No award is made in regards to General and punitive damages.
 - d. Interest on (2) above at court rates from the date of filing suit until payment in full.
 - e. Costs of the suit.

Analysis

20. The issue is whether the lower court erred in its finding. I note that the court was very lenient. The appellant then failed to transfer the shares on grounds that the account is dormant.



21. The respondents took out the notice to show cause why execution should not issue. There are two aspects, first the verified dividends by Safaricom and the inactive CDSC. The court stated that the court decree was to be followed to the letter.
22. The appellant stated that they cannot be executed against until verification is done and the account activated. The difficulty both parties face is that this was a specific order for carrying out of certain activities outside the control of the parties. The order for immediate return remains that, the court will deem that this was to be complied with immediately. It is now 4 years and no serious steps were carried out to transfer shares. This has cost the decree holder dividends payable from the date of judgment to date.
23. Surely, filing the Decree with the CDSC will suffice to activate the account. The respondents are no longer holders of Safaricom shares courtesy of the Appellant. We now have a situation where there can be no activation of the account and on the other hand there can be no transfer.
24. The situation will not resolve itself. The parties must actively seek for a solution. Attaching properties will not solve the problem of immediate return. It is not upon this court to give orders in vain. In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] 1 KLR 828 the court stated as follows:

It is essential for the maintenance of the rule of law and order that the authority and the dignity of Courts is upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.

25. Similarly in *B v Attorney General* [2004] 1 KLR 431, the court stated as follows:

The Court does not, and ought not to be seen to make orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.

26. Therefore, in my view, the only way out is to have parties be reasonable and conclude the matter. This will be done through a series of structural interdicts to help the execution of the decree.

Determination

27. The court therefore allows the Appeal partly by making the following orders:
 - a. The NTSC was premature as the CDSC is still inactive. The Respondents to activate the CDSC within 30 days and inform advocates for the Judgment-debtor, who shall transfer the shares as ordered by the court within 7 days.
 - b. Given the 4 year delay and the court had ordered immediate transfer, the Judgment-debtor shall pay equivalent of dividends lost between the date of judgment and the date of transfer of shares.
 - c. Should the CDSC Account not be activated by 26/8/2024, the Appellant shall transfer money equivalent to those shares using the average trading price of the Wednesday preceding the transfer. This will discharge the decree in respect thereof.



- d. The Decree-holder to serve upon Safaricom Limited an order to verify the interim and final dividends paid out between 1/1/2009 and the day of issuance of the verified dividends. The Judgment-debtor shall then calculate total dividends less requisite withholding taxes and remit to the Decree-holder within 7 days of receipt of the verified dividends. This does not stop the Decree-holder from paying estimated dividends using the best available information. In default execution do issue.
- e. The end result is that the Notice to Show Cause is lifted.
- f. Given mixed results, the best order is for parties to bear their own costs.

DELIVERED, SIGNED AND DATED AT NYERI ON THIS 22ND DAY OF JULY, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Miss. Makori for the Appellant

No appearance for the Respondent

Court Assistant - Jedidah

